IN THE COMPETITION APPEAL TRIBUNAL

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

Victoria House,
Bloomsbury Place,
London WC1A 2EB

18 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 29)

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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Friday, 18 November 2011

(10.30 am)

SUBMISSIONS BY MR HOWARD (continued)

THE CHAIRMAN: Yes, good morning.

MR HOWARD: Good morning. May it please the Tribunal, if I can just summarise what I suggest are the questions that the Tribunal needs to answer.

The first question: is paragraph 40 of the Office of Fair Trading's skeleton still part of the OFT's case?

Secondly: if not, what is the effect of the OFT considered statement on Day 26?

Three: is it open to the OFT to contend that the refined case is within the decision?

Four: in any event is restriction 2(a) within the decision, or is restriction 2(b) within the decision?

Five: what is the effect if paragraph 40 is not part of the case and it is not open to the OFT to contend that restrictions 2(a) and 2(b) are within the decision, or you find insofar as that is necessary in the light of the prior issue that they are not, what is the Tribunal then required to do?

Six: what is the nature of the jurisdiction under schedule 8, paragraph 3(2)(e)? Does it permit the Tribunal to allow the appeal to continue for the purpose not of considering the appeal against the

decision or the defence of the OFT in respect of the notice of appeal, but to consider whether the OFT can make out a different infringing agreement in order that the Tribunal can then decide whether, when allowing the appeal and setting aside the decision, to make a different decision of the kind that the OFT could have made if still seized of the matter?

Seven: is there any discretion to permit the OFT to run a case based on saying that there are findings in the decision on which restrictions 2(a) and 2(b) are based, or that they are components of the finding in the decision?

Finally, eight: if there was a discretion, whether of the type just mentioned or under schedule 8, how should that be exercised?

That's the order in which I am going to take things.

So if we turn to the first question, is paragraph 40 of the OFT's skeleton still part of its case? In fact it's tedious, but could we turn up the skeleton in core 4, if you don't have it loose. {C4/45/1}. You will remember that at a previous hearing the OFT conceded that it was not able to prove a case within paragraphs 40(b) to (d), and that it was -- but it sought to reserve its position or say it was in fact still seeking to prove the case under 40(a).

You won't be surprised to know that I suggest that the Tribunal is entitled to expect a clear and unequivocal statement from the regulator, the OFT, of its position. Unfortunately that still is not forthcoming, although once you analyse the position it is clear that 40(a) is not being proceeded with, notwithstanding the continued reluctance to actually come out and say explicitly what the position is.

Now, just looking at the matter firstly as a matter of generality, any attempt by the Office of Fair Trading to cling on to paragraph 40(a) would be highly surprising, given that the suggestion of a requirement of this type having been imposed by Imperial would be plainly risible. What is it they are suggesting? 40(a), if the retail price of Gallaher's brand increases, then the retail price of ITL's rival brand must also increase. Why would Imperial have wanted the price of its product to increase when it had not put up the wholesale price? Why would it wish to be deprived of the commercial advantage sought to be gained by having a lower wholesale price? How could you derive this from the trading agreements? Moreover, how could this make sense where the OFT now accepts that Imperial was free to reduce its price, and the alleged requirement in 40(c) has gone; in other words, the OFT

accepts that Imperial can reduce its wholesale price in order to get a competitive advantage and that it has no expectation of the retailer to reduce the price of the Gallaher product, whereas here this is just the flipside, which is Imperial seeks to gain a competitive advantage by not putting up its wholesale price when Gallaher has done so.

Now, that's just looking at it as a matter of what is at all likely. But it's now in fact clear that 40(a) is not part of the OFT's case.

What one has to remember, if you turn to paragraph 6 of the Office of Fair Trading's recent submission, on Day 26, Mr Lasok said they were still seeking to prove 40(a). Paragraph 6 of their recent submission says that:

"The articulation of the infringement set out above differs from the description in the decision ..."

And it's the next bit that's important:

" ... in that it is not a consequence of the infringing agreements that following a price change instigated by one manufacturer, the retailer was required to change the retail price of a competing manufacturer's brand in order to maintain or realign ..."

Sorry, I am referring to paragraph 6 of the document

served by the Office of Fair Trading on Wednesday last.
THE CHAIRMAN: The refined case?
MR HOWARD: The so-called refined case.
THE CHAIRMAN: The so-called refined case.
MR HOWARD: One could say there is not much that's refined about it, but I refrain from saying that.
THE CHAIRMAN: Paragraph 6.
MR HOWARD: Paragraph 6.
THE CHAIRMAN: Yes.
MR HOWARD: Just read across now, compare that with paragraph 40(a) of their document. In the light of paragraph 6, which explicitly says their case is that the retailer was not required, it's not a consequence of the infringing agreements that the retailer was required to change the retail price of a competing manufacturer's brand.

So then if you ask yourself: right, 40(a) says:

"If the retail price of Gallaher's brand increases, then the retail price of ITL's rival brand must also increase."

That is no longer the case. They are now accepting that is not the case.

So we then had Mr Lasok, on Day 27, shilly-shallying -- I have given you the reference to this, it's Day 27, page 79 -- when he stood up and said

"No, no, that wasn't quite the case".

Now let's look at the submission that they made yesterday in the speaking note. If you turn in that to paragraph 48 is where any start to address paragraph 40.

Paragraph 49, they say:

"Paragraph 40 sets out four permutations of the scenario that arose for consideration in the case set out in the decision. These permutations are expressed in absolute terms and are therefore stylised."

I've no idea what that means "and are therefore stylised". Those are the terms of their case. I think "stylised" is intended to mean, I assume, "Well, that's not really what we meant when we wrote this down".

They then say:

"As has been set out above, the OFT's case in the decision was not based on automatic or lock-step implementation."

Not true. The only caveat concerns 40(d), which is a Gallaher brand decrease. The central plank of their case is in fact 40(b), which is absolutely based upon this automatic lock-step implementation, and what he was saying the other day about 40(a) on Day 26 was exactly the same.

Now, just to make clear the central plank you will need core volume 4, and paragraph 35. {C4/46/152}.

This paragraph is actually of enormous importance in relation to the points that you are having to consider, once one properly understands what it was that the Office of Fair Trading was saying.

Paragraph 35 --
THE CHAIRMAN: Is this of --
MR HOWARD: It's of their defence. It's at tab 46. Sorry if I am taking things too quickly. Tab 46, paragraph 35. It's very important to understand what is the central plank and why, and I'll come back to the "and why" in more detail in a moment.

What they are saying here is, in the first sentence they criticise the ITL summary of the theory of harm, and they say:

"In doing so, ITL ignores the central part of the OFT's explanation of the anticompetitive nature of the infringing agreements at decision 6.216."

I will read this out, because it is so fundamental to what this case is actually about. Well, you are very familiar -- perhaps if you just read that to yourself, rather than ... my throat is failing.

(Pause)
THE CHAIRMAN: Yes.
MR HOWARD: Now, this is central to their case, because you have to remember we are talking about an object

infringement. What you are having to ask yourself is, on their case, particularly when you come to the fine, for instance: why is it you are saying this is anticompetitive, and why is it you are saying Imperial ought to have known? What they are saying is "This is it: you, Imperial, what you have done is you have an agreement with the retailer whereby if you put up the price of your product, they have to put up the price of the rival product so you can do that without fear that you are going to lose market share", and that's why they regarded this as the central plank, because it has nothing to do with saying "Well, this is how Gallaher would look at things, this is what you, Imperial, were seeking to get from your agreement. That is why it is said this is an object infringement from your perspective, Imperial, because that's what you were trying to get". That's the point they were making here.

Now, that point, firstly the point is perfectly clear, it doesn't matter what you call it, lock-step, automatic, what's perfectly clear is the way it operates is Imperial puts up its price, Mr Retailer has to put up the price of Gallaher, and that's the protection, supposedly, that you are getting.

Now, that central plank has gone. If we go back to what they were saying in their skeleton, that it wasn't

automatic or lock-step, completely untrue, it was and plainly set out there.

Equally, the so-called lock-step operated on their case in relation to the Gallaher price increase, this is the situation where when Gallaher puts up its price there is to be an automatic increase of or a requirement of the retailer to put up ITL.

Now, going back to Mr Lasok's and the OFT's submissions of yesterday, at paragraph 50 they purport to say that the documents were not footnoted on the basis of automatic or lock-step. Well, that's simply not the case, and it's perfectly clear from the language used and the cross-reference I've just given you to their defence, what they were saying, and that the only caveat was concerning (d).

Then come to paragraph 51, which is supposed to explain what their case is now about paragraph 40(a). I've used the expression "mealy mouthed" before, but this is about one of the most mealy mouthed positions, particularly when you consider what they were saying to you on Day 26. On Day 26 they said "We are standing by paragraph 40(a)". On Day 27, Mr Lasok seeks to say that when we said that they weren't -- couldn't any longer be doing that, he sought to say we were misunderstanding.

Now look at what he says in paragraph 51:

"Under the refined case, two of the factual permutations set out in paragraph 40 [that's (a) and (d)] fall within the factual scope of the restrictions set out at paragraph 10(a). On the refined case, the factual scenario involved the realigning of P&Ds by giving instructions by the manufacturer to the retailer. The difference between the case made out in the decision and the refined case lies in a different understanding of what was agreed or concerted between the manufacturer and the retailer."

He then sets out paragraph 6, and then he says:

"This paragraph simply stated that the OFT's refined case does not involve a requirement of the retailer under an agreement with the first manufacturer, say ITL, itself to change the price of the other manufacturer's brand, say Gallaher, by virtue of its agreement with the first manufacturer."

Now, it's very unclear what it is that they are there trying to say. But if one simply presents it in a different way, by asking a very simple and very straightforward question, "Mr Lasok, is it your case that if the retail price of Gallaher's brand increases, the retailer is required to increase the price of ITL's rival brand?" Plainly that is not their case any more, and that is clear in fact from paragraph 51 and from

paragraph 6.

THE CHAIRMAN: Well, in the second half of 52, what they are saying is that the realignment, if it occurs, occurs not because of a requirement to realign the Gallaher price contained in the ITL agreement, but from the likelihood that Gallaher will itself give an instruction to the retailer to move its price up to match what ITL has done.

MR HOWARD: Exactly. So if we go to 40(a), if Gallaher puts up its wholesale price with the consequent effect on the Gallaher retail price, is the retailer required to put up ITL's price? Answer: no. If ITL alters its wholesale price, then the retailer may do so. But there is no requirement, as set out in paragraph 40(a). It doesn't actually make any sense, such a requirement. On the basis --

THE CHAIRMAN: I think the difference between you may be this: what the OFT say is, "Well, this is how we see the market working in the evidence that we have seen; the result of how this works is that prices become realigned", and what they are saying is "So it doesn't really matter whether this happens as a result of requirements under the agreement or partly as a result of requirements under the agreement and partly as a result of other market factors", whereas what you say

is "Yes, it jolly well does matter because we have been fined for an infringing agreement".

MR HOWARD: Firstly, I say it absolutely does matter, what it is you are saying is the infringing agreement. You can't just come along and say, "Well, I said it was this, but it is not that, I am not quite sure what it is, but it's something else which may end up with the same result". How you get there, the fact is manufacturers can chase each others' prices up and down. We know that just as a matter of common sense, but we also know it from the evidence in this case. I've asked lots of people about that, and they explain it.

But the important point for the moment is understanding what their case was in paragraph 40. Their case in paragraph 40 was, as it was in 40(a), 40(b), 40(c) and 40(d). Well, leave aside 40(d) because of the opportunity to respond. Each of (a), (b) and (c), and you can see it in the decision that I showed you a moment ago that's referred to in paragraph 35, if we take (b), their case was: if ITL puts up its price, the retailer had to put up the Gallaher price. Here, this is just the converse. If Gallaher put up its price, Imperial's price had to be put up, whatever Imperial -- I mean, Imperial didn't have to do anything, that was the real point, whereas they are now

recognising it in paragraph 6.

Paragraph 6 actually sets the matter out in unequivocal terms because it is not a consequence of the infringing agreements. In other words, it's not the infringing agreement that is causing this to happen. The price realignment happens through independent action.

Now, it is a matter of regret that one has to, as it were, extract this in this way and that we are not getting a clear statement of case from the OFT, as you remarked the other day. But once you analyse this, it is clear that paragraph 40, in all its glory, has gone.

DR SCOTT: I think that characterising it as independent is probably a step too far, because I think what Mr Lasok would say is that there was a context for the movements that took place, and that that was apparent in the answers given by the witnesses. Now, the causation is clearly a matter for debate, but I think to describe what happened in terms of independence is --

MR HOWARD: With respect, I think that's not really my point at all. I think that's where we need to be very careful.

DR SCOTT: I think we can see where you are going, but I think you want to avoid overstepping where we are going --

MR HOWARD: No, my point is this, I think this is where one is addressing a different point. We are not addressing at the moment -- I could make a lot of submissions about what the evidence does and doesn't show, and I could have come today and said "On the evidence, these points are hopeless". That's not what we are seeking to do.

DR SCOTT: No, we are seeking to understand where Mr Lasok is with OFT's case.

MR HOWARD: Well, we are seeking to identify what their case is, and if one asks oneself this question, this is the only relevant question: is 40(a) their case? The answer to that is it is not their case. They may then say "What we are saying", and this is what appears in paragraph 51, "is that within 10(a), we are saying something which" -- basically what they seem to be saying now, or 10(a)/2(a), is that if there is a Gallaher price increase then their case -- I don't say it's right -- would be that Imperial can, they put it manipulate, we just say change the wholesale price, so if it puts up its price, because it knows what the margin is that the retailer is after, it can be clear as to what retail price we will arrive at.

I think you are picking me up on whether that's independent. The point is it's a totally different mechanism to what was in 40(a), and that's really the

point. At the moment we are on understanding whether that case in paragraph 40 is the OFT's current case. My submission is it's completely clear that it isn't. They have already conceded that 40(b) to (d) is not. They have been mealy mouthed about 40(a). When you actually properly address what they are saying about 40(a) both in paragraph 6 of their document and paragraph 51, it's perfectly clear they are not saying "There is this requirement", they are saying something different. That's really the key to this.

Before I move on, just having understood where paragraph 40 stands, again some points that one mustn't lose sight of in the current debate.

The first thing is the OFT's case in the decision is that each of the trading agreements or concertations was an object infringement, viewed in isolation. It's very important. Their case, and they have said this on a number of occasions, is not based on the parallel and symmetrical allegation. Their case is that each of the agreements per se is anticompetitive. The anticompetitive harm that they were alleging, they said was exacerbated by the parallel and symmetrical nature.

That is important because that is why they are not embarrassed that they recognise that the parallel and symmetrical point in the decision couldn't actually be

made good and was watered down in the defence to be saying something similar, ie that they were similar rather than parallel and symmetrical.

