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IN THE COMPETITION

Case No. 1062/1/1/06

APPEAL TRIBUNAL

Victoria House
Bloomsbury Place
London WC1A.2EB

15th May 2006

Before:
MARION SIMMONS QC
(Chairman)

PETER CLAYTON
DAVID SUMMERS

Sitting as a Tribunal in England and Wales

BETWEEN:

LONDON METAL EXCHANGE

Appellant

and

OFFICE OF FAIR TRADING

Respondent

Miss Margaret Gray (instructed by Mayer Brown Rowe & Maw LLP) appeared for the Appellant.

Mr. Daniel Beard (instructed by the Solicitor, Office of Fair Trading) appeared for the Respondent.

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CASE MANAGEMENT CONFERENCE

1 MISS GRAY: Ma'am, I appear on behalf of the London Metal Exchange. In the light of the recent
2 developments, in particular the letter which we just received from the Office of Fair Trading, I
3 would be very grateful for a direction from the Tribunal as to what issues they would like
4 counsel to address, and in what order they would like us to address them?

5 MR. BEARD: I am sorry, ma'am, just to check that the Tribunal does actually have a copy of the
6 letter written with today's date following on from the decision earlier today with summary
7 reasons.

8 THE CHAIRMAN: We were just handed a letter which sets out a timetable?

9 MR. BEARD: Yes, that is the one that my learned friend is referring to.

10 THE CHAIRMAN: Yes, well I do not think it is for you to ask me what we want to do, what do you
11 want to do?

12 MISS GRAY: Well we would like to make our application as to costs and to seek permission from
13 the Tribunal to withdraw the Appeal in the light of the withdrawal of the direction that was
14 made by the OFT this morning at 11 o'clock.

15 THE CHAIRMAN: Do you want to make an application for costs today or do you want to see the
16 full reasons?

17 MISS GRAY: Ma'am, we would like to make an application for costs today if the Tribunal is happy
18 to entertain an application for costs today. The Office of Fair Trading would like us to wait
19 until they have had the opportunity to look at the full reasons of the decision that is
20 withdrawing the direction. Ma'am, we have seen the summary of the decision withdrawing the
21 direction and our position is that we would prefer that the matter was dealt with today. We
22 have no reason to believe that there is anything in the full decision that may change our
23 position as to an application for costs. We have already waited almost three months since the
24 original direction was made, we are three weeks after the lodging of the Appeal and we would
25 very much value the drawing of a line under this matter.

26 If we are to wait for 21 days and then a further 21 days for the OFT that is 42 days
27 alone on costs and, ma'am, we feel that this really takes this case further and further along a
28 road when it could be much more economical if it could be decided today and the Tribunal
29 could make an order accordingly.

30 THE CHAIRMAN: Shall we see what Mr. Beard says?

31 MR. BEARD: With respect to my learned friend there is no basis upon which this Tribunal could or
32 should consider costs today. First of all, it is perhaps important to stress that the fact that the
33 OFT has taken a decision to withdraw an interim measures' direction is not somehow a
34 concession that the interim measures' direction was wrongly imposed or contrary to law in the
35 first place. So, even if this Tribunal usually applied a rule that costs follow the event ----

1 THE CHAIRMAN: Which it does not.

2 MR. BEARD: -- which it does not, then there is some leg work for my learned friend and London
3 Metal Exchange to do before they even begin to get the costs' application off the ground.
4 Now, no proper submission has been made in relation to what that reasoning might be. What
5 the Office has suggested is, that given that this is a situation where London Metal Exchange
6 needs time to consider precisely on what basis it is now seeking costs, if it is seeking to pursue
7 an application -- and we are not trying to keep them out of doing so -- we will resist it. We
8 think they are wrong to make that application, but it is a matter for them -- in those
9 circumstances we have suggested that, as is the case in most Appeals, that these matters should
10 be dealt with in writing and, given that this is the first interim measures' direction in relation to
11 which these matters have arisen, it is sensible to give reasonable time to both sides to consider
12 the position and make submissions on those matters.

13 We further suggested that it is appropriate to do so only after London Metal Exchange
14 have seen the full reasons for this second decision and, in those circumstances, we put forward
15 the timetable with the suggestion that this might be the appropriate way of dealing with it. If
16 this matter can be dealt with in writing then so be it. If it is a matter that requires a further oral
17 hearing then so be it. The Office is clearly concerned to minimise further costs in relation to
18 this matter. It does not want to have this thing running ever onwards, but there is clearly no
19 prejudice to London Metal Exchange in allowing this timetable now, given that the operative
20 imposition of the original interim measures has now been withdrawn.

