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IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1160-65/1/1/10

Victoria House,
Bloomsbury Place,
London WC1A 2EB

11 November 2011

Before:

VIVIEN ROSE
(Chairman)
DR ADAM SCOTT OBE TD
DAVID SUMMERS OBE

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) IMPERIAL TOBACCO GROUP PLC
(2) IMPERIAL TOBACCO LIMITED

Appellants

– v –

OFFICE OF FAIR TRADING

Respondent

CO-OPERATIVE GROUP LIMITED

Appellant

– v –

OFFICE OF FAIR TRADING

Respondent

WM MORRISON SUPERMARKET PLC

Appellant

– v –

OFFICE OF FAIR TRADING

Respondent

(1) SAFEWAY STORES LIMITED
(2) SAFEWAY LIMITED

Appellants

– v –

OFFICE OF FAIR TRADING

Respondent

(1) ASDA STORES LIMITED
(2) ASDA GROUP LIMITED
(3) WAL-MART STORES (UK) LIMITED
(4) BROADSTREET GREAT WILSON EUROPE LIMITED

Appellants

– v –

OFFICE OF FAIR TRADING

Respondent

(1) SHELL UK LIMITED
(2) SHELL UK OIL PRODUCTS LIMITED
(3) SHELL HOLDINGS (UK) LIMITED

Appellants

– v –

OFFICE OF FAIR TRADING

Respondent

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HEARING (DAY 27)

Note: Excisions in this transcript marked "[…][C]" relate to passages excluded.

APPEARANCES

Mr Mark Howard QC, Mr Mark Brealey QC and Mr Tony Singla (instructed by Ashurst LLP) appeared on behalf of the Appellants Imperial Tobacco Group Plc and Imperial Tobacco Ltd.

Mr Rhodri Thompson QC and Mr Christopher Brown (instructed by Burges Salmon LLP) appeared on behalf of the Appellant Co-operative Group Ltd.

Mr Pushpinder Saini QC and Mr Tristan Jones (instructed by Hogan Lovells International LLP) appeared on behalf of the Appellants WM Morrison Supermarkets Plc and Safeway Stores Ltd and Safeway Ltd.

Mr James Flynn QC and Mr Robert O'Donoghue (instructed by Norton Rose LLP) appeared on behalf of the Appellants Asda Stores Ltd, Asda Group Ltd, Wal-Mart Stores (UK) Ltd and Broadstreet Great Wilson Europe Ltd.

Ms Dinah Rose QC and Mr Brian Kennelly (instructed by Baker & McKenzie LLP) appeared on behalf of the Appellants Shell U.K. Ltd, Shell U.K. Oil Products Ltd and Shell Holdings (U.K.) Ltd.

Mr Paul Lasok QC, Ms Elisa Holmes, Mr Rob Williams, Ms Anneliese Blackwood and Ms Ligia Osepciu (instructed by the General Counsel, Office of Fair Trading) appeared on behalf of the Respondent.

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1 Friday, 11 November 2011
2 (12 noon)
3 Tribunal's opening remarks
4 **THE CHAIRMAN:** I have just a few opening remarks.
5 The parties will, I hope, all have received the
6 letter that the Tribunal sent out yesterday, in which we
7 have suggested the framework for today's case management
8 conference, and the next stage in these appeals.
9 The question, as we see it, that faces the Tribunal
10 is whether these appeals should be allowed to continue
11 on either of two bases.
12 The first basis is that the OFT contend that the
13 refined case set out in their submissions reflects part
14 of the decision, but not the whole of it, and
15 the Tribunal should proceed on the basis that we could
16 at the end of the day confirm the decision to that
17 extent.
18 The second basis is that if the Tribunal is not
19 satisfied that the refined case is part of the decision,
20 the Tribunal should proceed with the appeals on the
21 basis that we could, at the end of the day, set aside
22 the decision but exercise the powers under schedule 8,
23 paragraph 3(2), to make another decision which the OFT
24 could itself have made.
25 We have not had a response from the parties to that

1 letter, not surprisingly as you would only have received
2 it quite late yesterday, but we will no doubt hear
3 shortly from the appellants as to whether or not they
4 oppose those courses.
5 We are not today going to hear submissions as to
6 whether either or both of those courses should be
7 adopted; rather, we are considering what steps we need
8 to take in order to reach a decision on that.
9 Clearly the process from here on must give all the
10 parties the opportunity to address the relevant law, and
11 the factors to be taken into account in the exercise of
12 the Tribunal's discretion.
13 We have read the OFT's submissions carefully, and we
14 have looked at the paragraphs of the decision to which
15 they refer. Our preliminary view is that a useful first
16 step might be for the OFT to amplify its submissions on
17 two matters: first, as to where in the decision we find
18 the two restraints now described in the refined case;
19 and, second, for them to set out more precisely how they
20 would envisage the Tribunal exercising its powers under
21 paragraph 3(2) of schedule 8 in the event that we found
22 the acceptance of the restraints was proven on the
23 evidence.
24 As to further steps, we will need also to consider
25 whether the parties should be allowed to adduce any

1 further evidence on this issue. The Tribunal wants to
2 retain a degree of control over how much evidence and
3 precisely what it is going to cover, pursuant to Rule 22
4 of the Tribunal's rules.
5 That is what we propose to say by way of
6 introduction. Mr Howard, are you going first?
7 **MR HOWARD:** Yes.
8 Submissions by MR HOWARD
9 **MR HOWARD:** In considering this, it is first necessary to
10 remind you of how we have got to where we are today. In
11 our submission, that will inform what actually is
12 appropriate for debate. If I cut to the chase, and I'll
13 develop this, but we say it's not going to be
14 appropriate to debate whether the refined case falls
15 within the decision, because it does not, and that's
16 been conceded, and I'll explain that to you in a moment.
17 We say the only issue is whether a part of this
18 refined case can -- whether that could proceed under
19 schedule 8. We obviously say it can't, but that will be
20 the argument for another day.
21 Now, I don't propose today to go into the full
22 history of the remarkable shifts in the OFT's case, but
23 we do need to look carefully at the OFT's considered
24 statement of position last Thursday and the Tribunal's
25 ruling then.

1 Let's just think about what has happened in this
2 case. Last Thursday, the Office of Fair Trading applied
3 for an adjournment of these proceedings. That was on
4 Day 26. That was then on the eve of the commencement of
5 the expert evidence. If we just stop for a moment, we
6 need to pause and think: here is a party who has applied
7 to adjourn, why was it doing that? The position was
8 this: the context was there was concern as to the extent
9 to which the Office of Fair Trading continued to
10 maintain its case based on the restraints which were
11 identified in paragraphs 40(a) to (d) of its -- we call
12 it its skeleton, it's not a skeleton argument, it's
13 a written argument in support of its case here.
14 Now, the importance of this was that these four
15 constraints formed the basis of the theory of harm in
16 the decision and of Professor Shaffer's expert reports,
17 which the Office of Fair Trading was relying on in
18 support of its case.
19 It was obviously relevant also because the case
20 addressed by the appellants in their notices of appeal,
21 in their factual evidence and in their expert evidence,
22 was obviously by reference to the theory of harm in the
23 decision. Concerns on the side of the appellant had
24 been raised when, at earlier junctures, Mr Lasok sought
25 to explain the Office of Fair Trading's case. You will

1 remember on Day 16 he initially, on behalf of the Office
2 of Fair Trading, denied that paragraph 40 represented
3 the Office of Fair Trading's case. Secondly, he resiled
4 from that, correctly, as he had to do, on Day 17. But
5 he then sought to suggest that it was not necessarily
6 critical to the Office of Fair Trading's case to
7 establish all four restraints or, where there were
8 maxima P&Ds, two. But suggested that was an issue for
9 experts and submission in due course.
10 Now, that, what he said on Day 17, was obviously
11 unsatisfactory, as it involved consideration of an issue
12 which had not been subjected to expert analysis, and
13 indeed we said was inconsistent with concessions made by
14 Professor Shaffer in the experts' joint statement.
15 Just stopping for a moment, expert reports in
16 litigation are extremely important, as is the joint
17 statement, in that it is intended to define properly
18 what experts are saying. The whole purpose of having
19 reports is so that you know what the other side's expert
20 case is. The purpose of having a joint statement is to
21 refine the expert issues.
22 Now, what Day 17, Mr Lasok's submissions, appeared
23 to contemplate was a different theory of harm based only
24 on some of the 40(a) to (d) constraints. He didn't
25 identify how this would work, he just said "Well, that

1 will be a matter for the experts".
2 Then on Day 17 there was a further point raised
3 which had no relationship at all to the theory of harm
4 in the decision and in Professor Shaffer's report.
5 That's because -- again it's very important to just bear
6 all this in mind -- the theory of harm in the decision
7 and in Professor Shaffer's report is about incentives on
8 manufacturers' wholesale prices, and the claim that they
9 would -- on the OFT's case -- be disincentivised from
10 reducing their wholesale prices, there would be no
11 point, to summarise the way it's been put, and
12 incentivised to increase prices, there would be every
13 point.
14 What appeared to be coming forward on Day 17 was
15 a theory of harm not articulated but a theory of harm
16 which was unrelated to the manufacturers and which was
17 premised on retailers being inhibited from self-funding
18 promotions of one manufacturer's products without
19 effecting a corresponding promotion in regard to the
20 other manufacturer's competing product.
21 It is very, very important for the Tribunal to note:
22 no theory of harm was articulated in the decision in
23 relation to this. No theory of harm was articulated on
24 Day 17. No theory of harm that relates to this has been
25 articulated today. What's more, this has not been

1 addressed by any expert on either side.
2 Now, before considering what was said last Thursday,
3 we need to recall that the Office of Fair Trading has
4 only called and only ever intended to call one factual
5 witness, namely Fiona Bayley as she then was, now
6 Fiona Corfield. Fiona Bayley's evidence repudiated
7 unequivocally the existence of any of the constraints on
8 which the OFT relied. She also accepted that the
9 arrangements for the prices were maxima, not fixed
10 prices, and that Sainsbury's could always self-fund.
11 She also confirmed that she regarded herself as free to
12 self-fund a reduction in the retail price of Gallaher's
13 brands without also reducing the price of Imperial's
14 rival brands.
15 So we then come, and you have to remember it was all
16 of this, what was said on Day 17, Fiona Bayley's
17 evidence, which provoked my submission on what would
18 have been Day 23, to say "This is all completely
19 hopeless, this case has fallen apart", and I think you
20 said to me at the time, "Well, what are you asking me to
21 do?" And where we got to is, "Well, we need the Office
22 of Fair Trading to actually explain its case".
23 Now, that's what Mr Lasok came to do on Day 26, and
24 we need to look carefully at what was the position as
25 explained to you on Day 26.

1 If you go to page 1, what Mr Lasok starts, at
2 line 6, is he responds saying:
3 "Madam, the Tribunal has asked the Office of Fair
4 Trading to specify which constraints apply."
5 What he then explains is that the constraint that
6 they are now relying on is only 40(a). That's it, and
7 you will remember that's supposed to be the situation,
8 if Gallaher puts up its wholesale price and the retailer
9 puts up the shelf price of a Gallaher product, the
10 suggestion that there was then a requirement for the
11 retailer to put up the price of Imperial's product,
12 notwithstanding that Imperial hadn't altered its
13 wholesale price.
14 So that's where he started.
15 Now, but if you go to page 2, line 4, he then
16 addressed the position if none of the restraints are
17 there:
18 "If the Tribunal were to find in relation to any one
19 of the infringing agreements that are the subject of
20 these appeals that none of the constraints in
21 paragraph 40 of the OFT's skeleton argument were
22 present, it does not follow that there was no object
23 infringement. In other words, putting matters in the
24 statutory language, for reasons that the Tribunal will
25 well understand in a minute or two, there are reasonable

1 grounds for suspecting an object infringement that
2 worked in the absence of the four constraints as they
3 are described in paragraph 40 of the OFT's skeleton
4 argument."
5 Stopping there, the language that he is using "there
6 are reasonable grounds for suspecting an object
7 infringement", that of course is the language which is
8 in the statute which triggers the administrative
9 procedure whereby the OFT starts an investigation.
10 Now, look at line 16. Remember we are considering
11 the situation where the constraints in paragraph 40 have
12 gone. He then says, it is absolutely clear and
13 unequivocal:
14 "Now, that is a departure from the decision as
15 currently formulated."
16 In other words, he is acknowledging, if he cannot
17 prove 40(a) to (d) he is outside the decision.
18 He then says:
19 "... although the suspected infringement [note the
20 word 'suspected'] that appears on the face of the
21 evidence is the same in nature as that found in the
22 decision. The procedural question that then arises is
23 whether these appeals can and should be dealt with by
24 the Tribunal in exercise of its powers under schedule 8,
25 paragraph 3(2)(d) and (e) of the Act, expanding the case