Now, their case is in the decision. Imperial and the retailers ought to have known that the agreements or concertations were anticompetitive by their very nature. So, as I said earlier, what they are saying is that "When you, Imperial, entered into this, you ought to have known that it was anticompetitive". So that, pausing there for a moment, what from Imperial's point of view were they saying? They were saying -- it's in paragraph 35 of the defence -- "What's so important and the central part of our case is that you, Imperial, have secured this arrangement whereby you can think you can put up your prices without losing out". And that's the basis on which they were saying "Imperial, you are party to something which is obviously anticompetitive".

Now, you have to then contrast that, when we look at the refined case -- I'll come back to it a bit later -- in the refined case, the central plank has gone. Very important to not lose sight of that. It is no longer suggested that the agreements, concertations provided any certainty to Imperial in relation to the situation where Imperial put up its price. If one just thinks about what they are saying in 2(a) and 2(b), 2(a) is

just allowing Imperial to alter its wholesale price and get that reflected in the shelf price. They are no longer saying that there is this link whereby Gallaher's price gets affected.

So in fact what they are saying -- and this again is very important, if you just think about the terms of 2(a) -- is, they are pointing to a vice here, but what is the vice? The vice is, they say, that if you alter your wholesale price you can be confident that that alteration will be reflected in a retail selling price. Prima facie one would have thought that actually is likely to be pro-competitive rather than anticompetitive because the manufacturer who cuts his price wants to be confident that that feeds through to a full lower price for the consumer and not only a partial lower price where the retailer seeks to gain additional margin for himself.

Now, compared to paragraph 35 of their defence, Imperial's arrangements, agreements or concertations are said to be pernicious for a wholly different reason. Now what they are pointing out is simply how Gallaher would perceive the situation of Imperial. But what Gallaher is then perceiving, on the refined case, of course is something quite different to what they were suggesting in the decision. So it is impossible to

jump, as the OFT does by assertion only, from the particular theory of harm in the decision to say that that applies -- mutatis mutandis, insofar as we are allowed to use such expressions -- to a wholly different arrangement, or to a different arrangement. That's the point. You can't simply assert black is white. That's really what it amounts to.

Now, so my submission is it is in fact completely clear and the OFT, if they were behaving in the way a responsible regulator should, would be saying to the court, instead of being mealy mouthed, "Yes, we are no longer running paragraph 40", and it's a matter of regret that they are not, they are so coy.

But that then takes one to the next point: what is then the position if they are no longer running a paragraph 40 point?

Now, that then takes you to Day 26. You will remember Day 26 of course was preceded by the evidence of Mrs Corfield. I don't propose --

THE CHAIRMAN: Which was Day 26? What was the date for Day 26?

MR HOWARD: Day 26 was --

THE CHAIRMAN: Oh, 3 November.

MR HOWARD: --Thursday, 3 November. It was the date of the adjournment. We have looked at the transcript of that

on a number of occasions.

THE CHAIRMAN: This is your point that you made on what was then Day 27, on the Friday --

MR HOWARD: Yes.

THE CHAIRMAN: -- as to the concession that you say they made and that they should be held to.

MR HOWARD: Yes. I think I can just take it very simply, because you have the point.

THE CHAIRMAN: We have the point, yes.

MR HOWARD: You have the regulator, first coming along and saying "If I can't prove a case within paragraph 40, I accept then we are outside the decision and I want an adjournment in order that I can consider my position as to whether or not I want to hoist the white flag completely or whether I say I am within schedule 8".

In my submission, having done that, they can't now, without any explanation at all, come along and say, "Actually, something different and I am in the decision~..."

If you just analyse it for a moment, on their approach to life there was no need for an adjournment. That must be the logic of their position. The logic of their position is, "Well, the experts were all due to come, our case is in the decision", that's what they should have been saying on that Thursday, "Now let's

carry on".

Of course one sees the tension because it's self-evident you couldn't actually carry on, we don't even know properly what the current case is. But if you take their point at face value, if you take Mr Lasok's submission that "This is all within the decision and it's all part and parcel of the case that we are running", then why did you seek an adjournment? Why couldn't we get on with the expert evidence? Why should my clients be put in the position where what's being said is "Oh, no, we were always pursuing this case", why didn't we then just get on with it? If one thinks what is on their case likely to happen now, these proceedings, if one went down the route they appear to be proposing, are likely to remain in abeyance for about another year or 18 months at the minimum, bearing in mind the steps that they recognise would need to be taken then you would have all sorts of issues about people's availability and so on. It really is quite astonishing. You might think -- and I certainly suggest you should think -- that it is very peculiar indeed that the Office of Fair Trading has not sought to explain its position to the court. We are here dealing with what is in effect a public body, but if one thinks about ordinary litigation, a litigant who comes along and says

"I want to adjourn the case because I can't prove the case that I've currently put forward, and please give me an indulgence so that I can come back and explain in a week's time what I want to happen", you then turn up a week later and say "Well, I know we said we couldn't prove it and we had an adjournment but actually, court, I can prove it. I would like to carry on and we should do so".

DR SCOTT: We are in a strange state that we have neither an application from you to strike out the defence, nor an application from Mr Lasok to amend the defence.

MR HOWARD: No, you do have an application from me. My application is -- I am sorry, please don't get that wrong --

DR SCOTT: No, no, we do have an application from you, but it's not an application to strike out the defence.

MR HOWARD: One could --

THE CHAIRMAN: Well, as I understand it, your application is that we should allow these appeals and quash the decision.

MR HOWARD: Yes, and the basis for that is --

THE CHAIRMAN: And that we have the power under paragraph 3(1) of schedule 8 to do that, it doesn't say you have to wait until any particular time that we should do that, you can do that at any point that it is

appropriate.

MR HOWARD: In my submission on that, it's not only you have the power, you actually have a duty to do it, and the reason for that is, once you recognise that paragraph 40 has gone, the Office of Fair Trading is not seeking to defend the decision, and so one could formally say strike out the defence, but if they stood up properly -- you see, they never actually say to you openly what is the position, we get all this double speak. If you properly analyse what they are saying, they are saying, "We cannot defend the decision on its current terms, we would like to invite you to make a different decision". Now, that's actually where we are, that's the true position. Once you analyse it in that way, we say the answer to that is simple, that the Tribunal then says "Well, under 3(1) I am obliged to decide this case by reference to the notice of appeal; you are not allowed to amend your defence to raise a different decision, that's not what the rules require, therefore that is the end of this appeal in the light of your position, OFT", and that's why we are saying that you are obliged now to set aside the decision and allow the appeal.

THE CHAIRMAN: I suppose, having regard also to what Mr Thompson said when we were here previously, if one looks at it by analogy with an application for a late

amendment of the defence, if an amendment of the defence is not allowed, then a defendant has to decide: can we continue with the unamended defence, or is that effectively the end of the case because we have already conceded that we cannot continue to fight the case on the basis of the unamended defence? I understand that you are saying that, having regard to everything that we have seen, they are saying that either they can continue on this refined case or they can't continue at all, they have burnt their bridges as far as the existing defence to the appeals is concerned.

MR HOWARD: The only case they are seeking to run is the refined case. If the refined case is not supporting the decision, then they are not -- that's the only case they have, therefore the decision necessarily can't stand. One of the ways you actually have to look at that is -- well, I'll make the point now and we will look at it in a little more detail.

THE CHAIRMAN: Yes, we are taking you out of your order.

MR HOWARD: We are going to look at: are 2(a) and 2(b) within the decision? But you also have to look at what is it on their refined case they would be asking you to do. What would be the decision? Because once you realise it could not be a decision whereby you said "I uphold the OFT's decision" it's necessarily

a different decision. So that is where we are. That even on their refined case, and even they are saying "Well, there are some elements of this there", what they are actually asking you to do is to make a different decision to that which the OFT made. That being so, they are not seeking to defend the current decision.

Now, anyway, the point I was making was that they have made a concession, and there is no basis on which they have asked to be released from that concession, so it's slightly difficult for me to address. They have just ignored it, and that being so, you can actually deal with it rather easily. But without prejudice to that, I obviously go on to consider the next issues, namely: are 2(a) and (b) within the decision?

We have gone over some of this already yesterday, but in asking that question, you have to remember that what we are talking about is an object infringement in a vertical context. So that what you are asking yourself is: what is the restriction for these purposes which is alleged to have been imposed by the agreement or practice on the retailer? What is the restriction on the retailer? Then secondly: does that restriction have an anticompetitive effect and, if so, what?

You will remember on Day 27 -- we have already referred you to the bit of the transcript -- where

Mr Lasok actually concedes in terms that the current restrictions are not part of the infringing agreement set out in the decision. What he said was:

"If you put the broad question: is the infringing agreement arising from the restraints in paragraph 2 of the Wednesday document the same as the infringing agreement which is described in the decision?, the answer is no, because there is a difference between them."

So we say that actually answers the point anyway.

THE CHAIRMAN: There is an ambiguity in that passage, and there is a limit to which one can attempt to analyse this kind of statement, but it's not clear to me whether there is a distinction being drawn there on the one hand between it not being the same as the infringing agreement but being a subset of the infringing agreement on the one hand, and on the other hand, not being part or the whole of the infringing agreement but being nonetheless within the decision, treating the decision as something different from the infringing agreement.

MR HOWARD: Yes.

THE CHAIRMAN: Now, I am not sure which of those two Mr Lasok meant.

MR HOWARD: I think he said yesterday he was trying to make both points. In the particular passage to which

I referred you, he was actually simply unequivocally accepting that these restraints are not the same as the infringing agreement described in the decision.

What, as I understand it, he has now in the latest position put forward yesterday, he tries to run it in two ways, if you get to this. One is, as I understand it, he says "This is a component of the infringing decision", so --

THE CHAIRMAN: The infringing agreement.

MR HOWARD: Sorry, of the infringing agreement found. But, for instance, if you said "Well" -- anyway, that's the first way -- whether it's the first way or second way, that's one way he puts it.

The other way he puts is he says, "You can look at this decision very broadly and if you can extract a finding from it, then that's good enough". I think those are the two points, and both are bad.

Now, the first thing to do, we would suggest, is to look at the Court of Appeal authority in EWS v Enron, which gives some guidance as to the approach. It's at volume 13 of the authorities, tab 175. This case is of course a case concerned with follow-on damages under section 47(a), but as you can see at paragraph 29, the statute provides it's section 47(a) subparagraph 6(a) that:

"You can rely on a decision of the OFT that the" --

THE CHAIRMAN: We are reasonably familiar with the judgments, so ...

MR HOWARD: The key paragraphs are paragraph 31 of Lord Justice Patten, and paragraph 64 of Lord Justice Carnwath and Lord Justice Jacob agreed with both of them.

If you go to paragraph 31, what is clear is what you are concerned with is the conduct -- if you look in the middle of it:

"There is no right of action unless the regulator has actually decided that such conduct constitutes an infringement of the relevant prohibition as defined. The corollary to this is that the Tribunal must satisfy itself the regulator made a relevant finding and definitive finding of infringement."

Then at the end:

"The Tribunal ought therefore, in my judgment, to be astute to recognise and reject cases where there is no clearly identifiable finding of infringement."

Then Lord Justice Carnwath, second sentence:

"It's not enough to be able to point to findings in the decision from which an infringement might arguably be inferred. By the same token, it's important that in drafting such a decision, the regulator should leave no

doubt as to the nature of the infringement which has been found."

All that's being said there is actually obvious: as a matter of common sense, you can't fine somebody in our case £112 million without identifying very clearly what it is that you are saying constitutes the infringement of the statute.

Once one bears that in mind, it is, for the reasons I largely went over yesterday and I don't propose to repeat and we have set them out in writing, it is clear the nature of the infringement was that there was an agreement or practice as one which restricted the ability of the retailer to determine its retail prices for competing tobacco products, and that was anticompetitive by object because it both increased Imperial's incentive to raise its prices and decreased Gallaher's incentive to lower its prices, and that's what is stated repeatedly in the decision and indeed was reflected in the skeleton argument.

When we come to paragraph 2(a), if we turn to each of the restrictions elements of the case, paragraph 2(a), so we are looking for an agreement or consultation of specific retail prices in the context of the maintenance of the manufacturer's P&D strategy regarding the retail prices of its own brand relative to

the retail prices of linked brands.

As I've already made clear, the central plank has totally gone and this is a totally different creature to what was previously alleged because the horizontal link -- and by that what one means is -- one needs to be careful with language here, and you will see in their speaking note the OFT are deliberately ambiguous about this -- the link in the decision was the link which if you move one, it's linked to the other and that has to move.

This is explicitly --

THE CHAIRMAN: Well, this is a straightforward RPM case in the context of the reason why the price is chosen is because of the manufacturer's own strategy.

MR HOWARD: That is bang on point, but there is a slight difficulty with that, the OFT acknowledge they did not have an RPM case at the SO stage.

THE CHAIRMAN: Well, I noticed you said that in your skeleton, that that was one of the points that had been made in the statement of objections and dropped.

MR HOWARD: Yes.

THE CHAIRMAN: Where do you find that?

MR HOWARD: I had better show you that. I didn't realise there was any doubt about that.

THE CHAIRMAN: It doesn't seem to be mentioned in the

decision as one of the points that was dropped. I may have missed it.

MR HOWARD: I think the best thing is, rather than my doing it on the hoof, we will give you the references after the break.

THE CHAIRMAN: Yes.

MR HOWARD: You are right that -- there are two points about that -- in essence the case now is RPM. Two points about that: one is they investigated that at the SO stage, but secondly, what has come to light now which should permit them to introduce an RPM case in these proceedings? The allegation that they are making, if it were a good allegation, was one that was always apparent to, and if they dispute that, you will see in the SO they were actually making the point.

This actually picks up a point that Mr Lasok made yesterday, he says "Oh, well, you know, we are entitled at the OFT to take account of the evidence and nobody should criticise us that we now want to run a different case". The difficulty with that is this: the different case that they want to run is not something that has emerged in the course of the evidence. If this were a good case, this case was evident at all stages. What they are saying is "I sought to prove a different case, I can't prove that different case, now I want to try and

prove this case". But what they don't do is say "This is a case that has only emerged in the course of these proceedings", and if they did say that, it would just be nonsense.

THE CHAIRMAN: This is a case that at least did seem to be being put to the witnesses when they were being cross-examined in that they were taken to those letters and emails in which there was a price instruction and there were questions asked about whether that was an instruction to go to that price or not.

MR HOWARD: That is right, but I am making a different point. The fact that you could put that case shows that it's not something --

THE CHAIRMAN: No, no, I understand.

MR HOWARD: -- that's emerged from these proceedings. Over the summer when my learned friends were preparing their cross-examination they obviously thought this was a relevant line. So in other words, if so far as you are saying the setting of specific prices is part of the case, that was something that they must have always thought was a relevant ingredient and therefore they could see, otherwise the cross-examination would be improper, because you are not supposed to cross-examine on irrelevant issues.

The critical point that I am on at the moment --

I do not want to lose sight of it -- is that this is not a horizontal linking case.

THE CHAIRMAN: No, no, I understand.

