

CONFIDENTIAL

IN THE COMPETITION
APPEAL TRIBUNAL

IN PRIVATE

Victoria House
Bloomsbury Place
London WC1A 2EB

28th April 2006

Before:
SIR CHRISTOPHER BELLAMY
(President)
GRAHAM MATHER
VINDELYN SMITH-HILLMAN

BETWEEN:

MR T. BRANNIGAN

Applicant

- v -

OFFICE OF FAIR TRADING

Respondent

Mr. Ben Rayment (instructed by Mr. David Greene of Messrs Edwin Coe) appeared for the Applicant.

Mr. Anneli Howard (instructed by the Solicitor, Office of Fair Trading) and Mr. Vincent Smith, Director, Competition Enforcement, OFT appeared for the Respondent.

Transcript of the Shorthand notes of
Beverley F. Nunnery & Co.
Official Shorthand Writers and Tape Transcribers
Quality House, Quality Court, Chancery Lane, London WC2A 1HP
Tel: 020 7831 5627 Fax: 020 7831 7737

PROCEEDINGS

IN PRIVATE

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1 THE PRESIDENT: Good afternoon ladies and gentlemen. Could I begin by just establishing who
2 we have here? I assume we have Mr. Brannigan, have we?

3 MR. RAYMENT: This is Mr. Brannigan, sitting here.

4 THE PRESIDENT: Hello, good afternoon, Mr. Brannigan. I understand that this has probably been
5 a long and difficult matter from your point of view, but I believe you have some assistance
6 here today. Is that right, Mr. Rayment, what is the position?

7 MR. RAYMENT: That is correct, Sir. My instructing solicitors, Edwin Coe, and in particular Mr.
8 Green, have agreed to go on the record and represent Mr. Brannigan for the purposes of this
9 hearing and I am instructed by them.

10 THE PRESIDENT: So Edwin Coe is on the record now?

11 MR. RAYMENT: They are on the record as I understand it.

12 THE PRESIDENT: And you are instructed by them?

13 MR. RAYMENT: Yes.

14 THE PRESIDENT: And we have Miss Howard for the OFT, yes. As I think you know, we have
15 convened this hearing to decide what we should do in this particular case. We convened it in
16 the first instance “In Private”, or in “In Chambers” without publishing a notice that the case
17 had been received so that we could determine what should happen and, in particular, that all
18 possible options as regards the further development of this case (or not, as the case may be)
19 were open. It seems to us that the issue that we are seised with today is whether we should, in
20 effect, strike out this case under Rule 10, and in general terms I think our approach to that sort
21 of issue is to ask whether Mr. Brannigan has introduced an arguable appeal from the point of
22 view of the two questions before us at the moment: (i) is it arguable that there is an appealable
23 Decision; and (ii) is it arguable that the appeal is not out of time? Or, to put it round the other
24 way, is it clear that there is no appealable Decision and/or that the appeal (if there was one) is
25 nonetheless out of time.

26 So that is the issue that we think we are seised of at this stage. If we were to answer
27 those questions in the affirmative, namely that it is arguable and/or that the negative is not
28 clearly established, we then need to go on and discuss where this case goes in general terms, in
29 terms of the procedure to be followed hereafter, in particular in terms of intervention
30 procedures and so forth.

31 I should say also at the outset that we have some rather general concerns about the
32 way the system at the material time was apparently working as a system, which we can come
33 on to in due course, but I think we should start, if I may suggest it, with the issue of the
34 admissibility of the appeal, and I think since it is your appeal that is at risk, Mr. Rayment, I

1 think you should probably help us into those points which you have already helpfully started to
2 develop in your written observations. Is that a convenient course?

3 MR. RAYMENT: Yes, Sir. Sir, could I just begin with one or two preliminaries. As you are aware
4 we have been recently instructed and we have had to get ourselves together fairly quickly. We
5 have endeavoured to produce some submissions in writing, a skeleton which was filed by close
6 yesterday. I am afraid in the speed there are one or two errors in the skeleton in terms of dates
7 which are in the wrong year. They are fairly obvious.

8 THE PRESIDENT: We have picked them up and I think we have had a chance to read those
9 submissions through.

10 MR. RAYMENT: The other matter of housekeeping is that there is a case referred to in the skeleton
11 argument *The Federation of Wholesale Distributors v The Office of Fair Trading* and I have
12 provided the Registrar with copies for the Tribunal. It is not a long point but it is right that it
13 should be before the Tribunal.

14 THE PRESIDENT: Yes, thank you.

15 MR. RAYMENT: I have provided my learned friend with a copy as well. The other matter which
16 you may have noted from the skeleton is that we also say that questions of disclosure do arise
17 in the context of appealability and the question of when it was that Mr. Brannigan can properly
18 be said to have been notified of the Decision in this case. We had a clip of further material
19 through yesterday evening, certainly in my case, and I have just been handed some more
20 material just now which I have not had an opportunity of looking at yet, so I do not know
21 whether that is relevant to anything at the moment.

22 THE PRESIDENT: We think we had the new clip, which I think we got this morning – when I say
23 the “new clip” the first new clip. The second new clip I think we may just have been handed
24 now but I am not sure that I have actually got it to hand myself. Yes, Mr. Mather has kindly
25 passed it across to me.

26 MR. RAYMENT: I have not had an opportunity to look at those documents yet. I am bound to say
27 that looking at the disclosure we received yesterday it has prompted one or two further
28 questions. Looking at yesterday’s clip of correspondence you will see that there is a draft
29 letter, this was one of the earlier drafts of a letter to reject Mr. Brannigan’s complaint. This is
30 the draft that is described in the email to which it was attached as the “trying to be sympathetic
31 - but probably not enough creation”. Do you have that?

32 THE PRESIDENT: Yes.

33 MR. RAYMENT: It has some manuscript. As you know, part of our case, certainly on appealability
34 of the Decision is that the OFT did look at the merits of this case sufficiently to engage the first

1 *Claymore* question, if I can put it that way, and that in their letter of 6th February then indicated
2 that they effectively then answered the first *Claymore* question in the negative, that there was
3 no infringement, indeed there were not even reasonable grounds for suspecting an
4 infringement.

5 THE PRESIDENT: It does seem to us at the moment very largely to turn on the letter of 6th
6 February.

7 MR. RAYMENT: Yes, that is a crucial document. If I could just draw your attention to the second
8 page of this most recent piece of disclosure.

9 THE PRESIDENT: “Trying to be sympathetic ...” yes.

10 MR. RAYMENT: Yes. You will see on the second page in the middle there is a section that deals
11 with “...the main factors informing this decision, include, in descending order of importance
12 ...” Then there are the factors listed, and they include “Level of consumer detriment”,
13 “Strength of the case” – that is obviously about the evidence – “The OFT’s current case load”
14 and “The likely precedential value of any final decision.” Then there are some manuscript
15 markings. The “strength of the case” seems to have a tick by it – we would quite welcome
16 some clarification about what significance, if anything, we are supposed to draw from these
17 markings and in a sense before we launch into our case on whether or not this Decision is
18 appealable.

19 THE PRESIDENT: Well I do not know that it is going to turn particularly on what that tick means,
20 or who put it there or whether they had authority to tick it, or what?

21 MR. RAYMENT: I do not know myself either yet.

22 THE PRESIDENT: Let us go on for the moment, we will see whether any elucidation is
23 forthcoming as we discuss these matters. Anyway, you point out that there are apparently a
24 number of factors that, in this draft at least, were said to inform the decision they proposed to
25 take?

26 MR. RAYMENT: Well it certainly looks that way at the moment.

27 THE PRESIDENT: One of which was the strength of the case?

28 MR. RAYMENT: Yes. We have obviously three points. First, the time point, which I think it is
29 convenient to take first.

30 THE PRESIDENT: Just before you do that, shall we just look at the new stuff? Is it useful to look at
31 the new stuff?

32 MR. RAYMENT: Well I do not know, I have not had the opportunity. I would quite like to.

33 MISS HOWARD: If I could perhaps clarify the source of the additional information that was
34 disclosed this morning?

1 THE PRESIDENT: Yes.

2 MISS HOWARD: That arises out of my learned friend's skeleton yesterday when they asked for a
3 complete check for the freedom of information request, to make sure that everything on the file
4 had been disclosed. The Office went through the file once again this morning and pulled these
5 documents out as additional materials, and I can now confirm that that is everything on the file
6 that has been disclosed.

7 THE PRESIDENT: Right, thank you.

8 MR. RAYMENT: That is very helpful, thank you.

9 THE PRESIDENT: I am just glancing it, Miss Howard are you able to help me? Looking into this
10 little clip on the third page in there is a document that is headed "Complaint by Mr. T.
11 Brannigan against Newsquest Group." What is the provenance of that?

12 MISS HOWARD: I understand that is an internal chronology that was drawn up within the case
13 team to inform other members of the case, because some time had elapsed in between, and I
14 believe it was drafted in November 2005. I think the circumstances are that Mr. Brannigan
15 approached the OFT asking them to reconsider and because some time had elapsed since the
16 original rejection decision in September 2004, this chronology was drawn up to inform
17 members of the case team about the details of the case.

18 THE PRESIDENT: With a view to reconsidering?

19 MISS HOWARD: I think there was a change of personnel, and you will see that in the internal
20 emails, the original officer was Annette Baxter and then other officials came on to the case. I
21 am just being informed, Sir, that a new branch director came into the branch and they wanted
22 to inform him of the precise developments of the correspondence.

23 THE PRESIDENT: Right. I see, thank you. Yes, Mr. Rayment.

24 MR. RAYMENT: As you know, Sir, we have three points, but as you have identified we are going
25 to deal with two now and that is the question of the time point and the appealability issue.
26 Time, under the Tribunal's Rules, begins to start from the date on which the Decision is
27 notified to the addressee. We say in fact notification had only taken place once we get to 6th
28 February, because it was only then that we learned first of all that the decision was actually in
29 part at least based on the OFT's views of the merits of the complaint; and also that the OFT
30 was closing its file on the Chapter I aspect of the complaint. Up to this point it is not actually
31 clear whether they had actually taken a decision at all on this issue, or whether the issue was
32 mixed up with the Chapter II complaint, but it had not until then been crystal clear that both
33 aspects of the complaint were being rejected until that letter was received.

34 I think the best thing to do is to go through the correspondence and see what position

1 the OFT had been taking prior to the letter of 6th February, what had been communicated to us,
2 what we understood was the decision, and contrast that with the letter of 6th February. Has the
3 Tribunal already had an opportunity to ----

4 THE PRESIDENT: We have had an opportunity to look at it. I think perhaps it would be useful to
5 go through it because it is not always completely clear what was in the relevant decision
6 maker's mind at the relevant time.

7 MR. RAYMENT: Yes.

8 THE PRESIDENT: But we are familiar with it, Mr. Rayment, so you can assume ----

9 MR. RAYMENT: Well I hope we can take it fairly shortly then.

10 THE PRESIDENT: Yes.

11 MR. RAYMENT: Really at this stage I do not want to concentrate on the internal documents, I want
12 to concentrate on the external documents.

13 THE PRESIDENT: Yes.

14 MR. RAYMENT: The external face, if you like, that the OFT was presenting to Mr. Brannigan in
15 terms of what he could have known.