1 in the decision to the alternatives that arise from the
2 evidence.
3 "An alternative is that the OFT should amend the
4 decision by removing the infringing agreements currently
5 before the Tribunal and, if it considers it appropriate
6 to do so on further consideration, issue a new statement
7 of objections that is more broadly based but seeks to
8 capture all the alternatives that the evidence has
9 thrown up.
10 "If the Tribunal considers that the schedule 8
11 solution is a possible option ... the Tribunal would
12 need to hear submissions from the parties before these
13 appeals go further" and it requires serious
14 consideration of the practicalities.
15 So the position at this stage is you have the Office
16 of Fair Trading saying "I can still rely on 40(a),
17 that's still part of my case, but without 40(a), I am
18 outside the decision and there is then a choice: either
19 you accept we can do this within schedule 8, or we have
20 to amend the decision. It's one or other."
21 It's also significant in relation to what has come
22 forward to look at the exchange on page 6, the foot of
23 page 6, at line 23. This is important, because this is
24 where you have Mr Lasok explaining the correct approach
25 to the decision. What he is explaining -- we will look

1 at it in a moment -- is that what you have to do is take
2 a sensible view of the decision, and that the OFT has
3 recognised that, and that is why they are recognising if
4 they can't fall within 40(a) to (d) they are outside the
5 decision. It's very important, you will have seen, of
6 course, what our notice of appeal says and what their
7 defence says. It is self-evident from any review of
8 those documents that we have been addressing what
9 everybody has understood to be the case. What Mr Lasok
10 then explains is this, he says at line 23:
11 "Because we think, having looked at the evidence in
12 the round as it has come out, that the decision has, to
13 put it loosely, been cast too narrowly. If you like, it
14 has identified a particular mechanism or method of
15 implementation that gives rise to the anticompetitive
16 harm. But in some of the cases that are before the
17 Tribunal, it looks as though the same end result, that's
18 to say the same anticompetitive harm, results or may
19 result in a different way, which is not captured
20 sufficiently clearly in the decision. When I say
21 'sufficiently clearly', one can look at the decision and
22 seek to read it in different ways, but at the end of the
23 day, you know, a decision has a particular legal
24 meaning, the Tribunal decides what the legal meaning of
25 the decision is, and it is clearly open to the Tribunal

1 to conclude that on the legal meaning of the decision,
2 it's too narrow to capture some of the permutations that
3 we have seen in the evidence.
4 "For that reason, it appeared to the OFT on
5 reflection that there were really two routes arriving at
6 the correct result. Because if there are infringements
7 then they need to be the subject of a decision [note
8 that, it has to be the subject of a decision] and the
9 two routes -- I emphasise the word 'if' of course -- are
10 either through the Tribunal exercising its powers under
11 schedule 8 or it's through the OFT dealing with the
12 matter, but in order to deal with the matter properly
13 [again the word properly is important] the correct
14 thing, in our submission ... would be for the OFT to
15 amend the decision so that the disputed infringing
16 agreements are cleared out of that decision and then you
17 have a statement of objections that puts, as it were,
18 the entire case to the undertakings in question so ...
19 they have a fair opportunity to answer it, but answer it
20 in its entirety, and in its broad sense. Then you would
21 arrive at a decision, if a decision was necessary, in
22 the light of the submissions made by the undertakings
23 that did properly capture what had actually happened."
24 Now, what is self-evident there is it's recognised
25 that you cannot approach a decision, as it were -- if

1 you look at the basis, we are going to come to it in
2 a moment, of saying "Well, this point is reflected in
3 the decision, the question is: is this point in the
4 decision as everybody has actually understood it and
5 proceeded? What Mr Lasok was recognising is once you go
6 outside 40(a) to (d), you are outside of the decision,
7 and it needs then a decision which at this stage he is
8 actually saying the only proper way of doing it is by
9 going through the administrative procedure, although he
10 then goes on to float, and had earlier floated, the
11 question of schedule 8.
12 But the important thing is that what we had last
13 week was that what the OFT was trying to do was cling on
14 to one aspect of its case, which was 40(a), and the
15 reason for that is fairly transparent, that was
16 a figleaf, because what they wanted to do was say "We
17 are still pursuing 40(a), that can keep these appeals
18 alive", and then somehow use that as a vehicle for
19 expanding or relating to other points, but at the same
20 time they recognised that insofar as they are running
21 some other case, then that has either got to be the
22 subject of their own decision or the subject of
23 schedule 8.
24 What is unequivocal in all of this is the basis on
25 which the case was being adjourned was a recognition

1 that without 40(a), you either have to invite
2 the Tribunal to exercise a discretion, if it has it
3 under schedule 8, or you have to go back through the
4 administrative procedure.
5 Now, the position on 40(a) as a stand-alone
6 restraint, having dropped (b) to (d), is frankly
7 ridiculous, and I pointed that out to you last week.
8 You can point it out, why it's ridiculous. How on earth
9 could anybody suggest a retailer was restricted by
10 Imperial from putting up the price of Gallaher's
11 product? If you are Imperial, you are going to be
12 delighted when you see Gallaher's product go up and
13 yours not. Why on earth would anybody think Imperial
14 required the retailer to put up the shelf price of its
15 product when it was not putting up its wholesale price?
16 Why would the retailer oblige himself to do that? It
17 was in that context that the Tribunal itself recognised
18 that the reality was the OFT was faced either with
19 amending the decision, which meant the appeals would be
20 allowed and the decision set aside, or making
21 an application in effect to amend before the Tribunal so
22 as to invite the Tribunal to exercise its powers.
23 That's actually clearly set out if you turn to your
24 ruling at page 46. The ruling starts on page 45 at
25 line 21, and you record the OFT's --

1 **THE CHAIRMAN:** Wait one moment.
2 **MR HOWARD:** I am sorry.
3 (Pause)
4 If you go to page 46, at line 16, after the
5 preamble:
6 "The question, therefore, arises as to where this
7 acknowledgement by the OFT leaves the future course of
8 these appeals.
9 "The OFT considers that there are two possible
10 courses it could take. The first is to concede that
11 these proceedings should now be brought to an end, the
12 appeals should be allowed and an appropriate order made
13 by the Tribunal under paragraph 3(2) of schedule 8 to
14 the Competition Act.
15 "The second is for the OFT to apply to be allowed to
16 reformulate its case to carry on resisting the appeals
17 on the basis that it will, at the end of the day, ask
18 the Tribunal to exercise its powers under
19 paragraph 3(2)(e) of that schedule. This would involve
20 the Tribunal in effect making a decision which the OFT
21 could itself have made and thereby upholding the appeals
22 by finding that an infringement of the same kind as was
23 condemned in the decision, albeit a different
24 infringement, has been established."
25 Again, important, different infringement:

1 "To that end, the OFT has asked the Tribunal to
2 adjourn the hearing to give it time to decide which of
3 those two courses it is inviting the Tribunal to take."
4 So that was the basis upon which you were
5 proceeding. Then if we actually look at what it was you
6 were expecting the Office of Fair Trading to do, and
7 indeed the Office of Fair Trading themselves have
8 recognised, page 48, line 2:
9 "The OFT recognises that if it decides to invite the
10 Tribunal to take the second course, what we have called
11 the schedule 8 course, then there is still quite a lot
12 more work that needs to be done. The OFT has accepted
13 that if it were to decide to ask the Tribunal to allow
14 the proceedings to carry on, it would have to explain in
15 very clear terms (a) the entirety of the constraints
16 that it now contends were included in the 15 bilateral
17 arrangements; (b) how those constraints fit within the
18 description of the infringements set out in the
19 decision; and (c) whether and how the theory of harm
20 expounded in the decision applies to an agreement
21 including those, but only those, constraints."
22 What was there contemplated, therefore, was that
23 there were two possibilities that were going to arise
24 out of what the Office of Fair Trading would do on
25 Wednesday. The first is that it would cease to contest

1 the appeals, and the second is that it would seeking to
2 down the schedule 8 route. That point was then also
3 reiterated on page 50, it starts at page 49 where at
4 line 20 you said:
5 "What we are minded to do now is to direct that the
6 OFT indicate to the parties and to the Tribunal by 4 pm
7 on Wednesday, 9 November whether it continues to contest
8 these appeals and, if so, on what factual and legal
9 basis.
10 "We would therefore adjourn this hearing until
11 Friday [11th] ... on that morning, if the OFT has
12 decided, as it says, to amend the decision and so has
13 ceased to contest these appeals, we will consider what
14 order it is appropriate to make to bring the appeals to
15 an end. We will not at that stage consider costs.
16 "If the OFT has decided to invite the Tribunal to
17 adopt the schedule 8 route, we will next Friday hear
18 submissions from the parties about whether they are
19 satisfied with the OFT's description of its case, in
20 terms of its clarity, and we will at that stage set
21 a timetable for hearing any dispute about the
22 appropriateness of proceeding as the OFT wishes."
23 Therefore, against that background, it was with some
24 surprise that one saw the document produced by the
25 Office of Fair Trading on Wednesday evening. The first

1 thing that is of great surprise, bearing in mind the
2 position of the OFT as a regulator here, that it does
3 not address the points made the previous Thursday.
4 So the first thing it does not address or explain is
5 the position by reference to paragraph 40 of the
6 skeleton argument. Remember, that's what Mr Lasok came
7 along to address on the previous Thursday. He said "We
8 are still relying on paragraph 40(a)", and of course
9 when you look at this document there is no reference to
10 paragraph 40, and particularly to paragraph 40(a), which
11 I have described as the figleaf.
12 Now, notwithstanding that surprising coyness, it is
13 in fact evident from analysis that the concession that
14 was made the previous Thursday concerning
15 paragraphs 40(b) to (d) now also encompasses and extends
16 to paragraph 40(a), and that is evident from the terms
17 of paragraph 6 of this document, in that firstly they
18 don't address paragraph 40 at all, but paragraph 6 makes
19 it clear that they have dropped any requirement that
20 where a price change is instigated by one manufacturer,
21 any requirement to change the retail price of
22 a competing manufacturer's brand. So that's completely
23 gone.
24 Of course, it's very important to note, not only
25 does that destroy any reliance on 40(a), (b), (c) or

1 (d), we say it actually also self-evidently destroys the
2 theory of harm which is in the decision, which is based
3 upon precisely what you see in paragraph 6.
4 So the entire theory of harm has gone. Now,
5 a theory of harm, why are we talking about theory of
6 harm in relation to this case? It's because this case
7 is an object infringement case and as part of proving
8 that the agreements were anticompetitive by object, the
9 Office of Fair Trading seeks to prove a theory of harm,
10 which is the harm that they say that these agreements
11 economically give rise to.
12 Now, that's all gone, so paragraph 40 has gone, and
13 the requirement to change the retail price of the
14 competing brand has gone, and so we are left with, as
15 the Tribunal says, that they are now relying on what
16 appeared to be two restraints in paragraph 2.
17 Now, these restraints, again, when one talks about:
18 are these restraints in the decision, the critical point
19 of course is whether these are restraints which are
20 relevant in the decision, in the sense of being the
21 restraints on which the theory of harm is based.
22 Because that's the whole purpose of -- ie are they the
23 restraints that give rise to the anticompetitive effect?
24 For instance, take an example, if you pointed to the
25 fact that, in the -- I can't remember whether it does or

1 it doesn't, but I suspect it does -- voluminous
2 decision, pointed to the fact that there is reference to
3 agreements which provide for Imperial's products to be
4 placed on the gantry in a particular way. If you are
5 going to place Imperial's products there, then
6 Gallaher's products wouldn't be placed there. So on one
7 view of the world, you say "Well, that's a restraint".
8 But that's not a restraint that is alleged to give rise
9 to any anticompetitive effect.
10 Now, at this stage, what should the Tribunal be
11 doing in relation to this, in the light of the way this
12 has come forward? The first point is: the Tribunal
13 should be noting, and therefore determining, that in the
14 light of what the OFT itself said last Thursday, these
15 restraints and any theory of harm said to be based on
16 them are not within the decision. That point was made
17 clear by the Office of Fair Trading on Day 26 in the
18 passages we have looked at.
19 Very curiously, what is said in this document is
20 that what is called this refined case reflects a part
21 but not whole of the infringement found in the decision.
22 Now, this is again very odd mealy mouthed language, but
23 it is not language consistent with saying it is within
24 the decision, but in any event, if that's what whoever
25 drafted this meant to say by this language, it is

1 contrary to the concession that was made. This is
2 an important point. This concession was made in the
3 context in which the Office of Fair Trading was asking
4 you for an indulgence. The Office of Fair Trading was
5 asking for an adjournment of these proceedings. So you
6 have granted an indulgence to them in the light of what
7 they said.
8 Now, in our submission, one can't conduct litigation
9 on this basis where a party comes along to court, on
10 Day 26, the eve of expert evidence, and says "This is
11 now my position, I am making this concession", and then
12 the case is adjourned for over a week, and then say
13 "Well, actually, I didn't really mean it, I have this
14 other case that I now want to run which I say is within
15 the case". To say this is hopeless is really
16 an understatement.
17 One comes back to: what is the debate that
18 the Tribunal should be concerned with? The debate
19 should be whether the refined case that they are putting
20 forward can and should be dealt with by the Tribunal
21 pursuant to its powers in schedule 8. That was the
22 debate that you envisaged in your ruling last week, that
23 we would then be having.
24 So in my submission, that is the appropriate legal
25 framework, it's: can they bring this refined case in