21 It is perhaps worth noting two further points, ma'am. The first is in the only other
22 case, as far as I am aware, where there has been a full withdrawal, which was *Hasbro*,
23 indications there were that no costs should be ordered in those circumstances. Now, it is
24 accepted that, of course, this is a different case and there may be different issues arise here; the
25 OFT quite understands that. Indeed, that is part of the reason why it says that further time
26 should be allowed for both sides to consider their respective positions. But we, as the OFT,
27 need to see what the reasons are that are now being give for this costs' application given the
28 legal structure of what has happened here, given the fact that the OFT maintains that it was
29 right to impose a decision under s.35 and given the fact that it has reviewed that decision and
30 has now supplanted that original interim measures restriction upon London Metal Exchange.

31 So, with that in mind, the timetable has been put forward and it is done with a view to
32 avoiding some kind of surrogate appeal hearing in order to do with costs, because that would
33 clearly be ludicrous and it cannot be the desire of either side that somehow we end up in a
34 situation where this Tribunal is seeking to decide an appeal just in relation to matters relating
35 to costs. That is a matter that has arisen in Judicial Review proceedings in the course of giving

1 some direction how that matter should be dealt with. But again, that is probably a matter for
2 submission.

3 All we have at the moment is an Appeal, which my learned friend accepts can
4 properly be withdrawn save for the issue as to costs, and the OFT supports that approach; that
5 is the appropriate approach in the OFT's submission. However, in the circumstances the OFT
6 would propose that this timetable gives the London Metal Exchange adequate opportunity to
7 put forward its submissions for the OFT to consider them. If, on reflection the OFT considers
8 that there is real merit in them, of course, as has happened in other cases these matters may not
9 need to come back before the Tribunal. If, on the other hand, the OFT says "No, I am sorry,
10 that is not the right approach", we will put in written submissions and there can be a decision
11 whether or not an oral hearing is required at all.

12 Unless I can help you further, ma'am?

13 THE CHAIRMAN: No, thank you. Miss Gray?

14 MISS GRAY: Ma'am, I am more than happy to make proper submissions on why we feel we would
15 be entitled to our costs. The London Metal Exchange's position is that the OFT has withdrawn
16 the direction. The OFT said it was properly entitled to make the direction and we say "yes", it
17 was properly entitled provided that it met the criteria laid down in s.35 of the Competition Act,
18 criteria which we already have provided evidence on in our representations to the Office of
19 Fair Trading, namely on the question of:

- 20 (i) serious irreparable damage to Spectron,
- 21 (ii) protection of the public interest; and
- 22 (iii) urgency and balance of interest.

23 We had already provided evidence to the Office of Fair Trading on these points in our
24 representations of 22nd February ----

25 THE CHAIRMAN: Yes, but Miss Gray ----

26 MISS GRAY: -- a further direction was made and we do not agree with the Office of Fair Trading's
27 interpretation of the new evidence which has come to light which has caused it to change its
28 mind and withdraw the direction.

29 THE CHAIRMAN: But you do not know until they have provided their full reasons exactly what
30 the reasons are. You cannot just rely on what you said because it depends on what the OFT
31 knew, so until you have seen the full reasons I am not sure at the moment how you can make
32 out your submissions that they were wrong to have made the direction in the first place.

33 MISS GRAY: Ma'am we have seen the summary of the decision and we are confident that the full
34 reasons will reflect the reasons that have been given in the summary as to why the Office of
35 Fair Trading has chosen to withdraw the decision.

1 If I can put down a marker as far as the *Hasbro* case is concerned, we fully agree with
2 the Office of Fair Trading on that point that this case is quite a different case to the *Hasbro*
3 case. In this case there would be a withdrawal by the Appellant in circumstances where the
4 Office of Fair Trading had unilaterally withdrawn the direction which the Appeal was
5 concerned with.

6 MR. BEARD: I am sorry, perhaps I should be clear. The Office of Fair Trading is not withdrawing
7 its original decision, it is lifting the interim measures that it has imposed. It is perhaps
8 important to stress that here.