16 THE PRESIDENT: Which is relevant in your submission to what has been quote "notified"?

17 MR. RAYMENT: Yes, exactly, and we say that that question falls to be determined on the face of
18 letters sent to Mr. Brannigan.

19 THE PRESIDENT: Yes, the external documents, yes.

20 MR. RAYMENT: The first document is the letter of 24th November 2003 which is at p.5 of the first
21 tab of the bundle. The key points on the notification issue are that Mr. Brannigan was
22 informed that he should not interpret the OFT's response as confirmation that the OFT
23 currently has reasonable grounds for suspecting an infringement of the Chapter II prohibition
24 of the Competition Act, or indeed where there had been an infringement either way. We
25 interpret this document as basically a decision not to decide.

26 In my submission the subsequent correspondence from the Office continues along that
27 theme. So the next document we come to is the letter of 8th December 2003 (p.9) and that is an
28 email. That is the next communication from the OFT and it is trying to be helpful but there is
29 no change in position. Further communication at p.12, again nothing there, no new
30 developments to report: "... matters remain as set out in my letter of 24th November 2003." So
31 the outward stance taken by the Office again is what we describe as a decision not to decide?

32 The chronology then is that Mr. Brannigan goes off and manages to secure some legal
33 representation and obtains counsel's opinion and the opinion is in the bundle, and that is dated
34 March 2004. That is then sent to the OFT and the OFT respond in relation to that submission

1 of the opinion with the letter which you see at p.39 of tab 1. Again, it is a similar refrain, we
2 say, in the last paragraph although they can see merit, it should not be taken as confirmation as
3 any view on the merits effectively.

4 The next communication that Mr. Brannigan receives from the OFT is at p.42. Again
5 we say it is a decision not to decide, and this of course is the decision that the OFT say is the
6 decision that we should have appealed.

7 THE PRESIDENT: "... decision not to decide." Yes?

8 MR. RAYMENT: Having been advised by the OFT – I do not mean in a formal sense – but having
9 the suggestion made by the OFT that he should try and explore the possibility of private
10 enforcement, Mr. Brannigan goes off and does that, but to no avail. He gets back in touch with
11 the OFT and the next letter that we see from the OFT to him, in response to his invitation to
12 them to reconsider, is the one at p.45, and we are now at 17th November 2005.

13 THE PRESIDENT: I am just catching up – in this tab at least there is a gap between September 04,
14 and September 05, and then there is the OFT's response, that is chased up by an email
15 apparently – no, this is American style, is it not, when it says "11.9.05" it means "9.11.05"?

16 MR. RAYMENT: Yes. That is why I mentioned the fact that Mr. Brannigan was off trying to see
17 what he could do privately.

18 THE PRESIDENT: Yes, quite, we have seen that very considerable efforts were made to do
19 something.

20 MR. RAYMENT: Yes, he approached legal expenses' insurers, he approach the Legal Services
21 Commission. He did everything that he could but to no avail, and he gets back in touch with
22 the Office of Fair Trading, and it is the same old story effectively, as you see in this letter.
23 There is a reference in that letter to the assessment they have undertaken, but on the basis of
24 that they decided not to re-open their file. Mr. Brannigan is not put off, and persists and this
25 results in a further letter from the OFT on p.48, just following along.

26 THE PRESIDENT: 10th January.

27 MR. RAYMENT: Yes, this is a particularly clear example – outwardly at least – of a decision not to
28 decide. You can see that from the last sentence of the penultimate paragraph.

29 THE PRESIDENT: Yes.

30 MR. RAYMENT: So no analysis of strengths and weaknesses. We say up until that point, as far as
31 Mr. Brannigan was concerned, the OFT had decided to not to decide, they have not gone into
32 the merits of his case at all. We say that that position is less apparent though once you come to
33 the letter of 6th February. The crucial passage, as you are aware from the skeleton, on which
34 we rely is in again the penultimate paragraph of that letter.

1 THE PRESIDENT: Perhaps we should just glance at the email from Mr. Brannigan of 18th January,
2 (p.1 of tab2) which provoked the letter of 6th February.

3 MR. RAYMENT: He is expressing there that he is unclear.

4 THE PRESIDENT: And he makes a Freedom of Information Act request.

5 MR. RAYMENT: That is right. The response to the Freedom of Information Act request comes
6 back on 6th February, which is the same date on which the further letter about the case is sent
7 to him.

8 THE PRESIDENT: Yes.

9 MR. RAYMENT: The letter of 6th February is at p.28. It is only in this letter we say that it becomes
10 apparent that, at the very least, there may be another reason for the decision when the OFT
11 says it never had reasonable grounds for suspecting an infringement of the Chapter I and/or the
12 Chapter II prohibitions. That is the first specific mention of the Chapter I provision as well.
13 We say there are two new aspects to this letter which cast light on the decision that was taken.
14 First, that the OFT was now specifically dealing with the Chapter I aspect of the complaint and
15 also saying that it had never had reasonable grounds throughout this whole saga to suspect an
16 infringement of the Act.

17 THE PRESIDENT: So that is in relation to a complaint that was first lodged in October 2003?

18 MR. RAYMENT: 24th November 2003.

19 THE PRESIDENT: 24th October, I think.

20 MR. RAYMENT: The complaint was lodged, yes, I am sorry.

21 THE PRESIDENT: Can you help me a little – we will come to Miss Howard in a minute but let me
22 discuss it with you while you are on your feet – with what you actually make of this last
23 paragraph of the letter of 6th February. If we try and analyse it, it is saying – or seems to be
24 saying – “We have never had reasonable grounds to suspect, therefore we cannot use our
25 formal powers”. The absence of reasonable grounds would at first sight mean that the OFT
26 could not use any of its powers to ask for documents or conduct searches or anything of that
27 kind. So it is not quite clear what further inquiries are being referred to as a possibility. Then
28 in the last sentence it said: “As it is not an administrative priority to launch a formal
29 investigation we cannot make an analysis of the merits.” But it is not a question of an
30 administrative priority because they have just said “We do not have power to launch a formal
31 investigation.” So what is it that you think they think they could do, if anything, in the face of
32 a conclusion that they never had reasonable grounds to suspect?

33 MR. RAYMENT: In a sense this is an issue that I would come back to in the context of the other
34 issues in the case. They seem to be suggesting that there are informal steps that they need to

1 take in order to satisfy themselves that there is even a reasonable suspicion. Although I am
2 bound to say it is not entirely clear to me whether resources are relevant to even those informal
3 steps. Resources are also rolled-up with administrative priorities, so you may well have the
4 resources, but as a matter of administrative priority you decide not to in any event.

5 THE PRESIDENT: Well they have made an initial assessment which has come to the conclusion,
6 apparently, that there are no reasonable grounds to suspect, so that is the end of it as far as any
7 exercise of their formal powers is concerned.

8 MR. RAYMENT: That is what we say, on the face of it, this letter suggests, and we say that is
9 something new that has turned up and it is not something that we had been informed of
10 previous to this letter.

11 THE PRESIDENT: And if you went to the civil courts, for example, on an application for pre-trial
12 discovery or something, and you had to disclose this letter – as you would have to ----

13 MR. RAYMENT: This would be most unhelpful.

14 THE PRESIDENT: One might imagine what the Judge might say.

15 MR. RAYMENT: Indeed. It is a point made in the skeleton but the fact is Mr. Brannigan's
16 complaint, if he goes off to try and enforce matters privately in the courts, of course, his
17 complaint will be the basis of his pleadings and, as you say, if this comes out on disclosure it is
18 clear what view the OFT has taken about his basic case.

19 THE PRESIDENT: Yes.

20 MR. RAYMENT: That is clearly unhelpful and of course that is one of the objectives of the appeal
21 from his point of view, which is to effectively expunge this conclusion.

22 THE PRESIDENT: Yes.

23 MR. RAYMENT: But dealing with the letter for the purposes of the time point we say all we have
24 to show is that these are new matters that we might have wished to explore and appeal if only
25 we had known about them and, in those circumstances, it would be most unfair if time could
26 have been said to have started to run at any time prior to that.

27 THE PRESIDENT: Yes. Mr. Mather I think has a question.

28 MR. MATHER: Going back to the letter of 24th November, p.5 of tab 1, second paragraph, it says:
29 "We believe that further inquiries by the OFT are justified in order to establish whether there
30 are reasonable grounds for suspecting a Chapter II prohibition has been infringed." Then they
31 say that they have insufficient resources to make those inquiries, and then you took us through
32 the 6th February letter. Does that complete the jigsaw that because they do not have sufficient
33 resources they are not able to establish whether there are reasonable grounds?

34 MR. RAYMENT: I think that is what they say, yes.

1 THE PRESIDENT: And the change is that they say clearly, according to you, that they never had
2 reasonable grounds and still do not have reasonable grounds?

3 MR. RAYMENT: That is right, whereas we, looking ahead to our actual attack on the validity of
4 this decision, would say “You did have reasonable grounds and you placed the threshold far
5 too high”, with the potentially serious consequences that you have already pointed out. That is
6 our pretty short submission on the time point.

7 THE PRESIDENT: That is the nub of the argument.

8 MR. RAYMENT: One possible issue which arises is the fact that there were two aspects to the
9 original complaint, one under the Chapter I prohibition and one under the Chapter II
10 prohibition. Perhaps anticipating submissions from the other side of the room, we would
11 strongly urge you not to adopt any approach bifurcating the complaint in the sense that perhaps
12 reaching a conclusion whereby a time limit started to run on one aspect of the complaint, and
13 did not on the other, that would be a most unattractive result.

14 THE PRESIDENT: Right.

15 MR. RAYMENT: I think that is all we have to say on the time point. Moving on to the question of
16 admissibility, the key issue here we say here is whether a decision that a complaint gives no
17 reasonable grounds for suspicion is an appealable decision. You have my submissions on this
18 issue in the skeleton, I hope, I will not just repeat those. Instead, I would like to look at the
19 matter through the lens of the two *Claymore* questions, and those are, of course, in trying to
20 determine whether an appealable decision has been made or not, the first question is to ask: did
21 the OFT ask itself whether, on the basis of the complaint – which we say is an important point
22 – a relevant prohibition has been infringed?

23 THE PRESIDENT: I am just trying to find where the *Claymore* questions are?

24 MR. RAYMENT: 115.

25 THE PRESIDENT: Yes. It is all set in Miss Howard’s observations.

26 MR. RAYMENT: That is right, it is set out very helpfully in full. I have given the reference in my
27 skeleton as well.

28 THE PRESIDENT: I am just checking exactly what the questions are. (After a pause) At para.13
29 the two questions are: “Did the Director ask himself whether the Chapter II prohibition has
30 been infringed? What answer did the Director give to that question when making his
31 decision?”

32 MR. RAYMENT: That is right, and we say that those questions are directed to the material in front
33 of him.

34 THE PRESIDENT: On the material before him?

1 MR. RAYMENT: Yes.

2 THE PRESIDENT: Which is *Claymore* at para.122(2) on the material before him, which you say is
3 the complaint?

4 MR. RAYMENT: Yes.

5 THE PRESIDENT: Plus, I suppose, the opinion and the other things?

6 MR. RAYMENT: Yes, and I would not understand that to be disputed, either. We say that the OFT
7 answered the first question in the affirmative.

