

This Transcript has not been proof read or corrected. It is a working tool for the Tribunal for use in preparing its judgment. It will be placed on the Tribunal Website for readers to see how matters were conducted at the public hearing of these proceedings and is not to be relied on or cited in the context of any other proceedings. The Tribunal's judgment in this matter will be the final and definitive record.

**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Case No. 1104/6/8/08

Victoria House  
Bloomsbury Place  
London WC1A.2EB

3 April 2009

Before:  
THE HONOURABLE MR. JUSTICE BARLING (President)  
PROFESSOR JOHN PICKERING  
GRAHAM MATHER

Sitting as a Tribunal in England and Wales

BETWEEN:

**TESCO PLC**

Applicant

- v -

**COMPETITION COMMISSION**

Respondent

- supported by -

**ASDA STORES LIMITED**  
**MARKS AND SPENCER PLC**  
**WAITROSE LIMITED**  
**THE ASSOCIATION OF CONVENIENCE STORES**

Interveners

---

Mr. Nicholas Green QC and Mr. Mark Hoskins QC (instructed by Freshfields Bruckhaus Deriner LLP) appeared on behalf of Tesco Plc.

Mr. Peter Roth QC and Mr. Daniel Beard (instructed by the Treasury Solicitor) appeared on behalf of the Competition Commission.

---

Transcribed from 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

---

**HEARING (Handing down and Permission to appeal)**

1 (The hearing commenced at 2.00 pm)

2 THE PRESIDENT: For the reasons set out in the judgment which is handed down now, the Tribunal  
3 proposes, subject to any comments of the parties on the precise terms, to make an order as  
4 follows:

5 1. that the decision of the Commission contained in the report to recommend the  
6 establishment within the planning system of a competition test, as described in, *inter alia*,  
7 paras.43, 11.12 to 11.16 and 11.437 to 11.441 thereof, as one of a package of remedies to  
8 address the AEC (“Adverse Effect on Competition”) and its detrimental effects identified in  
9 the report be quashed;

10 2. that the matter be referred back to the Commission and that the Commission is  
11 directed to reconsider and make a new decision in accordance with the Tribunal’s ruling.  
12 We will recite in the order that we make the Commission’s undertaking to reach a new  
13 decision in accordance with that direction within a period of six months.

14 The costs issues are, as we have said in the judgment, going to be dealt with in a different  
15 ruling.

16 We are now going to give you a chance to have a look at it. It is not exactly a *Harry Potter*,  
17 there are not many surprises in it, so I would hope that 30 minutes or so would be enough, but  
18 obviously if you needed a little bit more time then just let us know. Subject to that, we will  
19 come back, assuming you want us to, at about 2.35 to see if there are any consequential  
20 applications.

21 (Short break)

22 MR. GREEN: Thank you, Sir, for giving us time to read the judgment. We do have an application  
23 for permission to appeal. There are four points that I wish to address you on. They are, first of  
24 all, the essential point of law which arises out of the judgment; secondly, the importance of the  
25 issue from the procedural perspective of the system, both for the Competition Commission, for  
26 the OFT and indeed for the Tribunal; thirdly, to explain that the issue which arises is a very  
27 real one, and it is one which has already arisen in earlier cases and no doubt will arise again;  
28 and fourthly, there is a very real value in having a ruling of the Court of Appeal.

29 Let me take those in turn. First of all, the essential issue of law which arises out of the  
30 judgment is the inter-relationship between s.179(5)(b) and s.137. As to this, we say that s.137  
31 is drafted in clear and unequivocal terms and it makes no exception for the case where the  
32 decision is quashed and time has expired. Indeed, we rely upon the fact that that is the only  
33 time period laid down in the Act, and s.179 does not lay down a time limit. We say that the  
34 logical interpretation of the Act is that s.137 governs.