9 MISS GRAY: I think you will find at para.4 of the summary it says that "... a summary of the
10 reasons for the decision to withdraw the direction is provided in the annex to this decision."

11 THE CHAIRMAN: As I understand it they are withdrawing it as of today, they are not saying that
12 as of February 28th – or whatever the date was – they were wrong; they are saying that as of
13 today. One of the issues is going to be whether that is appropriate, or whether you can say
14 that in fact if you look at their full reasons those reasons were available to them at the earlier
15 date, and you do not know that until you have seen the full reasons.

16 MISS GRAY: We have in fact seen a draft ----

17 THE CHAIRMAN: Of the full reasons?

18 MISS GRAY: Yes, we have.

19 THE CHAIRMAN: Well we have not. We have not seen that and that is not available to us.

20 MR. BEARD: I am not sure that is correct either. What was put forward – there was a consultation
21 period whereby just over two weeks' ago the OFT wrote to both London Metal Exchange and
22 to Spectron, who are obviously the most interested other party, saying "... the provisional view
23 of the OFT is that we are going to withdraw this IMD going forward". That had attached to it
24 various reasons seeking comments and representations - an opportunity that London Metal
25 Exchange took and that Spectron took – and the summary decision that has been provided
26 today takes into account those representations but I would be surprised – I do not understand
27 that there is such a document as a draft set of the full reasons. If it exists, well, my learned
28 friend has the advantage of me.

29 MISS GRAY: We have seen a draft document.

30 THE CHAIRMAN: There is great confusion in the row behind Mr. Beard, and they would have seen
31 it ----

32 MR. BEARD: There is no confusion ----

33 MISS GRAY: The draft document that we are referring to is the same – there was no confusion as to
34 the document that we have seen. The draft document that we have seen is the one that Mr.
35 Beard has just referred to.

1 THE CHAIRMAN: That is not their full reasons.

2 MISS GRAY: No, it is not their full reasons. It was their draft reasons.

3 MR. BEARD: It is not a draft reasoning. It is the provisional view being expressed for the purposes
4 of consultation. Now, obviously we are not pretending that many of those reasons might not
5 appear in the final fully reasoned document, nor are we suggesting for a moment that the fully
6 reasoned document will somehow suddenly diverged from the summary of reasons because we
7 can quite see that London Metal Exchange might feel rather aggrieved if that were to be the
8 case. So if that is of any comfort to my learned friend and those in London Metal Exchange I
9 can give that undertaking at this stage.

10 MISS GRAY: Just to draw a line, ma'am, the cover letter of 2nd May which was attached to this
11 document, the controversial document that we are now discussing states that:

12 "We are now writing formally to London Metal Exchange and Spectron setting out in
13 draft the facts and reasons which form the basis for its provisional view that the
14 interim measures direction should be withdrawn."

15 THE CHAIRMAN: Yes, but as I understand it, what they did is they drafted something which is
16 their provisional view for comment. They then have put out today their summary of reasons,
17 and they are going to put out a detailed document which is their full reasons by 24th May. Now
18 what Mr. Beard has very fairly said is that one of the issues on costs is as to whether the
19 information which they say they have recently got was available to them at an earlier time, and
20 if it had been available to them at an earlier time then the fact that they are withdrawing their
21 decision today you might say "Well, they should have withdrawn it at an earlier time". Now,
22 that information is not detailed in their full reasons so one does not know what their position is
23 on those particular matters.

24 One of the matters that I was possibly going to raise a little bit later is that we, having
25 looked at the documents, are particularly interested in the dates when the OFT first became
26 aware of the relevant information. Just picking up one example there apparently was a
27 meeting between Spectron and the OFT on 16th August 2005 – you will find it at file 2A, tab
28 13 – information was obtained at that meeting and how that information relates to the
29 information which they now say is new information needs to be looked into, and we assume
30 that is going to be dealt with in these full reasons. But unless those sorts of things are
31 investigated one is not going to be able to answer the question which I think Mr. Beard has
32 very fairly raised.

33 MISS GRAY: If I can say that it is apparent from the submissions that we have made in our Notice
34 of Appeal and the reference that we have made to particular documents that may be of the type

1 of documents or may be of the type of information that you have just outlined, that there are
2 dates that we do know when the Office was aware of that sort of information.

3 THE CHAIRMAN: Are you prepare today to take us through it and show us what information they
4 had at what particular times and why that is – if you say so – inconsistent with what they are
5 saying now?