1 schedule 8?
2 In relation to paragraph 2(b), even when we come to
3 consider the refined case, paragraph 2(b) is echoing the
4 point that arose on Day 17, which is the self-funded
5 promotion by the retailer, because this is -- I am not
6 going to -- lots of criticism I want to make of it, I am
7 not seeking to do that, but what is it actually talking
8 about? It is a requirement or expectation the retailers
9 would adhere to the manufacturer's strategy in the
10 absence of manufacturer wholesale price changes or
11 alternative manufacturer instructions.
12 They deal with it in paragraph 5, where they explain
13 that the agreement or concertation was that the retailer
14 would not itself move prices for linked competing brands
15 in such a way as to take the price of the manufacturer's
16 brands out of line with the manufacturer's P&D strategy.
17 So it's got nothing to do with the manufacturers,
18 because the case at this stage is recognising that each
19 manufacturer can try and get a competitive advantage by
20 moving the price of his product. This is simply the
21 point about retailers.
22 Now, the simple point about that is: this point
23 cannot even form part of the debate. I remind you again
24 of your very clear ruling about this last week. What
25 the Office of Fair Trading was to do was, in respect of

1 the restraints that it was going to put forward, to
2 explain how they fit with the description of the
3 infringements, but importantly whether and how the
4 theory of harm applies to an agreement containing that
5 restraint.
6 Now, what is the theory of harm that they are
7 putting forward here? Where does one find it? The only
8 paragraphs that could be said to be -- this document,
9 you won't be surprised to know, this is for a different
10 day, is a wholly inadequate document as a basis for this
11 case to go forward. But at the moment I am just
12 focusing on this argument: the theory of harm, you see,
13 you get an assertion in paragraph 8:
14 "The OFT's case remains that whichever way a P&D
15 arrangement is implemented, the result is that
16 competition is restricted and consumers are harmed.
17 Under the refined case, the harm arising from each
18 infringing agreement in isolation accords with that set
19 out in 6.217 [again, a lot I could say about that but
20 I won't at the moment] whereby the rival manufacturer
21 would have a reduced incentive to lower its wholesale
22 price and a greater incentive to increase its wholesale
23 price.
24 "10. Where the rival manufacturer also operates
25 a P&D, it will likewise create a reduced incentive for

1 the manufacturer to lower its wholesale prices and
2 a greater incentive to increase wholesale price.
3 Therefore a consequence of both manufacturers having P&D
4 is that both manufacturers would have an increased
5 incentive to raise their wholesale price", and so on.
6 In other words, this is entirely, paragraphs 9 and
7 10, focused on the incentives and disincentives alleged
8 to be imposed or impressed on the manufacturers.
9 That has no relationship with whether or not
10 retailers independently are or are not inhibited from
11 self-funding.
12 Now, the submission, we say, is that in so far --
13 firstly, the only basis on which you should be going
14 forward is that you need to consider whether the refined
15 case can proceed under schedule 8, and it's essentially
16 an amended case --
17 **THE CHAIRMAN:** Well, schedule 8, the powers under
18 paragraph 3 appear to apply both if we confirm the
19 decision and if we set aside the decision. But is what
20 you are saying that the only option that we would have
21 at the end of the day on this case is to set aside the
22 decision and exercise the powers rather than confirm the
23 decision and exercise.
24 **MR HOWARD:** My submission is today the only proper exercise
25 of jurisdiction by this Tribunal is to set aside the

1 decision, and that that is something that the Tribunal
2 must do, because of the constraints in 40(a) to (d) are
3 no longer sought to be established by the Office of Fair
4 Trading, that means the Office of Fair Trading on the
5 decision no longer has a case, therefore the appeal must
6 be allowed and the decision set aside.
7 In my submission, that's the important starting
8 point for where one should be, and that the reflected
9 case is not in the decision and therefore you cannot --
10 in other words, if one thinks about it, you couldn't
11 confirm the decision because your decision would be
12 a different decision, even if you went down their route,
13 you would actually be saying something different, and
14 therefore the decision itself cannot stand.
15 So that, in my submission, is the starting point.
16 In terms of framing the debate under schedule 8, having
17 set aside the decision, you will then hear submissions
18 to determine whether, notwithstanding that, the Office
19 of Fair Trading should be permitted to run its refined
20 case.
21 In my submission, today you can say you cannot run
22 your refined case within paragraph 2(b) because, as you
23 don't have a theory of harm, therefore you haven't in
24 any way sought to articulate a case as to what
25 anticompetitive object this has, or why it has

1 an anticompetitive object, and therefore that is
2 something we can just dismiss at this stage.
3 Then the questions for you going forward will be:
4 firstly, in these circumstances where you have to look
5 at where we are, Day 27 now, and so on, I don't need to
6 repeat all of that, in these circumstances, does
7 the Tribunal -- including the circumstance, in my
8 submission, that you are bound at this stage to set
9 aside the decision and allow the appeal at least to that
10 extent, I am not saying you can't retain jurisdiction at
11 least to decide the issue of whether you can go further
12 under schedule 8, but you have to decision: do you
13 actually have jurisdiction in that situation to, as it
14 were, conduct what is really something which amounts to
15 an investigation as to whether there is some other
16 infringing agreement here? And if you do have
17 jurisdiction, is it appropriate for you to embark on
18 such an investigation and decision?
19 **THE CHAIRMAN:** I don't think they are asking us to embark on
20 an investigation. As I understand it, the OFT
21 accepts -- although Mr Lasok may tell me differently --
22 that we would have to arrive at our findings on that on
23 the basis of the evidence that is currently before
24 the Tribunal.
25 **MR HOWARD:** The thing is, if you did it -- that's extremely

1 helpful, because, you see, that's not really what the
2 Office of Fair Trading is saying. One needs to be very
3 careful about all of this. If one said, for instance,
4 to the Office of Fair Trading, "Where is your evidence
5 that supports the current case? If we stop now, where
6 is it?" There is not any evidence that supports the
7 current case in terms of a theory of harm which is
8 actually articulated by experts. So what they say --
9 and this is actually remarkable -- in this document is
10 at paragraph 23, "It would not be difficult to put the
11 OFT's refined case to the expert economists. In other
12 words, we haven't put this refined case to the experts.
13 We don't have any expert support for our case. What we
14 are hoping to do is to conduct an enquiry in front of
15 the Tribunal whereby we seek to either ask, put in
16 additional evidence from Professor Shaffer, by asking
17 him questions, or hoping that we will ask him questions,
18 or by asking questions of our experts on a case that has
19 not currently been put."
20 Now, in my submission that is effectively
21 an investigation.
22 One of the difficulties is it's putting the cart
23 before the horse. You have to remember that this -- we
24 will come more fully to our submissions about
25 schedule 8, but if one just thinks about this for

1 a moment, this is in effect -- these are criminal
2 proceedings, and this is a prosecution. In
3 a prosecution, the normal thing is, of course, the
4 prosecutor comes first and he proves his case. If he
5 can't prove his case, then the defendant, at half time,
6 says "There is no case to answer here".
7 Here of course it's being constructed, although the
8 onus of proof remains on the Office of Fair Trading,
9 it's an appeal where we go first. The rationale for
10 that is that you have an SO at the administrative phase,
11 followed by a response by the party who is alleged to
12 have done something wrong, followed by the decision. In
13 other words, there is a phase at which everything is
14 investigated, and the results of the investigation are
15 set out in the decision.
16 Now, think about where we are here. We have
17 a theory of harm which has not been articulated, other
18 than at best in these paragraphs 9 and 10 in relation to
19 this infringement, it's not been the subject of any
20 deliberations at the SO stage, and yet we are the
21 appellants, we have to call our evidence first, how on
22 earth can this operate within the confines or operate
23 properly under the procedures that you have to consider?
24 But that's all, if you like, for another day. I mean,
25 the thrust of what we say is, or will be saying, that

1 you either don't have jurisdiction or the jurisdiction
2 is one which couldn't be exercised in these
3 circumstances because what you are in effect doing is
4 allowing the investigation phase to be conducted before
5 the Tribunal.
6 What we would also say is that of course before this
7 Tribunal -- and we will look at the jurisprudence when
8 we come to it -- it is not entirely the same as normal
9 litigation, in the sense that if there were normal
10 litigation you would have a situation where the Office
11 of Fair Trading is seeking to amend and you would
12 consider under the usual rules that apply in litigation,
13 whether you can amend. So you would consider the
14 cogency of the amendment, the lateness, the prejudice,
15 and so on. All of those considerations come in here,
16 but there is this additional hurdle as to whether it is
17 even appropriate for this sort of issue to be raised in
18 this sort of way in this hearing.
19 What we say is that in relation to paragraph 2(b) of
20 their refined case, it's actually self-evident that
21 there is nothing to debate, because there isn't a theory
22 of harm that they are even now seeking to identify. In
23 relation to 2(a), we say there are lots of deficiencies
24 with it, but we will address that in the context of
25 schedule 8.

1 So we say that that is how you should proceed and
2 that's the correct legal framework for going forward,
3 and what one would then determine is what date
4 the Tribunal has available to hear matters, and then we
5 would work out when skeleton arguments would be served.
6 We, for our part, would say, believe that this could
7 be dealt with towards the end of next week, and what we
8 would have in mind is that we would produce our skeleton
9 argument on Tuesday at 4.30, and the Office of Fair
10 Trading should respond by Wednesday at 4.30, the hearing
11 should commence on Thursday at 2pm, and should run to
12 Friday, and the Tribunal would then hopefully be in
13 a position to deliberate and give its conclusions the
14 following week.
15 **THE CHAIRMAN:** You don't envisage needing to adduce some
16 evidence of any kind?
17 **MR HOWARD:** No, at the moment I don't. I don't really
18 understand what evidence would be appropriate.
19 Obviously we would be making submissions as part of our
20 case as to the prejudice suffered, but those are points
21 which I don't think really -- obviously one could put in
22 a witness statement, but they are really points of
23 submission which I don't think need to be put through
24 a witness, but they could be if that were necessary.
25 **THE CHAIRMAN:** No, no, I am not at all pressing you to --

1 **MR HOWARD:** No, I am just making it clear that we will be
2 saying, as part of the submission, this is grossly
3 prejudicial. One of the points again you won't be
4 surprised that I will be making, in addition to those
5 I have reflected on, plus many more that you can
6 imagine, but I will be also saying that there is a very
7 important public interest in the finality of litigation
8 and in particular in the finality of these sort of
9 proceedings, and not only has this investigation been
10 going on for seven long years, but we have come along to
11 deal with the case. We have frankly destroyed the
12 Office of Fair Trading's case, and they cannot at this
13 stage, and they should not be permitted, in the light of
14 that, to suddenly say "Well, I would like to say I've
15 got a different case and we can all proceed on that
16 basis". It entirely subverts the process of the appeal
17 and really the process under which these sort of
18 proceedings are to be conducted. I can't make that
19 point sufficiently strongly.
20 The other point I would make is this, in relation to
21 what was said this morning -- well, actually I don't
22 think there is anything I particularly need to respond
23 to, unless there is anything you want me to address on
24 those. I think I have probably covered the points that
25 were in your letter, but if there is anything --

1 **THE CHAIRMAN:** Except for this, Mr Howard: you did say this
2 morning that you don't accept that the OFT's submissions
3 are satisfactory, and as we suggested in our opening
4 comments this morning, we wondered whether the first
5 step was actually for the OFT to amplify its case for
6 the benefit of the parties, but you don't seem in your
7 proposed timetable --
8 **MR HOWARD:** In my submission, this is just going about
9 things in entirely the wrong way. This is not the first
10 time that the Office of Fair Trading has sought to
11 clarify its case. There has to come a point at which
12 the Tribunal says, "Look, that is your case that you
13 have put forward, these ten paragraphs, nine
14 paragraphs". That's their case. That's the case that
15 the Tribunal should be ruling on. One can't go through
16 a continual process of saying, "Well, why don't you have
17 another go, Office of Fair Trading, let's see where we
18 get to next week" and then just keep rolling forward.
19 You have directed them, last week, to set out, very
20 clearly -- those were the words -- what their case is.
21 This, we are entitled to infer, is the very clear and
22 the clearest statement they can make of their case. You
23 know, you asked them to identify the entirety of the
24 constraints, how they fit with the description of the
25 infringements, whether and how the theory of harm

1 expounded in the decision applies. This is the answer.
2 Now, it may not be a very good answer, I agree, but
3 that is the answer, and we can't just go down a process
4 of constantly rolling forward and saying "Well, it
5 doesn't look a very good case, why don't you come up
6 with something more", because that's simply not fair to
7 the parties, and we are entitled to say "That's their
8 case, frankly it doesn't amount to a row of beans", or
9 "it's full of holes, and that's the case they must live
10 with". I would suggest it is not necessary or
11 appropriate for the Tribunal to seek to invite them to
12 do a better job or whatever it is. That's their case.
13 **DR SCOTT:** I think it's just worth putting this debate into
14 context. It arose from the fact that we had heard the
15 factual evidence from the cross-examination of
16 witnesses, we realised that in moving to the expert
17 evidence it was going to be important that the experts
18 commented on matters that seemed relevant to the factual
19 evidence that we had heard, but we had not yet got
20 closing submissions, so we hadn't been taken to the
21 detail of those matters, which in some cases have not
22 been addressed in the oral evidence stage because there
23 were no witnesses, as you appreciate, from the Gallaher
24 side to take a for instance. So that the effort that
25 was going on was to clarify the point that we had