1 We also submit as a connected point that the implication of the sentence in the Tribunal's  
2 para.29 to the effect that the possibility of a further market investigation reference by the OFT  
3 to the Commission would hardly be a satisfactory substitute for immediate reconsideration by  
4 the Commission is, with respect, to give insufficient emphasis to the role of the OFT under the  
5 Act. I will come back to that in one moment, but we believe that the position of the OFT is, in  
6 fact, extremely important. Contrary to the implication in para.29, the OFT is a critical filter. It  
7 can decide to make another reference under s.131. It can do that in general terms or in partial  
8 terms in accordance with the provisions of s.131 and 133.

9 It is possible, and indeed we rely heavily upon this, that the OFT could say, "No further  
10 reference is required because we take the view that it is otiose or that the market has shifted or  
11 that there are other matters and facts which we take into account which would obviate the need  
12 for a reference" – in other words, a reference back to the Competition Commission might not  
13 inevitably arise.

14 Alternatively, the OFT, exercising an impartial filtering process, could say, "We will make a  
15 reference back and we will follow slavishly the indications of the Tribunal reflecting the  
16 manner in which they found there to be an error on the part of the decision maker" – here the  
17 Competition Commission.

18 The OFT, therefore, has all the powers which it needs to act as an impartial intermediate  
19 decision maker. It may decide immediately, without any undue delay, to send the matter on to  
20 the Competition Commission, so that there would be no delay, or it may decide to consult.

21 There are many permutations which arise, but we see no policy problem in the OFT acting as  
22 soon as an intermediary, and there is no black hole or lacuna in the Act which the absence of a  
23 time limit would necessarily create.

24 THE PRESIDENT: It would inevitably add to the delay, would it not? The Commission have  
25 undertaken to look at it again within six months. If one had to interpose the OFT it would be  
26 adding on a few months, would it not?

27 MR. GREEN: Yes, indeed, there is no doubt about that. There is no reason why that is necessarily  
28 problematic. It would be for the OFT to decide how urgently it should conduct its review. On  
29 the facts of this case, the Competition Commission has promised to take a new decision within  
30 six months, but we are concerned here with the interpretation of the statute. The OFT might  
31 take six months, it might take a week, it may be so blindingly obvious that it says, "We will  
32 have a quick consultation exercise and we will take a decision in a month". There may be  
33 some delay and that may be inevitable. Since Parliament has given two years to the  
34 Competition Commission to conduct an investigation, there is nothing inconsistent in the  
35 policy of the Act in a further period of time being taken if it is appropriate. We are talking

1 about two regulators having a bit of forensic argy-bargy between themselves possibly and one  
2 regulator – here the only one who has not been criticised – deciding whether or not a new  
3 reference should be made.

4 Our simple point is this: a matter of policy, the Act does not leave any problems, any lacuna,  
5 any gap, simply because the time has expired. It simply means that the OFT is now the arbiter  
6 as to whether or not there should be a new reference.

7 You were taken, I think by Mr. Hoskins, to certain passages in *Hansard* which indicated that at  
8 least one of the purposes of giving a two year period to the Competition Commission was that  
9 Parliament considered that most references would take very much less time than that. In  
10 reality, they tend to run up against the time limit buffer, and that is what has happened as a  
11 matter of practicality.

12 If we are right, this raises really rather an important point, because it emphasises the central  
13 significance of the OFT in what happens next. It downplays the role of the Competition  
14 Commission and it undoubtedly circumscribes the powers of the Competition Appeals  
15 Tribunals. If we are wrong, of course, your judgment stands and you have, as it were, a free-  
16 standing power under s.179(5)(b) create a new jurisdiction. Our point is that this is an  
17 arguable point, and it is a very important point.