MR HOWARD: I've already shown you the fundamental proposition in their skeleton, and I've shown you the references, for instance, at paragraph 9 of the skeleton saying "It's useless to look at a different case". This is a different case.

That the Tribunal actually has, in terms of a case that's to be put forward, is this document which actually just comprises nine flimsy paragraphs. So the position now is that Imperial are to be fined 112 million on the basis of these two pieces of paper. If one actually tries to piece it together, one might say that of itself ought to cause one to think: what on earth is going on here with this public body?

What one then has to see is, well, where is the theory of harm on this new case? And it is just in one paragraph, paragraph 9. Paragraph 8 contains an assertion, paragraph 9 is the so-called theory of harm.

Now, this is where we are just completely losing sight of the process. At the SO stage, what the OFT does, and we see it here, is they set out their theory, they set out their story on the facts, their

interpretation of the facts, and then their economic theory based on that.

The appellants -- or the people against whom the complaint is made -- put in a response and then they put forward their decision which sets out all of this, and it sets out a proper economic analysis. One can argue about it, obviously, before this Tribunal. All that we have at the moment is this paragraph 9. This is the economic analysis which is supposed to support whatever it is going forward.

Now, it's very important, when you look at that, to contrast what they were saying in the decision with this theory of harm. Because what they were doing in the decision was trying to say why these vertical agreements are anticompetitive. What they were trying to say, and they say it in numerous places both in the decision and in their skeleton argument, is that this is horizontal price-fixing, that's what it amounts to. Once you take away the horizontal price-fixing, where are you? You are in a vertical context with vertical restraints.

Now, vertical restraints are a thing of everyday life, and so if you are trying to say a vertical restraint is, by its very nature, anticompetitive, one would have thought you start off with an uphill struggle and it requires some economic analysis to explain why.

Now, what they do is they refer, both here at paragraph 9 and in their speaking note, to paragraph 6.217 of the decision. But paragraph 6.217 of the decision -- this is now what's said to be the theory of harm for the new case -- is being plucked out of context.

So if you remember how this all fits together, there is a sequence here. 6.213 is explaining that there is a restriction on determining the retail price of competing linked products. Then you see at the end of 6.213 what happens if a parity or fixed differential requirement is implemented, you get this increase or reduction in one brand leading to a corresponding increase or reduction in the other. Now, that's explaining what then follows.

6.214 explains what happens for the manufacturer imposing the requirement, and 6.215 is then -- this is the point I've already taken you to this morning -- 6.215 and 6.216 are the position where Imperial puts up its price, and 6.216 is the counterfactual.

6.217 is then looking at the alleged impact on a rival manufacturer. But the impact is following what has been set out at 6.213.

THE CHAIRMAN: Yes.

MR HOWARD: You can't just --

THE CHAIRMAN: Is this the position, then: although 2(a) seems now to be a resale price maintenance case, which is resale price maintenance is generally considered one of the few vertical restraints which does amount to an object infringement, the theory of harm underlying the case law that decides that retail price maintenance is anticompetitive is a different theory of harm to do with competition at the retail price level. From this theory of harm into which the OFT is still trying to link the restraint in 2(a), they say the link arises because within the manufacturer's mind, the reason for the price picked is to achieve the P&Ds rather than anything arising from the vertical agreement?

MR HOWARD: A lot of what you said -- if not everything -- is entirely right. Of course, the Tribunal is always right --

THE CHAIRMAN: No, we are not always right.

MR HOWARD: The starting point is that, properly analysed, the allegation could only be an RPM allegation, but the OFT doesn't want to run an RPM allegation. The reason for that is actually obvious, because that would be a gross abuse because they themselves recognised at an earlier stage they could not establish RPM and they would have to explain to the Tribunal why that flip-flop should be permitted. So they don't want to call it RPM

and rely on an RPM theory of harm. So they have to rely on a theory of harm which they say is essentially a transparency one, that what they want to say is this renders things more transparent. That's, I think, the nature of the theory.

But the thing that is firstly rendering things more transparent and giving rise to a harm is a different thing to what they had in the decision. And the difficulty, once you are looking at it in this way, firstly from Imperial's perspective when it enters into these agreements, it isn't doing anything, as it were, anticompetitive in the sense of the central plank. That's gone. So that it would be quite an odd thing -- and this is what one actually needs to think about -- to say that "My agreement -- I, manufacturer -- with the retailer is anticompetitive because, although from my perspective it is not doing anything, I should have realised that somebody else looking in at my agreement would be able to work out something which would affect the way that person was going to operate".

In the context of an object infringement, that's a pretty odd allegation. I can understand it if you say "You, Imperial, realised and intended that you got this protection where you put up your prices". That's perfectly capable of being understood. But it's quite

a different thing to say "You should realise that somebody else will work out something from what you are doing".

DR SCOTT: This is happening in the particular context of at least an oligopoly, if not a duopoly, and so I think that's the context in which the OFT would place that very brief paragraph.

MR HOWARD: Sorry, which very brief paragraph?

DR SCOTT: Paragraph 9.

MR HOWARD: Yes, but my real point is: that may be true, but we shouldn't have to be spelling this out and trying to work it all out. It is actually quite an incredible thing that we have these three lines and that is supposed to be the theory of harm.

DR SCOTT: As we had said to you earlier on, part of our concern was what is to be put to the experts who are coming to give the economics to illuminate our understanding, of what is going on.

MR HOWARD: We now say nothing, because you are not going to get to that stage.

But the point is, this is what again we mustn't lose sight of, the only point I am addressing at the moment again is that the theory of harm here is not a theory of harm in fact by reference to what they are currently talking about.

DR SCOTT: It's still horizontal.

MR HOWARD: Yes, and what they are doing is plucking that out. What they are really saying, if you think about it, is "Under my original theory of harm, under my original case, we had these paragraph 40(a), (b) and (c) plus (d). That meant prices moved up and down as a result of a requirement of a retailer, that then affects Imperial who have imposed it because they get the protection, they can put up their prices, and Gallaher would, through this mechanism, also learn the position".

Now they are saying something rather different, they are saying "Imperial can feed through wholesale price cuts to the retailer, its wholesale price cuts would be reflected in the retailer's selling price". But then if you are going to say "I have an object theory of harm based on that" you have to look at the entirety of the position and you would have to look at a counterfactual. Because if what you are saying -- and this is what was very interesting in what Mr Lasok appeared to be saying yesterday, that in the counterfactual world, which they haven't spelt out, nobody has analysed, he appears to be saying that the retailer would not necessarily, if you cut your wholesale price, feed that through to the shelf price.

Now, therefore he says here is a different situation whereas in our situation that he wants to prove he says they will reflect it. And therefore he says that is anticompetitive. One would have to consider, if you went down that route, well, hang on a minute, why are you saying that's anticompetitive when surely it's a good thing to get to a situation where if you cut your wholesale price that that is reflected in the selling prices because that means lower prices for consumers.

In other words, once you start to look at this different case, it becomes self-evident --

THE CHAIRMAN: But that was why I asked Mr Lasok yesterday whether it was a key element of their new case that the price was a minimum as well as a maximum, because that is the advice with retail price maintenance, not that the retail price follows down the manufacturer's reduced wholesale price, but that it supposedly can't follow it down further than the manufacturer instructs the retailer to do.

MR HOWARD: But the thing is, you see, in relation to his -- well, when you asked --

THE CHAIRMAN: It may be that this is -- fascinating though this is -- taking us rather away from your main point, which is that if this had been pursued as an RPM case, it would have been a much shorter case at every step of

the way, and it would have been a different case.

MR HOWARD: It's a different case. The point is even today you might say -- I can't resist pointing out that when you asked Mr Lasok that question, he actually wasn't in a position to give you an answer and he had to take instructions. You might think that itself is a pretty puzzling position, that they don't know that element of their case. But we got the answer eventually that he says, having taken instructions from whoever, that it is based upon the price being a fixed price. But for whatever reason, they are not running an RPM case as such, therefore there is no reason to, as it were, approach it as an RPM case. But even if one did, that would be a fundamentally different case.

The critical point about all of this is that what -- not the critical but an important point about this is that if you look at the -- I've lost my file. Can we look at what ... (Pause). I was looking for the speaking note, sorry.

If we look at the speaking note on this, what you see, the new case is addressed at paragraphs 24 and following, leading up to paragraph 29, where it's said.

"The essence of the theory of harm and that of the theory of harm underlying the OFT's case are the same."

But they are not. It's self-evident they are not.

They are different. Saying something is similar in effect is not the same as it's the same.

What is clear, in fact, the theories of harm are completely different because, and this is what the OFT just ignores, the central plank has gone. So that what we are now left with is you take away all of that and you are simply left with a theory of harm which is based, insofar as one can understand it -- I am picking up Dr Scott's point -- based upon saying there is a duopoly and this is going to create greater transparency than having the RRPs. But you asked Mr Lasok yesterday: is that what you are saying, there is greater transparency than in the RRP world? He says yes, but none of that is explained, we don't have any economic analysis. If this case were a serious case, that's what one would require, a proper analysis, that's what a decision would actually reflect, proper thinking, not Mr Lasok making it up on his feet when asked a question, or having to ask somebody behind him "What should we say in answer to that?" These things are required and should be properly thought through.

THE CHAIRMAN: Is that a convenient point to break?

MR HOWARD: That is, yes.

THE CHAIRMAN: We will come back at five to 12, thank you.

(11.45 am)

(A short break)

(11.55 am)

MR HOWARD: For your note, in relation to the RPM case that was ventilated in the SO, you can see that in paragraph 13 and later paragraphs, but paragraph 13, there is a whole section addressing RPM.

In the decision at --

THE CHAIRMAN: Paragraph 13th of the SO?

MR HOWARD: Of the SO. In the decision, paragraph 8.19 to 8.21 the OFT explains why it's not appropriate to fine on the basis of a vertical RPM, because that was an argument that had to be considered, or it was being put forward I think by some of the retailers and the OFT said that that was not the case.

More fundamentally they are not today saying this is an RPM case, it's really as simple as that, and one can't shift to yet another variant of the case.

Now, I think I have probably both in writing and orally explained sufficiently what are the problems with the 2(a) case when you contrast it with what's in the decision. So I am not going to sort of elaborate further.

What I do want to make is this point at this stage, and to consider this: assume for the moment that the Office of Fair Trading was permitted to amend its

defence in order to run a case on a new infringement. The simple answer is it's not actually allowed to do that, and that's why -- although that's actually what it's trying to do, it doesn't come out and say it.

What I am more interested in at the moment is, leaving the question of whether it could amend the defence, leave it on one side and ask oneself, assume that is what was happening and they said "I want to prove this case", is there material on which this Tribunal could permit an amendment of the defence at this stage of the proceedings? In my submission, once you ask that question, you would say, well, what the Office of Fair Trading has put forward in these nine paragraphs is wholly insufficient. If you actually examine what the true position is of the Office of Fair Trading, it appears to be saying "I don't actually currently have the material to prove this, what I want is there to be an investigation by the Tribunal to see whether or not this case could be made out".

Even if they are saying "I currently can prove this", a party that is seeking to amend at this late stage of proceedings would be expected to come along firstly with a properly formulated coherent case, including properly setting out an economic analysis, and at this stage supporting it with independent economic

evidence. It's an extraordinary thing to think of a litigant coming to court, still less a public body, with this document at this stage and saying "Adjourn the proceedings", because that's what they are saying has to happen, "Adjourn them for some indefinite period to allow us to set this out properly", because I think they recognise it is not properly set out, notwithstanding the order that the Tribunal made, "then the appellants would respond to it, then we would see what factual evidence is required, then we would see what expert evidence is required"; in other words, a whole new case developing.

Now, on what basis can the Tribunal, if it were an amendment application, conceivably allow that? The answer would be utterly obvious, and if you put it as an amendment application, you would be laughed out of court. One would say: this isn't a basis on which you can come to court and seek amendment.

Look at it another way. Let's assume that we are at the stage at which they publish a decision. These nine paragraphs, could the Office of Fair Trading put that forward as a decision under its statutory duty and say "That's the basis upon which I am going to fine people"? The answer is that doesn't begin to comply with what they are required to do. It would be again a joke if

that was what the Office of Fair Trading produced.
So the 2(a) restraint, for the reasons I've explained, is not within the decision and not part of the infringing agreement as properly understood. I'll come separately to this point about a component.
2(b), you already have our submission, I think, and we have set it out in writing, that 2(b), the self-funded retailer reductions, there is no theory of harm to this day that addresses that.
Just before I move off, can I ask you to look at Mr Lasok's speaking note, because in fact, once you look at it, once one unpicks what is said here, it's actually perfectly clear again that they are recognising that this case is not within the decision, the refined case.
If you go to paragraphs 36 onwards, at paragraphs 36 and 37 they try to point up paragraphs of the decision where they say they can extract these restrictions.
What's interesting is how little correlation there is, of course, to the theory of harm. What they try then to do is to do this jump at paragraph 38 where they say that:
"The paragraphs in the decision that refer compendiously to the restriction of the retailer's ability encompass here the restrictions including the second restriction in paragraph 10."

Now, we don't accept that for a moment. If you then go on to paragraph 40, what they then say is that the restrictive nature involves a combination of constraints affecting the shelf price of A's brands and constraints affecting the shelf price of B's brands."
Stopping for a moment, that's actually completely untrue, in that the restrictive nature of the agreements put forward in the decision is 2, not 1, and that's stated in all of those references that I gave you.
But more important than that is look at paragraph 42:
"The reasoning set out in the decision supporting the conclusion that the infringing agreements were object, read as a whole, was not directed at the situation in which only the restrictions in paragraph 10 above are present."
So the answer to that is: exactly, that however you look at it, you do not have a theory of harm, even on their way of putting it, trying to say the theory of harm was based upon the two lots of things that they set out at paragraph 40, what they don't have -- and that's what they are saying -- is the theory of harm which is based upon one element, and that's what paragraph 42 acknowledges.
So once you recognise that, it is in fact fatal to

the argument that they want to run, however you put it, because what you don't have is any theory of harm, you don't have any basis of saying "These restrictions that I now rely on are themselves the subject or what give rise to the object infringement", it's something different.

THE CHAIRMAN: Just to try and find an analogy, suppose one was looking at a traditional horizontal cartel, and the finding in the decision was that it fixed prices and allocated customers to the members of the cartel.
And if there was an appeal, and it became apparent that the customer allocation part of the infringement was not really supported by the evidence, but the price-fixing was, what do you say would be the result in that situation?

MR HOWARD: Of course there, I mean, the question that would arise there is whether -- it's actually rather similar to the question you put yesterday about if you had alleged a period of 92 to 98 and it's now 92 to 96, it's whether there is within what is said to be the infringement, whether if you apply a blue pencil, you can still see an infringement.
So on your example, if you said "Well, price-fixing in a horizontal cartel is well known to be anticompetitive by object", so even though what you were

trying to prove was both price-fixing and customer allocation, if only price-fixing is made out, it would still be open to say that is part of the decision, that price-fixing, that is part of the same, insofar as you had to have a theory of harm, that we have put forward.
But here we are not in that territory at all, you are in something which is a different restraint, and the linking part has completely gone, and what you can't do, as it were, is extract out of the decision, Mr Lasok acknowledges that you couldn't apply a blue pencil, you have to come up with a completely different theory.
If you took your example, of course you have given a stark example, but if you had a case where what has happened is the infringing agreement consists of two elements, and you have a theory of harm which is based upon the existence of those two elements, and you don't put forward a theory of harm which is based on the existence of one, then you would be running a different case. It's only if you can say that what I've put forward can survive with a bit that falls off.