1 reached at that stage.
2 Now, as we have hinted in our letter, we see that
3 there is room for further clarification, clarification
4 which in the ordinary course of events would have
5 occurred in closing submissions, but we haven't reached
6 that stage yet.
7 **MR HOWARD:** Well, I am not sure I understand that. Closing
8 submissions is not a time for clarification of your
9 case. That is again --
10 **DR SCOTT:** Clarification in the sense that we would be
11 pointed to the parts of the decision and the evidence
12 which are asserted by the OFT as underlying what they
13 are saying.
14 If you imagine a fried egg, for a moment, part of
15 the lack of clarity that exists, if you imagine that the
16 white of the egg is the case as set out in the decision,
17 and the yolk is paragraphs 2(a) and (b), part of the
18 area which needs clarifying is: is that yolk sitting
19 firmly inside the white, partly on the border of the
20 white, or entirely outside the white?
21 Now, as we understand it from Mr Lasok's documents,
22 he isn't yet saying, in the submission that he put
23 forward, that it's entirely outside the one --
24 **MR HOWARD:** No, no, you are misunderstanding, then, my
25 submission. He is not saying that. He has done

1 a volte face. He came along last week acknowledging
2 that any case he had outside of 40(a) to (d) was outside
3 the decision. That's the critical point. We have
4 passed that point. What, without any explanation at
5 all --
6 **DR SCOTT:** I understand that. What you are saying is he has
7 made a concession from which he now appears to be
8 resiling.
9 **MR HOWARD:** That's right, and without any apology or
10 explanation, and in the context -- and this is what's
11 very important -- it's not that we were just one day we
12 heard from Mr Lasok and he said "I concede this", and
13 then comes back, "We are carrying on with the case" or
14 he concedes something on Friday afternoon and then on
15 Monday morning, nothing has changed, we come back on
16 Monday morning and he says "Oh, I didn't really mean
17 that, I am withdrawing the concession". One could see
18 that would be one situation. But to turn up on Day 26
19 and, as it were, say, you know, drop what is, I was
20 going to say a bombshell, but of course it was
21 an extremely welcome one from the appellants' point of
22 view, saying "I concede (a) that 40(b) to (d) have gone,
23 and (b) that although I cling on to 40(a), if I can't
24 maintain that, I am outside the decision, and therefore
25 we need an adjournment for us to consider whether we

1 drop the case or whether we seek leave to continue under
2 schedule 8", to then say "Actually, no, no, no none of
3 that was necessary, it wasn't necessary to put off the
4 experts", because that's really what it amounts to, "it
5 wasn't necessary to have this adjournment because I say
6 actually this refined case, it's always been my case".
7 Remember, that's what they have to say "This has always
8 been my case", and that the appellants should -- the
9 subtext has to be: "the appellants should always have
10 realised that was my case and should have been ready to
11 deal with that".
12 Once we start to think of it in those terms, it's
13 actually completely ridiculous. If you look at, for
14 instance, what Professor Shaffer said when he was
15 considering our version of events, for instance, that
16 wholesale prices were what was driving this, he said,
17 "That's a fundamentally different type of situation to
18 the one I have considered", fundamentally. So you can't
19 possibly say on any fair view of this that what they are
20 putting forward as the refined case was the case that we
21 had come to deal with in front of you. Mr Lasok
22 recognised that last week.
23 It's quite transparent in fact now what has happened
24 here, is that the Office of Fair Trading realises --
25 this is what must have happened at the beginning of this

1 week -- that they are facing a situation where they
2 recognise they couldn't cling on to 40(a) because it's
3 completely hopeless, the decision therefore wouldn't be
4 able to stand, and then it would have to be set aside,
5 the appeals allowed, and frankly it's pretty obvious
6 what follows in terms of costs.
7 So they are now trying to wriggle out of that
8 position because that is an uncomfortable position.
9 That, in my submission, is all that has happened. In my
10 submission, the Tribunal should not simply say "Well,
11 they conceded this last week, we took a very serious
12 step in the light of that, and we will now let them
13 withdraw that". It's just not, in my submission, how
14 sensible litigation, particularly litigation of this
15 type, is conducted. We are not in Brentford County
16 Court. These are incredibly serious proceedings, these
17 are criminal proceedings on the basis of which this
18 regulator is purporting to fine my clients no less than
19 £110 million. In my submission, it should be held by
20 this Tribunal to the concession it has made to this
21 Tribunal, and that means that, as I said, the decision
22 cannot stand, and all that we can debate is 2(a) and
23 whether that proceeds under schedule 8.
24 **THE CHAIRMAN:** Thank you, Mr Howard. Before we break for
25 the short adjournment, can I just see who else, apart

1 from Mr Lasok, is planning to make submissions this
2 afternoon, so we get a rough idea of the timetable for
3 this afternoon?
4 **MR SAINI:** Madam, I certainly want to make submissions for
5 at least 15 minutes, because although we adopt a lot of
6 what Mr Howard says, our position is not identical to
7 the position he is taking in terms of the direction
8 the Tribunal should give.
9 **MR THOMPSON:** I would be in the same position, not least
10 because this document that is being put before
11 the Tribunal doesn't mention my client at all, I don't
12 think it mentions any of the retailers.
13 **THE CHAIRMAN:** So you will be 15 minutes as well. Mr Flynn?
14 **MR FLYNN:** I shall take instructions over lunch, Madam,
15 I wouldn't need more than 15 minutes, but I think there
16 will be a couple of things I want to say to follow on
17 from Mr Howard.
18 **MR KENNELLY:** Madam, on behalf of Shell I will need about
19 five minutes, but we do have an additional point to
20 make.
21 **THE CHAIRMAN:** So that would take us to about ten to 3, and
22 then do you know how long you will be, Mr Lasok?
23 **MR LASOK:** I don't know, possibly 20 minutes.
24 **THE CHAIRMAN:** Well, we will come back at five past 2, and
25 we will keep people to those time estimates to make sure

1 that we finish in good time this afternoon. Thank you.
2 (1.05 pm)
3 (The short adjournment)
4 (2.05 pm)
5 Submissions by MR THOMPSON
6 **MR THOMPSON:** Madam Chairman, the basic point that I wish to
7 make on behalf of CGL is that there are five or six
8 appeals in this case, depending on whether you treat
9 Morrisons and Safeways as separate. Each of those
10 appeals is substantial. For example, the CGL fine was
11 over £14 million, and in respect of each of these
12 appeals the OFT must justify its proposed course of
13 action. Whatever general defects there are these
14 specific points must be addressed, and that's why
15 I mentioned the fact that we weren't even mentioned in
16 this note that the OFT has put up. I am not intending
17 to argue the points identified by the letter from
18 the Tribunal, but to make certain preliminary issues
19 which I hope will assist the Tribunal in taking this
20 matter forward.
21 In my submission, there are in substance three
22 questions that need to be addressed in relation to the
23 CGL aspect of this appeal. First of all, has the OFT
24 complied with the order of the Tribunal in respect of
25 the Co-op? We would say that the answer is

1 overwhelmingly and obviously no. It is clear that the
2 order intended some degree of particularity and none has
3 been forthcoming.
4 Secondly, are paragraphs 2 to 8 of the OFT's note
5 within the terms of the OFT's decision and defence in
6 respect of the Co-op? Again, we would say no. I adopt
7 the submissions of Mr Howard in this respect. I would
8 simply add that 2(a) is in reality wholly unclear for
9 what it means, and 2(b), for the reasons Mr Howard has
10 given, is outside the scope of the decision on any
11 sensible view of the matter.
12 Thirdly, is there any good reason why the OFT should
13 be permitted to abandon its case against the Co-op as
14 advanced in the decision and the CGL defence and in the
15 hearing to date, and to run a new case at this stage?
16 We would say again the answer must be overwhelmingly no.
17 The reality of the situation is that the OFT has
18 been forced to recognise that the theory of harm
19 advanced in the decision, the defence to CGL's notice of
20 appeal, and in the expert evidence of Professor Shaffer,
21 is unsupported by the facts. That's not because any new
22 facts have emerged. It is simply that the OFT had
23 failed properly to engage with either the documentary
24 evidence or the witness evidence, including witnesses
25 who had been available to the OFT and provided evidence

1 in 2005 and indeed earlier, and it had therefore totally
2 misunderstood and misrepresented that evidence in both
3 the statement of objections and the decision.
4 Now, the consequence of that, in my submission, is
5 not that schedule 8 comes into play, but that the OFT is
6 in reality bound to be seeking to amend its defence at
7 a very late stage in these proceedings. These are
8 formal, quasi-criminal proceedings in which the OFT is
9 required by the CAT rules to define its position in its
10 defence at an early stage for the good reason that
11 the Tribunal wishes to exercise case management powers
12 including early reading into the case.
13 So far as CGL is concerned, the defence is at core
14 bundle 5, tab 57. {C5/57/80} The first step that would
15 need to be considered if these proceedings were to be
16 permitted to proceed on the basis now suggested by the
17 OFT that whether the OFT should be allowed to amend its
18 defence and in that respect I would refer the Tribunal
19 briefly to rules 11 and 14, which make it clear that the
20 power to amend is a very restricted one. If I could
21 just take the Tribunal to that very briefly and the
22 point would be clear.
23 It's rules 11 and 14 of the Tribunal Rules.
24 **MR SUMMERS:** Is there a page reference, by any chance?
25 **MR THOMPSON:** In my version, the 2010 purple book, it's

1 page 2108.
2 **MR SUMMERS:** Thank you.
3 **MR THOMPSON:** Rule 14(3) is the best starting point.
4 It sets out three mandatory obligations for the OFT
5 to fulfil. First, a succinct presentation of the
6 arguments of fact and law upon which the respondent will
7 rely. Secondly, the relief sought by the respondent and
8 any direction sought pursuant to Rule 19. And (c)
9 a schedule listing all the documents amended to annex to
10 the defence.
11 Then at 5:
12 "There shall be annexed to the defence a copy of
13 every document upon which the respondent relies
14 including the written statements of all witnesses of
15 fact, and where practicable expert witnesses, if any."
16 So that is the basic position, that the OFT has to
17 set out a comprehensive statement of its case in
18 response to the notice of appeal.
19 Then 13(7) says:
20 "Rules 9, 10 and 11 shall apply to the defence."
21 **THE CHAIRMAN:** 14(7)?
22 **MR THOMPSON:** I am sorry, 14(7).
23 If one turns then to Rule 11(3) on the previous
24 page, it's stated in mandatory terms:
25 "The Tribunal shall not grant permission to amend in

1 order to add a new ground for contesting the decision.
2 This applies parri passu to the defence unless", and
3 there are three restrictive conditions:
4 "First, such ground is based on matters of law or
5 fact which have come to light since the appeal was
6 made."
7 In my submission, on no fair reading could that be
8 said to be the position here. The only point is that
9 Fiona Bayley's evidence given in 2005 has now been
10 subjected to cross-examination.
11 "Secondly, it was not practicable to include such
12 ground in the notice of appeal."
13 Equally, that would be inapplicable.
14 "(c) the circumstances are exceptional."
15 In my submission, the only exceptional nature of
16 this case is that it's a particularly unmeritorious
17 application, given that it comes so late in the day.
18 In my submission, the OFT faces very, very serious
19 questions if it were to seek now to amend its defence
20 against the Co-op, effectively to run a new case.
21 Indeed, we say that it is plain that the OFT should
22 not be permitted to advance a new case at this stage,
23 there is no good reason for it, it's simply a reflection
24 of the hopelessness of the OFT's existing case that it's
25 seeking to run a new one at this stage. I note in this

1 respect that the evidence in respect of the Co-op ended
2 over four weeks ago on 13 October 2011. The OFT didn't
3 seek to put either of the points on which it now relies
4 to any of the CGL witnesses or to Mr Goodall of ITL, at
5 the least any application to amend the CGL defence in
6 the way suggested would require specific justification
7 by reference to specific documents or witness evidence
8 relevant to the Co-op, and in my submission again the
9 OFT would face the highest possible barriers in trying
10 to achieve that at this stage.
11 Turning to schedule 8, I would say that the same
12 result is indicated by reference to schedule 8.
13 Paragraph 3(2) sets out the Tribunal's central
14 obligation to determine the case by reference to the
15 grounds set out in the notice of appeal. The terms at
16 paragraph 3(2) are intended to confer on the Tribunal
17 the same remedial powers as the OFT, but not to give
18 the Tribunal a free-ranging power to hear new cases if
19 the existing case, as set out in either the notice of
20 appeal or the defence, turns out to be hopeless on the
21 facts.
22 I do not want to anticipate next week's hearing
23 which is to take place, I would simply give the four
24 main headings that I think would be taken into account
25 that would lead to this conclusion.

1 First of all, the early case law of the CAT in this
2 Tribunal in Napp and Argos, to the effect that the OFT
3 is not entitled to bolster its case on an appeal. In my
4 submission, this would be a gross infringement of that
5 principle.
6 Secondly, the rulings of the Tribunal in MasterCard
7 and ABI. In my submission, this is a much more extreme
8 case than either of those cases.
9 Thirdly, the restrictive principles adopted by
10 the Tribunal in Burgess and Albion as to the limited
11 circumstances in which the Tribunal should exercise such
12 a jurisdiction. In my submission, those principles
13 again give a clear answer.
14 Finally, last but not least, the restrictive
15 approach that the OFT itself has advocated in a number
16 of cases, including Burgess and before the Court of
17 Appeal in Albion, where it specifically intervened to
18 make its position known on the restrictive nature of
19 schedule 8, paragraph 3(2). One sees that at
20 paragraph 127 of the Court of Appeal judgment, and
21 paragraph 123 of Burgess, where the OFT is summarised as
22 saying:
23 "The function of the Tribunal, being essentially
24 appellate, the Tribunal should not likely turn itself
25 into a court of trial."