18 That really takes me briefly to the other points that I wish to make. That is the point of law. It  
19 is not a new point. I think, again, Mr. Hoskins took you to what happened in the *Interbrew*  
20 case before the High Court, the only other occasion where the Competition Commission has  
21 been overturned. That was a case where the merger decision of the Competition Commission  
22 was overturned. The reference back by the High Court under the Fair Trading Act, not the  
23 Enterprise Act, was not to the Competition Commission. The reference back was to the  
24 Secretary of State to take a decision with the assistance of the Office of Fair Trading. The  
25 reason that the order was made in that way is not reflected in any judgment, but it reflected a  
26 disagreement outside of court between the applicant, the Competition Commission and the  
27 Secretary of State over the equivalent provisions, s.70, of the Fair Trading Act 1973.

28 THE PRESIDENT: That was a consent order?

29 MR. GREEN: It was a consent order in the sense that it was consented to by all the parties. The  
30 judge accepted it and it was made the subject of a formal order of the court by  
31 Mr. Justice Moses, but there was no assessment by the court on the point. The point was made  
32 by *Interbrew* that the Competition Commission had no jurisdiction to reconsider merger  
33 because time had expired.

34 THE PRESIDENT: The point was raised, but not ----

35 MR. GREEN: Exactly, and there is no judgment on it, of course.

1 It leads to this: this is not a new issue, it has been lurking in the background for some time. It  
2 is almost certainly going to arise again because of the practice of the Competition Commission  
3 of taking almost the maximum amount of statutory time that it requires. One can see that from  
4 all of the Competition Commission reports that are on the stocks or even in front of the  
5 Tribunal, that this is an issue which is going to arise again. We now have the Tribunal's  
6 judgment on the point, so there is some guidance.

7 That really takes me to the third point arising, which is that there is real value in a ruling of the  
8 Court of Appeal on this. As to that, it is a short point of construction. It is an important point  
9 which will have continuing relevance not only in this case but in other cases. It is, we submit,  
10 the sort of case that the Court of Appeal would be minded to grant permission in respect of.  
11 We have seen that they are interested in these sorts of points – *Floe Telecom*, the *ASF*, indeed  
12 in *Sky*. So the Court of Appeal is taking an interest. Whether it agrees or disagrees with the  
13 appellant is really rather beyond the point.

14 If permission is granted, our understanding is that the Court of Appeal would be able to deal  
15 with this quickly. Indeed, even without expedition, our understanding is that the *Sky* appeal  
16 would come on before the summer – we think either June or July.

17 THE PRESIDENT: The *Sky* appeal?

18 MR. GREEN: The *Sky* appeal, yes, and that is without expedition having been asked for. Our  
19 understanding is that a half day appeal could be brought on rather quickly. So there is the  
20 distinct possibility of the Court of Appeal either agreeing with the Tribunal's judgment or, if it  
21 sees fit, disagreeing with it, but there would be an interest and a benefit in having the Court of  
22 Appeal express its view upon this issue. It is an issue of wider importance.

23 We, therefore, submit that this is a short, important point of law which the Court of Appeal can  
24 deal with quickly and efficiently, and it is the sort of case that the Court of Appeal would take  
25 because of its importance and because it recognises the importance of this Tribunal, and it  
26 could take the case, if it saw fit, to endorse the judgment of the Tribunal, simply because it is  
27 an important point.

28 For those reasons we submit that permission should be granted. There is a point of law arising  
29 out of the judgment; there is the inter-relationship between the two provisions; there is a real  
30 issue of policy as to the role which the OFT should play in the remittal process; and it is an  
31 issue of continuing importance as well as historic importance. For those reasons we invite you  
32 to grant permission. Indeed, the counterfactual is that you refuse and it then takes us longer to  
33 make an application to the Court of Appeal, because we then have to apply for permission and,  
34 once we have got permission, serve the notice of appeal and skeleton, so it adds another stage  
35 in the process. We would, of course, be prepared, if you were minded to grant permission, to

1 jointly write with the Competition Commission to the Court of Appeal alerting them to the  
2 appeal and making sure that it comes on as soon as can possibly be arranged, recognising that  
3 there is an interest in the Competition Commission, if it is correct, not being held up more than  
4 is minimally necessary. It should be able to get on with its task as soon as possible, and we  
5 would, of course, concur in a letter to the Court of Appeal to that effect.