THE CHAIRMAN: So if you had a price-fixing cartel but it emerged on the evidence that actually they weren't fixing prices, they were exchanging information about historical prices, which is generally regarded as an effects based infringement, if at all, then you would

say because the -- that kind of information exchange is not really a component of the infringement that was found, you couldn't purport to uphold the price-fixing decision or the infringement decision but say they weren't fixing prices, they were exchanging pricing information.

MR HOWARD: It's a different infringement and a different decision. You can test this case or any case where this point arises by asking -- where what the OFT seeks to say is "I am narrowing my case", which is the way they try and put it, you have to ask yourself: having narrowed your case, can the case on the narrowed basis survive so that one can get to, on the basis on which you put in the decision, to paragraph here 8.2. The point is you can't here, once you drop off all this linking, because that's a critical feature of the allegation. So --

DR SCOTT: That's what Mr Lasok appeared to be saying yesterday that they hadn't got an alternative, there wasn't a clear route from the facts, if one can find this in the facts, to 8.2 along the way, there is a missing bridge.

MR HOWARD: Yes. It would be quite difficult to follow quite a lot of that. But he seemed to be recognising "We have not articulated it".

One actually has to think about it, "We have not articulated it", so we have not responded to it, and where are we? It's not part of the decision. Something that's not articulated is not the decision. A lot of these points are really a statement of the obvious. It's very difficult to understand how you can say something is part of the decision when you actually have this missing bridge, and now you just want to assert "Well, I can somehow put this pontoon across and say that will survive, I can somehow create a link with what I previously said", whereas what you were previously saying was about something different. It just doesn't work.

You can't get away from what the OFT was saying to you in their skeleton argument at paragraph 38:

"The OFT is not surprised that fundamentally changing the way the agreements work also fundamentally changes the effect they have."

They said the issue is not whether a different set of agreements would be pro-competitive but whether the current agreements, based on the facts which they were putting forward, are anticompetitive.

Now, that takes me through 2(a) and 2(b), and I've explained to you why those, in our submission, are not within the decision.

I'll come a little bit later to the point that emerges from the way Mr Saini has approached it. I am now going to come to what I described this morning as issue 5, which is the approach to paragraph 3(2)(e) of schedule 8.

In our written document we raised the question -- and this remains a question -- of what actually is the OFT asking you to do? This remains an oddity in the case, in that on Day 27 -- and we don't need to turn it up, I've given you the reference at 124 of our document -- Mr Lasok says it wasn't the case that the OFT was seeking permission to do something. It's the OFT making an application to the Tribunal for the Tribunal to do something, namely operate the schedule 8 powers which are not limited to 3(2)(e), it's a bit broader than that.

What on earth are we talking about? The Office of Fair Trading, armed with the many people who are sitting in court today, no doubt can decide whether or not they wish to invite you to allow them to prove a different case. What they are saying is "Oh, no, no", because they know they can't do that, that's the curiosity about this, they know they can't seek leave to amend their defence, "Oh, I am not doing that, I am not actually asking for anything" is what they were saying on Day 27,

"I am just saying to you, Tribunal, that you might want to exercise your powers under schedule 8".

Before you get there, these proceedings are of course adversarial in nature, and it's for the OFT properly to make an application. Either they are applying to do something or they are not. If they are not, then that's the end of it, because if we are right they are outside the decision, then that answers the point.

We have to proceed on the basis, notwithstanding Mr Lasok's position last Friday, that they are indeed seeking permission to run a new case for the purpose of then getting you ultimately to make a decision different to that which the OFT made. That's the only basis on which you can understand this.

We suggest that that is not open because of the jurisdiction that you have, which is that under paragraph 3(1) of schedule 8 you are unsurprisingly required to determine the appeal on the merits by reference to the grounds of appeal set out in the notice of appeal. That's absolutely mandatory. That's what Parliament has laid down that you must do.

So what the statutory scheme does not envisage is that you -- and this is actually what Mr Lasok is saying conversely, to the opposite effect -- get to a stage

where you can see that the decision has to be set aside and the appeal allowed, but then you keep hold of the proceedings, so you don't make your order, you keep hold of the proceedings in order that somehow new material could come forward and you can then decide in the light of that new material whether you would do something different to that which the OFT have done.

In other words, somehow what the OFT are saying is that there is an independent jurisdiction, we have all come along here to determine the case on the basis of the decision and the notice of appeal, but something has sprung up, he is saying, in the jurisprudence, and that's what we have to look at, whereby we depart from the decision and the Tribunal has its own capacity whereby it's now an investigative body, effectively, and for these purposes it would really be instructing parties to go out and get evidence so that the CAT can decide what it thinks.

This is a very surprising submission, and you will have noticed that yesterday in making this submission Mr Lasok, what he seeks to do is to say "Ah, well, we don't need to look at any of the old jurisprudence, that's all been overtaken by Albion Water, and it's Albion Water which has effectively overturned the jurisprudence of the CAT".

DR SCOTT: Just before you leap to (e), there is also (d), and (d) says:

" ... give such other actions or take such other steps as the OFT could itself have given or taken."

So that is complementary to (e) in that steps might have to be taken that weren't simply making a decision.

MR HOWARD: We make exactly the same point. What (d) is all about is the remedy that is being imposed at that stage where you are setting aside or allowing -- you may be confirming the decision. You have to remember this is in the context of confirming or setting aside. And part of what the OFT could have done is give a direction as to what is to happen in the future in a particular market. That's what (d) is looking at. It's not looking at the context of saying "Oh, let's carry on with this hearing", because if that were right, the decision in Floe -- which we are going to have to look at -- wouldn't make any sense because what Floe is making clear is once you have set aside, you are functus, you couldn't there say "Oh, OFT, we require you to do this within a particular period of time".

DR SCOTT: Yes, I am not trying to say that we have formed a view, what I am saying is that we do need to look at both (d) --

MR HOWARD: No, no, if I was suggesting that you had formed

a view, I wasn't. I am just responding saying that paragraph (d), the context in which you have to consider this is what is being said is that, how are these so-called schedule 8 powers going to arise? The appellants say they actually just arise when you get to making your decision, and these are therefore remedial. What is the OFT saying? What the OFT is saying is two things. They are saying that, in the course of the proceedings, the Tribunal could itself say "Although this is not part of the decision, I would like to investigate the following thing and I require the parties to make submissions and come up with evidence on these points". In other words, that one has some independent function. Or that when you get to the end of the process, rather than actually set aside the decision, you would say "Well, actually, I do not want to set it aside at the moment, even though I'm ultimately going to, because I want to carry on an investigation". In other words, what they are saying is that the function of 3(2) was to give rise to an independent investigative role rather than your resolving matters on the basis of the decision and the notice of appeal.

THE CHAIRMAN: When you use the word "independent" there, independent of what?

MR HOWARD: Well, independent of the appeal.

THE CHAIRMAN: Yes.

MR HOWARD: What I mean is, what they are saying is your function is not to do what paragraph 3(1) says, because --

THE CHAIRMAN: Well, it's rather saying that -- and you may disagree with this -- when you are deciding what the obligation is in 3(1), you interpret that having regard to the scope of the powers that you are given in 3(2), and that the obligation to determine an appeal on the merits, which are the words that Mr Lasok stresses --

MR HOWARD: But he doesn't stress the words that follow.

THE CHAIRMAN: No -- are to be read having regard in the context of the very wide powers that we have.

Now, you may say, well, that's making the tail wag the dog. I think that's the case that you have to meet.

MR HOWARD: No, I follow that, and firstly it is the tail wagging the dog, but of course -- by letting the tail wag the dog what you do is completely undermine the dog, to mix analogies, if you can undermine such a thing. Because where you get to on that argument is that 3(1) actually far from being mandatory has become completely meaningless because it actually is saying -- this is actually what Mr Lasok's submissions amount to -- once the OFT has made a decision, the appellants appeal and

once you are in the CAT, then all bets are off, you can -- it's just a free-for-all, it doesn't really matter.

THE CHAIRMAN: Well, he has said that in so many words.

MR HOWARD: He has, and it is an extraordinary submission, particularly when you look at the jurisprudence. But actually think about how this is to operate. The reason you have the OFT doing an investigation and you have the investigative phase is that that's meant to define the issues.

When you come before a court, here the CAT, or if you look at other criminal proceedings, you have a definition. In a normal case, you have an indictment so that the defendant knows, the accused knows, what the charge is, and a prosecutor in a normal case can't just come along and say "Well, I know I said you did this, but actually now I want to put it like this, and the criminal court has, as it were, an independent public interest in making sure that villains get caught", which I think is part of what Mr Lasok said yesterday, that people who had done bad things shouldn't really complain. But the point is that in a democracy and under our system generally you are entitled to know what the charge is that you have to meet, and that's actually the purpose of the procedure here, which is that we know

what it is that we have to deal with, and you, as a Tribunal, are then given a duty to determine the appeal on the merits by reference to the grounds of appeal.

You are then given a power, when you are doing that, which is confirming or setting aside the decision, and given further powers as to what you can do on that occasion. What it doesn't do, and nowhere in this statute do you see it being said, "Well, what the CAT is", that's what you would expect to see if Mr Lasok's submission were right. "We are setting up the CAT as a further level of investigative tribunal and we are going to actually equip it to carry out investigations by giving it" -- I am sorry --

THE CHAIRMAN: There are instances in the institutional framework of Competition enforcement in this country where that is effectively what happens, but the CAT is not one of them.

MR HOWARD: That's really my point. I don't mean any disrespect to you. The CAT has been set up as a court, as an appeal tribunal, that's why it's called the Competition Appeal Tribunal. That may be my best submission.

THE CHAIRMAN: We try and do what it says on the tin!

MR HOWARD: Yes, generally what it says on the tin is

accurate. That's why the advert is such a good one. Or it's certainly memorable anyway.

Having looked at the statute -- you are very familiar so I am not going to take a lot of time, with the jurisprudence. Of course we have the trilogy of cases which were Napp, Aberdeen and Argos. Argos summarised the law. It's probably worth just very briefly turning it up in volume 13 at tab 180.

(Pause)

The critical paragraphs are at paragraph 63, for what we are considering, through to 66.

(Pause)

Those paragraphs explain how the procedure works, why it's important, what is happening at the OFT stage, and how the OFT is held to the decision, particularly 66.1 making it clear it's the final administrative act which fixes the directors' position.

Actually this is a rather interesting point, what they say here:

"An attempt to strengthen by better evidence a decision already taken should not in general be countenanced."

We are not in a position simply about evidence here. If one thinks about cases like this, where what happened, as I understand it, in this case was the OFT

wanted to put in witness statement, I think transcripts of interviews, and the thing was sent back in order that they would take proper witness statements.

If you think about it, we are not in a situation where they are just saying "Oh, for instance, I had this transcript of Somerfield, say, and I want to now put in a witness statement". What they are saying is "I want to run a completely new case".

I refer you to that, I am not going to read it all out, but paragraph 66 is important. What, in essence, you are being told is that this jurisprudence has been overruled by the Court of Appeal's decision in Welsh Water or Albion Water, however one correctly refers to it.

THE CHAIRMAN: Yes. Dr Scott points out to me, at the end of this case, there is a reference to that the Filiatra Legacy case that you referred to.

MR HOWARD: Yes. The point, I can't remember where it is, yes, it's on page 36, where the Tribunal there was raising the question as to whether Filiatra Legacy and the McPhilemy case applied. That would be a point for another day. Just to spend one minute on it, it self-evidently must apply because these are civil proceedings and the principle of Filiatra Legacy is a principle which applies across the board. It's very

difficult to understand why it would not apply here. The point of Filiatra Legacy, I think what you can't do is call a witness and then seek to impugn the evidence of your witness. Of course you can argue as to what does the evidence mean. We do that in every single case. What you are not allowed to do is come along and say "When Mrs Corfield said X you should not believe her or treat it as unreliable for any reason". They are stuck with her answers, and you can't -- I don't really understand why Mr Lasok says "Oh, it's a problem for Imperial". Firstly, Mrs Corfield's evidence was 100 per cent in our favour. Leave that on one side, Mr Lasok seems to think it wasn't, although I suspect he is the only one who was in court who would say that.

But the real point is I can rely on those bits of her evidence, and I can equally impugn her evidence, that's what I am allowed to do. He is not. But that's all for a different day, indeed a day that I suggest, at least in this case, we are never going to get to.

Now can I go on to, from having looked at that, Floe and then to Albion Water. Floe you should have in this bundle at tab 182. If you look at paragraph 20 in Floe, you can see that:

"The issue was whether the CAT had power, having set aside a decision and remitted the matter to the relevant

regulator, to impose on the regulator a timetable or other directions as to how the matter is to proceed."

If you go forward to paragraph 25, the judgment of Lord Justice Lloyd:

"If the appellant challenges a decision by a regulator and establishes on grounds taken in the notice of appeal the decision was wrong, whether as a matter of procedure or because of some misdirection or because the CAT takes a different view of the facts, the Tribunal has a choice of a number of courses open to it.

"It may set aside the decision and remit the case. It may feel able to decide itself what the correct result should have been so that no remission or reference back is necessary. It may wish to retain for itself the task of deciding the eventual outcome but require further findings from the regulator, in which case it will not remit but may refer all or part of the decision back under Rule 19(2)(j) with a view to deciding the appeal with the benefit of the result of that deferral."

If one looks at that situation, you can have a situation where the third possibility is where you see some difficulty in the evidence as to whether you can decide the case, and therefore you can use 19(2)(j) to

send the matter for a finding of fact by the OFT so the matter can them come back, armed with that finding of fact. In other words, what's interesting about that is it's not contemplated but what this Tribunal does is itself carry out an investigation.

Then at 28 his Lordship considers a case may occur where the setting aside of the decision and remittal to the regulator doesn't dispose of the appeal entirely:

"I wouldn't wish to exclude that possibility altogether but the facts have to be very unusual."

He doesn't explain actually what situation that could be. If you go on two sentences:

"With respect to the CAT, it seems to me that in the prevent case, once it has set aside the decision and remitted the matter to Ofcom, there was nothing left of the appeal. Paragraph 3(1) did not compel or allow the CAT to treat the appeal as still subsisting in order to decide points which did not arise once it had set aside the decision complained of. Correspondingly, since there is no longer a subsisting appeal, Rule 19 did not apply."