8 THE PRESIDENT: You mean he answered it in the affirmative or in the negative?

9 MR. RAYMENT: The OFT asked itself whether the prohibition had been infringed, and we say
10 “yes” it did ask itself that question. Then the next question, which is crucial we say, is what
11 answer did it give? We say there are three possibilities. First, “yes, it has been”, secondly, “no
12 it has not”; and thirdly, “maybe”. I would submit that in the ‘maybe’ situation that implies that
13 there are reasonable grounds for suspicion.

14 The OFT appears to say that ‘maybe’ includes cases where there is a suspicion or
15 grounds for further action, but that it is less than a reasonable suspicion.

16 THE PRESIDENT: Where do they say that?

17 MR. RAYMENT: Well that is what we think they are effectively saying.

18 THE PRESIDENT: Something less than reasonable grounds to suspect?

19 MR. RAYMENT: Yes. In other words, they are allowed to sit on the fence of the question of
20 whether there is even a reasonable suspicion on the basis of the complaint. We say that if
21 there is a definite conclusion that the complaint discloses no reasonable grounds for suspicion
22 then that is a decision on the complaint to the effect that prohibition has not been infringed,
23 and the consequence of that is any errors in reaching that decision are susceptible to challenge
24 before the Tribunal.

25 As I say, the gloss that the OFT are attempting to put on the case is that they decided
26 there were not reasonable grounds for suspicion from the complaint, that there was some kind
27 of lesser degree of suspicion, and on that basis they say “Well we have not rejected your
28 complaint on the merits”, but I think it merits some further investigation as to what exactly is
29 this concept of a degree of suspicion that is less than reasonable, but would still justify further
30 action.

31 THE PRESIDENT: But not apparently statutory action?

32 MR. RAYMENT: Not apparently statutory action, no. We say that is really rather an artificial
33 distinction and it also has the unhappy – whether it is intentional or not may be beside the point
34 – but it also has the unhappy consequence of ousting the jurisdiction of the Tribunal over the

1 relevant decision. We say that if the conclusion is that a complaint cannot even be said to give
2 rise to a reasonable suspicion then that is effectively (and by necessary implication) a non-
3 infringement decision. So our first submission is that they decided expressly that there were
4 no reasonable grounds in the letter of 6th February.

5 THE PRESIDENT: Yes.

6 MR. RAYMENT: But, as I say, if they try to occupy this twilight zone between reasonable grounds
7 for suspicion and some lesser form of suspicion if it justifies further action we would say it
8 must be reasonable, there is no twilight zone, in fact.

9 Those are my additional submissions to what is in the skeleton, it is a short point in
10 my submission. Would it help if I actually go through the points in the skeleton? There is
11 certainly an error of reference in para.31. The reference there is to para.83 of *Bettercare*, it
12 should be para.85.

13 THE PRESIDENT: Yes.

14 MR. RAYMENT: The point being that it does not matter whether you have exercised informal
15 powers or not, if you are somebody with decision-making powers you can exercise your
16 decision-making powers at any time, if you choose to do so, and in this case the OFT did
17 effectively choose to do so, either expressly or, as I have said, by necessary implication.

18 MR. MATHER: At para.42 of the skeleton you say: "It is clear that the material submitted to the
19 OFT by Mr. Brannigan plainly did disclose grounds for suspecting a breach of the prohibition.
20 Are you referring there to the counsel's opinion, or would you have other ----

21 MR. RAYMENT: I am referring to the totality of the material that he submitted.

22 MR. MATHER: And your point is that if the OFT said it never had grounds for reasonable suspicion
23 and on the face of the documentation there is material which a reasonable person would think
24 gave such grounds, then that would prevail?

25 MR. RAYMENT: Yes, the decision would be in error and on that basis we are inviting the Tribunal
26 to set aside the decision, but obviously that is one stage ahead at the moment.

27 Those are all the submissions I have at the moment on this point. It is a fairly straight
28 forward point from our perspective.

29 THE PRESIDENT: Thank you, Mr. Rayment. Yes, Miss Howard?

30 MISS HOWARD: Sir, you have helpfully identified two issues. I would like to address you on three
31 issues, namely: what is the relevant decision in this case? Admissibility, i.e. is that decision an
32 appealable decision under s.46(3), and the implications for timing under Rule 10.

33 THE PRESIDENT: Before you start on all that, Miss Howard, I think the Tribunal is pleased to see
34 Mr. Smith is in attendance today. We do have some concerns about the general picture that

1 emerges from the documents in this case. If Mr. Brannigan is right, and we have no means of
2 forming any view at the moment whether he is right, but if he is right, he has found himself in
3 a position in which the system, as a system, has not enabled him to find any forum in which he
4 can have his case considered because, for reasons that are apparent from the documents we are
5 looking at – or in circumstances at least that appear from the documents you are looking at –
6 the OFT has not considered his case. It is perfectly apparent, notwithstanding various
7 references in the documents the desirability of private action, that Mr. Brannigan has made
8 great efforts, but so far unsuccessful efforts, to pursue any private action and he faces, among
9 other things, the great difficulty that a lot of the evidence will be in the hands of the parties
10 against which he seeks to bring his proceedings.

11 So it is perhaps not unsurprising that the Tribunal is extremely concerned about the
12 systemic issues that arise from a case like this, when it is a matter of a small and medium sized
13 company that is a new entrant to a market and apparently has no way of telling anybody what
14 his case is about. That may be of particular seriousness in a situation where both the OFT and
15 the Tribunal has devoted a lot of time and effort into setting out what the principles are the
16 *Aberdeen Journals* case, which should have made it much easier to enforce the law in these
17 circumstances, and got rid of a whole lot of issues that would otherwise have to be decided so
18 that one would have thought that it should not be too difficult now to pursue these cases or not
19 on the basis of existing case law, but nothing has happened here. There is a considerable
20 amount of comment in the papers about the issue of resources, but we cannot help notice that
21 in the relevant period there were not many decisions coming out of the OFT that the figures
22 suggest that the OFT had a large staff, and it was under spending on its budget and that does
23 raise questions of what is going on in cases like this? These are the kind of background
24 circumstances in which this case arises and it is very worrying.

25 You may want to come back at some point on the more general issue, because at the
26 moment we are on the legal issues, but a system that cannot deliver a forum in which a small
27 businessman can be heard is not a system that can be regarded as satisfactory one would have
28 thought.

29 MISS HOWARD: Might I deal with the more policy related issues at the end – if I deal with the law
30 first?

31 THE PRESIDENT: Of course, yes.

32 MISS HOWARD: Because I think it would follow on naturally. What I would like to do is to spend
33 some time explaining exactly what happened in this case, both for the benefit of the Tribunal
34 and for the benefit of Mr. Brannigan.

1 THE PRESIDENT: Yes, of course.

2 MISS HOWARD: My learned friend has latched on this one sentence in a letter that was sent a
3 considerable amount of time after the complaint, and after the rejection of the complaint in
4 September, and I submit that it is dangerous to read that sentence in isolation both from the
5 whole of the letter, the context in which that letter was written, and in the wider context of all
6 the other correspondence that had been sent to Mr. Brannigan. I do not want to overwhelm you
7 with going through the file in too much detail, but I would like to put that letter into context
8 and explain what that sentence actually meant for your benefit. At the same time I would like
9 to explain exactly what happened in this case and, as you pointed out, what the balance was
10 between resources and administrative priorities, to raise those issues with you.

11 Mr. Rayment contends that the letter of 6th February is the relevant decision in this
12 case.

13 MR. RAYMENT: That is not the case. The decision is the decision of the Office of Fair Trading to
14 close their file. The letter of 6th February notifies Mr. Brannigan of a reason, and we say one
15 not previously disclosed.

16 MISS HOWARD: Thank you for that clarification. We would say Mr. Brannigan has not identified
17 any material new facts or reasons that were subsequently disclosed that altered his
18 understanding of the reasons and the facts for the decision. The 1st September letter ----

19 THE PRESIDENT: So there is nothing new in the letter of ----

20 MISS HOWARD: There is nothing new in that letter. If you look at the requirements for reasons, we
21 would submit that the 1st September letter sets out quite clearly what the reasons were for
22 closing the file and those reasons have remained consistent throughout, and that is in spite of
23 several requests from Mr. Brannigan for the Office to reconsider the case and throughout the
24 story – and I have set out a chronology at annex 1 of my observations – the reasons have
25 remained the same. The letter of 6th February does not change them.

26 Indeed, in a telephone conversation between Mr. Brannigan and the Office on 3rd
27 September 2004 he explained that he understood the Office's dilemma, that he did not have
28 sufficient resources to proceed with the case. He did not express any confusion at that stage
29 why the Office had closed its file. So we would submit that it is artificial to treat that letter of
30 6th February as the relevant decision in this case, viewed in the light of the earlier decision as
31 well, and that the 1st September letter is the relevant decision.

32 I would like to move on to admissibility and to put that letter into context so that you
33 can see why it was written. I would like to go into the facts of how this complaint was actually
34 handled on the facts, and then apply those facts to the law as the Tribunal has expressed in

1 *Bettercare and Claymore.*

2 To set the context of this letter if we turn to p.48 of tab 1.

3 THE PRESIDENT: Yes, that is 10th January.

4 MISS HOWARD: This set off the train of correspondence leading to the 6th February letter. It was
5 again an email asking the Office to reconsider the complaint and, in the third paragraph, they
6 said “Due to the fact that we have not made any formal inquiries in your complaint we are
7 unable to provide you with advice as to the merits.” The specific circumstances were that Mr.
8 Brannigan was trying to get his insurance company to help fund his private litigation action,
9 but they needed a statement from the Office as to the underlying merits of the case before they
10 would commit to such funding. The Office felt it was unable to go into the merits of the case
11 because it had not carried out any formal inquiries.

12 THE PRESIDENT: “Formal” inquiries?

13 MISS HOWARD: Any formal inquiries. They set out the reasons, as we will see, tracked from the
14 1st September letter: “As your case is not an administrative priority for the allocation of OFT
15 resources it is not possible for us to conduct any analysis of its strengths and weaknesses.” So
16 in that situation, and I will come back to this, the OFT was specifically asked to give an
17 opinion on the merits of the case, and it refused to do so.

18 In response to that letter, Mr. Brannigan then came back with an email (p.1, tab.2)
19 where he expresses some confusion whether the OFT has made some inquiries, or no inquiries
20 at all and would request some clarification as to the extent of the inquiries that have been
21 made. That is the context of 6th February. That letter specifically made in response to that, and
22 the letter has to be regarded as a whole, and it starts off setting out the OFT’s procedures for
23 investigating complaints generally, that is under both the Chapter I and the Chapter II
24 prohibition, if you look at the first page. It sets out the procedures it has to go through before it
25 can investigate under s.25. So as the Tribunal pointed out “Upon receiving a complaint the
26 OFT may carry out an investigation under s.25 ...” – and I stress “may” because there is a
27 discretionary element involved – “... if it has reasonable grounds to suspect the infringement.”

28 Over the page at 29 ----

29 THE PRESIDENT: Before you go over the page at 29, as the letter points out, whether there are
30 reasonable grounds to suspect infringement of the Act would depend on the OFT’s assessment
31 of the information available.