6 We do not, therefore, think that an appeal would delay matters to any significant or material  
7 degree. It would certainly be a month or so, there is no doubt about that, but in the overall  
8 scheme of things that is not a crisis. This is not a merger case where there are City timetables,  
9 or anything like that. This is an inquiry which has already taken two years, at the end of which  
10 there will be a recommendation which will then fall into a political process. So it is not as time  
11 sensitive as some other cases, though we do not undermine or belittle the importance of  
12 dealing with it expeditiously and quickly.

13 For those reasons we think this is an appropriate case.

14 THE PRESIDENT: It would not get on, would it, realistically, this side of the long vacation?

15 MR. GREEN: We understand it would do – in the Court of Appeal?

16 THE PRESIDENT: Yes.

17 MR. GREEN: We understand – this is very, very informally, of course – that it could come on as  
18 early as June if expedition is asked for and if the Tribunal were minded to indicate that  
19 expedition was important. That is obviously very informally obtained information, but that is  
20 the indication we have acquired, that it would be brought on quickly, particularly if a joint  
21 application was made for expedition. We think it is a two or three hour appeal. It is a short  
22 point of law.

23 Unless I can assist further those are my submissions.

24 THE PRESIDENT: Thank you, Mr. Green.

25 (The Tribunal conferred)

26 THE PRESIDENT: Mr. Roth?

27 MR. ROTH: The Tribunal will hardly be able its surprise when I saw we oppose this application.

28 The appellant jurisdiction is, of course, only on a point of law, so on the two grounds argued  
29 before you, both of which were dismissed, one on discretion, the other on jurisdiction, it is  
30 only on jurisdiction. Indeed, Mr. Green confines his points on jurisdiction.

31 THE PRESIDENT: Yes, I think the application for permission is only in relation to the statutory  
32 construction point.

33 MR. ROTH: That can be the only point. The grounds on which permission may be given, the Civil  
34 Procedure Rules set out grounds governing the High Court, which technically, I think, or  
35 formally, do not apply to this Tribunal, but in many cases they have been, as it were, adopted.

1 We have copied for the Tribunal an extract from the CPR. We see on p.1391, rule 52.3, and  
2 the relevant rule is sub-rule (6) on the next page:

3 “Permission to appeal may be given only where:

4 (a) the court considers the court considers the appeal would have a real prospect of  
5 success; or

6 (b) there is some other compelling reason why the appeal should be heard.”

7 Dealing first with real prospect of success – I will not, of course, seek to re-argue the case,  
8 which I thought for just a moment that Mr. Green was tempted to do – we say, with respect,  
9 you have given a very clear and unanimous ruling based very firmly on the wording of the  
10 statute. We say not only is there no real prospect of success, we say on that construction there  
11 is no prospect of success. Your reasoning clearly supports and explains that this ruling is  
12 necessary for the effective operation of the regime of market references in terms of the time  
13 required for the Commission to conduct its task, and how it would become impossible if  
14 everything had to be done to leave scope for a lot of appeals. So we say no prospect of  
15 success.

16 As regards the points made in criticism of your judgment, I think the one point that was picked  
17 up by Mr. Green was at the bottom of para.29 and on the role of the OFT, the last sentence of  
18 para.29 on p.9 of your judgment about the OFT hardly being a satisfactory substitute; and  
19 Mr. Green sought to argue about the central significance of the OFT to the regime and how a  
20 new reference by the OFT could work perfectly well and deal with the matter. Therefore, the  
21 operation of the regime could function in a satisfactory way.

22 With respect, that was rather misconceived because of course in this case the only challenge  
23 has been to an aspect of the remedy, not to the finding of the AEC. Tesco has accepted that. If  
24 the OFT were to make a new reference it could not simply be to refer to the Commission what  
25 relief should be granted to the AEC found. The power of references and the questions that are  
26 then opened up is the whole AEC itself. If one looks s.131 of the Enterprise Act, what is  
27 referred of course is the feature, or a combination of the features of the market.