I commend the rest of the paragraph to you. The point is there, and Mr Lasok accepts this, once you get to the stage at which you exercise your duty under 3(1) then you become functus because that is the end of the

process. So that what then you are being asked to do is not exercise your power in order not to be functus in order that you can do something else, which is make a different decision, allowing different evidence to come forward in the course of these proceedings. Now, that is turning everything on its head.

THE CHAIRMAN: What makes me uncomfortable about this part of your submissions is, if you say we have come to a point in the hearing where everyone should realise that it's inevitable that the decision is going to be set aside, therefore we have a duty to set the decision aside now and it's not within our jurisdiction to keep these appeals on foot in order to explore whether we will want to exercise our powers under paragraph 3(2)(e), say. What is it that stops the following from happening: in the course of any long trial, after each witness, counsel pops up and says "Now, Tribunal, because of that evidence it's inevitable that this appeal is going to win, therefore the shutters must be brought down, if you are against me on that then we go on for another two days". Two days later, "Well, now it must be clear that" --

MR HOWARD: The answer to that, there is a very simple answer, because that's not how we manage cases, and if somebody did do that, in a normal case, for instance,

firstly if you try and pop up in a case and say, "Look, we have heard the evidence and it's all hopeless and you must now dismiss the case", the judge is going to say "What exactly is your application? Because if you are saying -- firstly, let's say you were the defendant. You would obviously have to wait until all the claimant's evidence had been called, because his evidence might change as you go through the six weeks or whatever it is calling.

If at the end of the claimant's case you say "This is all hopeless", then what you are doing is making a submission of no case and therefore if you want it do it, I am not going to call any evidence and we have an early bath, to use the analogy I've used before, and under our rules what you are allowed to do is say "Submission of no case, I am not calling any evidence" and then the order of speeches is reversed, and that's -- I suspect there are very few people here who have done it when acting for the defendant. I have personally done it I think once, but it's a bold decision because you have to be satisfied that calling your evidence won't make any difference.

In the context of an appeal, simply popping up and saying "It's all pretty hopeless, we have heard from Fiona Corfield, you must do something", under the CAT

rules there is in fact no provision where the appellant could have done that, but if we had got to the stage -- I just can't see how it would work, is the answer.

THE CHAIRMAN: No, you are putting practical points to me, but your submissions seem to be directed at saying "Now that we are at this stage, it's not a matter of discretion, we simply don't have jurisdiction to continue, we must bring the case to an end".

MR HOWARD: Yes.

THE CHAIRMAN: You may say that the differential between the scenario I was positing and where we are is the acceptance by the OFT that they can't maintain their previous case.

MR HOWARD: That's right, that's the critical point.

THE CHAIRMAN: But their acceptance of that is not unqualified, because of the qualifications that Mr Lasok has put on it.

MR HOWARD: That's part of what you have to decide now, because they want to run -- that's the point. You see, this is why -- what is actually very unacceptable is the way they are bringing this forward. Where we have really got to is they want to run the refined case, which is paragraphs 2(a) and (b). What you have to decide is: what is the effect of your asking me to do that? It doesn't matter what they say, the question is

for you to decide objectively: does that mean that the decision is no longer being defended because what you are asking is something else? If that's right, you are then in a position -- imagine one puts forward a notice of appeal and the OFT says, by way of defence "I agree, the decision cannot stand, but I say before the CAT that there is a whole lot of other things that are bad about what these people have done and the CAT should make a decision to that effect".

THE CHAIRMAN: That was effectively the MasterCard case, I suppose.

MR HOWARD: Yes. MasterCard, perhaps we will look at that, it's not entirely clear whether -- ultimately the CAT didn't proceed -- it didn't proceed as a matter of jurisdiction or discretion. In my submission, it should have proceeded, if it didn't, as a matter of jurisdiction.

DR SCOTT: If the Tribunal faces a situation like this and it has wide discretion under its rules and in particular Rule 19(1) would you have thought that the exercise of that case management discretion was wide enough to bring proceedings to a halt under 19(1), as distinct from under ...

MR HOWARD: Yes. If one says "How do we get to exercise 3(1)?" Under 19(1) you have a constant, as it were,

supervision of the process, and you are entitled at any stage to say "Well, we can't see how this case could continue". So 19(1) would always allow you to say, well, we have heard some of this evidence, OFT, are you defending the decision and if so on what basis?"

If the OFT said they were, it's pretty unlikely that you would kick it out, unless you were saying, as here, you may say you're defending it but actually you're not, you're running a different case and I am not going to permit you to do that, the rules don't allow it and therefore this case, the decision has to be set aside.

I mean, that's the thing. What the OFT is really trying to do is to create a hybrid world where they don't put forward an alternative decision, but they say somehow -- and they can't do that, but somehow the Tribunal is taking charge and so that's the basis on which they can be excused or allowed to put forward something, because it's not that they want to put it forward, it's that the Tribunal's responding to them, but it's the Tribunal, as it were, of its initiative putting it forward.

If we perhaps pick up MasterCard and then quickly look at Albion Water. MasterCard I think is in the same bundle at 181. The relevant part starts at page 9. At paragraph 33, where the CAT actually got to is, just

before 34 -- everybody is familiar with what happened:

"The Tribunal is not satisfied that the procedural foundation for taking these appeals any further is sufficiently secure to justify the Tribunal contemplating that course, particularly given the extensive new material upon which the OFT would presumably seek to rely."

So they were not in fact saying there was a procedural basis for doing this, it was actually saying "We are not satisfied there is, but anyway if there was, we wouldn't proceed".

So it doesn't actually take the debate any further.

Floe, in my submission, does actually, because it shows that the CAT doesn't have an independent, as it were, investigative role. That point was made clearly both in the passage I referred you to at 28 but paragraph 57 in Lord Justice Chadwick makes it clear what the task of the CAT is.

THE CHAIRMAN: Sorry, which tab is it?

MR HOWARD: I beg your pardon, I've jumped, it's tab 182. We looked at paragraphs 25 and 28 of Lord Justice Lloyd and it's worth looking at paragraph 34.

Lord Justice Lloyd in the second sentence explained that:

"The Tribunal as a statutory body has the task of

deciding such appeals as are brought to it in accordance with the 1998 Act in the rules, but it doesn't have a more general statutory function of supervising the regulators."

Then at paragraph 57, the same point is made by Lord Justice Chadwick, and towards the end of the paragraph:

"The task of the CAT is to determine appeals and to do so in accordance with the provisions in schedule 8. For the reasons which Lord Justice Lloyd has explained, the CAT had fulfilled that task when it allowed the appeal and remitted the decision to the Office. There was nothing left for the CAT to do in relation to the appeal which had been brought to it."

The whole premise of that is what you do is you decide the appeal as you have to under section 3(1). Once you get to that stage, this is actually how it simply works: if the material before you justifies making some other decision then you can do so. But what you can't do is refuse to decide the appeal on the basis that you say "Well, what we want to do is to have some further investigation, and we will only decide -- we are only going to keep the appeal alive in order to allow the further investigation to take place".

THE CHAIRMAN: Is this a way one could express what it is

you are saying: the interrelationship between paragraph 3(1) and 3(2) is that the scope of the powers which the Tribunal can exercise may influence the nature of the grounds of appeal that are set out in the notice of appeal, so that in Albion, the notice of appeal is not limited to challenging the non-infringement decision but the grounds of appeal, because of the possibility of the Tribunal exercising the powers in paragraph 3(2)(e), asks the Tribunal to go further and make an infringement finding?

MR HOWARD: Yes.

THE CHAIRMAN: But it's there that the influence of the scope of the powers is felt, rather than in enabling the Tribunal to go beyond the grounds of appeal in order to exercise those powers?

MR HOWARD: That's exactly right, and of course Albion, if one thinks about it for a moment, for the CAT not to have been able to make a finding of (a) dominance and (b) therefore of infringement would have been completely absurd, particularly for the complainant, because the complainant has brought his complaint, then he has appealed, because what the OFT says is "I am going to assume dominance, but I don't find there was a margin squeeze and that's the way it worked". They would then appeal and the nature of the appeal is obviously they

say "You should have found an infringement, that's the bottom line, and the steps along the way are you should have said there was a margin squeeze and you should have made an actual finding of dominance".

So the argument to say "Oh, no, no, the CAT should only have decided part of the appeal and should send everything back" would be a rather odd position. Indeed, one of the things is this is not actually different to the way in which an appeal before the Court of Appeal would operate, where if the material is before the Court of Appeal, but the judge below hadn't made a finding, then you would invite the Court of Appeal to make the finding, because it is in fact a concurrent jurisdiction, and it may or may not do, depending upon whether the material allows it to do so. But it is all part of the appeal that has been brought. That's all actually schedule 8 3(2)(e) in my submission is doing, it's making sure that when you are disposing of appeal, on the material that is then in front of you, you are able to make the decisions, confirming or disposing of the appeal, the decisions that the body below, here the OFT, could have made.

THE CHAIRMAN: Yes. The scope of the material that is in fact before you is itself influenced by the possibility of the exercise of those powers.

MR HOWARD: That's right, but the scope of the material is also defined by the pleadings.
THE CHAIRMAN: Yes.
MR HOWARD: That's the other way you can look at this: is there a free range to put forward material that doesn't go to the decision and the notice of appeal? In other words, take what the OFT currently want to do, they want to put in material to support a different decision. The answer is they are not allowed to do that, and nor would the Tribunal be properly -- assume there were a case management conference. Our case management conference, whenever it was, seems a long time ago anyway, whenever it was. The OFT had turned up and said "I want to put in an expert report, the purpose of which is not to address my theory of harm in the decision but an alternative theory of harm which you might be interested in because we might get to a situation under schedule 8, paragraph whatever it is", to which one would have said "Hang on, evidence has to be by reference to the pleadings, and that isn't part of the pleaded case". And that's the answer.
DR SCOTT: Just to be clear, what you are also implicitly saying is that it would be outwith 3(1) for Mr Lasok to say at this stage: please exercise your jurisdiction under 19.2(j) to refer back to the OFT in part to enable

them to rebuild the bridge so that it then produces a bridge which gets you to 8.2 on, say, 2(a).
MR HOWARD: That's the thing, it wouldn't be getting them to 8.2, it would be getting them to something different.
DR SCOTT: They would argue it would still get them to 8.2 because they would still be within 8.2.
MR HOWARD: That's the problem, in fact, or a problem. 8.2 is by reference to the competing brands, whereas that's not the case they are now running.

Even so, what they can't do is ask you to send it back on that basis. In fact, anyway, the point is they are not asking for that.
THE CHAIRMAN: No, well, you dealt with remission in the close of your written skeleton and there's not been a response to that.
MR HOWARD: There is no response to that, and I think we are entitled and the Tribunal is entitled to take it that everything stands or falls on these proceedings, and if you agree with us, that would be it, you set it aside and you allow the appeals. The OFT is entitled -- if it wants to spend public money on doing things, that's a different matter and not something you have to be concerned with.

I know I might be taking things slightly quickly. We have discussed Albion Water and I think largely

the Tribunal probably has the submission. The overarching point I make is it is actually frankly a ridiculous submission to say that Albion Water in the Court of Appeal has overruled the jurisprudence of the CAT. That is not how the courts of this country operate, whereby in one paragraph without any reasoning you are kicking out a whole lot of jurisprudence. It's a rather startling submission.

If you look at the way Albion Water worked, if you go to tab 186, we have the decision of the CAT, the relevant paragraphs which I would suggest one needs to note are paragraphs 6 and 7 and 208, and then go back to 190 and 196.

(Pause)

And I am reminded of 17, which I think we looked at yesterday.

When the matter came before the Court of Appeal, which we have at tab 186, what is self-evident is the Court of Appeal was not considering the type of situation with which we are concerned.
DR SCOTT: 186 is the CAT.
MR HOWARD: Yes, sorry. 183. That's why I couldn't understand what I was looking at.

The jurisdiction issue starts at 112 and goes forward. The paragraph that's relied on is 127. It's

worth noting that the OFT's submission in fact was that the circumstances in which the Tribunal should act as a primary decision-maker should be limited.

Of course the Tribunal operates as any court does as a primary decision-maker where, although it is an appeal from the Office of Fair Trading, there is material that is put before the Tribunal that wasn't necessarily before the Office of Fair Trading. For instance, part of Mr Lasok's submission, that there has been oral evidence of witnesses, they had chosen not to interview those witnesses, so the result is that there is different material in front of you, so you are there a primary fact finder. That doesn't mean -- which is the jump he makes -- that your role is to conduct some independent investigation, it's just the nature of the process is that you receive material.

I think what you need to ask when you read 127, which is the paragraph that is relied upon by the OFT, you need to ask yourself two questions: is this paragraph saying that the OFT is entitled to adduce a new case, or put forward a new case in order to seek to prove a different infringement? That's what they are saying. Well, there is not a whiff of that in paragraph 127, and if that were the case, and the Court of Appeal was intending to overrule Napp and Argos and

Aberdeen, one would have expected that would have been clearly spelt out. It would have been quite fundamental, because it really would be the Court of Appeal saying there has been a fundamental misunderstanding of the nature of this Tribunal's jurisdiction.

Then if you ask yourself: is this Tribunal obliged to set aside the decision and to allow the appeal once the OFT ceases to defend the decision, either because it explicitly says so or because it's seeking to put forward a different case, in our submission that answer is provided by schedule 8 3(1), and there is again nothing in this paragraph which could conceivably suggest that the Tribunal, as it were, achieved some independent life.

What they are actually talking about, if you think about it again, here what had happened was you had an appeal where the appellant was saying "The OFT made an assumption of dominance, they should have found infringement and so they should have found dominance". What the Court of Appeal was saying, "Well, that is a matter that's all before the CAT, but the CAT itself needs to observe procedural fairness", so there is a question as to whether that issue has been properly ventilated and therefore it has to consider how it

should allow that issue to be tried out before it. But that's basically what you have to do with all the issues that are before you, ensure that there is procedural fairness. That has nothing to do with developing a new case which is not in the decision, or not the subject, as you said earlier, of the notice of appeal. That's why we say Albion Water is being looked at out of context.

I could finish probably fairly quickly, and I know others are keen to have their say. I don't know whether it would be convenient to carry on for a little bit longer or whether you would prefer I wrapped things up in about 15 minutes at 2 o'clock.

THE CHAIRMAN: I think we will take a break now. I am not sure whether you or any of your colleagues were intending to refer us to a decision of the Tribunal in a Telecoms case, BT v Ofcom [2010] CAT 17, which was upheld by the Court of Appeal earlier this year, which dealt with this question of the appeal on the merits and what that means. I think Ms Rose and Mr Kennelly were in that case.

MS ROSE: Madam, I was; he is not guilty on this occasion, but I was there.

THE CHAIRMAN: Yes. That was a case concerning the interpretation of the test under the Communications Act,

which is similar in some respects to this test but different from the other test. Anyway, I just throw that out before we pause.

MR HOWARD: On this occasion I am going to acknowledge complete and utter ignorance, but I am happy to defer to the greater wisdom of Ms Rose, and I am sure she will address the point.