6 MISS GRAY: We would be happy to point the Tribunal towards certain documents that we have
7 already indicated in our Notice where the Office was aware of evidence which, in our
8 submission, would have militated against the direction as it was imposed on 27th February.

9 If I can turn to the Notice of Appeal, if the Members have binder 1?

10 THE CHAIRMAN: Which page would you like us to look at?

11 MISS GRAY: I would first like to draw your attention to p.25 of the Notice of Appeal, where we
12 make reference also to a document which is in file 2A at tab 4 – that is the large number “2”
13 for the members. This is a letter which had been received by Mr. O’Hegarty, who is a witness
14 in this matter, and that was a letter from one of the London Metal Exchange’s members who
15 was requesting that there be an extension of the service that the LME was providing by LME
16 Select. That letter was sent by us to the Office of Fair Trading and it is in our representations
17 on 22nd February, along with – if you can turn to tab 10 of the same binder – an email which
18 indicated a number of overseas locations to which certain LME members wished to have
19 extended trading hours.

20 THE CHAIRMAN: Well why is this relevant to what knowledge they had previously, which they
21 say they did not have? What fact does this go to?

22 MISS GRAY: This goes to the fact that they say that they have no evidence, if we look at their
23 summary of the decision where, at para.12(b) the Office says that “... there is significant
24 customer demand for the extension of LME Select.” This is not new evidence, this is evidence
25 which was already before the OFT on 22nd February. This is just in response to your
26 request ----

27 THE CHAIRMAN: What about 11(a)? Have you got some evidence that shows that they knew all
28 about 11(a)?

29 MISS GRAY: About Spectron?

30 THE CHAIRMAN: Yes.

31 MISS GRAY: I am not giving evidence about Spectron. I am only indicating how, on the evidence
32 that we have provided to the Office of Fair Trading ----

33 THE CHAIRMAN: The public interest is only one aspect. There is the Spectron position.

34 MISS GRAY: Yes, and there is evidence from the meetings between the Office of Fair Trading and
35 Spectron that there was discussion of these issues regarding Spectron.

1 THE CHAIRMAN: Well can you identify the documents now to show that what is being said in
2 11(a) etc. is matters which they knew about at a much earlier date?

3 MISS GRAY: Ma'am, there was a meeting on 16th August as I think you have already identified
4 yourself.

5 THE CHAIRMAN: Yes, but without knowing what their full reasons are, are you able to show us
6 that the evidence that you have now is inconsistent with what they are saying in 11(a)?

7 MISS GRAY: We cannot show that the evidence that we have is inconsistent with 11(a).

8 THE CHAIRMAN: So do you not need their full reasons?

9 MISS GRAY: We would be prepared, if we got their full reasons, to answer to them in a period
10 considerably abridged from the 21 days that has been suggested in the letter, and we would
11 also request that the Office, who would be expecting equally 21 days, that if the Tribunal were
12 so minded to make a similar abridgment of time, and equally in respect of the intention to
13 provide the reasons by next Wednesday, 24th May.

14 THE CHAIRMAN: So you are now suggesting that we actually do have a timetable and that we do
15 not try and deal with this this afternoon.

16 MISS GRAY: On the basis of the steer that I am getting from the Tribunal we are accepting that we
17 would.

18 (The Tribunal confer)

19 THE CHAIRMAN: Right, so we will make a timetable for this to be dealt with. You are going to
20 put in your full reasons by 24th May?

21 MR. BEARD: Yes.

22 THE CHAIRMAN: And you have heard the sort of things that concern – at the moment, there are
23 aspects of this which appear on its face to be unsatisfactory, and that all goes to costs – so it
24 may well be that it is all very easily explained.

25 MR. BEARD: Well, obviously – as I indicated – I am not privy to the full reasons so I am not going
26 to comment on the ease of explanation but I hope the answer is “yes”.