28 THE PRESIDENT: It could be anything, could it not?

29 MR. ROTH: It could be anything, but it is not. It is not just the relief based on the AEC that you  
30 found in a previous report. The Commission then has a duty to decide whether there is an  
31 AEC. So all of that then gets opened up again, because that is s.134(1), the mandatory duty of  
32 the Commission to decide whether there an AEC. It would enable all the parties, particularly  
33 Tesco, who had argued against an AEC, to start that all over again.

1 So, far from being a satisfactory way forward, it would be, frankly, a disastrous way forward  
2 and give the opportunity through a limited challenge to open up every aspect of the report by  
3 starting the process all over again.

4 THE PRESIDENT: It would make a mockery of everything really, would it not?

5 MR. ROTH: Absolutely. As for *Interbrew*, the point was not argued but you will, I know, bear in  
6 mind that that was under a regime where the decision maker was the Secretary of State. It was  
7 not the Commission that had to take the decision.

8 THE PRESIDENT: You will have to remind me, I am afraid, the decision that was challenged was  
9 that of the Secretary of State, was it, in *Interbrew*? I have just forgotten.

10 MR. ROTH: Yes, Mr. Beard, who was in the case, is nodding.

11 THE PRESIDENT: He ought to know.

12 MR. ROTH: It was, and the judicial review was against both. The Secretary of State was certainly a  
13 respondent to that application.

14 THE PRESIDENT: And it was referred back to the Secretary of State?

15 MR. ROTH: It was referred back to the Secretary of State, yes.

16 THE PRESIDENT: It does say referral back to the decision maker, does it not, in the statute?

17 MR. ROTH: Yes, and the decision maker in that case.

18 THE PRESIDENT: It is not as though you can refer it back to anyone you want to, it is pretty  
19 limited, is it not, as you would expect?

20 MR. ROTH: Absolutely. Mr. Green says the Court of Appeal is minded to grant permission in cases  
21 of this kind. No doubt the Court of Appeal considers the strength of the judgment and the  
22 prospects of success and applies the test that has to be applied. We say that if Tesco is so  
23 advised they should seek to persuade the Court of Appeal to grant permission in this case and it  
24 should be a matter for the Lord Justice to say that there is something in this judgment that  
25 actually calls out for reconsideration, and if Mr. Green says the Court of Appeal is minded to  
26 grant permission in such cases then no doubt he will get it, but proof of that submission will be  
27 in whether it is granted or not. The fact that it has just been granted in the very different  
28 circumstances of *Sky* is no guide to what might happen here.

29 THE PRESIDENT: I think the point he was making there was that *Sky* got on pretty quickly with a  
30 hearing and therefore you could assume that this would get on pretty quickly.

31 MR. ROTH: I think there were two points. As I understood it, the first was that they are minded to  
32 grant permission, and so you should grant permission, in terms of getting through the filter;  
33 and the second point was that there will not be great delay because it can come on fairly  
34 quickly.

1 THE PRESIDENT: What about the delay? Supposing they do re-apply, if we refuse permission,  
2 what about his point that there will actually be more delay then?

3 MR. ROTH: The position is this: if you refuse permission ----

4 THE PRESIDENT: Is that a reason, that actually there will be more delay than if we do not give  
5 permission?

6 MR. ROTH: The outside period for the application – and the application, sir, as you will know, is  
7 made to the Court of Appeal with the draft notice of appeal, it is not that one puts in an  
8 application for permission, then they say yes and then you put in your notice, it all has to go in  
9 together – the period is ----

10 THE PRESIDENT: It gets decided in stages, does it not?

11 MR. ROTH: It gets decided in stages in the sense that once they grant permission then the appeal is  
12 heard separately. The period in which that has to be done, first of all, the period in which the  
13 application has to be made is short; and you can abridge that time in any event. It is 14 days.