32 MISS HOWARD: That is right.

33 THE PRESIDENT: And then that is followed up over the page. After assessing the information it
34 has available it then has to consider its administrative priorities.

1 MISS HOWARD: That is the point I was just about to take you to, over the page.

2 THE PRESIDENT: But that is after assessing the information it has available.

3 MISS HOWARD: That is right. My learned friend would seem to accelerate the procedure to taking
4 a decision right at the very outset of receiving the complaint. We would submit that there is
5 more flexibility than that because the case may change shape as the OFT goes through its
6 informal and formal procedures.

7 THE PRESIDENT: The point that is being made is that an assessment of the complaint has been
8 made with regard to the assessment of your complaint, i.e. there has been an assessment, a
9 conclusion has been reached to the effect that the OFT has never had reasonable grounds to
10 suspect an infringement. That is the assessment.

11 MISS HOWARD: That is the Appellant's interpretation of that paragraph.

12 THE PRESIDENT: Well that is what it says: "With regard to the assessment of your complaint the
13 OFT has never had reasonable grounds to suspect an infringement of the Chapter I or Chapter
14 II prohibition under s.25 of the Act.

15 MISS HOWARD: But that sentence is written in the context of explaining inquiries that have been
16 carried out.

17 THE PRESIDENT: But no inquiries have been carried out apparently.

18 MISS HOWARD: That is exactly the point, they had not actually got to the stage of assessing the
19 s.25 threshold, because the OFT carried out a preliminary informal assessment when it
20 read ----

21 THE PRESIDENT: Well it has, because it says it has assessed the complaint.

22 MISS HOWARD: We agree that there is an assessment, but there are different degrees of the
23 assessment. When the complaint came in the case handler read the complaint and, if you like,
24 I can take you back to the preliminary letter of 24th November. The official read the complaint,
25 considered that there was merit in proceeding and going further to see whether there was a s.25
26 threshold and whether it could be satisfied, but did not have the resources to do so and stopped
27 there.

28 THE PRESIDENT: Well just hang on a minute, Miss Howard. I think it is quite important that we
29 understand all this – there seems to be something of a gloss on the Statute at the moment. The
30 letter on p.28 of tab 2 says: "Whether there are reasonable grounds to suspect an infringement
31 of the Act will depend on the OFT's assessment of the information available". So you first of
32 all have to assess whether there are reasonable grounds to suspect an infringement. That is the
33 starting point, presumably?

34 MISS HOWARD: Initially, because at any stage in the investigation the OFT can assess its

1 administrative priorities.

2 THE PRESIDENT: No, I am not on administrative priorities at the moment, that becomes ----

3 MISS HOWARD: But that may come in as a precursor to assessing ----

4 THE PRESIDENT: That comes ----

5 MISS HOWARD: -- the evidence for the purposes of s.25.

6 THE PRESIDENT: According to this that comes at a later stage, when the OFT decides whether to
7 launch a formal investigation after assessing the information it has available it will also
8 consider its administrative priorities at the time. So the first thing you do is to assess the
9 information you have available.

10 MISS HOWARD: Which the Office did, in its letter of 24th November.

11 THE PRESIDENT: Right, and according to this letter now: "With regard to the assessment of the
12 complaint the conclusion is that the OFT never had reasonable grounds to suspect an
13 infringement ..." etc., that was the result of the assessment, that is what says. Whatever degree
14 of assessment there was somebody assessed something and came to that conclusion.

15 MISS HOWARD: I do not want to argue with you, but I would just like to have a chance to set out
16 just how steps actually occurred in this case, because at the time the complaint was received
17 there was an evolving internal policy on dealing with administrative priorities. The complaint
18 was received, the case handler read the complaint, had a preliminary assessment of the case.
19 The next stage normally is to proceed to informal inquiries, to ask the complainant for more
20 information in order to carry out more inquiries to see whether s.25 has actually been passed in
21 the circumstances of that case.

22 In Mr. Brannigan's case the case official could not proceed to that stage because he
23 was fully occupied with work, the whole of his team within the newspaper team were running
24 at full capacity and there were simply no resources to go on to the next stage of making
25 informal inquiries, and the complaint was put on hold.

26 THE PRESIDENT: What informal inquiries are we talking about? You mean asking the
27 complainant for more information?

28 MISS HOWARD: That is correct, or for example running internet searches, finding out information
29 about the companies that are subject to the allegations, finding out general market information,
30 and the Office of Fair Trading did not have the resources to actually conduct those internal
31 inquiries. If you think that we are looking here at a potential abuse of dominance allegation
32 there would be a lot of background information that you would need to find about the market
33 to establish whether dominance had been satisfied, and those would be the subject of
34 preliminary informal chats.

1 THE PRESIDENT: Well he gave you a lot of stuff, did he not?

2 MISS HOWARD: Not in relation to the market as such, and not in relation to the market position of
3 the companies subject to the investigation.

4 THE PRESIDENT: Well, is that right? You have counsel's opinion, and you have ----

5 MISS HOWARD: I am sorry, I am still talking about 24th November letter.

6 THE PRESIDENT: Well you have all the stuff that was sent on 13th March 2004.

7 MISS HOWARD: With counsel's opinion.

8 THE PRESIDENT: At that stage there was a reconsideration as you can see on 8th April letter that
9 was sent. But again there was the issue of resources that the OFT had hoped that resources
10 would become available, and there was a genuine hope – Mr. Brannigan's complaint was not
11 the only complaint that was held up in this situation and they genuinely hoped that resources
12 would become available. But when the OFT officials concerned finished the cases they were
13 currently working on there then became other cases with competing priorities, including cases
14 remitted from the Tribunal, that took more important priority. Again, they could not take
15 resources off those other cases to dedicate to his complaint.

16 MR. MATHER: Could it be possible – I posture this as hypothetical – that at some point in
17 examining the documentation which is before it the OFT does have a reasonable suspicion, but
18 that that fades away because it is not able to allocate resources to further investigation?

19 MISS HOWARD: I think resources are dealt with separately to the reasonable suspicion test. The
20 reasonable suspicion test is run in conjunction with an assessment of administrative priorities
21 and resources, and those two are closely linked, because the Office cannot just review each
22 complaint in isolation from all its other competing priorities. For example, if it takes an
23 official off case X to put on to, say, this complaint then that means the length of investigation
24 of other complaints will be prolonged and potentially adverse implications for consumers will
25 be prolonged. If it had to investigate every single complaint it would come to a standstill
26 because it simply does not have the resources to deal with every complaint. It is not that the
27 reasonable suspicion threshold is watered down in some way because of a lack of resources,
28 they are two separate issues.

29 MR. MATHER: It seems to me in the natural order of things it may be perfectly possible to review
30 the documentation during which a reasonable suspicion arises but then decide administratively
31 not to take any action ----

32 MISS HOWARD: That is exactly what happened in this case.

33 MR. MATHER: -- and that would be a decision.

34 MISS HOWARD: It is a decision not that there is no infringement, but it is a decision not to proceed

1 with an investigation under s.25, and if you look at the wording in s.25 even if the reasonable
2 suspicion threshold is satisfied, the Office may commence an investigation. It still has a
3 residual discretion whether to launch the investigation in that particular case, and that is where
4 the administrative priorities come in.

5 THE PRESIDENT: In this case the decision was on the state of the file we have no discretion as to
6 whether to launch a formal investigation because the threshold for doing so has not been
7 reached. That is the decision.

8 MISS HOWARD: If I might explain how that wording in the letter of 6th February came about?
9 That sentence was trying to convey what inquiries had actually been conducted by the Office
10 in relation to Mr. Brannigan's complaint, and it is unfortunate drafting. What the official was
11 trying to do was to track the wording of s.25 so it is taken from the statutory language, and it
12 follows on from the general explanation that he has given in p.1. What he is trying to say, and
13 you have to read that sentence in the light of the rest of the paragraph, is that the OFT never
14 actually got to the stage of considering whether the s.25 threshold had been met in this
15 particular case, and informally ----

16 THE PRESIDENT: Miss Howard, how can you possibly submit that in the face of the plain wording
17 of the letter?

18 MISS HOWARD: Because there was a distinction between a preliminary and informal assessment,
19 when the complaint first came in, and was put into the filing try as a "to do" list, but there were
20 nor resources to deal with it and ----

21 THE PRESIDENT: Even on the basis of a preliminary and informal assessment based solely on the
22 information Mr. Brannigan had provided you are saying on the basis of the information you
23 have provided there are no reasonable grounds to suspect an infringement.

24 MISS HOWARD: The language is unfortunate, but it is not ----

25 THE PRESIDENT: But what other possible ----

26 MISS HOWARD: If you read it in the context of the rest of the paragraph it is not intended to mean
27 a statement as to the merits of the case. The whole purpose of that paragraph is to explain why
28 the office was unable to go into the merits of Mr. Brannigan's complaints.

29 THE PRESIDENT: What we have said is that if you break down each of the sentences and just see
30 where we get, because I think they are fairly consistent. "With regard to the assessment of
31 your complaint ..." so there is an assessment.

32 MISS HOWARD: Yes.

33 THE PRESIDENT: "The result of the assessment apparently is that there had never been reasonable
34 grounds to suspect an infringement, therefore there would be no question of using formal

1 powers.

2 MISS HOWARD: Yes.

3 THE PRESIDENT: There has been an informal, initial assessment, but whether ‘informal’ or
4 ‘initial’ nonetheless there has been an assessment on the basis of the information Mr.
5 Brannigan has provided. On that basis, i.e. on the basis of counsel’s opinion, and of all the
6 stuff about what happened and the market information and so forth, there are still no
7 reasonable grounds to suspect on that basis.

8 MISS HOWARD: That does not follow, that sentence is not there. They have carried out an
9 informal initial assessment, but they are unable to make further inquiries or launch a formal
10 investigation because of resources. They have made an administrative decision “not to make
11 further inquiries into your complaint.”

12 THE PRESIDENT: Right. They have made a decision not to make further inquiries into the
13 complaint, so on the basis of what you have there are no reasonable grounds to suspect.

14 MISS HOWARD: Not the case ----

15 THE PRESIDENT: Well that is what it says.

16 MISS HOWARD: -- because that first sentence, you are automatically inferring from that sentence
17 that that is a statement as to the merits, and it was not drafted with that meaning. I know you
18 are taking counsel’s word for it, but the Office is prepared to give a witness statement if you
19 require it.

20 THE PRESIDENT: This is a strike-out application, Miss Howard. All we have to decide this
21 afternoon is whether the Appellant’s case is arguable or not.

22 MISS HOWARD: Perhaps it would be clearer if I show you some of the internal documents, and
23 then you can also see the Office’s thinking as it was approaching the decision under ----

24 THE PRESIDENT: This is all quite apart from this at first sight somewhat worrying view as to what
25 the threshold of reasonable grounds to suspect is. It is about as low a test as you could have, I
26 would have thought, a reasonable ground to suspect. It was deliberately drafted in a way that
27 would give the OFT very wide powers to intervene as a number of senior OFT officials have
28 stressed publicly more than once. But there seems to be a sub-stage before you even reach
29 reasonable grounds to suspect that is a bit troubling at the moment.