THE CHAIRMAN: Yes. That may be a sensible way of proceeding. We have copies if somebody does want to take us to it. It seems to us that that may shed some useful light on the matter.

Very well, we will come back at five past 2, then. Thank you.

(1.05 pm)

(The short adjournment)

(2.05 pm)

MR HOWARD: Could I just revert on one point that was raised this morning which concerned schedule 8, paragraph 3(2)(d), just to make the point that the nature of the power there was actually discussed in Floe in the Court of Appeal at paragraph 31 and 32 and it's clear from that that the point I was making to you this morning was right, which is that it's not a case management power under (d), it's looking at the decisions that the OFT could have made and which the CAT

could then make at the final stage.

I was then going to come on to the point which was raised in Mr Saini's skeleton argument, which is whether there is a discretion to permit the Office of Fair Trading to run a new case based on saying either that there are findings in the decision on which 2(a) and (b) are based, or that 2(a) and (b) are components of the infringing agreements.

I think all that Mr Saini, as I understand it, is saying is that even if the OFT has a hook on which to hang a refined case, it would be a fundamentally different case from that in the decision and you should not permit it. So in essence it's the same point. Our position is that this cannot arise because if you ask yourself: what is the restriction relied on in the decision, and what is the theory of harm?, neither 2(a) nor 2(b) is in fact the restriction, nor is there a theory of harm.

But even if you concluded that they comprised elements of what ultimately goes into the infringing agreements, or there are findings of fact in the decision, doesn't advance things for the very simple reason they are not the restraints relied on and they are not the restraints which give rise to the theory of harm and the object infringement.

So there isn't a discretion to put a refined case, and the point about the OFT not being entitled to amend the defence of course is particularly pertinent.

So we say that discretion never arises. But insofar as either you have to consider a discretion along the lines that they should be entitled to run a refined case, developing it out of the existing case, or to run a new case under schedule 8, that leads me to the discretionary factors which are going to be the same.

Now, we have largely set these out in writing, and in fact when you analyse what is in the speaking note produced yesterday there is very little response to this, very little attempt to engage.

The first point we made was the lack of particularity in the OFT's submissions. The OFT appears to recognise that, we have dealt with it and I am not going to read it out, at 145 and following. As I understand it, what the OFT says to this is, "Oh, well, we will produce a proper document setting out our case and then the respondents can reply to it". But the answer to that is at this stage, if you are being asked to do something, assuming you have a discretion, it is incumbent upon the OFT to have put forward before you a proper document which sets out the case. Not only is it incumbent upon them to do that, you actually ordered

them to do it, and that's the order you made.

They were supposed to set out the entirety of the constraints in the 15 bilateral agreements, how the constraints fit within the description of the infringements, and whether and how the theory of harm expounded in the decision applied to an agreement including those but only those constraints. They haven't done that.

If the Office of Fair Trading, assuming there was a discretion to allow this to happen, were serious, what they would have put before you would have been firstly a proper document setting out the nature of the restraints, including the evidential basis for them; secondly, a proper economic analysis of the basis of the case that this amounts to an object infringement; thirdly, they would have supplied you with expert evidence to support it, bearing in mind the novelty of the situation that would be being put forward; then they would have also dealt with exemption and exclusion and the fine.

Now, Mr Lasok seeks to brush aside all of that on a basis that's actually difficult to follow. They are now putting forward a different case. Surely the Tribunal and the parties are entitled to understand how the case feeds through from beginning to end. One

doesn't even begin to have that.

THE CHAIRMAN: We did raise, I think, with Mr Lasok what is the decision that the OFT contemplates that we would take, because if it's an infringement decision then all those steps have to be gone through in addition to simply finding on the facts whether these restraints actually occurred.

MR HOWARD: Yes. That's right. It's not sufficient -- that's the problem -- just to say there was something which restrained the retailer from doing something. You then have got to say why that is an anticompetitive restraint and why it's an object infringement, and then you have to consider, in relation to what you have said is the restraint which has its object of anticompetitiveness, does it fit within the conclusion order, does it fit within the exemption and what is the position on the fine? That's what the decision-making process was all about. You can't just say "Well, I stand by everything I said", when you just look at the paragraphs of the decision, if you look at the one about the fine, it's all in the context of the restraint that they were dealing with and particularly the central plank. Once you take away that, nobody knows where they stand.

For instance, these proceedings, if you imagined

a different decision, it's quite possible that even if the OFT tried to stand by its view that this was an unlawful object infringement, they then may have to analyse it and say "But we realise nobody could have spotted this and therefore there is no fine". That would have meant that the complexion of all of this would have been completely different. The point is at the moment we don't have any of that, so we are just left actually with the case being adjourned and they are asking you to let them go away and write what would actually just be a new decision, that's actually what it amounts to, and that shows how manifestly inappropriate and improper this is.

The next heading was that, to continue the proceedings would subvert the administrative procedure, and that we have set out, and again I don't need to go through it in detail, at 159 to 170.

Mr Lasok's only answer to that is to say, "Well, Albion Water has trumped all of that, and once we are in front of the CAT we can forget about the administrative procedure". What you see is the learning of the CAT is that where something new is being raised generally that needs to go through the procedure because of the procedural safeguards, and the obvious point is I'm the appellant, what am I now appealing against if you don't

go through that? It's putting everything the wrong way around.

The next point is that the OFT could always have run the new case. I've largely addressed that already. The reason that's important is the OFT has chosen to run a particular case, the refined case, their submission is "We always knew about this, it's in the decision, we always had these restrictions there". So they have chosen, whether through a deliberate decision or incompetence, not to put forward a case based on that, so why should they now, without any explanation at all, be entitled to come along to the court and say "Just because the evidence has gone badly for me on the particular sort of recherche case that I did want to run, now I want to run this other case, and you have to remember this is in the context of where they are saying this is an obvious object infringement so it must have been always obvious, these points were there, they didn't run them, and so that's why we make the points we do, that this is a case they could always have run and they shouldn't now be entitled to run it.

The prejudice to Imperial. This is actually rather interesting, the way that Mr Lasok seeks to deal with this. He says, "Oh, there can't be any prejudice because Imperial will still have its right of defence in

relation to this new case, therefore no prejudice". He says these are public proceedings so it's not likely -- I think he referred to commercial parties being somehow, they are constrained by the court from introducing a new case but that doesn't apply to a public body like the OFT. Well, actually the point applies even more strongly to a body like the OFT which has public duties and responsibilities including a responsibility of not harassing people unfairly. It has made a decision, we have appealed it, we are entitled to expect finality of that process. This court surely is not the old Court of Chancery as described by Dickens in Bleak House. This is not the 18th century, it's the 21st century and this is meant to provide a modern, efficient procedure.

We are eight years into this matter. The idea that a further vista is to open up whereby for some uncertain period simply because the OFT has decided it wants to have another go at some different point not yet fully ventilated, in our submission is something that the court should have no difficulty whatsoever in rejecting.

Not only does Imperial have an interest in these proceedings coming to an end, but there is a public interest in the finality of litigation. There is a particular public interest here, which is: how are future appellants to understand the position? So you do

what Imperial has done, you face a decision which you say is wrong, and you decide to appeal, you spend a lot of money with Mr Brealey and others charging lots of high fees, and then what? You to Day 26, it's all going swimmingly well, and then the OFT says "Well, that's all very well, and well done you lot, but actually we have another case up our sleeve, so there is absolutely no point appealing this because if you knock that one down, no doubt they will say "We have another one", and where does it end?

The OFT of course would like it because what the message would be to appellants in the future is: don't bother appealing because you have no idea how this process is going to go in the sense that nobody can predict whether the OFT will just run some new case in the course of the appeal, it will never end.

Of course they would like that, because they like the fact that people may find the procedure oppressive and as a result settle. But that's not what this Tribunal should be saying. This Tribunal should be saying that people are entitled to have the case disposed of on the basis that it was put forward and not to face what is open-ended litigation without any understanding of when it could be brought to an end.

Finally, practicalities. There is no proper

submission before you as to the practicalities of any of this. What was originally said is, when they produced their document last week, "We will address the practicalities in due course". Now they say, eventually it comes out, "Well, it can all be dealt with, we will produce a pleading and others will respond". But what's the timescale of all this? When is this litigation, when is this appeal ever going to be brought to an end? And how are you going to take account of the fact that people may not be available, experts are not available and so on. As things stand, I can only speak for my personal position, I was booked to conduct this case until 21 December. I am not available to conduct this case in the New Year; I am not available until next autumn. Now, other people in my team may face similar difficulties and so on. I don't know when our experts would be available. It's simply not how litigation in the modern world is conducted, and that's a further reason why you should unhesitatingly say enough is enough and this now has to come to an end.

So I have gone through that rather quickly, but I think, as I say --

THE CHAIRMAN: The points are very clear.

MR HOWARD: Yes, and there has been very little attempt to engage with them. So those are my submissions, unless

I can assist you any further.
THE CHAIRMAN: Thank you very much, Mr Howard.
MR HOWARD: Thank you.
Submissions by MR SAINI
MR SAINI: Madam, I have had a word with the other appellants' counsel and we have agreed I'll go first and we will all try and confine our submissions so that Mr Lasok has a generous period of time to reply.
My submissions are going to be divided into three parts. First of all, I am going to consider the position if Mr Lasok is right in saying that the restraints are in the decision. Secondly, I am going to consider the proper construction and interpretation of schedule 8. Thirdly, I am going to address the issue of what the Tribunal should do now in terms of its procedural powers.
Can I ask the Tribunal have handy a copy of the 2003 rules, because I am going to be referring to those on several occasions.
I've also copied for the Tribunal, just for ease of reference, copies of yesterday's transcript which I hope can be provided just to speed things up, just two pages, pages 53 and 54, because before I start my first submission, I want to be absolutely clear what the OFT's position is. (Handed).

I've identified on this two-page extract under 1 and 2 on the right-hand side at the bottom of the page, the two different positions which the OFT are taking. First of all, the bottom of page 53 where I have marked 1, which is simply that the position that the allegations are in the decision and you can just get on with it and eventually decide to uphold the decision and set aside part of it. The second position, which Mr Lasok said the Tribunal could easily reach, which is at page 54, which is that these allegations are not within the decision and therefore you have to exercise your schedule 8 powers.
Now, those are the two concrete ways in which the OFT now puts its case and I am going to undo each of those.
Dealing with the first way, which is simply just get on with it, assume it's in the decision and the Tribunal can go ahead. I emphasise that the submissions I make are without prejudice to what Mr Howard has said about whether or not these points are within the decision.
Now, we say that this is in substance an application either for some kind of direction under Rule 19 or in substance an application to amend the defence.
There must be some kind of application being made because Mr Lasok accepts frankly that you can't simply

just get on with it, because even if one finds these allegations within the four corners of the decision, the case that we have come to meet is very different to the case that's now advanced, so something has to happen, there has to be some procedural step taken.
We say in those circumstances what effectively the OFT have to do is to persuade the Tribunal to allow the OFT to run a case which might be within the four corners of the decision but is essentially a different case.
Now, there are very, very limited powers to amend a defence, and the Tribunal has the rules. Under Rule 14 one sees what a defence must contain, and in particular under Rule 14(3), the defence has to contain all of the arguments of law and fact that are relied upon and any directions, and in particular you will notice, Madam, under (3)(b) that there is a provision indicating that -- it may seem rather odd for a defence, but the defence must identify the relief sought by the respondent, the defendant.
So what in substance is happening here example, and this is absolutely clear from the first part of Day 28 that I was reading a few minutes ago, is that Mr Lasok is in effect, without really doing anything, applying to amend the relief he is seeking in the defence to say that "I would like part of the decision to be set aside

and part of it to be upheld", so it's application effectively to amend the defence.
You will recall that in all of the defences they do actually say something about relief. Just to give you an example, in the main defence concerning ITL, volume 4, tab 46, page 307 {C4/46/307}, they do seek some relief. They seek an order dismissing the appeal.
So what in substance Mr Lasok is trying to do, without actually articulating it, is he is seeking to amend paragraph 452 and the similar paragraph in the other defences to seek some different form of relief. We know, just while we are back in the rules, under -- I can perhaps give you a cross-reference -- Rule 14, subrule 7 says:
"Rules 9 and 10 [et cetera] shall apply to the defence."
If one could please go back to Rule 11, which also applies to a defence, Mr Thompson showed you this the other day:
"The ability to make an amendment to a defence under Rule 11(3)", and under 11(3) where it says:
"The Tribunal shall not grant permission to amend in order to add a new ground for contesting the decision", one has to read in there "shall not grant permission to amend a defence".

The ability to amend is very, very limited. First of all, matters of law or fact which have come to light since the appeal was made. No, that's not the case. (b), not practicable to include such a ground in the notice of appeal or in the defence. Not the case because Mr Lasok says that these points were in his decision in the first place. Then (c), the circumstances are exceptional. There is nothing exceptional here.

So in substance what one has is an application to amend the relief being sought, to seek some other relief, and that application has to be adjudicated upon according to 11(3).

Mr Howard has already explained the huge problems there would be in trying to amend at this stage, the practical problems. I would summarise those as four problems.

THE CHAIRMAN: Were you the appellant who referred to the Swain-Mason case?

MR SAINI: Yes. I am going to come to that. I am trying to do it very, very quickly.

Four matters that the Tribunal would have to consider and four hurdles that have to be overcome, first of all -- and this is actually made very clear in the Swain case as well -- that the person seeking to

amend has to set out very clearly his case but also at this stage, not later, he has to show that the amendment he seeks has a reasonable prospect of success. So on the basis of the case as it currently is, Mr Lasok would have to show that the case based on 2(a) and 2(b) is one that has every reasonable prospect of success. That's both on the facts and on the basis of some economic evidence, that first of all the facts show that 2(a) and (b) are made out, and also that he has a reasonable prospect of success of showing that they amount to those restraints amount to an object infringement. He would have to come to this Tribunal now to do that, not later.

One particular point made in the Swain case, I believe it was by Lord Justice Lloyd who gave the main judgment in that case, was that it's not acceptable to basically set out an outline amendment and then say to the court, "Let's just see how the evidence develops". The Court of Appeal said that was not acceptable. That's one hurdle.

The second is that there would be have to be an ability on my client's part and on the part of all the other appellants, to answer that case, and not just pleadings but we also want the liberty to put in new evidence.

Just to give you one example, the restraint in 2(b)

which is the retailer initiated prohibition. We never put that to any of our witnesses and none of our witnesses were cross-examined about it. So one would have not only pleadings but also both factual evidence and expert evidence.

My third and fourth points is essentially the need for factual and expert evidence.

Putting aside those points, a further point made in the Swain case which represents the current approach in ordinary civil proceedings is that there are other public interests at play wherever an application to amend is made. Once upon a time the position used to be that you could just about amend at any time because the ultimate aim of the court was to do justice. That is no longer the approach under the CPR. The current approach is that the decision as to whether or not permission to amend will be given has to be informed by: first of all, the interest in the finality of litigation; secondly fairness to private parties who have been harassed by litigation; and thirdly -- which may or may not be important but I think it is important in this Tribunal -- the interest of other litigants who want timely access to courts.