1 In my submission, that sums the position up very
2 well.
3 Finally, in my submission, the expert position
4 cannot be ignored, and this is a point that Mr Howard
5 has made. The reality is that the OFT's core theory of
6 harm was stated in paragraphs 6.215 to 217 of the
7 decision, defended in the CGL defence, and in the expert
8 report of Professor Shaffer. That was not a flash in
9 the pan, or an afterthought, as it emerged from
10 Professor Shaffer had advised on this theoretical basis
11 in 2007.
12 Six distinguished expert economists have engaged
13 with Professor Shaffer's theories as the basis for the
14 OFT's case for over a year, including a series of
15 bilateral and multilateral meetings and documents
16 produced under the supervision of the Tribunal to ensure
17 that there were no misunderstandings of their respective
18 positions.
19 The OFT now appears to be suggesting that all this
20 work can be abandoned on the basis that
21 Professor Shaffer's opinions were based on
22 a comprehensive misunderstanding by the OFT of the
23 facts. That leaves the parties and the Tribunal in
24 a hopeless position to decide this case, with no
25 theoretical analysis having been attempted of the

1 factual position that the OFT now contends to prevail.
2 So overall, this is a position where the OFT's case
3 is in complete disarray for the simple reason that the
4 decision, the CGL defence and the OFT's case to date has
5 been based on factual premises that are wholly divorced
6 from reality. That is not a situation where the OFT
7 should be granted extraordinary indulgence to try and
8 come up with a new case with some resemblance to the
9 facts. It is a case where the OFT's decision should be
10 set aside and the OFT ordered to pay CGL's costs.
11 Thank you.
12 **THE CHAIRMAN:** Yes. They haven't, so far as I am aware,
13 applied to amend their defence. If you were right --
14 and this is just exploring the issues that we are going
15 to need to explore in due course -- that their defence
16 doesn't cover the case that they are now putting
17 forward, but they don't actually apply to amend their
18 defence, where does that leave the Tribunal in terms of
19 what powers we have to exercise?
20 **MR THOMPSON:** In my submission, there has effectively been
21 a concession last Thursday that three limbs of the
22 defence have fallen off, now sub silentio, there is
23 a concession that a fourth one has fallen off. There is
24 really nothing left except a very hazy allegation of
25 micromanagement, you may recall in the OFT case, which,

1 in my submission has also been shot to pieces by the
2 evidence, which is clearly that promotions were used in
3 effect to compete, and were not to manage parities and
4 differentials, and as I understand it, part of the
5 retreat by the OFT includes a concession that that is
6 right, although paragraph 2(a) of the note is completely
7 uncertain in its meaning. It seems to be a strange
8 agreement that the retailers would simply hop around at
9 the manufacturer's beck and call, without any wholesale
10 movements in the background. That seems to be a novel
11 and bizarre allegation which hasn't been explained, and
12 which obviously we would contest were the matter to go
13 forward.
14 **THE CHAIRMAN:** As far as practicalities are concerned,
15 Mr Howard this morning suggested that he would be
16 prepared to put in submissions by, was it close of play
17 next Tuesday, Mr Howard? We may need to explore whether
18 there could be a joint submission or some way in which
19 we avoid having five versions of the same thing. But as
20 far as that kind of timetable is concerned, is that
21 satisfactory to you and your clients?
22 **MR THOMPSON:** I am sure we could meet such a timetable, and
23 we would obviously focus on the points that I have been
24 making to date, which would relate to the CGL appeal,
25 which I think mustn't be forgotten is a substantial

1 appeal in its own right --
2 **THE CHAIRMAN:** Yes.
3 **MR THOMPSON:** -- and where the OFT has to make its case or
4 give up.
5 **THE CHAIRMAN:** Thank you. Thank you very much. Who is
6 next? Mr Saini.
7 Submissions by MR SAINI
8 **MR SAINI:** Madam, I want to make three preliminary points
9 and then move on to try and assist the Tribunal on the
10 order it should make as to what is heard next week.
11 The three preliminary points are as follows: first
12 of all, in our submission, the Tribunal has to proceed
13 on the basis that the concession that Mr Lasok made last
14 week remains in place. He has made no application to
15 withdraw that, and therefore next week's hearing and
16 today's hearing is proceeding on that basis.
17 Secondly --
18 **THE CHAIRMAN:** Could you just enunciate what you see that
19 concession as being?
20 **MR SAINI:** As I understand it, as articulated by Mr Howard
21 this morning, the concession was that apart from the
22 paragraph 40(a) case, the remainder of paragraph 40(a)
23 was not being pursued.
24 **THE CHAIRMAN:** The remainder of paragraph 40 wasn't being
25 pursued?

1 **MR SAINI:** Yes.
2 **THE CHAIRMAN:** Yes.
3 **MR SAINI:** And now we have a position where, looking at the
4 latest paper that has come through, it doesn't seem that
5 40(a) is being pursued either, so that's our
6 understanding, and we will hear what Mr Lasok has to say
7 in due course, but there is no application to withdraw
8 from that position thus far, and were there any
9 application, then there would have to be further
10 argument.
11 **THE CHAIRMAN:** So you say that what we would be considering
12 next week is on the assumption that, at the end of the
13 day, we are going to be asked to set aside the decision,
14 whether the appeal should nonetheless continue because
15 we have power to set aside that decision but exercise
16 the powers under schedule 8, paragraph 3(2)?
17 **MR SAINI:** The first part of that I will agree with, which
18 is that it follows that the decision should be set
19 aside. I am going to come back and deal with the issue
20 of schedule 8 in a moment, but the first point
21 I reiterate is that concessions have been made and there
22 is no application to withdraw them, and it would be
23 a serious matter indeed for a public authority now to
24 resile from a no doubt well-considered position.
25 The second preliminary point is that we agree, with

1 respect, with Mr Howard that there is nothing to be
2 gained by asking the OFT to call in yet further
3 submissions. They have had plenty of chances to do
4 that. They have to stand or fall by their current
5 position in the paper of two days ago.
6 The third preliminary submission, and in this we are
7 slightly disagreeing with Mr Thompson, which is that we,
8 with respect, don't agree that amendments to the defence
9 are really relevant here. Because what the OFT are
10 seeking to do is not amend their defence, they are
11 seeking to move away from the decision. The defence has
12 become a bit of an irrelevance now. It's really the
13 decision that they are trying to move away from or
14 amending the decision. It is no doubt helpful to look
15 at the powers, limited as they are, to amend a defence,
16 but they are not really relevant to the present debate.
17 With those three preliminary points having been
18 made, we want to try and assist the Tribunal in terms of
19 what order it should make; in other words, what's on the
20 menu for next week.
21 We have formulated the issue as follows: should the
22 OFT have permission to defend these appeals on the basis
23 of the case that the appellants committed Chapter 1
24 infringements as identified in paragraphs 2(a) and 2(b)
25 of the OFT's statement dated 9 November 2001?

1 I have put that in very, very wide terms because it
2 leaves it open to anyone to argue whichever points they
3 want to argue, but this is where we essentially are,
4 which is: the OFT are seeking an indulgence to move
5 away, as Mr Lasok accepts, from the decision; they want
6 permission to run a different case.
7 Madam, I have formulated the issue in those terms
8 with the conscious decision to avoid any reference to
9 schedule 8, because in our submission there is a real
10 danger of allowing assumptions concerning the proper
11 role of schedule 8 to infect the issue which
12 the Tribunal is determining. Because our submission
13 next week will be that one cannot use schedule 8
14 particularly subparagraph 3(2) as some covert means to
15 allow the OFT to amend a decision in the middle of
16 a case.
17 **THE CHAIRMAN:** It's more whether the scope of the powers in
18 paragraph 3(2)(a) to (e), to what extent the existence
19 of those powers affects the interpretation of
20 the Tribunal's duty under paragraph 3(1). That's how
21 I would see it.
22 **MR SAINI:** I don't disagree with that way of putting it. As
23 we read some of the debate last week, and also the
24 Tribunal's very helpful letter of yesterday, it seemed
25 to us that too much was being read into schedule 8, and

1 our point is simply this: schedule 8, paragraph 3 under
2 "Decisions of the Tribunal" only comes into effect at
3 the end of a case. It's a provision setting out the
4 orders that the Tribunal can make at the end of the
5 case. What was concerning us was somehow this was being
6 suggested effectively by Mr Lasok last week, that
7 "because at the end of the case you can do X, Y and Z,
8 in the middle of the case, let us change courses and run
9 a different case". We say with respect that's wrong in
10 principle, and that's why we formulate the issue in what
11 one might call bland or neutral terms. Where no
12 assumptions are being made as to the relevance or
13 application of schedule 8 and everyone can argue
14 whatever they want to argue, I should make it clear that
15 although I've identified in that formulation that there
16 is an issue as to whether or not the OFT should be
17 allowed to run paragraphs 2(a) and 2(b), it's obvious
18 that the case that's in 2(b), the retailer initiated
19 case, is a completely new case. But obviously it's
20 a matter for argument next week as to whether or not the
21 OFT have an answer to that.
22 So we would respectfully suggest that's the issue,
23 and we also agree with the timetable that Mr Howard has
24 suggested, we can live with that, and we can also seek,
25 if the Tribunal thinks it is appropriate to co-operate

1 and have a single submission rather than four or five
2 submissions.
3 Thank you very much.
4 **THE CHAIRMAN:** Thank you. Mr Flynn?
5 Submissions by MR FLYNN
6 **MR FLYNN:** Madam, you described this as a case management
7 conference, and that's what it is, so I shan't
8 anticipate submissions to be made on another occasion.
9 What was the case management conference called for? It
10 was to discuss the next steps to be taken, it was
11 envisaged, either in the event of the OFT saying "We no
12 longer contest the appeals" or "we invite the Tribunal
13 to go down the schedule 8,(3)(d) and (e) route".
14 That application by the OFT, in the form of the
15 submissions you received the other day, is entirely
16 defective for that purpose. It doesn't comply with your
17 order because it doesn't specify the factual or the
18 legal basis on which they make that invitation to you,
19 it certainly makes absolutely no reference to
20 developments in the evidence that were said to have
21 provoked this need to adjust their case, because they
22 said "As the evidence has turned out, things have
23 changed", that's what provoked this change of position.
24 There is absolutely no reference to that, there is
25 no attempt to tie it into the decision, and there is no,

1 obviously, reference to how it reconciles, if at all, to
2 Professor Shaffer's theory of harm.
3 It seems to me, if I may make so bold, you
4 recognised in your opening comments that it was
5 a defective application, because you say it would need
6 to be supplemented, you would need a fuller statement.
7 In our submission, you gave the OFT an extraordinary
8 indulgence, as it's been called, and it hasn't taken it.
9 The document you have in front of you is insufficient to
10 persuade you to go down the schedule 8, 3(d) and (e)
11 route. So our primary submission today is that, in the
12 face of that inadequate application, you should today
13 allow the appeals, and if the OFT has a refined or
14 an unrefined case to put, it can do that in a subsequent
15 statement of objections if it is so advised, and
16 the Tribunal could not possibly be criticised for
17 adopting that course.
18 Leaving aside the many changes of position that took
19 place before the decision, there have been several
20 during the course of these appeal proceedings, the
21 unedifying process in regard to the various experts'
22 reports and the number of clarifications, none of which
23 now seem to be the clear case being put forward that
24 have been advanced in the course of it, but we say
25 enough is enough.