30 MR. MATHER: Could I test that a bit further by asking what should that sentence, which you say
31 was wrongly drafted, or badly drafted ----

32 MISS HOWARD: But the OFT has never got to the stage of considering reasonable grounds to
33 suspect, and that is why it cannot use its formal powers.

34 MR. MATHER: It has never got to the stage of – just help me, finish the sentence – it never got to

1 the stage of?

2 MISS HOWARD: To the stage of considering whether it had reasonable grounds to suspect an
3 infringement.

4 MR. MATHER: It never got to the stage of considering whether it had reasonable grounds. Are you
5 seriously suggesting that that is an accurate description of the OFT's procedures?

6 MISS HOWARD: That is what my instructions are. If I could just take further instructions? (After a
7 pause) My instructions remain the same and what happened in this case is the OFT did not
8 even have the resources to get to the stage of asking itself about s.25 and that is shown in the
9 letter of 24th November. Would it help if I took you to that letter briefly?

10 THE PRESIDENT: You never asked yourself, you never even asked the question "Are there
11 reasonable grounds to suspect?"

12 MISS HOWARD: No, it did not get that far. The letter came in, it was read and then it was put on
13 hold pending availability of more resources. That is what the letter of 24th November says.
14 The official said "We see considerable merit in taking further inquiries to see if the s.25
15 threshold can be satisfied." But at that stage it was a very preliminary assessment. There was
16 no assessment of s.25 and there were no resources to carry out informal inquiries. After
17 counsel's opinion was submitted in April 2004 there were still no sufficient resources to
18 dedicate to this case. It was put on an informal "wait and see" basis. The Office wanted to
19 pursue the case, and you can see that from the internal documents. They say "It is a real
20 shame, this is a compelling case but we just do not have the resources available." If you like I
21 can take you to that email that shows that – if you look at p.6 of tab.2.

22 THE PRESIDENT: It is rather tricky a point like this, because some of the disclosure suggests that
23 at least some people in the group considering this case thought that a number of other
24 considerations were relevant to what was actually going on, including matters of consumer
25 detriment, how important it was, whether there was a precedent, and all that sort of thing.

26 MISS HOWARD: Perhaps I can assist you with that. I would like to just take you to that email, it is
27 at p.6 of tab 2, and I will just track through the internal reasoning. Again this is American
28 numbering.

29 THE PRESIDENT: 12th August?

30 MISS HOWARD: Yes. "It is really a shame we cannot pursue but it is the way the regime works.
31 Unfortunately people on the outside world over estimate our power and resources." So they do
32 see it as a case that has some merit, but they cannot even pursue it, this is following on from
33 24th November letter.

34 Then the email I wanted to take you to was from p.19 onwards. At the time the OFT

1 was formulating the criteria that it has for dealing with administrative priorities, and in the
2 bundle I have attached two speeches, one from Vincent Smith and one from Philip Collins
3 explaining how those priorities work.

4 THE PRESIDENT: But we are now on a completely different point, we are on the administrative
5 priorities' point.

6 MISS HOWARD: But this is explaining the criteria that we are taking into account in rejecting the
7 complaint.

8 THE PRESIDENT: Yes.

9 MISS HOWARD: And whether other criteria (other than just resources) were relevant. The Office
10 was formulating these criteria at the time, but they had not actually been formalised at the time
11 of this complaint and as you can see through the letters dealing with the draft letter for the pre-
12 cursors of the September letters the team are discussing the criteria, which way to go ahead.
13 At p.19 there is an email from Mr. Lee on the dismissal for these wait and see cases.

14 THE PRESIDENT: Yes.

15 MISS HOWARD: In the second paragraph: "You will note I have focused on the issue of not having
16 and are unlikely to have any spare resources in order to open investigation. I have to admit
17 there was discussion/disagreement within the team as to the right way of dismissing these
18 cases now ...", and this is in the light of the new criteria that were being established – "...
19 whether we should more closely follow your approach adopted in ..." the name of that
20 complaint is redacted for confidentiality reasons. "However, I believe there are a number of
21 reasons why not to follow this approach in this instance." Then he explains that the cases have
22 been open for a significant time, "... and we told the complainant that we can see merit in
23 looking into their complaint further to reach the s.25 stage. Thus, if we start saying we are
24 closing our file not just because of a lack of resources, but also because of other factors ...",
25 and those factors are taken from the evolving criteria that have now been finalised, and he
26 concludes that those factors are not relevant in this case.

27 So he says a lack of consumer detriment, and then he says that consumer detriment
28 may actually be significant in this case. He goes on: "The weakness of the case", and then he
29 applies that criteria to Mr. Brannigan's case and says that it could actually be quite strong, we
30 do not know, and/or the lack of any precedent value from pursuing the case. He says that this
31 could be true given that *Aberdeen Journals* is a relevant precedent in the area. So in that
32 email the relevant official refuses to apply other criteria and stays with the resources reason,
33 which is the genuine reason that has been given all the way along, and that is the substance not
34 the form of the reason behind the rejection of the complaint.

1 MR. MATHER: Well if I can just pick you up on that. You said that the three criteria mentioned
2 were not relevant, but that is not what the official actually says in the email, is it? The reason
3 he gives for dismissing those is that “We will be open to the criticism we could have reached
4 this view back in November.” Is that not the basis on which he makes that recommendation.

5 MISS HOWARD: But he is also saying that those criteria are not really appropriate for this case and
6 that he cannot justify ----

7 MR. MATHER: Where does he say that?

8 MISS HOWARD: In the section where the three bullet points are, because he says that if we do
9 dismiss it on lack of consumer detriment, and we use that as a reason for justifying it, it may
10 actually be significant ----

11 THE PRESIDENT: No, he is not saying that, Miss Howard. He is saying “If we start saying we are
12 closing our file not just because of lack of resources but also because of” those three things,
13 “... then we will be open to criticism we could have reached this view back in November last
14 year, so why did we not dismiss it then?” That is the main thing he is saying. He is
15 commenting, maybe in passing, on various other things but what he is basically saying – and
16 this is really quite troubling from the Tribunal’s point of view – is “say as little as possible,
17 give away as little as possible. Give this complainant as little information as we possibly can
18 get away with in order to explain why nothing has happened so far.”

19 MISS HOWARD: I do not think that is how it is meant to be read. What they are trying to do is to
20 apply the new criteria that have just been formulated, and he does not feel that it is right to
21 apply those criteria to this case, which was dismissed at a time when those criteria were not in
22 place. He does not think it is appropriate because, first, those criteria were not in place at the
23 time and, secondly, they are not really met in this particular case.

24 THE PRESIDENT: Where does he say that?

25 MISS HOWARD: He does not say that in this email, but if I can take you to the speech of Mr. Philip
26 Collins he goes through the criteria that have now been formalised.

27 THE PRESIDENT: But that is over a year later.

28 MISS HOWARD: In November 2004 Mr. Vincent Smith’s speech they were also being formalised
29 there as well.

30 THE PRESIDENT: But a case in which you are deciding you are not going to pursue it because it is
31 an administrative priority, that is a completely different point from assessing whether or not
32 there is a reasonable suspicion, is it not? It is a completely different exercise.

33 MISS HOWARD: Yes, and in this case the OFT did not turn its mind to considering whether s.25
34 was satisfied.

1 THE PRESIDENT: Well then how does it say that it never has been satisfied on that point? It must
2 have considered it and said it is not satisfied.

3 MISS HOWARD: Because that sentence was not intended ----

4 THE PRESIDENT: Not intended to mean what it says?

5 MISS HOWARD: Quote: "... was not intended to comment on the underlying merits of the case."

6 That paragraph was written explaining why the office could not go into the merits of the case
7 and was explaining the extent of the inquiries that had been carried out, and it was intended to
8 convey that the Office had not even considered whether s.25 had been satisfied or not, it had
9 not reached that stage of the inquiry.

10 THE PRESIDENT: If that is really your case it paints an even more alarming picture of the state of
11 this regime than might have been thought in the first place. If the Office is unable even to
12 consider whether a threshold of about the lowest imaginable kind is met, it must mean that
13 large swathes of this Act are going completely unenforced.

14 MISS HOWARD: I think the Office is mindful – and you will see this in the correspondence as well
15 – of the evidential requirements that it needs to justify, because it is also open to challenge if it
16 does open an investigation and ----

17 THE PRESIDENT: You have counsel's opinion, you have a lot of background stuff, you have Mr.
18 Brannigan himself, how could anybody say you did not have reasonable grounds to suspect in
19 a case of that kind. You have *Aberdeen Journals'* Decision in favour of you.

20 MISS HOWARD: Because it did not have the resources to actually even check the information that
21 it had been given.

22 THE PRESIDENT: On the assumption that counsel has not been misled by her client, on the basis
23 of the information provided, which the Office has apparently assessed, it is rather difficult to
24 reach the conclusion that this letter says you could possibly have reached. This is not a high
25 threshold. It is intended to mean that you can take action on suspicion. It is less than a
26 magistrate would need to grant an arrest warrant, I would have thought.

27 MISS HOWARD: Sir, could I ask for a brief adjournment, Mr. Smith would like to give me some
28 instructions?

29 THE PRESIDENT: Yes, by all means, of course. Shall we rise for 10 minutes?

30 (The hearing adjourned at 3.30 p.m. and resumed at 3.40 p.m.)

31 THE PRESIDENT: Yes, Miss Howard?

32 MISS HOWARD: Thank you, Sir. I do not want to descend into an argument with the Tribunal.

33 THE PRESIDENT: No, we are only just testing the various propositions, Miss Howard.

34 MISS HOWARD: Probably if I just summarise my submissions on that point. I do not know

1 whether you then want me to address you on admissibility or on timing, that will come back to
2 the same point again.

3 THE PRESIDENT: The time point goes with it, does it not?

4 MISS HOWARD: Yes.

5 THE PRESIDENT: And the admissibility point rather turns on what meaning we give to the letter,
6 does it not?

7 MISS HOWARD: That is correct, so I do not want to go over old ground.

8 THE PRESIDENT: No, I think that is reasonable, yes.

9 MISS HOWARD: If I could just summarise my submissions and then Mr. Vincent Smith is going to
10 address you on the wider policy implications that you raised, and also on complaints' handling
11 and administrative priorities, very briefly.

12 THE PRESIDENT: Yes, thank you.

13 MISS HOWARD: So in summary the Office submits that the 6th February letter has to be seen in
14 context. It was not a decision in response to the file. This was a response some 18 months after
15 the closure of the file, in response to a general inquiry in response to the steps that the Office
16 had taken. It has to be seen, both in the context of the letter as a whole, and the previous
17 correspondence. The Office's position is that all of its resources were fully occupied. They
18 carried out an initial preliminary assessment of the complaint, but they did not have any
19 resources available to go to the next stage of actually testing the complaint, and the material
20 that had been submitted. I do not want to enter into a debate about the level of the s.25
21 threshold, but the Office feels ----

22 THE PRESIDENT: It carried out an initial preliminary assessment, but had no resources to go to
23 next stage of testing – what did you say?