27 THE CHAIRMAN: So hopefully the reasons and/or the submissions in answer in relation to the
28 costs will deal with what appears, possibly, on its face ----

29 MR. BEARD: Well there are two points. First, the reasons will be as the reasons are – they will be
30 provided by the OFT – no doubt they will cover these sorts of matters, but equally those issues
31 as to prior understandings might be relevant to an analysis for the purposes of cost. They may
32 not be necessarily germane to the decision as to whether or not to apply a s.35 test, so I could
33 not possibly commit the Office ----

34 THE CHAIRMAN: No, Mr. Beard, that is what I said, it was one or the other.

1 MR. BEARD: Ma'am, you are quite right, that those are matters that would be dealt with in any
2 costs' submissions and, with respect to my learned friend, these general indications and
3 occasional references to a pleading, which is dealing with the situation that is rather different,
4 are not sufficient for the OFT precisely to understand the legal and factual case – and I stress
5 the former as well as the latter because, of course, this does have to be seen through the prism
6 of the OFT's obligations, and its powers under s.35. It may be that there are important issues
7 as to the nature of the subjective understanding that the OFT had that come to bear on how this
8 should be dealt with, and all the OFT are saying is that if we are going to face this costs'
9 application we should have a properly reasoned application which we can answer, they go
10 through and say "You knew about this, this was crucial to your understanding for the following
11 reasons", so that we can understand what is being said. We are not – and I have stressed this
12 already – we are not seeking to have some kind of surrogate appeal here and we are concerned
13 about that, and we are concerned that in making that application London Metal Exchange
14 should deal with that issue and recognise that we are not here going to have a surrogate appeal
15 because we anticipate that that is not the way that the Tribunal would wish to deal with it
16 either. But these are matters again that we would want to ensure are properly dealt with.

17 My learned friend is asking for an abridgment of time. With respect, we do not
18 understand why that is crucial ----

19 THE CHAIRMAN: Well they are suggesting a shorter time limit.

20 MR. BEARD: Well, yes – in relation to the reasons I leave that to one side.

21 THE CHAIRMAN: 24th May.

22 MR. BEARD: That seems entirely proper and I do not perhaps need to get into issues about the
23 jurisdiction of this Tribunal ordering decisions and so on, ma'am. However, nonetheless, in
24 relation to issues which clearly fall well within the purview of this Tribunal's jurisdiction ----

25 THE CHAIRMAN: We are still an ongoing Appeal.

26 MR. BEARD: I am very cautiously not trying to pre-judge anything, ma'am. I am not saying one
27 way or another, I am just saying that is perhaps territory we do not need to stray into.

28 THE CHAIRMAN: You are going to accept it in this case?

29 MR. BEARD: Yes. In relation to the timing of submissions, we do not see why any prejudice is
30 caused, because the substance is now dealt with. We have indicated that we think there may be
31 substantive issues that need to be dealt with and thought about, and we do not think it is
32 sensible in this first Appeal in relation to an interim measures' direction, where it has been
33 subject to a subsequent decision that effectively withdraws the impact of that IM, that these are
34 matters that should be rushed. We want to ensure that they are properly dealt with and the

1 OFT and LME ably represented puts forward these arguments clearly to the Tribunal so that
2 anything can be dealt with.

3 THE CHAIRMAN: Well Miss Gray says that she does not need 21 days.

4 MR. BEARD: Well that is splendid.

5 THE CHAIRMAN: So how long do you need?

6 MISS GRAY: I am instructed that we would be happy to provide our answers within five working
7 days maximum.

8 THE CHAIRMAN: 29th May. I think that is a bank holiday ----

9 MR. BEARD: Five working days.

10 THE CHAIRMAN: So when is that? That is why I said I think the date I gave you was a bank
11 holiday. (After a pause) 1st or 2nd June, which do you want?

12 MISS GRAY: 2nd June. Ma'am, as far as the prejudice which my learned friend says is difficult to
13 divine, the prejudice is ongoing for the LME, we are having diversion of time and resources in
14 a matter which could be brought to a head rather more quickly. That is the prejudice that we
15 are continuing to suffer.

16 THE CHAIRMAN: Well the costs' application is dealt with by a legal team, it is not dealt with
17 within the LME, they can get on with whatever business they are getting on with, surely?