1 The secondary submission, if you don't accede to
2 that and you do wish to hear argument on whether to
3 proceed with the invitation that the OFT extends, either
4 to find something within the decision, I don't know
5 whether it's the yolk or a bit of fried bread trapped
6 under the egg somewhere or what it is we are actually
7 looking for, because nobody can make any sense of this
8 document, or to go down the schedule 8 route and carry
9 out what would be an extensive and complex
10 investigation.
11 If you wished to hear submissions on that, then we
12 think you should follow the route suggested by
13 Mr Howard, in other words that we would put in
14 submissions and it would be followed by the OFT, and you
15 should not at this stage give the OFT the chance to get
16 yet again amplify and refine its case. The decision in
17 principle on how to proceed should in my submission be
18 taken by the Tribunal on the basis of what it has before
19 it now, and that, in a way, is my principal submission
20 for today and obviously arguments on the utility, the
21 powers of schedule 8 and so forth, are for next week if
22 that's the way you go.
23 So that's really what I have to say to the Tribunal
24 at this stage.
25 **THE CHAIRMAN:** Thank you very much. Just one moment,

1 Mr Kennelly. (Pause).
2 Submissions by MR KENNELLY
3 **MR KENNELLY:** Madam, Shell's concern is in broad terms that
4 once again we are being swept up with the other
5 appellants, we are called a retailer when we are not in
6 fact a retailer. My three short points are: first that
7 the OFT has failed to comply with the Tribunal's
8 direction in relation to Shell; the new case is not
9 within the four corners of the decision against Shell;
10 and the OFT shouldn't be permitted to make this new case
11 as against Shell. I appreciate I will deal with these
12 very briefly because they will be dealt with most likely
13 on a different occasion.
14 But our basic submission is that whatever the order
15 is made in relation to other appellants, the Tribunal
16 ought to allow Shell's appeal at this stage, because we
17 are in a quite different position and the OFT's new case
18 doesn't relate to Shell at all, it doesn't seek to
19 relate to Shell at all.
20 The Tribunal directed the OFT to deal with the
21 specific factual basis as it emerged from the evidence
22 for the continued case as against the appellants in
23 relation to each bilateral arrangement, and that
24 included the bilateral arrangement between Shell and ITL
25 and Shell and Gallaher. This isn't addressed in the

1 OFT's document at all.
2 We adopt the submissions of Mr Howard and the other
3 counsel in relation to the new nature of the refined
4 case but whatever the broader position, this case
5 doesn't relate to Shell. The Tribunal will recall that
6 the cornerstone of the OFT's case against Shell is in
7 paragraph 7.26 of the decision. The Tribunal has seen
8 this already. This is the part where the OFT alleges
9 that:
10 "Shell was at all relevant times in a position to
11 implement the infringing agreements insofar as Shell had
12 the power to specify or negotiate the terms under which
13 the contractors were to operate the Shell owned sites."
14 That's the OFT's answer to the RBA. That argument
15 is nowhere raised in the redefined case, and the
16 redefined case doesn't relate to that argument in any
17 way.
18 My final point is that the OFT shouldn't be
19 permitted to run this new case as against Shell, for the
20 main reason that it doesn't relate to Shell. There is
21 no attempt in this redefined document, taken at its
22 highest, the most generous reading, there is no attempt
23 to answer the point that Shell could not and did not
24 under the RBA set shelf prices. The reference in the
25 redefined case is throughout to the setting of shelf

1 prices, and that Shell could not do.
2 These new points, paragraphs 2(a) and 2(b), were
3 never put to any Shell witness, and there is no basis in
4 the evidence as it's emerged -- and again that's the
5 evidence taken at its height, I am referring here to the
6 questions put by Mr Lasok to the Shell witnesses -- for
7 the case against Shell in paragraphs 2(a) and 2(b) of
8 the redefined case in the document.
9 The factual evidence has closed. The OFT says
10 positively at paragraph 22 there is no need for any new
11 factual evidence. So the OFT's redefined case has to be
12 tested on the evidence as it's emerged. As I said, not
13 only was this case not put to any Shell witness, the
14 evidence as it's emerged doesn't support this case at
15 all, even taken at its highest, as one would if one were
16 seeking permission to amend, although I appreciate this
17 isn't an application for permission to amend.
18 The Tribunal should consider the merits to that
19 extent when it considers whether this new case should be
20 allowed to proceed. So, although I appreciate the
21 difficulties that Shell has, because the Tribunal will
22 be minded to make an order that wraps all of the parties
23 up together, I do make a special plea for Shell on the
24 basis of its different facts, that this process end as
25 against Shell at this stage.

1 If I can be of any further assistance?
2 **THE CHAIRMAN:** No, thank you. Thank you very much,
3 Mr Kennelly. Is that everybody? Yes. Mr Lasok.
4 Submissions by MR LASOK
5 **MR LASOK:** I think in relation to Shell there is possibly
6 a point here, because my recollection is that Shell
7 opened its appeal on the basis that what differentiated
8 itself from everybody else was loosely the RBA
9 arrangements.
10 If it's right that Shell's appeal stands or falls on
11 the RBA arrangements, then it will be perfectly fair to
12 say that much of what we are debating doesn't really
13 apply to Shell. But I am not sure that that actually is
14 Shell's position. But it may be that what Shell needs
15 to do is to perhaps go back to the way they put things
16 in opening, and consider whether they are actually
17 accepting that the critical point in their appeal is
18 this RBA point.
19 Moving on from that, what I am going to do is to
20 make one general observation which I hope will take me
21 less than a minute, and then I am going to make some
22 submissions on next steps.
23 The general observation is this: as the Tribunal has
24 seen, there is a great deal of dispute between the
25 parties which centre on the, in relative terms, unusual

1 wording of the statutory framework that governs the
2 operations of the OFT and the Tribunal, and when one
3 looks at a case like Albion Water, one sees a situation
4 that does not correspond at all to the interpretation
5 placed on the statutory framework by the appellants.
6 The inference that we draw from that is that the
7 statutory framework, so far as the Tribunal is
8 concerned, involves a situation in which, when
9 a decision of here the OFT is made and then appealed,
10 the notice of appeal brings the matter in question
11 before the Tribunal, and as a result of the extensive
12 powers that the Tribunal has, the Tribunal's function at
13 the end of the day is to decide whether or not, in
14 relation to the matter brought before it, which of
15 course is the matter that the parties are arguing about,
16 gives rise or does not give rise to an infringement of
17 the Act.
18 There obviously will be circumstances in which, in
19 the course of ruling on that question, the Tribunal may
20 conclude that the best conclusion is, for example, the
21 setting aside of the decision and the remission of the
22 matter to the OFT, or the various other variations on
23 that, which include the Tribunal itself cutting short
24 the possibly lengthy alternative process of a remission
25 of the matter to the OFT, and itself deciding the

1 question.
2 Albion Water is an illustration, it's one of
3 a number of cases that the Tribunal is well aware of, in
4 which the Tribunal takes more of an active role in
5 discharging its function of deciding the basic point, is
6 there or is there not an infringement? And in a case
7 like Albion Water, it steps far outside the normal kind
8 of function that a court performs when hearing
9 an appeal.
10 Here we are confronted, in our submission, with
11 a case in which, as the evidence evolved, as we see it
12 at any rate -- I appreciate that the appellants take
13 a different view of the evidence, but that's not the
14 view that we take -- we had to evaluate the evidence
15 when we made the decision originally. We had to
16 evaluate the evidence that was led by the appellants in
17 their witness statements, and we then had to take stock,
18 when that evidence had been tested in cross-examination,
19 and come to a conclusion as to what was the appropriate
20 thing to do, and we took the view that the appropriate
21 thing to do was to react to the evidence as it came out
22 before the Tribunal, and that's the reason why we are
23 here.
24 Now, the reason why the Tribunal has this more
25 extensive function is perfectly obvious, and that is

1 because the Tribunal performs a particular role in the
2 public interest that Parliament wishes it to perform.
3 I do not want to elaborate those points any further,
4 because it may well be that next week or whenever it is
5 there will be further arguments on this point. But the
6 essential problem that we have here is one that, in our
7 submission, is recognised in the statutory framework,
8 and it's also recognised by previous decisions of this
9 Tribunal and by the Court of Appeal. This is not the
10 type of situation in which one starts fiddling around
11 with amendments to the defence, because if you start
12 doing that, you are introducing unnecessary
13 complications. If you take the rather robust view taken
14 by the Tribunal in Albion Water, it thought that even
15 though that was an extremely complex case, it could
16 simply manage the process in a sensible way.
17 That in essence is the submission that we are making
18 to the Tribunal. Contrary to what Mr Saini has
19 suggested, it's not a case of the OFT seeking permission
20 for it to do something, it's the OFT making
21 an application to the Tribunal for the Tribunal to do
22 something, namely operate the schedule 8 powers, which
23 are not limited to 3(2)(e), it's a bit broader than
24 that.
25 Now, next steps. The Tribunal had started off by

1 suggesting that the appropriate thing to do would be for
2 the OFT to put forward a submission dealing with two
3 points identified by the Tribunal, the first of which
4 was the question whether or not, and if so to what
5 extent, the restraints fall within the scope of the
6 decision. There appears to be some confusion on that
7 point on the part of the appellants. However, none of
8 the appellants, I think, has been vastly enthusiastic
9 about getting clarification from the OFT on that point,
10 because they seem to be more inclined to rush into them
11 putting forward a skeleton argument and the OFT
12 responding to that.
13 It's really a matter for the Tribunal, but there is
14 an argument for saying that if the appellants are in
15 a state of confusion, then it is rather better for the
16 OFT to put forward the answers to the queries that
17 the Tribunal has raised.
18 Now, if that is what the Tribunal is minded to do --
19 **THE CHAIRMAN:** Well, on that point it may be you can clear
20 up the matter now, having heard Mr Howard's submissions
21 and the submissions of the other appellants as regards
22 the comparison of the OFT's statement of its position on
23 last Thursday and the OFT's statement of its position in
24 the submissions that we got on Wednesday. Because it
25 would be helpful for everyone to know whether the OFT

1 does accept, first, that the restraints in 2(a) and 2(b)
2 of the submissions are not the same as any of the
3 restraints in paragraph 40(a) to (d) of the OFT's
4 skeleton argument, and if it does accept that, whether
5 that does mean that these restraints are outside the
6 decision so that what we are talking about is, at the
7 end of the day, setting aside the decision and the
8 matter which we will be considering next week is whether
9 the appeal should nonetheless continue on the basis that
10 you are asking us to exercise our powers in
11 paragraph 3(2).
12 **MR LASOK:** The short answer is that the restraints
13 identified in the document that the Tribunal and the
14 parties received on Wednesday are in the decision.
15 **THE CHAIRMAN:** That may be a bit too short an answer.
16 **MR LASOK:** For example --
17 **THE CHAIRMAN:** Well, I do not want to -- so you are -- well,
18 I'll let you try and say what it is you are saying,
19 rather than us trying to guess what it is you are
20 saying. Briefly, though.
21 **MR LASOK:** Yes.
22 Reduced to their essentials, the restraints referred
23 to in the document last Wednesday concern the setting by
24 a retailer of shelf prices for the brands of, we will
25 call them manufacturer A, when there is an agreement or

1 concerted practice between A and the retailer. So those
2 restraints are concerned with A's brand prices. Now,
3 that restraint is referred to in the decision in
4 a variety of different paragraphs.
5 **THE CHAIRMAN:** Is the point that it's referred to in the
6 decision as one of the mechanisms whereby the parities
7 and differentials were achieved, whereas now it's been
8 regarded as a stand-alone restraint, in that it's not
9 now linked with any obligation in respect of the rival
10 manufacturer's --
11 **MR LASOK:** That's very close to it, because in the decision
12 they were described as being part of the infringing
13 agreements, but I think one of the paragraphs offhand is
14 1.6. It appears quite early on in the decision. But
15 the decision proceeded further than that, and got into
16 an understanding of parity and differential arrangements
17 that also involved the changes to the price of the
18 brands of the competing manufacturer.
19 **THE CHAIRMAN:** Whereas here what you seem to be saying is
20 that the manufacturer set the price for the retailer to
21 charge for its own brands. The price that it chose to
22 set was determined, as far as the manufacturer was
23 concerned, by its wish to achieve certain relativities
24 to its competitor's brands. That may have been known to
25 the retailer or it may not, but it wasn't part of the

1 agreement with the retailer that that was what was being
2 achieved.
3 **MR LASOK:** Well, that depends on the particular agreement.
4 If you look at the facts recited in the decision, one
5 sequence is paragraph 6.413 to 421 as an example,
6 a sequence concerning Asda, which goes into this at
7 great length.
8 **THE CHAIRMAN:** But the long and the short of it is that you
9 are not conceding, as far as today is concerned, that
10 Mr Howard is right in saying that you accepted on
11 Thursday that these kinds of restraints, not being
12 restraints within 40(a) to (d), must therefore be
13 outside the decision so that we are only considering
14 setting aside the decision?
15 **MR LASOK:** That raises the conceptual point: what do you
16 mean by the decision? That's not an evasion. The point
17 is if, for example, you take the decision as being
18 a conclusion in a paragraph like 1.1 of the decision,
19 then all this is within the scope of the decision, all
20 the findings of fact are in the scope of the decision,
21 but the thing is that the reasoning that leads to the
22 conclusion in 1.1, the reasoning is different because in
23 the decision, the focus was on a different view of how
24 the parity and differential arrangements worked. If you
25 like -- and it's probably perilous to go back to the

1 analogy of eggs -- the contention made out by the
2 appellants most eloquently this morning or before lunch
3 was that effectively the OFT had overegged the pudding
4 and they had been found out. The difficulty with that
5 is that, even if it's true, it doesn't mean that there
6 is no pudding, it simply means that you have overegged
7 it that is -- I thought that there would be loud
8 guffaws, but sad to say my expectations have not been
9 met.
10 That, broadly speaking, in our submission, is the
11 problem that has arisen. In other words, even if you
12 have a narrower view of how this thing operated, because
13 it operated by virtue of the restraints described in
14 Wednesday's document, in our submission you still end up
15 at the place where you ended up before, it's just you
16 have done it through a different route.
17 If you put the broad question: is the infringing
18 agreement arising from the restraints in paragraph 2 of
19 the Wednesday document the same as the infringing
20 agreement which is described in the decision?, the
21 answer is no, because there is a difference between
22 them. But if you say: is the restraint in the decision
23 or not in the decision?, it is in the decision. It is
24 there, it's just that it doesn't have the extra bits
25 that the evidence didn't tend to support when witnesses

1 were cross-examined.
2 **THE CHAIRMAN:** Yes. So I think you were going on to deal --
3 the second point that we referred to this morning was in
4 what way you would be asking us to exercise our powers
5 under paragraph 3(2).
6 **MR LASOK:** Yes. Broadly speaking, in our submission, and
7 I think -- I can't remember who it was, I think it may
8 have been Mr Saini who said this -- the correct thing is
9 that at the end of the process, the Tribunal has to make
10 a decision, and that decision may involve a number of
11 separate decisions. They will be at the same time
12 decisions either to uphold the decision or uphold it in
13 part or set aside the decision, coupled -- depending on
14 which permutation is taken by the Tribunal -- with
15 whatever other remedy the Tribunal thinks appropriate in
16 exercise of the powers under paragraph 3, and
17 I deliberately say paragraph 3. Those include the power
18 under 3(2)(e) in circumstances in which the Tribunal
19 concludes that it's appropriate to exercise those
20 powers.
21 But that is, if you like, something that comes at
22 the end of the process. It's something that has to come
23 at the end of the process, because the Tribunal needs to
24 have a full view of the case in its entirety before it
25 can decide what is the order it can properly make.