24 MISS HOWARD: The allegations made in the complaint. I do not want to go into debate about the
25 level of the s.25 threshold, but the Office feels that it does have to have some degree of
26 evidence before it can go forward to a s.25 assessment, and mere assertions in a letter, or the
27 complaint, are not sufficient, it would need to get further information from Mr. Brannigan,
28 witness statements, and actual evidence about the market, and it did not have the resources to
29 carry out that evidential checking exercise.

30 So the reason for rejecting the complaint was based on resources and administrative
31 priorities, and that is part of the Office's discretion under s.25 – as the Tribunal has accepted
32 from *Automec*, *Claymore* and *Aquavitae* – that the Office is entitled to close the file on a
33 complaint, cannot be obliged to investigate every complaint and it has to have a look at the
34 complaint in the context of its priorities as a whole, with other competing cases.

1 On that basis, following from para.83 of *Bettercare*, and *Claymore*, a decision
2 rejecting a complaint and closing the file because of administrative reasons connected to a
3 level of resources is not an appealable decision within the meaning of s.46(3).

4 THE PRESIDENT: Yes.

5 MISS HOWARD: So closing on admissibility; a short point on timing: the Office submits that the
6 relevant decision in this case was actually the letter of 1st September 2004. That was notified
7 on 3rd September and the time expired on 3rd November 2004, some 16 months ago, and Mr.
8 Rayment has not advanced any reason for the delay to explain why there as no action in the
9 intervening period.

10 Unless I can assist you further, I plan to close there and I will let Mr. Smith address
11 you on the wider policy implications.

12 THE PRESIDENT: Yes.

13 MISS HOWARD: Thank you.

14 THE PRESIDENT: Good afternoon, Mr. Smith.

15 MR. SMITH: Good afternoon, Sir Christopher. If I may, Sir Christopher, I would like first of all to
16 give the Tribunal some background information on the resources available to the Office
17 overall, because I think that might help you in reaching your view on the arguments we have
18 made earlier. Secondly, on the prioritisation criteria we use; and thirdly, if I may touch briefly
19 on the access to justice point that you raised first and possibly suggest a way forward for this
20 particular case.

21 THE PRESIDENT: Yes, thank you.

22 MR. SMITH: First, on the resources we have available to deal with competition case work, it is in
23 the public domain in our Annual Report amongst others that we receive about 1200-1300
24 complaints a year which have something to do with competition law. We have internally the
25 resources to deal with about 25 to 30 formal investigations at any one time, so there is a
26 significant attrition rate between what comes in the door and what gets taken forward as a
27 formal investigation. Clearly any balancing act – and I do that and my directors do that on an
28 ongoing basis – is a relative one, and the case load that we have is of a changing nature. In
29 particular I would ask the Tribunal to take a note that more recently – over the last two to three
30 years – our leniency policy has become more successful, our formal investigations therefore
31 into horizontal price-fixing cartels have become a greater part of our ongoing case load.

32 THE PRESIDENT: The latest information we have and it may not be completely up to date is that in
33 April 2005 there were 194 staff in the competition enforcement division and 60 staff in the
34 legal division. Does that sound approximately right.

1 MR. SMITH: The 194 staff are the staff in post, I regret to say that my division is somewhat
2 understaffed, so the actual number of people available is probably closer to 180. I cannot
3 vouch for the number of people in the legal division, but not all of those will be dealing with
4 Competition Act matters.

5 Can I then touch on the criteria that we use now in deciding whether or not ----

6 THE PRESIDENT: It may be related to the point you have just made about staffing levels, it
7 appeared to us that in 2003/04 and 2004/05 the OFT had an under spend on its budget in
8 relation to what I think is classed as “administrative expenditure” as well as other things, but
9 that is probably ----

10 MR. SMITH: That is correct, Sir Christopher, and it was quite a significant one. One of the
11 difficulties we have is in recruiting staff with a sufficient experience and expertise in this area
12 to be able to progress casework effectively. You will, I am sure, be aware of the recent report
13 of the National Audit Office, which has examined the efficiency of my division ----

14 THE PRESIDENT: Yes.

15 MR. SMITH: -- and that was one of their main findings, that particular difficulty.

16 THE PRESIDENT: Yes. Our concern, as yours, Mr. Smith, is to try to see how the system is going
17 to work.

18 MR. SMITH: I very much share your concern, Sir Christopher.

19 THE PRESIDENT: I do not think we are in any opposing frame of mind from that point of view, we
20 are struggling with some very difficult points here.

21 MR. SMITH: As I said, the attrition rate between what comes through the door and what can take
22 forward as a formal investigation with a view to taking some form if infringement decision is a
23 large one. We are now using six heads of prioritisation in order to decide what cases should be
24 progressed to the next stage. These are roughly in descending order of ----

25 THE PRESIDENT: These are from what date, Mr. Smith?

26 MR. SMITH: We put this policy in place from about the beginning of 2005. It was approved by the
27 Board from memory in February 2005.

28 MR. RAYMENT: Are these the ones in the speech?

29 MR. SMITH: These are the ones in the speech, both speeches. First, the extent of the consumer
30 detriment caused by the practice that is alleged.

31 THE PRESIDENT: Sorry, when you say “the speech”, you mean ----

32 MR. SMITH: There are two speeches, Sir Christopher, I am afraid I do not have the tab numbers.

33 THE PRESIDENT: They are in the authorities bundle, are the not. We have read them.

34 MR. SMITH: The first one was my speech at a conference at the end of 2004, and the second one

1 was a speech approximately a year later which said much the same thing, I think, from the
2 current Chairman, Mr. Philip Collins, in late 2005. The policy which the speech reflects was
3 in fact formally adopted by the OFT Board I believe, as I said, some time earlier in 2005.

4 There are, broadly speaking, six criteria, and looking at it on the basis of what we
5 have, the likely size of the consumer detriment caused by the alleged anti-competitive
6 behaviour. Secondly, and I very much appreciate this may stray into the merits' issue but we
7 feel we have to take this into account: what sort of evidence we have and how strong it looks at
8 any stage? Thirdly, the nature of the alleged infringement, and here we look at the type of
9 infringement generically and, for example, we would prioritise horizontal price-fixing cartels
10 above, say, an abstruse abuse of dominance involving intellectual property.

11 **THE PRESIDENT:** Your speech, I think, says that you will focus firstly on price fixing and market
12 sharing cartels' hardcore behaviour, and secondly you will focus on serious abuse of
13 dominance with predation being high on the list?

14 **MR. SMITH:** Yes. The third head of prioritisation is the nature and gravity of the alleged
15 infringement, and I think those were the more serious breaches which we would prioritise
16 above others, all other things being equal.

17 The fourth head is whether there are special aggravating or mitigating factors in
18 relation to that particular case. So, for example, whether the conduct of one of the parties has
19 been particularly unconscionable or whether there is something special about the case which
20 causes it to attract our attention.

21 **THE PRESIDENT:** Yes.

22 **MR. SMITH:** The fifth head is precedent and policy consideration, and it is under this head that we
23 take into account the OFT's priority areas which are included in our annual report and our
24 annual plan. Finally, of course, we look at whether or not we are the best placed public body
25 or indeed private body to take action in any particular case. So those are the six heads of
26 criteria that we use. We have undertaken to the Public Accounts Committee following the
27 National Audit Office reports to elaborate on those somewhat further during the course of this
28 year but that has not yet been done. That is what I wanted to say, Sir Christopher, in relation to
29 resource versus priority. Can I now touch briefly on the access to justice point that you alluded
30 to at the beginning of the hearing this afternoon?

31 We have every sympathy with Mr. Brannigan's position and I am personally rather
32 ashamed that we have led you on so long and I apologise for that. I do, however, genuinely
33 put it to you, Sir Christopher, that we did not have the resources to do anything more with this
34 complaint than we did. I think that we did properly advise Mr. Brannigan of the alternatives

1 available to him and indeed he availed himself of some of them to the extent he could. We are
2 sensitive to Mr. Brannigan's particular position, given his financial position in particular. I
3 think the wider policy debate is probably better conducted outside of an "In Camera" hearing
4 in the Appeal Tribunal ----

5 THE PRESIDENT: Yes.

6 MR. SMITH: -- and certainly if this case goes further forward in this Tribunal, and the Tribunal
7 wishes to hear our submissions on that in public I would be very happy to come back to the
8 Tribunal and, either through counsel or myself, engage in that particular discussion. Can I
9 suggest a way forward for this particular case? Rather than engage Mr. Brannigan and his
10 resources in further expense at this stage, can I undertake to the Tribunal that I will have Mr.
11 Brannigan's complaint revisited and that we will reach a view on whether or not at the very
12 least there is reasonable ground to suspect an infringement as a result of the material that Mr.
13 Brannigan has put to us.

14 Can I draw both the Tribunal's and Mr. Brannigan's attention to a recent set of
15 statutory guidance which we issued in relation to complainants and third parties? It has an
16 annex to it which sets out the kinds of information that we would expect a complaint to
17 contain, and it would be very helpful if Mr. Brannigan, or (if he has advisers) his advisers were
18 able to address as much of the heads of information in that annex as possible. Perhaps the best
19 way forward would be for me to invite Mr. Brannigan to say anything more he wants to say
20 within the next month, perhaps, and then I will undertake to write to him, possibly in a form
21 that can be disclosed either to this Tribunal or to a court, with our view of what the evidence
22 shows.

23 I do not think I have anything more which I wish to add at this stage, Sir Christopher.

24 THE PRESIDENT: No, thank you for that, Mr. Smith. We will see what Mr. Brannigan and his
25 advisers think of your last suggestion, but that is at least something, if I may say so. The wider
26 points, which I think it was fairly apparent from early on were concerning us, which formed
27 part of the background to this case include the point that private action is inherently difficult
28 for a small firm for all kinds of reasons, not least because it cannot get hold of the evidence,
29 and if this case was to go forward now – for example, if Mr. Brannigan found some legal
30 advisers who were prepared to take a case on a *pro bono* basis, just to take a for instance, and
31 to try to get some form of pre-emptive discovery order, and were to produce your letter of 6th
32 February, as they would be obliged to do on the *uberrimae fidei* principle that applies to *ex*
33 *parte* applications one might imagine they might have considerable difficulty because of the
34 confusion that has crept in, as it were, to put it neutrally.

1 MR. SMITH: I hope, Sir Christopher, that the Tribunal does accept that this was a letter written by a
2 relatively junior official who may not have paid the attention he should have done to exactly
3 what was said.

4 THE PRESIDENT: Well that may or may not be so, but if the meaning of the letter is disputed we
5 would have to have some witness statements, and Mr. Rayment would want to cross-examine,
6 and all the rest of it ----

7 MR. SMITH: I understand that, Sir Christopher.

8 THE PRESIDENT: -- which is very difficult to do in the context of this kind of hearing at this stage
9 of an afternoon.

10 More generally, plainly we have in mind the fact that there had been the *Aberdeen*
11 *Journals'* Decision, and if the *de facto* decision is that once there has been a decision in a
12 particular area OFT in fact moves on and does not enforce the existing decisions then, if the
13 news of that gets around, it does leave rather a big gap in the enforcement armoury. That is, I
14 suppose, a second observation. A third observation is that by the time this complaint was
15 being considered the Enterprise Act was already in force, so the provisions as to possible
16 criminal liability for collusive behaviour and Directors' disqualification were in force, and if
17 you are dealing with major companies, if the OFT, having received a complaint, takes action --
18 even if it is a first request for information or something of that kind -- that may very well
19 produce an enforcement outcome because they are frightened of what might happen next and
20 in some way or another the situation is rectified. So there is a sort of intermediate point
21 between -- as I am sure you are well aware -- doing nothing and going for the full fig, as it
22 were. That sort of intermediate position is very often a reasonable position for an Authority to
23 go down, I would have thought.