18 MISS GRAY: It is diversion of time and resources for the LME's legal team.

19 THE CHAIRMAN: Well is it the legal team, or is it you and your instructing solicitors?

20 MISS GRAY: And the LME's counsel.

21 THE CHAIRMAN: Yes, well anyway they are going to do it by 2nd June.

22 MR. BEARD: I maintain the application that we would want 21 days to deal with that, for the
23 reason that I have set out that, given that this is the 1st application we want to ensure that the
24 legal issues are properly put forward by the OFT, these are matters that will have to be
25 considered, both in relation to the general point and in relation to any particular issues that are
26 raised and, as I have already indicated these may not be matters that are canvassed in any detail
27 in the full reasons – I simply do not know. If they are not then it may be necessary to carry out
28 internal searches into what was known by whom at what time, depending on what is said
29 against us in this regard. In that respect, 21 days, given that it is the OFT that will be engaged
30 with this the LME does not have to be doing anything until it receives those submissions. I
31 simply do not understand why it is that if it received the matter 21 days later or a month later,
32 or six weeks' later, it may be at that point that the LME's legal team has to engage, but it is
33 wholly unclear why it is that that somehow creates any prejudice to the amount of time and
34 involvement. 21 days is an entirely reasonable period. It is not outside the realms of what has
35 been ordered in relation to other costs' applications and, as I have indicated, if what is put

1 forward by LME is such that in fact there are ways and means that this matter can be further
2 resolved it would be prudent, I would suggest, to leave some leeway to enable that to happen.

3 (The Tribunal confer)

4 THE CHAIRMAN: You have persuaded the Tribunal – 21 days. So that takes us to 23rd June.

5 MISS GRAY: Ma'am, I am sorry, if I could just interject? If I could clarify for my learned friend
6 the urgency for the LME as to receiving the reasons from the OFT, that is because as they say
7 in their letter "... following this exchange of submissions either party may indicate a desire for
8 an oral hearing to be listed at the CAT." Obviously there is a considerable concern on the part
9 of the LME that if the OFT does not accept, as it has suggested today that it is not entirely in
10 accord with our submissions on costs, that we will be back here before the CAT.

11 THE CHAIRMAN: Yes, but we are going to list a hearing in case we need it – if you settle it, well
12 fine, but otherwise we are going to list a hearing today in the ordinary way that this Tribunal
13 normally works, so that the date is in the diary of everybody and, if necessary, you will be able
14 to come back on that day.

15 MISS GRAY: And that is going to be a day that is going to be after the response that has been
16 provided by us on 2nd June, and the incomparable response time that the OFT has of 21 days.

17 THE CHAIRMAN: Yes, and the date that I would suggest is Wednesday, 28th June, which will be
18 five days after – is that too short?

19 MR. BEARD: To some extent for the OFT there is probably less problem, I will have to check
20 availability, but it may be that the LME actually may consider that ----

21 THE CHAIRMAN: You may think that is too short. We have a difficulty the following two weeks
22 in July.

23 MISS GRAY: Madam, I am just being instructed by my solicitor that if the Tribunal is not minded
24 to have parity in the length of time for the submissions of both parties, then we would like to
25 stick to the original, in other words the period of time that the OFT is going to be accorded in
26 order to respond to our submissions in writing.

27 THE CHAIRMAN: But if you say that you can do it in five working days you can do it in five
28 working days. You cannot then turn and say "We want 21 days".

29 MISS GRAY: Well if the OFT ----

30 THE CHAIRMAN: You were saying how urgent it was.

31 MISS GRAY: It was urgent, if there was going to be a determinative end to the matter.

32 (The Tribunal confer)

33 THE CHAIRMAN: I am sorry, you said you could do it in five days, your tasks are very different.
34 You came along today saying that you actually could make this application today. You can
35 start now by setting out in draft what that application is. The reasons for the decision may

1 change that, but you will have the five days which you said you could do it in. The OFT have
2 to look into what you say and they do not know how you are going to put it – I do not know
3 how you are going to put it so they certainly do not know how you are going to put it.

4 MISS GRAY: We have already indicated what line we will be taking so perhaps that might give the
5 OFT some kind of indication of what we will be saying, ma'am.

6 THE CHAIRMAN: Well they say they need 21 days. Will you be ready to come back on 28th June,
7 or do you want longer, and I am warning you that if you cannot take 28th June – or possibly
8 29th June – then it has to go off to the end of July because of ----

9 MISS GRAY: We are very ready to come back on 28th June.

10 THE CHAIRMAN: Mr. Beard, having regard to what I was saying earlier, one of the matters that
11 the Tribunal is interested in is what the test really is in relation to the interim measures, and
12 what steps the OFT took to verify the matter that it was told and on which it relied for taking
13 the interim measures. It may well be that that becomes very clear, but at the moment on the
14 documentation it is not very clear.