I am sure there are a queue of people waiting to enter this court to have their cases heard but they are

obviously going to have to be put to the back of the list. So there is an overwhelming series of hurdles before Mr Lasok, if he were going to seek to amend. We are still in this rather Alice in Wonderland world where he hasn't made an application to amend, but that is really what he is doing. I am not going to take you to the Swain case, because I think you have that well in mind.

I am going to turn then to my second submission, which is that there is an error in the way Mr Lasok has approached the powers of the Tribunal under schedule 8.

I may just simply be echoing a point you made before the short adjournment, Madam, to Mr Howard. If the Tribunal could please go to schedule 8, Mr Lasok's submission is that the powers under 3(2), particularly 3(2)(d) and (e), are unconstrained by 3(1), in the sense that 3(1) imposes no limits, imposes no shackles on the exercise of the Tribunal's jurisdiction under 3(2). He made his position very plain. He said that once we enter the Tribunal, everything is up for grabs, and that the Tribunal's exercise of powers under 3(2) is not constrained by the grounds of appeal.

We say the position is exactly completely the opposite, that the powers under 3(2)(d) and (e) are no doubt wide but they must be exercised within what we

call a jurisdictional box created by 3(1). So 3(1) creates a box, the box is defined by the issues in the appeal, set out in the grounds of appeal, and any exercise of powers under 3(2) must be within that box.

We say in fact that our submission is made good both by the Albion Water case and also by the Burgess case, the funeral directors' case, you will recall.

In Albion Water it was absolutely clear, see paragraph 208 of the CAT decision, that all the issues that the CAT decided had been raised by the notice of appeal. So issues of dominance and abuse were both raised by the notice of appeal. I think, Madam, you said yesterday that perhaps in Albion Water the CAT had simply, by way of extension, dealt with certain things that were raised. But there wasn't even an extension. The issues that the Tribunal dealt with were fairly and squarely before the Tribunal, by reason of the notice of appeal. So anything that's said by the Court of Appeal has to be taken with some caution, because the Court of Appeal were not dealing with a case where the CAT had dealt with issues that weren't in the notice of appeal.

Similarly, in the Burgess case, the Burgesses were not only appealing the finding of abuse, but they were also saying that there was dominance. Again, in their notice of appeal.

By contrast, in the present case Mr Lasok does not even try to suggest that the issues which he would now want the Tribunal to resolve are issues that are raised or debated in the grounds of appeal set out in the notice. So we are completely outside the jurisdictional box.

Before I conclude the second of my submissions. I should make it clear that even if the Tribunal were not to accept our submissions as to the limits in relation to 3(2), and there was a discretion to exercise, all of the points I've made earlier and Mr Howard made earlier as to how the discretion should be exercised apply with equal force.

Now, finally, I want to deal with an aspect of the Tribunal's powers, and particular provisions I don't think the Tribunal has seen in the rules yet, which in a sense deal exactly with the situation the Tribunal is faced with now.

Where we essentially are is that Mr Lasok is saying that his defence, the document by which he defends these proceedings, no longer represents his case as to why there was an infringement. That very issue is contemplated by these rules. Perhaps I can ask you to go back to the rules and please go back, first of all, to the provision dealing with defences. It's

Rule 14(7), and you will recall that I read to you 14(7) which says that:

"Rules 9 and 10 except Rules 10(1)(b) and 10(c) and 11 shall apply to the defence."

We have also looked at the provision about amendments. However, we also know, because Rule 10 is applied, that the rules about power to reject apply. If you would go back to Rule 10, please, and one has to write in here, notice of appeal write in defence.

So:

"The Tribunal may, after giving the parties an opportunity to be heard, reject a defence in whole or in part at any stage of the proceedings if it considers that the defence discloses no valid defence."

That's the position we have reached. One of the questions raised last week in the Tribunal's letter to the parties is: what does the Tribunal do when one reaches the position that we are currently in? Can the Tribunal simply go on and allow the appeal? We say the Tribunal should exercise this power under Rule 10 and say that on the basis of a concession by the OFT the defence falls to be rejected, and then if you look at subrule (2) under 10, you can make a consequential order. The obvious consequential order here is that you allow the appeals and set aside the decision.

So the Tribunal has ample procedural powers to deal with the current position, and it's not controversial, and it shouldn't be controversial in this case, that the defence should be rejected, because Mr Lasok effectively concedes that. He is saying that he can no longer defend the case on the current pleaded document. And that's why he is effectively seeking to amend.

THE CHAIRMAN: Rule 10 is usually exercised clearly before the trial has started.

MR SAINI: Yes.

THE CHAIRMAN: And on the basis of an analysis of the document itself rather than an analysis on how the content of that document has been affected by subsequent events. I suppose then it gets us back to the same question I asked Mr Howard, namely: what is there to stop a party jumping up part way through the case and saying "We have now reached a point where the defence should be rejected"?

MR SAINI: Yes. But you will have seen, Madam, that this makes it clear, Rule 10(1) makes it clear that it can be at any stage of the proceedings. So I quite accept the point that this would be something that would normally apply prior to a trial, but clearly the draftsman had the foresight to see that something might happen in a case at a later stage which meant the defence no

longer represented a tenable position. That appears to be the position we are in. Mr Lasok accepts that. That's why he wants to run what he calls an alternative case.

DR SCOTT: I did put to Mr Howard that we have not had an application to strike out the defence, which seemed to me one of the logical steps that might be taken by the appellants.

MR SAINI: Well, we don't need to, because the position we are already in is that Mr Lasok accepts his current defence does not represent his case as a basis for defending the decision. The Tribunal has given the parties an opportunity to be heard, see 10(1), and we ask you to reject that defence and enter judgment. This is the right procedural route.

Unless I can assist you any further, those are our submissions.

(Pause)

THE CHAIRMAN: No, thank you very much, Mr Saini. Yes, Mr Flynn.

Submissions by MR FLYNN

MR FLYNN: Madam, sirs, there is obviously a great deal I could say, and in a sense in my client's interest I ought to say, but we are going to keep it short. We have agreed to follow in the wake of Imperial. We have

said in our written submissions, which I here take as read, that we broadly agree with the thrust of what they say, and you have seen our additional points.

I think, in the light of something that was said earlier, I will just say we formally reserve our position on remission, should the OFT come back to that, but I think you said in an exchange with Mr Howard that it looked as though the choice was either proceed on some basis or allow the appeals, full stop, so I just put down that marker.

So I am not going to say anything about the new points in the speaking note, although we have a great deal to say about it.

Plainly we would contest on a jurisdictional basis the idea that it's possible to go forward, as Mr Lasok is suggesting that you should, and we say for the reasons we set out in our paper that Albion Water is not a relevant authority. I refer particularly to paragraph 21.2 of our paper. I think that a discussion that's been had has brought out very clearly that it is highly relevant that Albion Water was a non-infringement decision and one where necessarily the applicant was seeking to prove, or at least show to a sufficient extent, actually that there had been an infringement.

So it's very relevant to consider that the applicant

was trying it show abuse as well as dominance. The abuse bit was pretty fully pleaded and the Tribunal went on, if you like, to make the gap between where the regulator had not made a finding of dominance, the Tribunal supplemented that gap. The issue of abuse was fully pleaded out and that was an issue arising in the appeal, in the notice of appeal. So that was within the box, as I think Mr Saini puts it.

It is very different when you are dealing with an infringement decision, because what is in the box is a notice of appeal saying why the infringement decision should be set aside. What we are saying is the infringement identified in the decision is not made out and you should set aside that decision. There is nothing in the notice of appeal saying actually it's a different infringement. The example you gave earlier today, Madam, about what if there is a price-fixing cartel decision, and actually what it appears, at the end of the day, is there was not a price-fixing cartel but there was an exchange of information about historic pricing, which might or might not be an infringement, depending on the case.

I would say in those circumstances my submission is Albion Water is of no relevance, it's not providing a gateway for the Tribunal to investigate or find some

completely different infringement that's not in the decision. In the example you gave, the appropriate course is to say: no, the OFT has not established the price-fixing cartel. Whether there is something else that can be established is a matter for the OFT at a later stage.

That's all I wanted to say on jurisdiction.

What I wanted to concentrate on was discretion.

THE CHAIRMAN: Just a further question on that. Suppose you have an infringement decision, for example suppose in this case there had been more in the decision about whether, for example, having category champions had some anticompetitive effect, say, I can't think at the moment why it would, I am not suggesting it might, but just as an illustration to get to this scenario: there is then in the decision findings that certain aspects of the arrangement constitute infringements but that other aspects of the arrangement either are benign or the OFT is not arriving at a decision in relation to those infringements.

MR FLYNN: Just so I understand the question, Madam, you are suggesting that the category champion bit would be in the second category?

THE CHAIRMAN: Yes, that's right. So they don't arrive at any conclusion, we know now that they can't actually

decided they are not infringements, at least of the European provisions, but they say there is ...

So then one might have a position where those who have been found to have infringed appeal against the infringement decision, and say a smaller manufacturer who's never chosen to be category champion and doesn't like the whole category champion business wants to appeal against that non-infringement finding or the part of the decision that doesn't come to a conclusion on that. What would be the position then?

MR FLYNN: That would be a separate appeal. The smaller company wouldn't be appealing the main decision, they would be appealing a non-infringement decision, if you like, recorded in the principal decision.

THE CHAIRMAN: I see. So if their relief, then, in their notice of appeal, asked for a decision finding that actually those aspects of the arrangement didn't amount to an infringement then you would still be within the notice of appeal --

MR FLYNN: They would be like Albion Water and they wouldn't be like us. But if you just had the cartel appellants in front of you, the fact that the OFT thought that, you know, category champions had some questionable aspects but they hadn't found an infringement about it, and say the Tribunal was pretty encouraging and said "Actually,

we didn't like the look of those things", if the OFT then pressed you to make a finding on that, my submission would be that would not be within the notice of appeal. That would be trying to find a separate infringement that's not raised by the appeal, or found in the decision under appeal, and that's precisely the boundary I would say that is set and that you should not cross.

DR SCOTT: Imagine a situation where Tesco's decided that they looked at the decision, they thought the present appellants were a wicked collection of people who ought to get their just desserts, but that OFT had got it wrong, and if Tesco's had brought before us 2(a) and 2(b), or 10(a) and 10(b), then it seems to me what you are saying is that if Tesco's had in their notice of appeal said "What was happening here was 2(a) and (b) and 10(a) and (b)", then we would be in an Albion type situation. Do I have that ...

MR FLYNN: Potentially, you would, sir, if you like, in another world. It's most unlikely that the Tribunal will be faced with someone trying to establish through the Tribunal an infringement of that kind when the OFT hasn't taken a formal non-infringement decision. That's the Albion --

THE CHAIRMAN: There has to actually be a decision which is

appealed. There has to be an appealable decision within section 46.

DR SCOTT: I am assuming that we have got the decision as it is, but we have a dissatisfied party who thinks that the decision isn't the right decision.

THE CHAIRMAN: Then they would have to make a complaint to the OFT. Anyway, we are getting rather far away from --

MR FLYNN: I can imagine that if -- Tesco I don't think would be in a position to do that -- someone came along and said, "The OFT's decision, not only is it a jolly good one but there are further infringements they should have found", the Tribunal might well say your first course is to take that up with the OFT and see what they think about it, and we are not going to deal with that, we are certainly not going to deal with it in parallel with the main appeal. That would be a subsidiary second issue, even if it's justicial. I think if one focuses on the difference between an actual infringement and an actual non-infringement decision, one sees a very clear distinction between the cases and that's the principal submission I wanted to make on that.

Let's assume we are wrong about everything and the last question in front of the question is: should we exercise our discretion for something to go forward, and it almost doesn't matter whether it's something within

the decision that one can discern the decision, or it's a wholly new and wholly separate case, where are we then?

Let me make firstly the point that there is nothing in Albion Water to guide you, because the Court of Appeal is quite plain -- you were taken to paragraph 125 but it's an important paragraph -- that discretion didn't arise on the appeal and they were not considering the exercise of discretion by the Tribunal, they were only interested in the jurisdictional question of principle, was it open to the Tribunal to follow the route that it had. Whether it should have done was another question entirely.

THE CHAIRMAN: I think it was also a question where permission to appeal was refused.

MR FLYNN: Particularly given that Lord Justice Richards himself had refused all permission, I think that's why he was quite careful to delineate the scope of the appeal. Nevertheless that's what he does in the judgment of the court at paragraph 125. I am just going to read it, because I think it's a significant paragraph:

"The written observations of the OFT [who of course were not the regulator who had taken the decision but they were intervening, as it were, or making submissions

about the scope of schedule 8] accept that the Tribunal has jurisdiction under paragraph 3(2)(e) to reach its own decision in respect of the matter forming part of the decision under appeal."

Then they go on to say that the fact that it was taken by the regulator on the basis of the assumption, an assumption doesn't prevent the Tribunal from going further and making that into a finding. It says that the circumstances in which this should happen should be limited.

Then Lord Justice Richards says:

"That, however, engages the issue of discretion, which is not before us on this appeal."

So it's impossible to read Albion as in any way endorsing what the Tribunal had done in that case as a matter of discretion, and indeed I think if one were to read anything into the judgment, it would probably be the other way, given the comments at least about the number of stages in the proceedings and the length of the judgment and so forth. Leaving that aside, it is most definitely not any endorsement of what the Tribunal had done, even in the circumstances of an Albion case.

So in this open world, if you were to exercise your discretion and let the case go forward, what steps would follow? It's accepted by the Office of Fair Trading

that it would have to issue a full statement of its case. Let's not call it a statement of objections but there would have to be something which set out in full the new case, something that we could respond to.

Mr Lasok says, well, then the appellants might need to recall their witnesses. Well, that's not exactly right. We would need probably to lead new factual evidence, directed at the new case, because the current factual evidence is not relevant to the new case. Our evidence might not be confined in our case to the three witnesses that were called in this case. You might need to go further or to find different Asda personnel, leaving aside the difficulties we have that two of our chaps are retired and one works for the competition.

So the case would be on a new factual basis.

The OFT might itself want to provide a witness statement, if it is really being suggested that this is a JJB type case where you need something from someone without an axe to grind, whereas my submission would be all these documents were perfectly open and there is no suggestion there was anything covert going on. That evidence would have to come from the manufacturer, given the way the OFT is now presenting the case, and to say no more about it, there could be some considerable problems in getting a statement from Gallaher, who may

have entered into an early resolution agreement in respect of the infringement in the decision, but have not about any new infringement.

By taking the discretionary route of going into these proceedings, the Tribunal would be making that problem its own.

New economic evidence would have to be called. It is not just a question of putting things to our economists. They would have to prepare economic reports at basis of the new case. The existing economic evidence does not address the case that is being put forward. It doesn't address the incentives of the retailers, our evidence doesn't address the incentives of the retailers to enter into this different form of arrangement. The adherence analysis would have to be started again because it would need to be pegged to wholesale prices, not compliance with the schedules. So we would have to start again. This is a different economic case. You would have to have evidence on whether the price changes observed in response to wholesale price changes would have been different in the absence of any alleged restraint.