1 As to the prediction of what the Tribunal may be led
2 to, that's very difficult for the OFT to be drawn into,
3 because if you take for example one permutation, and
4 that is that the Tribunal concludes that the restraints
5 identified in paragraph 2 are there, they are found as
6 a matter of fact, they give rise to an object
7 infringement, they are within the scope of the decision,
8 the Tribunal would then look at the conclusion in
9 paragraph 1.1 of the decision, and in those
10 circumstances, the Tribunal might set aside a finding of
11 fact in the decision, but it might not set aside the
12 decision at all.
13 On the other hand, you could have another scenario
14 in which the Tribunal concludes that the case, as it is
15 eventually found to be, doesn't fall within the scope of
16 the decision in some relevant respect, and that might
17 cause the Tribunal to make a different type of decision.
18 **THE CHAIRMAN:** But we do have to direct our minds, it seems
19 to us, as to whether it is sufficiently likely that
20 there will be something that it will be appropriate and
21 possible for us to do at the end of the day, under
22 paragraph 3(2), to justify carrying on and not regarding
23 the end of the day as being, if not exactly now, but
24 shortly. That does seem to us to raise questions as to
25 what kind of decision. You said there an object

1 infringement. Is it the OFT's case that one might not
2 be limited to object infringements, what do we do about
3 the application of section 9 or the vertical exclusion
4 order? It does seem to us that, if we are going to
5 carry on with these appeals, it must be on the basis
6 that, having regard to the case that's now being put,
7 it's worth continuing to hear that case because there is
8 something useful that we would be able to do other than
9 simply setting aside the decision.
10 **MR LASOK:** But I don't think the way things are currently
11 placed that there would be issues so far as exemption or
12 anything else is concerned, it would be a straight
13 object infringement issue. That's largely because there
14 is no evidence to justify an exemption claim in this
15 case.
16 **THE CHAIRMAN:** I think the most that we can say now is that
17 we would need to -- in order to justify the attempt to
18 overcome whatever practical difficulties there may be,
19 given where we are now, in continuing with these
20 appeals, we would need to be reasonably sure that there
21 was something that we were likely to be able to do, if
22 all the facts were found in your favour, say, because it
23 would be very unfortunate to carry on with these appeals
24 and then, having, say, agreed that these two restraints
25 have been proven, to say "Well, nonetheless the only

1 thing we can do is set aside the decision and leave it
2 to the OFT to decide whether to pursue these restraints
3 in a separate proceeding".
4 **MR LASOK:** Well, with respect, if the Tribunal had come to
5 the conclusion that the decision should be set aside but
6 nonetheless these restraints had been proven, then on
7 the basis of the precedents set by the Tribunal in
8 earlier cases, in our submission, the Tribunal would
9 itself go on to conclude the matter.
10 **THE CHAIRMAN:** Because you say one could jump from a finding
11 of fact as to these being made out to saying "well,
12 there is therefore an object infringement"?
13 **MR LASOK:** Because the Tribunal is not a fact finding
14 tribunal, its jurisdiction extends to cover all the
15 elements that have to be considered when deciding
16 whether or not there is an infringement. The dicta in
17 the --
18 **THE CHAIRMAN:** Yes, but it would depend on how much one
19 would be required to go into all those different
20 elements and the practicalities of that.
21 **MR LASOK:** Indeed, but then Albion Water is quite graphic on
22 that, because that was a situation where the matter was
23 highly complex, and indeed it involved the Tribunal in
24 remitting a particular enquiry to the decision-maker for
25 it then to come back so that the Tribunal came to

a conclusion. I think that was on the excessive pricing point.

DR SCOTT: Engaging rule 19 rather than going straight to schedule 8.

MR LASOK: Yes. But I think that that was the technical process, because on that part of the Tribunal's decision -- this is the 2006 CAT 36 decision -- you have one bit where the Tribunal was not acting under 3(2)(e) and I can't remember the paragraphs, it's something like paragraphs 187 to 197, and then you have a second bit which is something like paragraphs 275 to 281, where the Tribunal is acting under paragraph 3(2)(e), and from recollection, the remission of the particular enquiry to the regulator was in the context of the second part, it was the 3(2)(e) part of the exercise.

THE CHAIRMAN: As far as practicalities are concerned, and what direction we are making today, what do you want to say about the timetable?

MR LASOK: Well, I had thought, as I have said, that the better thing would have been for the OFT to have put forward its responses to the two queries that the Tribunal had raised at the outset, and the last few minutes have tended to strengthen that view, because in our submission, if the Tribunal is in that situation, in which it feels that guidance on -- or at least the OFT's

views on how the Tribunal should exercise its powers should be disclosed to assist the Tribunal and the appellants, then one would have thought that the starting point would be that the OFT put in a submission dealing with the two matters that the Tribunal had identified, and we proceeded from there.

When I say "proceeded from there" one would have supposed that there would then be the skeleton argument from the appellants and we would have suggested that there should be an attempt by the appellants to have a consolidated skeleton argument because I am slightly concerned about getting five skeleton arguments, some of which may overlap, but overlap in different ways, if you see what I mean. Then the OFT would have the opportunity to put in a reply skeleton argument, and then we would have a hearing.

(Pause)

THE CHAIRMAN: We will rise briefly and decide what we are going to do, and perhaps dates can be thrashed out thereafter.

We will probably need until, let's say, 20 past 3. It might take us a little longer than that.

MR HOWARD: There were some observations I would want to make by way of reply to what Mr Lasok has said. I am particularly concerned; I don't actually think what he

has said can go without a reply, I think it does affect what is going to happen next.

THE CHAIRMAN: We had better hear what you have to say.

Reply submissions by MR HOWARD

MR HOWARD: The reason I say that is Mr Lasok has not, with respect, dealt with the first point I made, which is the concession. He has actually sought to avoid it. What actually I think developed in the course of it is that his case actually has to recognise that the new case is not within the decision.

The reason for that is, firstly, he has made his concession, I've shown you the transcript, I don't think it's necessary to go back, but it's actually unequivocal, if you are outside the constraints in 40(a) to (d), it is outside the decision. That's actually what he conceded and that was the basis on which the case was adjourned. He wouldn't answer your question directly, but he is actually now conceding that his current restraints are not part of 40(a) to (d).

The point is: they are not part of the decision, and what he referred to you as the decision is not the decision. The decision is not in paragraph 1.1, and that's disingenuous to say that. I come as a relative newcomer to all of this, but if you actually look at it, the decision is set out in paragraph 8.2, that's where

the OFT sets out the decision.

THE CHAIRMAN: Well, the decision is what is appealed, which is a decision that there has been an infringement of the Chapter 1 prohibition.

MR HOWARD: Yes. That's right, but it's not simply -- if you took this to an extreme, you have a document here which runs to 1,000 pages or something, and you say "Well, my decision is that you have done something unlawful, therefore it doesn't matter, I can just come along and say anything now". That's not actually what's being appealed. It's the decision that you have done something unlawful in the respect that has been identified. That is actually clear at 8.2, which is where they actually -- this is the paragraph that's headed "Decision", and the decision, as you were putting to Mr Lasok, is actually that the infringing agreements restricted the retailer's ability to determine prices for competing tobacco products. So that once you say -- which is what he is recognising -- 2(a) is not about competing tobacco products, 2(a) is not within the decision that is the subject of the appeal. 2(b), he simply ignored the point, which is that this doesn't relate to the theory of harm, but in fact the point is equally applicable to 2(a) and 2(b). They are not part of the theory of harm. The debate that you had with

1 Mr Lasok, with respect, again, the flaw in the position
2 that's being taken, it's not a question of whether you
3 can identify in the agreements whether or not you say
4 "There was, for instance, a restriction on retailer
5 self-funding", let's assume for current purposes that
6 you can identify that on the evidence. The question is:
7 so what? What is the harm that this is said to give
8 rise to? That is what the OFT's case doesn't address.
9 Now, that is what then causes, with respect, the
10 absolutely fundamental difficulty, because where we are
11 in these proceedings -- and that's why we are in
12 currently what I can only describe as a complete
13 muddle -- we are in a position where the Office of Fair
14 Trading's case, as put forward in the decision, has
15 collapsed and that is because 40(a) to (d), which is the
16 foundation for the theory of harm, has gone, and this is
17 what the Tribunal is being asked to do.
18 What you are being asked to do is proceed where the
19 appeal against the decision must succeed, and what's
20 being said is, "Well, you can carry on, on the basis
21 that we are going to put forward some new case which
22 must require new evidence, new expert evidence", and
23 somehow that's an appropriate course for the Tribunal.
24 I am not asking you to make a final decision on that
25 today; that would be for next week. But before you get

1 to that, you actually have to decide, I would suggest,
2 what is the current status of where we are. In the
3 light of what I've shown you, which hasn't been resiled
4 from, what the OFT said, as a public authority, as
5 Mr Saini said, on Day 26, which is that once you are
6 outside 40(a) to (d) it's a new decision, they recognise
7 now they are outside 40(a) to (d). We are in a position
8 where the decision that they have made is no longer
9 relevant, it no longer stands. They then want to say,
10 and that's the decision for you, that they want to
11 proceed with a different infringing agreement, ie
12 something which is not the infringing agreement that was
13 in 8.2, and that is the question.
14 Now, we will submit, once you realise that's the
15 question, this is fundamentally misconceived, the idea
16 that the Competition Appeal Tribunal at that stage then
17 says, "Well, because the decision has fallen away that
18 one can somehow -- I don't know what it is we are
19 appealing. It will be very interesting to try and work
20 it out. What are my clients appealing at this stage,
21 once the current decision goes? It's a very difficult
22 question. We will explore next week.
23 The reason I wanted to make that clear: in my
24 submission, the concession that was made, or the
25 position put forward as the basis of the adjournment,

1 stands, 40(a) has now been abandoned, therefore the
2 decision has been abandoned in the sense of the OFT
3 seeking to defend it as that decision. They say they
4 can persuade you to make a different decision on the
5 basis of different infringements and so on.
6 Now, that's the question for next week: are they
7 entitled to do that? Is there a jurisdiction to do
8 that? And what are the circumstances in which you would
9 exercise your discretion, if you have it? Perfectly
10 happy to argue that. But we should not, as it were,
11 fudge this question, which is: where do we stand in the
12 light of their dropping paragraph 40(a) now, which they
13 were previously clinging on to?
14 **THE CHAIRMAN:** Yes, Mr Lasok, do you just want to answer
15 briefly?
16 Reply submissions by MR LASOK
17 **MR LASOK:** I think I ought to make a brief clarification
18 about that because as far as 40(a) is concerned, the
19 reason why it doesn't appear in paragraph 2 of the
20 document that we put in on Wednesday is because we came
21 to the conclusion if they were not able to establish the
22 restraints in 2, then we wouldn't be able to establish
23 the restraint in 40(a), so for all practical purposes,
24 you might just as well argue the case on the basis of
25 the restraint in 2.