15 MR. BEARD: Those behind me hear the Tribunal's comments, ma'am, and will bear that in mind,
16 although as I say I would not want to presume that that will influence the reasons ----

17 THE CHAIRMAN: No, but on the costs, it might be relevant on the costs ----

18 MR. BEARD: On the costs, and I interpolate into what you are saying, ma'am, you are asking not
19 simply "Is it s.35?" but also how this OFT approaches s.35 and how this Tribunal should deal
20 with the assessment of the OFT's decision under s.35, given that it is different from an
21 infringement decision, and indeed is the exercise of a power.

22 (The Tribunal confer)

23 THE CHAIRMAN: Without giving too much of an indication, I am not sure I was going quite as far
24 as you suggested, because I do not think we necessarily need to look at how this Tribunal
25 would exercise a review of the OFT's decision if you see what I mean.

26 MR. BEARD: Well I entirely see, although I reserve the position as to whether or not the OFT
27 wants to make comment on those matters.

28 THE CHAIRMAN: I am not ----

29 MR. BEARD: No, certainly, sorry ma'am, I did not want to ----

30 THE CHAIRMAN: I am not asking you to go that far.

31 MR. BEARD: Understood.

32 THE CHAIRMAN: If you decide that is where you want to go that may be different, but we are not
33 saying that we want you to go that far. But what we are interested in is as to the evidence that
34 was before the OFT at the time, and the verification of the information that was before them.
35 Do you understand what I mean?

1 MR. BEARD: Oh quite, ma'am. I think it is clear.

2 THE CHAIRMAN: I do not want to say too much in the open because it may be completely
3 unjustified.

4 MR. BEARD: I understand and these are matters which I take on board, and those behind me will
5 take on board in dealing with this, but given where we are it may be ----

6 THE CHAIRMAN: It may be that you want to go a bit further.

7 MR. BEARD: It may be that we want to go a bit further, and it may be that these matters do not
8 form the core of the application – I do not wish to anticipate it one way or another.

9 THE CHAIRMAN: Of course, if they go further than is necessary then there is a costs' implication.

10 MR. BEARD: If the?

11 THE CHAIRMAN: If you want us to decide a little bit more than is necessary for the costs'
12 application then ----

13 MR. BEARD: Ma'am, there was no suggestion – or certainly I did not intend any suggestion – that
14 the OFT would be inviting the CAT at large to deal with these matters more widely. If it were
15 to make submissions on these points it would do so because it considered them germane.
16 Unless I can assist further?

17 THE CHAIRMAN: No, I think let us see where we get to. So the OFT is going to give their full
18 reasons by 24th May?

19 MR. BEARD: Ma'am, yes.

20 THE CHAIRMAN: And that is going in the order notwithstanding.

21 MR. BEARD: But ma'am, in relation to that perhaps the safest thing is that that has been indicated
22 by the OFT in correspondence, and perhaps that can be simply part of a preamble to the order
23 in the ordinary form.

24 THE CHAIRMAN: Yes, we could do that, although I do not think there is a problem because this is
25 an ongoing Appeal until it is withdrawn. It is not withdrawn until after the costs, and we can
26 make any order we like during the ----

27 MR. BEARD: Yes, although the Appeal is of course in relation to the imposition of the IM ----

28 THE CHAIRMAN: Which have gone, yes.

29 MR. BEARD: Again, I do not want to start dealing with issues which may be completely irrelevant
30 and I do not think in practice there is going to be a problem, but perhaps it is safest to put it in
31 the preamble. But the OFT have made it crystal clear, and I repeat it in public, that they are
32 going to give their full reasons by 24th.

33 THE CHAIRMAN: You are going to do your application for costs and written submissions by 2nd
34 June?

35 MISS GRAY: Yes, ma'am.

1 THE CHAIRMAN: There will be a full response by the OFT by 23rd June.
2 MR. BEARD: Yes, ma'am.
3 THE CHAIRMAN: And if this matter has to be raised orally then the hearing will be on 28th June –
4 at 10.30?
5 MR. BEARD: Ma'am, certainly.
6 MISS GRAY: Thank you, ma'am.
7 MR. BEARD: Thank you.
8 THE CHAIRMAN: Anything else?
9 MR. BEARD: Not on our side?
10 MISS GRAY: No, no thank you ma'am.
11 THE CHAIRMAN: Thank you very much.
12 (The hearing concluded at 3.50 p.m.)