14 THE PRESIDENT: It is 14 days to renew an application for permission.

15 MR. ROTH: But you can, I think, abridge that time.

16 THE PRESIDENT: What I meant was, the Court of Appeal do not normally roll them up together, if  
17 they are going to grant permission?

18 MR. ROTH: No.

19 THE PRESIDENT: They do not say that the permission hearing and the main hearing come on at  
20 the same time. They normally do it in stages, do they not, so there is likely to be an extra  
21 delay? I think Mr. Green was saying that, and I expect he is right.

22 MR. ROTH: Yes, there may be some slight extra delay. If they were to grant permission, then if an  
23 application for expedition was made then it may be that a short appeal could be heard before  
24 the summer. In *Sky* there is, I gather, no date yet that has been fixed for the hearing.

25 THE PRESIDENT: Anyway you are not encouraging us – assuming we were minded not to grant  
26 permission ourselves, you do not encourage us to grant it simply to avoid the extra bit of delay  
27 that might occur if the Court of Appeal granted it?

28 MR. ROTH: Absolutely. If the Court of Appeal on the papers – and it goes, as you know, on the  
29 papers – says no, then the delay is a lot less.

30 THE PRESIDENT: Yes, and you are happier!

31 MR. ROTH: Then one is talking about a matter of several weeks, as opposed to the hearing of this  
32 case. So we say really that does not get one anywhere.  
33 On the test of real prospect of success, we say that is not satisfied.

1 As to any other compelling reason, that is really a reserve power for quite exceptional cases. It  
2 is discussed in the notes to the **White Book**, which you have on p.1395-96, particularly on  
3 1396, the first new paragraph on the page:

4 “Experience has shown, however, that ground (b) constitutes a valuable reserve power  
5 to permit certain appeals to proceed to the Court of Appeal, even though it is not  
6 possible to say there is a real prospect of success.”

7 Then they continue to give a couple of examples, one being that, even though a point of law  
8 was unclear, it would elucidate an important point of law; and the other where there was  
9 binding authority on the decision making Tribunal so that it had to decide the case one way but  
10 by granting leave to appeal the matter could go up to the House of Lords and that authority  
11 could be reconsidered. That is the *Beedell v. West Ferry Printers*, and that is clearly not this  
12 case.

13 We say there is no uncertainty now. The specialist tribunal, which is best placed to take a view  
14 on what is necessary to the working of the competition regime, has given a clear and certain  
15 ruling. Everyone now knows what the position is in so far as anyone really could have  
16 doubted it before, about which I am somewhat sceptical, and therefore the suggestion that this  
17 is something that requires consideration by the Court of Appeal to explain the position is, we  
18 say, frankly fanciful. The position is now absolutely clear from your ruling, and if there is  
19 something to be said that is wrong about it that needs reconsideration and might get  
20 overturned, we say that should be left. The Court of Appeal can read the judgment, understand  
21 it clearly, it is a matter of statutory construction, the inter-relationship, there are just a couple  
22 of sections in the statute, and a single judge on the papers would be well able to see whether  
23 there is anything wrong with it, such that it has any remote prospect of success on appeal and  
24 decide whether to grant permission. It should be left to Tesco to renew its application, if it is  
25 really so advised, before the Court of Appeal. Therefore, we urge you to refuse permission.

26 THE PRESIDENT: Thank you, Mr. Roth.

27 MR. GREEN: Just a couple of points in response. First of all, the test so far as CPR 52.3 is  
28 concerned, the notes make it clear that the test is whether it is fanciful. We submit this clearly  
29 is not fanciful. There is a serious issue.

30 THE PRESIDENT: Just point us to where that is, Mr. Green, if you would not mind.

31 MR. GREEN: It is p.1395 under the heading, “The basic criteria for granting permission” (side note  
32 52.3.7), then there is the reference to the very well known judgment of Lord Woolf in *Swain v.*  
33 *Hillman*.