24 MR. SMITH: Can I make three observations?

25 THE PRESIDENT: Yes, I would be very grateful.

26 MR. SMITH: First, even an intermediate solution does require a certain degree of resource and,
27 given the attrition rate that I pointed out earlier, it may not be possible to do even that in a large
28 number of cases.

29 Secondly, I would be concerned about beginning something without intending to end
30 it, and I am very conscious in particular of the Tribunal's strictures in that regard not least in
31 the *Claymore* case where I think it is generally accepted that that was where we ended up.
32 Although I understand what you say, Sir Christopher, there is an issue there about
33 administrative burden on the people to whom we address our information requests -- I get
34 regular complaints about it, so there is a balance to be struck there. I think therefore that we

1 need to be a little bit careful about exercising our powers solely for the purpose of creating an
2 atmosphere which might be conducive to others taking enforcement action.

3 THE PRESIDENT: It comes back to what you need for reasonable suspicion, I suspect.

4 MR. SMITH: That may well be true, Sir Christopher.

5 THE PRESIDENT: Yes. Thank you, Mr. Smith. Mr. Rayment, I think in general you can formally
6 back on Miss Howard's submissions, which is probably useful for us just so that we have it
7 complete for the purposes of this afternoon; and secondly, you may want to consider what Mr.
8 Smith has just said and help us on what we should do next. Let us deal with the submissions
9 first, shall we?

10 MR. RAYMENT: I was going to do it the other way around.

11 THE PRESIDENT: You do it which ever way is convenient to you, but I want to complete the
12 argument this afternoon.

13 MR. RAYMENT: Yes, I understand that, it should all be relatively brief. May I just have a
14 moment? (After a pause) I am sorry ----

15 THE PRESIDENT: Do you want time?

16 MR. RAYMENT: Yes, we just want a bit of time to take a few instructions from Mr. Brannigan on
17 what has been said.

18 THE PRESIDENT: You have time, we will rise.

19 MR. RAYMENT: I was just about to gracefully accept on his behalf Mr. Smith's words, but I think
20 that would be completely wrong until I have had a chance to speak to him.

21 THE PRESIDENT: Take 10 minutes, talk it over with Mr. Brannigan, which you have probably not
22 had a chance to do. The point that Mr. Smith raises as to Mr. Brannigan's ability to relate his
23 complaint a bit more closely to the guidance and to put in any particular evidence that he wants
24 to put in is clearly obviously something you need to go into – or you may have already gone
25 into it with him – but we will rise for 10 minutes and see what you say.

26 MR. RAYMENT: I am grateful.

27 (The hearing adjourned at 4.00 p.m. and resumed at 4.10 p.m.)

28 MR. RAYMENT: I am very grateful, Sir, for the opportunity to take instructions. If I may, I will
29 deal very quickly with one short comment we have about the possibility of private action
30 because that hangs over this case if the public enforcement route cannot go anywhere, then I
31 will come back to Mr. Smith's suggestion and then finish off with one or two legal points if I
32 may.

33 It has been very useful to be able to discuss the matter with both Mr. Brannigan and
34 my instructing solicitor because one has had first hand experience of trying to litigate

1 competition law matters privately and the other is an extremely experienced litigator, and the
2 conclusions we have reached are simply that in these types of cases, without access to the sorts
3 of evidence you need, first of all the *pro bono* approach is almost certainly impossible because
4 the investment of time is just so enormous. You may be lucky but it is likely to be extremely
5 problematic, and it requires quite a lot of different professionals to come together to offer their
6 services on a *pro bono* basis, because even if, for example, you establish liability you are then
7 going to move to the issue of quantum and of course other professionals will almost certainly
8 have to be involved in quantifying loss and so on; it is really very, very difficult indeed.

9 CFA raise similar sorts of problems and again in order to get professionals to take
10 case on CFAs generally you need a bit more evidence than you ever have in a lot of these cases
11 in order to make a proper assessment as to whether it is a runner under a CFA. Plus, CFAs
12 also present real problems when going up against big companies, because they know full well
13 you are on a CFA and they can very easily exploit that.

14 THE PRESIDENT: By running up costs?

15 MR. RAYMENT: By running up the costs, yes. It is only an allegation at this stage, but one saw
16 even in Mr. Brannigan's case when he tried to use the word "Life" on his magazine he was
17 immediately swamped with correspondence from the solicitor for one of these other
18 companies, so they are very aware of their rights and not afraid to use them.

19 THE PRESIDENT: Since we are on this point and we are seeking more general information perhaps
20 Mr. Green can help us too, in terms of making pre-trial applications for discovery and all that
21 sort of thing, is there any experience how that might work in this sort of case, so that you could
22 get hold of – or might be able to get hold of – it would be a bit of a fishing expedition perhaps,
23 internal information about costs or customers, or something?

24 MR. RAYMENT: I could start, if I could just preface what Mr. Green is going to say, of course one
25 would hang a Judgment such as *Aberdeen Journals* in front of the Judge and say "Look, the
26 Tribunal says that this sort of material is often very relevant", so I think comments like that
27 from the Tribunal in its Judgments are useful. If one is dealing with facts of specific cases and
28 you have letters of the sort that we have been discussing today the position may not be so easy.

29 MR. GREEN: I would only reflect that, Sir Christopher. I think it would be difficult, and I think the
30 difficulty for a solicitor is that when you undertake, for instance, a CFA – I do not know if you
31 know the form of a CFA – you have to do a risk assessment, and any solicitor is going to look
32 at the risk involved in any particular proceeding without documentation, with the
33 documentation always being in the hands of the opponent; that is going to be very difficult. I
34 agree entirely that an early application might assist in that process.

1 THE PRESIDENT: But you have a chicken and egg problem, because you cannot afford to make
2 the application until you have made the assessment?

3 MR. GREEN: Indeed, and indeed there has been quite a lot of authority about the changing in risk
4 as disclosure comes along in the normal way that you can make a reassessment in disclosure.
5 My own experience is that you may be met with an argument about a fishing expedition in
6 trying to make the argument and obviously any issue such as that would be hard fought on the
7 part of the defendant, because they would see that as a very crucial issue – I think it would be
8 difficult. I know that the Commission, and indeed the OFT, has talked about private
9 enforcement, but I do say I think that is a little more difficult in practice than it might be
10 believed.

11 THE PRESIDENT: And particularly for the benefit of the Tribunal as a whole that kind of
12 application to try to get discovery at an early stage in the proceedings is an *inter partes*
13 application, is it?

14 MR. GREEN: Very much so an *inter partes* application. There is authority, for instance, third party
15 disclosure that says at an early stage I will not be allowed, and it is a very difficult area for the
16 claimant.

17 THE PRESIDENT: Has anybody tried freezing orders and that sort of pre-emptive intervention to
18 try to get your hands on relevant information, or is that pure fishing?

19 MR. GREEN: I think that would be regarded as pure fishing, and that has become much more
20 difficult in recent years. I think for the private litigant claimant whose funding is very limited -
21 ---

22 THE PRESIDENT: Yes, quite apart from the general difficulties of the smaller litigant.

23 MR. GREEN – it is hugely difficult. The other point is that if you lose that application then an order
24 for costs is going to be made against you and you are effectively dead in the water because you
25 will be bankrupted on the basis of that order and the claim will die, and you have to be very
26 careful in those circumstances. I really do say that the concept of private litigation is an
27 answer, and I think it is just misconceived.

28 THE PRESIDENT: But it needs to be thought about quite a bit. Can you just help me on one other
29 point before you sit down? What are the practical implications in this whole area for the fact
30 that Mr. Brannigan is, at the moment as I understand it, still an undischarged bankrupt?

31 MR. GREEN: I think discharged?

32 THE PRESIDENT: Discharged now, I see, thank you. I am glad to hear that.

33 MR. GREEN: Are you referring to security?

34 THE PRESIDENT: I was not referring to the practical question of lack of funds, I was referring to

1 the legal hoops he would have had to go through in a state of bankruptcy before he could have
2 started any legal proceedings.

3 MR. GREEN: On a personal basis either as trustee or there would have to be an assignment, which
4 the trustee was not prepared to do. The difficulty, and it may be not so much for an individual,
5 but certainly for a claimant company, would be security for costs. If a claimant company, for
6 instance, were to be placed into administration it is bound to face an application for security for
7 costs which again, of course, would be a huge hurdle for any ----

8 THE PRESIDENT: The difficulty being, in these sorts of cases, that once you are knocked out of
9 business you are *ex hypothesi* in liquidation or wherever, so that ----

10 MR. GREEN: Very often so, precisely, that the complaint you are making has taken away your
11 business.

12 THE PRESIDENT: -- the *de facto* possibility to take civil action is that much more difficult.

13 MR. GREEN: I think Mr. Brannigan would say that in these particular circumstances.

14 THE PRESIDENT: Yes, but I think in this case there is at least some evidence that the trustee was
15 not prepared to put it to the creditors because he thought it was not worth doing so, basically.

16 MR. GREEN: Indeed. So it is difficult.

17 THE PRESIDENT: Thank you.

18 MR. RAYMENT: Assessing the risk was very difficult and also even if you get an assignment you
19 may still get arguments based on security for costs on the basis you are claiming on behalf of
20 the company quite often, even though there may be an individual who has come loose from the
21 company that is being bankrupted. I have had personal experience of it myself, and indeed the
22 Tribunal has, there are a lot of difficult and technical arguments which sometimes arise about
23 assignment which again imposes quite a barrier.

24 THE PRESIDENT: In the Vitamins' cases we had we had examples of that, yes.

25 MR. RAYMENT: Yes.

26 THE PRESIDENT: If I could just ask one point of clarification in Mr. Brannigan's case, were you
27 always a sole trader, Mr. Brannigan, or did you have a company? Was there a limited
28 company on the scene at some point?

29 MR. BRANNIGAN: Sole trader.

30 THE PRESIDENT: You were a sole trader, yes, thank you. Anyway, those are some of the
31 difficulties on the litigation front, Mr. Rayment?

32 MR. RAYMENT: Moving to Mr. Smith's suggestion, first of all we are not sure quite what
33 procedural framework the Tribunal had in mind for that process to take place. We are
34 assuming just for the moment that the Tribunal decides that the Appeal was in time and it is

1 admissible, and maybe an adjournment or a stay of some type might be possible in order for
2 the matter to go off for reconsideration. So that is my first point – the procedural framework.

3 The next point is Mr. Smith’s point about the guidance. We may not have complied
4 with the formal letter of that guidance which was not, of course, available when Mr. Brannigan
5 submitted his complaint but broadly speaking he has tried to address those sorts of issues in the
6 material he submitted.

7 **THE PRESIDENT:** He clearly read up on it all and tried to focus accordingly.