1 **THE CHAIRMAN:** Well, let's not have a backwards and forwards
2 about this.
3 **MR HOWARD:** That's simply -- if I can just say --
4 **THE CHAIRMAN:** Well, Mr Howard, we have to deal with these
5 issues in an orderly fashion. It seems that everyone is
6 agreed we are going to have a hearing in due course and
7 we need to set a timetable for that. I understand that
8 you want that hearing to be more limited than the OFT
9 suggest it should be, because you say of what was said
10 last Thursday, and your contention that that concession
11 means that we are now working on restraints which are
12 outside the context of the decision. Mr Lasok contests
13 that position, as far as I understand it.
14 The question for us, then, is whether we decide that
15 today and then have a more limited hearing, or whether,
16 despite whatever we may think about the strengths of the
17 argument one way or the other, we acknowledge that there
18 are difficult issues about what is actually the
19 decision, whether these restraints are in the decision
20 as properly defined, and that those are issues which are
21 better resolved once we have had proper submissions
22 which everyone comes to the Tribunal prepared to argue
23 and respond to.
24 But that is where we are at the moment.
25

1 Further reply submissions by MR HOWARD
2 **MR HOWARD:** Okay, but I just want to make one point, it's
3 literally this: because in my submission, counsel have
4 to respond to a submission that's made. I have made
5 a submission which, in my submission, is actually
6 unanswerable, that paragraph 6 of the Office of Fair
7 Trading's document necessarily drops paragraph 40(a), it
8 drops all of paragraph 40. Now, it is disingenuous in
9 the extreme for the regulator not to explain its
10 position properly, if it's saying that's misunderstood.
11 You asked it to put forward its case. It did that.
12 Everybody on this side of the court, on the appellants'
13 side, has understood that paragraph 40(a) has gone. In
14 my submission, it has to go when you read paragraph 6.
15 That being so, you are then in a position where the
16 Office of Fair Trading conceded that without 40(a) you
17 are outside the decision. In my submission, we are just
18 in a muddle if we proceed without either giving effect
19 to that or the Office of Fair Trading being required to
20 explain why that concession is no longer valid.
21 (Pause)
22 **THE CHAIRMAN:** Well, we will come back at 3.30.
23 (3.20 pm)
24 (A short break)
25 (3.50 pm)

1 **THE CHAIRMAN:** We have had submissions today on what should
2 be the scope of the further hearing we are bound to have
3 on the future conduct of these appeals.
4 The OFT has lodged submissions setting out two
5 restraints, which have been referred to as
6 paragraph 2(a) and (b), which they now say are the
7 restraints accepted in each of the 15 bilateral
8 agreements covered by these appeals.
9 They argue first that these restraints form part of
10 the decision which is the subject of the appeals.
11 Secondly, they say even if these restraints are
12 outside the scope of the decision, these appeals should
13 continue to enable the Tribunal, on setting aside the
14 decision, to exercise its powers under paragraph 3(2) of
15 schedule 8, for example to take a decision on
16 infringement that the OFT could have taken.
17 ITL accepts with some reluctance that a hearing on
18 this second point is necessary.
19 Asda and Shell both ask us to allow their appeals
20 and set the decision aside today in their cases.
21 On the second point, that is whether, in the event
22 that the decision is set aside, we should make a new
23 decision, we consider that all the appellants should be
24 treated the same for current purposes.
25 So far as Shell is concerned, Mr Kennelly reminded

1 us of Shell's primary case, that the RBA agreements mean
2 that it was not in a position to set retail shelf prices
3 at the petrol station shops. So, they say, the new
4 refined case in the OFT's submissions cannot apply to
5 it. From what we have heard of the evidence so far, we
6 are not convinced that the changeover to the RBA model
7 by Shell in fact had a significant effect on the
8 economic significance of the agreements it had entered
9 into with ITL and Gallaher. We do not, therefore,
10 consider that it should, for these purposes, be regarded
11 as being in a different position from the other retailer
12 appellants. This is, of course, subject to any further
13 submissions on the effect of the RBA agreements that we
14 might hear in due course.
15 On the first issue, namely whether the refined case
16 and the restraints in paragraph 2(a) and (b) form part
17 of the decision, Mr Howard on behalf of ITL argued
18 strenuously that the OFT should be held to the
19 concession which ITL assert was made when Mr Lasok
20 outlined the OFT's position on the morning of
21 3 November, Day 26 of this hearing.
22 He says that the OFT at that point was still
23 maintaining that the restraint described in
24 paragraph 40(a) of the OFT's skeleton argument could be
25 established on the evidence. Mr Howard says that

1 Mr Lasok conceded that if that was not the case and all
2 four restraints described in paragraph 40 were in effect
3 being dropped by the OFT, then any other constraints
4 contended for by the OFT must necessarily be outside the
5 scope of the decision.
6 He says, therefore, that if the OFT is now limiting
7 its case to restraints 2(a) and (b), the OFT is in fact
8 conceding that its refined case is beyond the scope of
9 the decision. If that is true, the only matter for
10 the Tribunal to decide now is whether, on setting aside
11 the decision, we should exercise our powers under
12 paragraph 3(2) of schedule 8.
13 Mr Lasok does not accept that this is the true
14 position, and he maintains that the restraints in
15 paragraph 2(a) and (b) are restraints within the scope
16 of the decision as he defines it.
17 We consider it's very regrettable that we are still
18 so unclear about what the OFT's case is. We also see
19 the force of Mr Howard's arguments, and we note that
20 when Mr Lasok stood up last Thursday to expound the
21 case, it was not on the hoof but in response to
22 questions from the Tribunal on the Monday beforehand.
23 His statement on Thursday was a statement that the
24 appellants and the Tribunal were entitled to treat as
25 the OFT's considered position. Yet it is clear that it

1 seems to bear little relation to the case now put
2 forward in the Wednesday submissions.
3 However, we note that the OFT has consistently
4 resisted ITL's attempts to insist that the paragraph
5 40(a) to (d) constraints are the be-all and end-all of
6 the OFT's case as set out in the decision. The issue
7 that has been debated appears to depend on the
8 Tribunal's conclusion as to what amounts to the decision
9 which is the subject of these appeals.
10 We therefore find that for the sake of completeness
11 and for the orderly future conduct of the appeals, it
12 would not be appropriate for us in effect to proceed in
13 a piecemeal manner in deciding our way forward. There
14 may also be links between the first two questions which
15 I just outlined which might cause us to regret in due
16 course coming to a premature conclusion on half of the
17 points that have been raised today. We therefore
18 consider that, for all the appeals, we should now set
19 a timetable for resolving these issues.
20 As far as next steps are concerned, we consider that
21 there is force in the appellants' submission that the
22 OFT should not now have a further opportunity to amplify
23 or change its stance. The next step, we accept, is
24 therefore for the appellants to lodge their skeletons,
25 and we will come on to timing in a moment.

1 Finally, I wish to draw attention, as a pre-emptive
2 measure, to problems that the parties will encounter
3 with quoting from Hansard in any submissions that they
4 make as to the proper construction of the Act.
5 The Tribunal is alert to not being drawn into
6 questioning or impeaching proceedings in Parliament,
7 contrary to article 9 of the Bill of Rights.
8 As far as the timetabling is concerned, it has been
9 suggested that the appellants lodge their submissions
10 next Tuesday, the 15th. What we would suggest, although
11 it might involve postponing the hearing slightly from
12 the Thursday date suggested, is that if ITL could share
13 a draft of its submissions with the other appellants to
14 enable them to ensure that their own submissions don't
15 overlap, that might be a quicker procedure than the
16 appellants trying to arrive at a single consolidated
17 submission, which we know from experience sometimes
18 takes longer rather than saving time. Let's then
19 consider what the steps are after the lodging by the
20 appellants of their submissions.
21 Discussion re timetable
22 **THE CHAIRMAN:** Mr Howard, do you have anything you want to
23 say on timing?
24 **MR HOWARD:** Sorry, I am not sure I understand. When you say
25 the steps after lodging ...?

1 **THE CHAIRMAN:** Well, if we were to stagger the submission of
2 the appellants' submissions so that ITL went first, and
3 the other appellants then had a chance to look at your
4 submissions before putting in their own.
5 **MR HOWARD:** Perhaps the way to do it is -- and I've already
6 mentioned, at least to Mr Thompson -- I am perfectly
7 content to say that I will produce my draft and
8 circulate my draft, but it will be a draft, on Monday
9 evening to all the other appellants. Obviously (a) that
10 may change in the light of comments from my team on
11 Tuesday, and/or comments from the other appellants, but
12 they will see at least where we are going.
13 Let's say we put in ours on Tuesday afternoon, and
14 if they either then put in theirs on Tuesday afternoon
15 or perhaps they have until Wednesday morning to make the
16 final changes to what they want to say, ensuring they
17 don't overlap. Then the OFT would have received ours on
18 Tuesday afternoon, and they can respond to that on
19 Wednesday afternoon, and either respond to the other
20 appellants also on Wednesday afternoon, or possibly on
21 Thursday morning, insofar as there are any different or
22 discrete points.
23 I don't anticipate there really should be, on the
24 main points. You understand I don't personally see the
25 specific retailer discrete points as really likely to be

1 determinative of what we are debating, therefore I will
2 not be really going into that in submissions. If they
3 want to, that's up to them. That would allow us to
4 commence the hearing, as I said, on Thursday afternoon
5 with a view to completing it on Friday.
6 **THE CHAIRMAN:** So you would envisage us starting at, say, 2
7 on Thursday and going over, and you see this as a day
8 and a half?
9 **MR HOWARD:** Yes. That's my view. If you had some different
10 view, so be it.
11 I should say that I'm personally not available on
12 the Monday and Tuesday of the following week, and
13 I don't know whether the Tribunal is, because those were
14 non-sitting days anyway.
15 **THE CHAIRMAN:** Yes. So let me just make a note of what it
16 is you are suggesting, then, and then we will hear from
17 other parties.
18 So you are suggesting ITL to lodge skeleton by, say,
19 5 on Tuesday.
20 **MR HOWARD:** Yes.
21 **THE CHAIRMAN:** Other appellants lodge by, say, 12 on
22 Wednesday.
23 **MR HOWARD:** OFT to respond to ITL's skeleton on Wednesday at
24 5.
25 **THE CHAIRMAN:** Well, do we need another --

1 **MR HOWARD:** Well, not necessarily.
2 **THE CHAIRMAN:** Let's see whether we really need further
3 written submissions from the OFT or whether it might be
4 possible just to wrap that up in oral argument.
5 **MR HOWARD:** Yes.
6 **THE CHAIRMAN:** Any of the retailer appellants want to say
7 anything with regard to that? Mr Lasok.
8 **MR LASOK:** I wouldn't have thought it was necessary for
9 the Tribunal to have another round of written
10 submissions. If the Tribunal prefers it, then obviously
11 we will do that. But it's likely to be a very skeletal
12 skeleton argument.
13 **THE CHAIRMAN:** Well, it's always open to the OFT to come on
14 Thursday with a short speaking note, that also seems to
15 be something people do, so to kick off on Thursday,
16 rather than us to delay matters to allow --
17 **MR HOWARD:** I suppose there is a question as to what you
18 envisage is the order of play at the hearing.
19 **THE CHAIRMAN:** Well, we have wrestled with what kind of
20 application this is, and who is making it, as you know.
21 Mr Thompson wants us to deal with a phantom application
22 to amend the defence, but as there has been no
23 application, that doesn't seem to assist us.
24 **MR HOWARD:** If I can just say, I think the assistance you
25 get from that is not because there is a phantom

1 application but it actually just gives you some ground
2 rules. Leaving that aside, there are essentially,
3 I suppose, two different points that are in play. One
4 point is the one that you have adverted to in the
5 judgment, which is we are outside the decision,
6 therefore that's the end of the appeal. In a way,
7 that's our application. We say, okay, they have now
8 said what their case is, our application is that's
9 a case outside the decision; and then you have their
10 counter blast: well, it doesn't matter if I am outside
11 the decision, in some way there is a basis on which we
12 can continue.
13 There is an argument for saying we go first, it is
14 not an argument for the OFT in a way. It's a matter of
15 what the Tribunal considers appropriate. I suppose if
16 we are going to put in our skeleton and there isn't
17 going to be a skeleton in response, then it would be
18 probably appropriate for the Office of Fair Trading to
19 have Thursday afternoon and for us to respond. But what
20 I wouldn't want to do by conceding that is to, as it
21 were, be shut out if there was something further
22 I wanted to say after the OFT had replied to my reply.
23 In other words, if the OFT goes first and I go second,
24 leaving aside the other appellants, I wouldn't want to
25 necessarily concede that the OFT had the last word. But

1 I suspect the procedure here will be that it's just
2 orderly case management and ensuring what everybody
3 wants to say is said.
4 The other point is, at least for my part, I would
5 want to know whether we were going to seek to achieve
6 the hearing in one and a half days or, if not, then
7 whether we come back. I couldn't come back, as I say,
8 until at least the Wednesday.
9 **THE CHAIRMAN:** Well, could we start at 10.30 on the
10 Thursday, or is that going to put you under too much
11 pressure, Mr Lasok?
12 **MR LASOK:** Well, there is the problem about the other
13 appellants' submissions.
14 **THE CHAIRMAN:** Yes. Mr Howard, if you are in difficulties
15 on the Monday and Tuesday, and that was always going to
16 be a non-sitting day, so we certainly wouldn't want to
17 continue without you or put you in any difficulties, we
18 are all otherwise engaged on the Thursday of that week.
19 **MR HOWARD:** Could I suggest this: why don't we aim to start
20 at 10.30? If Mr Lasok is saying it's the other
21 appellants' skeletons, let's just bring the time forward
22 for that a little bit. I would have thought, if they
23 are going to get my skeleton on Monday evening, I can't
24 actually see why they won't be able to by 9 o'clock on
25 Wednesday morning -- sorry to put them under pressure,

1 but I can't see why they wouldn't be able to do it.
2 Mr Saini is helpfully saying "Fine".
3 **THE CHAIRMAN:** Yes.
4 **MR HOWARD:** I think everybody seems to be in agreement.
5 **MR FLYNN:** We will do what we are told by Imperial, as
6 usual!
7 **MR HOWARD:** I am tempted to respond, but I will, on a Friday
8 afternoon, refrain.
9 **THE CHAIRMAN:** Yes. Well, we will direct that, then, that
10 ITL to lodge its skeleton by 5 next Tuesday, the other
11 retailer appellants to lodge by 9 on the Wednesday,
12 hearing will start at 10.30 on the Thursday. We will
13 endeavour to finish within the two days. We recognise,
14 however, that this is an extremely important point,
15 having got this far in these appeals, and it's essential
16 that everyone should have a full opportunity to air the
17 arguments that they wish to put to us. If we don't
18 finish by the Friday, then we will continue on the
19 Wednesday rather than on the Monday and Tuesday.
20 **MR HOWARD:** I am grateful.
21 **THE CHAIRMAN:** That's what we can say so far.
22 Thank you very much, everybody. We will see you
23 again, then, at 10.30 next Thursday.
24 (4.10 pm)
25 (The court adjourned until 10.30 am on

1 Thursday, 17 November 2011)
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