34 THE PRESIDENT: Yes, there we are, as opposed to a fanciful prospect.

35 MR. GREEN: Yes, exactly.

1 Second, Mr. Roth said one of the essences of the underlying dispute between the parties is the  
2 Tribunal's view of what is needed for a successful system. The Tribunal's view is that the role  
3 of the OFT is a minimal role and an unsatisfactory role. What is a satisfactory role for the  
4 OFT to play is not only a matter of policy, it is a matter of the structure of the Act. The OFT  
5 has the power to refer anything. It has a broad power under s.133(1) and it can confine its  
6 reference under s.133. It is not, we submit, entirely clear that the OFT cannot refer the  
7 question of remedies. The powers are broad and they have a power to confine. We do not  
8 accept that the combined effect of ss.131 to 133 is only to require the Competition  
9 Commission to conduct an entirely new *de novo* investigation spanning A to Z. That does not  
10 appear to us to follow from s.131. If I am wrong on that, that is at the very least an important  
11 point of law which affects the scope of any appeal.

12 Third, so far as *Interbrew* is concerned, one has to remember that the present case is not  
13 dissimilar. Under the old merger regime under the Fair Trading Act, the Competition  
14 Commission would leave the final decision to the Secretary of State. What was quashed in that  
15 case by the High Court was the Competition Commission's decision, and ultimately, as is in  
16 the public record, the OFT took the final decision. The mechanism by which this happened  
17 was an agreement. I entirely accept that there is no ruling upon it, but it was a practical  
18 concession that it would go via the Secretary of State straight to the Office of Fair Trading, and  
19 one could print off what the OFT's decision was, because it is on their website, in relation to  
20 this. It was understood the OFT would intervene and take a decision on the merger. So the  
21 OFT were perfectly able and willing to play a part. I accept there are differences between the  
22 regime, but the underlying arguable point accepted by all concerned was that there was an  
23 issue. Therefore, that supports our submission that this is not a new point.

24 Of course, here we are dealing with a recommendation to the Secretary of State as to what  
25 remedy should ultimately be adopted. It has that comparability.

26 The fourth point is that if you were to refuse permission then there is a real risk that any appeal  
27 would come on after the summer because we would, first of all, have to make a paper  
28 application. If that was granted, so be it; if it is not granted we renew an oral application. So  
29 there may even be two stages and that then increases the risk of a material delay to appeal  
30 which we say, if permission is granted, would be done and dusted in a pretty short period of  
31 time.

32 Point five, this is the importance, this is an entirely novel point which the Tribunal has ruled on  
33 for the first time. It does elucidate – that is to say the Court of Appeal's judgment would  
34 elucidate – an important practical principle. If we are right it has very serious connotations.  
35 That is a reason for granting permission, that if we are right then it has serious connotations for

1 the Tribunal, for the Commission and for the OFT. If we are wrong, then the position is as set  
2 out in the Tribunal's judgment.

3 It is a short point of statutory construction, as in *Floe Telecom*. There is room for the Court of  
4 Appeal to disagree. Elucidation, even if it is to approve this judgment, would be important.

5 That is a free-standing reason for granting permission.

6 MR. MATHER: A few sentences ago, Mr. Green, you referred to the Tribunal's judgment  
7 describing the OFT's role as minimal. I find it difficult to see where we said that?

8 MR. GREEN: Paragraph 29, last sentence:

9 "The possibility of a further market investigation reference by the OFT to the  
10 Commission would hardly be a satisfactory substitute for immediate reconsideration  
11 by the Commission, which is the relief expressly envisaged by the statute."

12 If my use of the word "minimal" is incorrect, what we do, with respect, criticise is the  
13 conclusion that the OFT's interjection is not a satisfactory substitute for immediate  
14 reconsideration by the Commission. We say that under the Act the OFT has a formal role in  
15 initiating investigations. On the facts of this case it could do it slowly or fast, it is entirely a  
16 matter for it.