8 **MR. RAYMENT:** Absolutely. Mr. Green and I were just thinking what more we might be able to
9 add. We might be able to restructure it and all the rest of it, but whether there is a great deal
10 more by way of evidence that he could actually put into it I think has to be open to question at
11 this stage. Mr. Brannigan – I will not mention it in open court – did raise three very good, as it
12 seemed to me, questions that ought to be asked of the parties against whom these allegations
13 have been levelled, and my understanding is that those questions are pretty much within the
14 information that he has submitted. The three areas in question would go a long way to bearing
15 out his allegations. So it is not really a question of us being able to provide that much more
16 evidence at this stage. It is about helping with, focusing an inquiry, whether formal or
17 informal. I am bound to say, for the purposes of this afternoon’s application, the lawyers on
18 this side of the room have not been focusing in depth on content of the complaint, it is simply
19 to note that, generally speaking, it is a coherent and credible complaint?

20 **THE PRESIDENT:** Yes. Well I just do not know, and we are getting probably a bit further than this
21 hearing this afternoon was designed to do. But if you look at p.2 of tab 1 in the complaint
22 there is, for example, an allegation of what happened in relation to the Halifax Estate Agency,
23 and several other estate agents. I do not know whether at this distance in time it is possible to
24 identify those other estate agents, for example. We are conscious of the fact that in some ways
25 this case has now got more difficult precisely because time has passed. Time has passed
26 because of the administrative procedure that has happened, but nonetheless I think one should
27 try to make as much effort as one can to particularise, but it may be difficult.

28 **MR. RAYMENT:** Indeed, but it is difficult.

29 **THE PRESIDENT:** And it may be time consuming and expensive.

30 **MR. RAYMENT:** Yes, but there are certainly questions that could be asked of Halifax, whether they
31 did in fact pay for this advertising, which is alleged to have been given to them free in order to
32 foreclose on Mr. Brannigan. Similar points arise in relation to whether or not the print slots in
33 question were full when they were said to be full, which had again the effect that his
34 newspaper was not published.

1 I think that broadly covers the more general issues that were canvassed towards the
2 end of the first session that we have just had. Just reverting to the legal issues now, I do not
3 have a great deal to add except that we are concerned that in the process of any reconsideration
4 by the Office that of course they do apply what we regard as the correct standard under s.25 –
5 or indeed under Chapter III of the Act as whole, i.e. what is the reasonable suspicion threshold.
6 It seems to me even now at this stage of the proceedings there is not agreement about that at
7 the moment. It seems to me that is a legal issue that may need to be sorted out. I think the
8 Tribunal is well aware of our submissions on the issue, we say that it is a very low threshold.
9 If there are matters that justify further inquiry then it tends to suggest that it is based on a
10 reasonable suspicion. If it is based on something that is not a reasonable suspicion, one starts
11 to wonder how it could be reasonable – if you see what I mean – one starts going around in
12 circles. There is a very small gap below reasonable suspicion.

13 Counsel for the Respondent at one point in her submissions, and to be fair to her it
14 was probably a slip of the tongue, did describe our case at one point as “compelling.” I think
15 that would certainly get us home on the reasonable suspicion test.

16 THE PRESIDENT: Well we are invited to give the letter a meaning that is not self-evidently the
17 meaning when reading the letter.

18 MR. RAYMENT: Well yes, you have already got our submissions on that, namely that you should
19 not go into the matter too deeply it is really a question for the purposes of assessing time is to
20 look at the face of the documents and, as you say, again the test is a strike out test at the
21 moment.

22 THE PRESIDENT: I suppose, and this is perhaps a comment for everyone generally, one would not
23 want to certainly give a Judgment in which a reasonable suspicion test was set at a level that
24 might make it more difficult for the OFT to do raids and so forth than it already is, and so
25 forth.

26 MR. RAYMENT: No, quite, and it is an issue of general importance in the field as a whole, because
27 there are other Statutes as well, such as Part 4 of the Enterprise Act, which talk about
28 ‘reasonable grounds for suspicion’. Although it was never in the end aired at a final hearing in
29 the ACS case, for example, there was an issue about whether or not thresholds had been
30 crossed and so on, so it is an issue of considerable practical importance.

31 THE PRESIDENT: Yes.

32 MR. RAYMENT: During submissions on behalf of the respondent I think we had some difficulty on
33 this side of the room understanding what this initial assessment involves. It seems to us in
34 order properly to assess administrative priorities an investigation of its nature is required, and

1 so it used to go at least that far to decide – not going to anybody else for information – whether
2 the complaint itself discloses reasonable grounds for suspicion, that is the absolute cornerstone
3 of that initial assessment process. Clearly some kind of assessment of the merits of the
4 complaint has gone on as can be seen in the correspondence, so it really is necessary to go up
5 to that point. In the absence of any countervailing information – that is an important point – a
6 complaint such as Mr. Brannigan’s clearly in our submission discloses reasonable grounds for
7 suspicion, and if a complaint of that nature, with no countervailing information to put into the
8 scales on the other side, is found to be lacking under that test that is potentially a grave
9 difficulty.

10 THE PRESIDENT: Yes.

11 MR. RAYMENT: I think I am just repeating the submissions, they are in the skeleton and I refer to
12 all of them. I would simply say that procedurally we would invite the Tribunal to follow the
13 sort of arrangement that I was outlining at the start if it is minded to hold that the Appeal is
14 within time inadmissible we would invite the Tribunal to stay the question of whether or not
15 the Decision is valid or not, pending the reconsideration because that would leave open the
16 question of the reasonable suspicion test.

17 THE PRESIDENT: I think we ought to think about procedure in a moment, but we just need to
18 confer.

19 MR. RAYMENT: Yes. I would just say that any reconsidered Decision might not be an appealable
20 Decision and in that case the Tribunal would not be able to pronounce on the question of the
21 appropriate test for suspicion.

22 THE PRESIDENT: Yes.

23 (The Tribunal confer)

24 THE PRESIDENT: We are going to retire for a minute or two, Mr. Rayment, just to consider what
25 to do next.

26 (The hearing adjourned at 4.35 p.m and resumed at 4.45 p.m.)

27 THE PRESIDENT: The position in broad terms and in summary is as follows: at this stage of the
28 argument the Tribunal is not prepared to strike this Appeal out under Rule 10 of the Tribunal’s
29 Rules on the basis that the existence of an appealable Decision and the question of whether the
30 Appeal was brought within time both raise arguable points, and it is not sufficiently clear cut in
31 our view that we would be entitled to strike out the Appeal today.

32 In the normal course we would give Judgment to that effect, and that Judgment would
33 necessarily be a reasonably detailed Judgment in the light of the circumstances of this case and
34 the various arguments that have been put forward. It would probably also follow, although we

1 have not yet had any argument about it so this is only an indication, that we would entertain an
2 application for the Appellant for the costs of today's hearing.

3 If the case were to continue in the ordinary way and we were to give Judgment, then
4 the case would continue, that means it would have be allocated a case number, there would
5 have to be publication of the existence of the case on the website in accordance with Rule 15
6 and, at that stage, we may have some applications to intervene in the case particularly from the
7 parties complained against. One of the reasons, as a precaution, that we have heard this case in
8 Chambers at the moment is that it appeared to us that it was not inconceivable that there might
9 be some administrative developments in the case, which possibility made it more convenient at
10 this stage to continue with this case in Chambers rather than to continue with the case in
11 public. However, if and when we give Judgment on the issues we have so far had argued that
12 Judgment has to be given in public, so that if we do proceed to give a Judgment that becomes a
13 public document.

14 It is certainly open to us to simply adjourn this hearing to see whether or not it
15 becomes necessary to give Judgment in the event that OFT is in a position to reconsider along
16 the lines indicated very helpfully by Mr. Smith. However, it seems to us at present that
17 whatever the outcome of that reconsideration we cannot at the moment exclude the possibility
18 of giving Judgment on the issues that have been argued in any event because some of the
19 questions raised are quite important, although the giving of such a Judgment may not become
20 necessary if there is a continuation of the administrative procedure.

21 If the case were to continue and it was clear that the case was going to enter the public
22 domain then one of the points we would like to have argued (which we have not yet had
23 argued) is whether there are any ancillary orders that the Tribunal ought to make in particular
24 in relation to ensuring that any relevant documentary material, or material on computers, is
25 preserved and not destroyed, tampered with or lost in the event that the case were to proceed.
26 That is a self-contained issue that we have not had a chance to ventilate or consider with the
27 parties. It is also the case that if the Appeal were to continue aspects of the Notice of Appeal,
28 in particular given the recent developments in the documents, would need "to be put in order"
29 under Rule 9 of our Rules so that we are quite clear what the points are. There would then, I
30 think, be a sequence in which we probably proceeded to full argument on the admissibility
31 points, and thereafter to address such points on the merits as fell within the proper remit of the
32 Appeal. So that is how we would see the procedure unfolding in general. However, if it be the
33 case that there is to be a reconsideration then probably the best course is simply to make no
34 order today but to adjourn this hearing on the basis of those indications to a date we will

1 consider in a moment, to see what now transpires.

2 So, Mr. Rayment, I do not know whether that helps you at all on your question as to
3 the procedural framework, or whether you have further submissions that you would like to
4 make before I turn to Miss Howard?

5 MR. RAYMENT: No, I think, to keep it simple, that that probably is the right approach.

6 THE PRESIDENT: So we simply adjourn – what period do you suggest for the adjournment, 28
7 days?

8 MR. RAYMENT: Well I think, subject to submissions from both sides ----

9 THE PRESIDENT: Well if we adjourned it in the first instance for 28 days ----

10 MR. RAYMENT: We could update the Tribunal.

11 THE PRESIDENT: -- and if we could be updated after 21 days as to what the situation was that
12 would be, I think, convenient.

13 MR. RAYMENT: That certainly gives us time to collate an additional material, put it in an
14 appropriate form and submit to the Office, subject to the point that I have made that of course
15 it is not going to look radically different simply because of all the difficulties we have
16 identified over the course of the hearing.

17 (The Tribunal confer)

18 THE PRESIDENT: Mr. Mather is rightly making the point that part of the difficulty now might be
19 that a certain amount of time has elapsed and in that context we would hope that the OFT
20 would do whatever is possible to assist this Appellant, given that any difficulty he may now
21 have in assembling more detail is partly due to the time that has elapsed. That is comment
22 which I am sure is heard.

23 MR. RAYMENT: I am sure that has been heard.

24 THE PRESIDENT: If I may also just make one other side comment. We are still somewhat
25 concerned that this case, if Mr. Brannigan is right, and we do not know whether Mr. Brannigan
26 is right, if you will forgive me saying so, Mr. Brannigan, we have not had a chance to assess
27 the evidence, it does suggest that there has been a flagrant disregard of the *Aberdeen Journals'*
28 principles – or there might have been – which one might think was a matter of seriousness
29 given that that case was already the subject of an OFT Decision and a very recent Judgment of
30 the Tribunal when these events were happening. However, that is another side comment,
31 which is not strictly relevant to the legal issues that we have to determine.

32 So, Miss Howard, I think what we are suggesting at the moment is that we simply
33 adjourn this hearing for 28 days. If the parties could be kind enough to update us after 21 days
34 and in the light of what now transpires this case will either continue or not, and we will either