17 THE PRESIDENT: The statute envisages a decision maker looking at it again. Leave aside time  
18 limits, it does not envisage another person looking at it who has not made the investigations.

19 MR. GREEN: Within the time limits, yes.

20 THE PRESIDENT: That is a separate issue, but in terms of who looks at it, what the statute  
21 envisages is the original decision maker.

22 MR. GREEN: That, with respect, begs the question. If you are right, then of course you are right. If  
23 you are not and the time limit has expired then ----

24 THE PRESIDENT: It has got to be someone else.

25 MR. GREEN: It has got to be someone else.

26 Unless I can assist further, those are my submissions.

27 THE PRESIDENT: We will just take a few minutes, thank you very much.

28 (Short break)

29 (For ruling, see separate transcript)

30 MR. ROTH: Sir, I made a submission in response to the application by Tesco for costs on the main  
31 judgment, the main hearing, saying that, in our submission, there should be no order for costs  
32 unless the conduct was unreasonable. We do not know, of course, at the moment how you will  
33 resolve that matter, and it would be quite wrong for me to anticipate the judgment the Tribunal  
34 might deliver. All I, therefore, seek to say, because of course one would wish to avoid yet  
35 another hearing on costs, is that if you accept our submission in that regard, that there should

1 be no order for costs regarding the main hearing, then I do not seek costs of Tesco's  
2 application regarding relief or the hearing today. I do not suggest it was unreasonable – just.  
3 If, on the other hand, you find that the Commission is liable for a part of the costs of Tesco on  
4 the sub application then I would seek the Commission's costs of the hearing regarding relief  
5 and the application for permission to appeal, on which they have failed.

6 I hope that makes the position clear.

7 THE PRESIDENT: Yes, I understand that. Mr. Green, do you want to say something about that?

8 MR. GREEN: I have just two points.

9 THE PRESIDENT: We are obviously not going to decide it now, we will deal with that at the same  
10 time as costs of the main hearing.

11 MR. GREEN: So far relief is concerned, it is not at all obvious in the light of your judgment, setting  
12 aside the question of discretion whether or not to refer, as to the nature of the reference, that  
13 they have succeeded. They wanted a very large number of paragraphs quashed. You have not  
14 done that. We were more content simply to point out the problem which arose. So that, I  
15 would say, was 50/50.

16 So far as today is concerned, we had to come to get the judgment. They did not know whether  
17 we were going to apply for permission or not. They nonetheless came, so the amount of time  
18 and effort that has been expended in dealing with the application this afternoon is, on an  
19 incremental basis, zero. They have been here for an extra half an hour or so. So there really is  
20 not a cause for dealing with this on any other basis than as part of the costs in the case.

21 The only other matter I would like to raise is as to the timing of the costs judgment, whether  
22 the Tribunal is able to give us any indication as to when that might.

23 THE PRESIDENT: I cannot really, no, we will do it as soon as possible.

24 MR. GREEN: Thank you. I do not think there is anything else which we want to add.

25 THE PRESIDENT: Thank you very much. Do you want to say anything else about costs?

26 MR. ROTH: I do not think I need trouble you further. You have seen the correspondence and the  
27 position that was taken and you will form your view as to who was the substantive successful  
28 party on the issue regarding relief that was debated before you and the substance of that  
29 hearing.

30 As regards the position today, it was because we were told there might be an application for  
31 permission to appeal that we had to come. As regards the actual outcome, you indicated that at  
32 the end of the hearing. Had it not been for the potential for an application for permission on  
33 the part of Tesco then in the ordinary way we would not have had to attend today by counsel,  
34 because there would have been the normal handing down of the judgment of its reasons for a  
35 decision you have already announced.

1 | THE PRESIDENT: Is there anything else? You have seen what the formal order we propose is. We  
2 | are not inviting any comments. We will get that out, I hope, very quickly as a proper order.  
3 | Thank you very much indeed.

4 | (The hearing concluded at 3.40 pm)