The OFT might itself want to put in new expert evidence because Professor Shaffer certainly doesn't give any support to the new theory except as we read it

to say that it could arguably be pro-competitive and you might need an effects analysis.

Finally, you would have to set it down for a trial and for legal argument, at some length. This is all going to take a great deal of time. It's impossible for that to be done in a year, and we are probably looking at something like two years. It would have to be actively case managed throughout. You might have interlocutory issues with possible appeals on those. The Tribunal would have to hold the panel together throughout that whole time and it would involve a considerable amount of additional cost compared with a renewed investigation, if that's what the OFT chose to do.

In my submission, the Tribunal should only go down this route if it is persuaded that the law and schedule 8 positively requires it to do so, and nobody is making that submission to you.

Ultimately the question is, I was going to say does it appeal to you, that's probably the wrong word, does this course commend itself to you? What possible public interest could there be in this? What benefit could there be through going through a Tribunal process as compared with those which the OFT itself has? The OFT has the power to investigate any alleged infringement

that it considers worthwhile. Why would the Tribunal see any benefit in conducting an elaborate and complex procedure of this kind in respect of these essentially historical matters?

Madam, those are my submissions just going purely to the exercise of your discretion right at the end of the process and in my submission it's pretty plain that you really should not take that course and these appeals should be allowed now.

THE CHAIRMAN: Thank you very much, Mr Flynn.

Submissions by MR THOMPSON

MR THOMPSON: Madam Chairman, gentlemen, the advantage of coming third is that I'm sure most of the best points have already been said, so I can be brief.

The basic position is that CGL submits, if it hasn't already submitted, but it submits it now, that the Tribunal should set aside the decision, both against CGL and in reality in its entirety given the nature of the decision and the way that the reasoning is essentially rolled up particularly at the beginning of part 6 of the decision.

Our overall position is that the OFT's case is now an embarrassment and should be put out of its misery. We are really in fact surprised that the OFT hasn't recognised that fact and thrown in the towel.

So far as what I want to say today, I still maintain the points made on Day 27, pages 39 to 49. I made them in summary form, but in my submission they are sound points and good points, and I draw them to the attention of the Tribunal.

I also maintain the points that were made in summary in the letter that we wrote to the Tribunal on 16 November.

Today I simply want to touch on five points very briefly. First of all, the case within a case point which seems to be the OFT's position now. There is a decision within the decision.

Secondly, and I'll touch on this only in a couple of sentences, the obvious difficulties facing the new case.

Thirdly, I think it's a point I should address because for some reason the Co-op was picked out by Mr Lasok yesterday, and a couple of points were made specifically at the Co-op, then I'll just briefly say what we say about 3(2)(e) and our position on the other appellants. These are all very brief points.

Just in relation to the point that was made before lunch by the Tribunal in relation to the BT case, I'll leave that to Ms Rose. I would simply refer in support of our case to paragraphs 70 and 71 and 76 of the Tribunal ruling, and in particular the citation of the

approach of Lord Justice Jacob admittedly on a judicial review and the approach to the pleadings referred to by the Tribunal at paragraph 76 where they say that the issue was defined by reference to the notice of appeal, and we would say that applies equally to the defence on the facts of this case.

On the first point, the case within a case, we would say that really the OFT's case is a sort of homunculus or Russian doll approach to the decision. It says that it has a new case on the facts which is part of the decision, and our submission on this, and I think it's echoing something that Mr Howard and others have said, we would say that this does not assist unless the decision and the CGL defence articulates a clear and discrete theory of harm based on those facts. Various hypothetical points have been put by the Tribunal to other advocates about what might arise. The first case I appeared in this Tribunal before was a case called Genzyme where the OFT had found an abuse based on a bundling abuse and also a margin squeeze and the Tribunal set aside the bundling abuse but upheld the margin squeeze abuse, and so in a sense it was an example of this, the narrower case was upheld and the wider case fell. But in that case, there was a fully articulated theory of exclusionary harm based on the

narrower case and so it was perfectly acceptable for the Tribunal to go ahead on the basis of that narrower case.

The problem here is that no narrower case was ever articulated in either the decision or the defence, and so that there is nothing -- or indeed in Mr Lasok's opening, and so we would say that since the wider case is the only case that has ever been run and if that case fails, then the decision must fail and must be set aside. If the OFT wants to run the narrower case, the humunculous or Russian doll within a doll, then it must issue a new SO or supplementary SO and deal with the matter itself.

So far as the new case itself is concerned, this is obviously a matter that would have to be dealt with at length were the matter to go forward, but it was raised as an issue by the Tribunal itself in its letter of 10 November, so I will simply say this: first of all, the 2(a) allegation is in my submission obscure and wholly unproven. Insofar as it includes an allegation that the Co-op was bound to raise its prices on instruction by ITL, then in my submission it is no more credible than the paragraph 40 case which has now been abandoned. There is nothing to support it in the documentary or the witness evidence.

Insofar as it is simply an allegation that, as a quid pro quo, for obtaining competitive discounts, a retailer such as CGL was expected to reduce its prices, then in my submission that is an entirely pro-competitive and indeed innocuous restriction which should not trouble the Tribunal.

2(b), the retailer case, is, in my submission, an obviously new case and indeed was expressly recognised and argued not to be part of the OFT's theory of harm at paragraph 40 of the CGL defence. CGL had made a point that it had no incentive to reduce its prices, and in response the OFT said, "Well, that doesn't matter because our theory of harm is about manufacturer incentives, so even if retailers have no incentives, that's nothing to do with this case". So in my submission, it's plainly and obviously a new case.

THE CHAIRMAN: Where did the OFT say that?

MR THOMPSON: That's paragraph 40 of the CGL defence, Madam.

THE CHAIRMAN: Right.

MR THOMPSON: That's core bundle 5/57. {C5/57/1}.

THE CHAIRMAN: Where had CGL made its point?

MR THOMPSON: It had made the point at section 2.13 to 17 of the notice of appeal.

The points that were made against the Co-op, first of all there was reference to Dr Jenkins as a devotee of

the margin parity assumption. That was pages 30 to 32 of the Day 28 transcript, by reference to paragraph 30 of the note put forward by the Office of Fair Trading.

In reality, in my submission, that simply displays the OFT's lack of understanding of the expert evidence. Dr Jenkins' theoretical analysis was not in fact a margin parity case. Her reports explain in detail that the P&Ds floated on MRPs, which is a different form of restriction on her understanding, and she explained in detail how on Professor Shaffer's own modelling assumptions that type of arrangement could actually sharpen manufacturer incentives. Indeed, that seems to have been to a large extent common ground between the experts.

Mr Lasok made some reference to Mr Goodall's evidence at paragraphs 84 and 85 of his note. That's page 82, lines 12 to 14 of the Day 28 transcript. In my submission, that is a complete misreading of the evidence. Mr Goodall merely confirmed that CGL was not prepared to engage in own funded promotional discounting, and that was simply a matter of its ethical policy and its lack of commercial interest in such matters because of its margins.

The third point I would make is that at the start of his submissions, Mr Lasok made play of the fact that the

OFT had relied on the contemporary documents. In my submission, that is a transparent figleaf, at least in relation to CGL. The Tribunal will recall that the documentary position was put in issue very strongly by CGL in its opening by reference to annex 4 to the reply, the failure of the OFT to refer to a single document relating to CGL in opening, the failure to put any such document to any CGL witness or ITL witness, and the schedule that was put in by me during our opening on 13 October, and also the reference to the Gallaher documents that I went through in some detail, and none of that material has been addressed. So in my submission, the contemporary documents certainly didn't justify the OFT's conduct to date.

So far as Albion Water is concerned, I will not say any more than has been said already, with two very short exceptions. First of all, I would adopt what Mr Flynn has said about the OFT's own intervention in that case, and in my submission both the OFT itself and the Court of Appeal would have been quite astonished by the submissions that were made by Mr Lasok in relation to the freewheeling nature of the Tribunal's jurisdiction. That was very much not what the OFT said to the Court of Appeal, and obviously if this matter were to go further, that would be a matter that would warrant further

attention.

Insofar as the CAT judgment is concerned, the references I would gave, in addition to those that have already been given, paragraph 17 I think Mr Howard referred to, I would also refer to paragraphs 51 and 70 in relation to the pleadings point, I would also refer to paragraphs 183 to 197 to the way the Tribunal itself dealt with dominance, 240 in relation to excessive pricing, 284 in relation to margin squeeze, and also the final analysis in the last paragraph of the judgment, paragraph 360, and the basic submission I would make was that, far from a freewheeling jurisdiction, the Tribunal was extremely careful in each of the different cases to work through its specific jurisdiction under the rules and the suggestion that Albion Water is authority for some general freewheeling approach is, in my submission, misconceived.

My basic point on 3(2)(e), which has obviously been dealt with in some detail, is that it is an ancillary power to the power to confirm or set aside the decision which is the subject of appeal. It is not a freestanding power to investigate matters outside the scope of the decision or the pleadings.

So far as the other retailers or ITL points are concerned, first of all I would endorse strongly ITL's

general account of the OFT's ever-shifting case.
I would endorse Mr Saini's account of the pleadings, indeed it appears that Mr Saini has to some extent on consideration adopted the points that I made last week, and I would endorse others' approaches in relation to the evidence, both factual evidence and, as I think I stated at pages 46 to 47 of the transcript of Day 27, particularly in relation to the expert evidence where, in my submission, the reality is that there would have to be a comprehensive re-casting of the expert case if this matter were to go forward, and that is a very strong issue that the Tribunal should take into account in the exercise of its discretion.
Thank you.

THE CHAIRMAN: Thank you very much. Ms Rose, I am wondering whether we should have a short break now.

MS ROSE: Madam, can I suggest, I am going to be very short, so it might be convenient to hear me and then to take a short break.

THE CHAIRMAN: Okay.

Submissions by MS ROSE

MS ROSE: Madam, I just want to address two points. The first is the 080 case that you raised just before lunch.
It's obviously a little difficult to draw an analogy between the Communications Act appeal regime and the

Competition Act appeal regime on this particular point, because the one difference between section 192 and the schedule 8, paragraph 3 power is that the CAT does not have the power under section 192 to take a decision that Ofcom might have taken, it only has the power to remit the matter for the decision to be retaken.
If you look at the CAT decision in the 080 case, you can see that this point is noted. If you go to paragraph 75, the Tribunal makes the point at paragraph 77 that under section 193:
"It is not for the Tribunal to usurp Ofcom's decision-making role. The Tribunal's role is not to make a fresh determination but to indicate to Ofcom what, if any, is the appropriate action for Ofcom to take in relation to the subject matter that the decision has to be on and then remit the matter back to Ofcom."
So that's actually a distinction between the Communications Act regime and the Competition Act regime which means that you do have to treat this decision with a lot of caution.
Having said that, it is of course right to note that at paragraph 76 it is stressed that the aim of the appeal is that:
"The notice of appeal must set out specifically where it's contended Ofcom went wrong identifying errors

of fact, errors of law and/or the wrong exercise of discretion. The evidence adduced will go to support these contentions, what is intended is the very reverse of a de novo hearing. Ofcom's decision is reviewed through the prism of the specific errors that are alleged by the appellant. Where no errors are pleaded, the decision to that extent will not be the subject of a specific review, what is intended is an appeal on specific points."
That's going to the question of the meaning of the Tribunal considering the appeal on the merits by reference to the notice of appeal, and that of course is the same as the wording that's in the Competition Act.
Then when we come to the Court of Appeal judgment --

DR SCOTT: I think just before you turn from that, for those who are unfamiliar with this, in 78(a) and (b) basically what he is saying is this is a sharp tool, this is not an all-embracing --

MS ROSE: Yes, it is not an all-encompassing eventuation. Exactly right, sir, yes.
So then when you get to the Court of Appeal, the Court of Appeal at paragraph 63 notes the fact that there are differences in wording between the Competition Act and the Communications Act and then says:

"... but the CAT has a similar function under both Acts. The same rules apply. Parliament must be taken to have been aware of the approach taken by the CAT towards the determination of appeals from the relevant regulator."
Now, the focus of the Court of Appeal is obviously only specifically on the question of the admissibility of fresh evidence by an appellant which was not put before the regulator and they say that it is admissible but there is no right to admit fresh evidence, it's a matter for the discretion of the Tribunal.
What the Court of Appeal certainly did not do was to in any way differ from or doubt the conclusions that were expressed by the CAT in that case as to the task of the Tribunal on the appeal. If you read the two decisions together, you can certainly derive the conclusion that the function of the CAT is intended to be the same, essentially the same, under both statutory regimes, even though it's right to say that the CAT has the extra power under the Competition Act. I should stress that of course before the Court of Appeal we were making much of the fact that under the Competition Act there is a power in the CAT to take the decision, and seeking on that basis to distinguish the appellate regime under the Communications Act and the Court of

Appeal was rejecting that very submission.

THE CHAIRMAN: And the practice of this Tribunal in the Communications Act appeals, because of the on the merits jurisdiction, has in fact been to arrive at a conclusion as to what should happen so that it's remitted with directions rather than remitting it in some more general way. So one can't exaggerate, I think, in the way these cases in fact are --

MS ROSE: Well, it depends a little bit, actually. If you consider a case like the mobile number portability case, that was a case where it was found that Ofcom had erred because it had not conducted a sufficient impact assessment, and in that case the CAT did remit it to Ofcom for it to re-take the decision with a proper impact assessment and the CAT didn't in that case seek to pre-empt what Ofcom might conclude.

There is just one final point on the Court of Appeal judgment, reflected in the postscript to the judgment, that Ofcom was making the point to the Court of Appeal that there was a difficulty for the regulator if the CAT entertained fresh evidence which had not been considered by the regulator at the time it took its decision. because Ofcom's point was: how can we take a stance on the appeal if we haven't evaluated this evidence and made a decision? We don't actually have a position on

this evidence. The Court of Appeal acknowledged that concern and said "As a matter of fact, Ofcom doesn't necessarily have to take an active role in the appeals" and the Court of Appeal was recognising that as the regulator of course Ofcom would have to maintain a neutral and impartial stance in case the matters should be remitted to it for reconsideration.

Madam, I suggest that that also is resonant with the very startling position in which the OFT has got itself in this case, because we start from the position that, as I understand it, it is accepted by Mr Lasok that the OFT did not find in its decision that the two restraints which the OFT now contends for constituted an infringing agreement. It's not suggested that there is any such finding in the judgment, either as an alternative or as a part of the decision, it's simply not put forward.

That means that the OFT has never taken a decision that these two alleged restrictions constitute an object infringement. Indeed, Mr Lasok also accepts that the OFT has not even put this proposition to its expert witness, and therefore does not have any economic evidence to support the proposition that these restrictions constitute an object infringement. It is very difficult to understand, on that basis, how it is that the OFT as a public authority can be seeking in

this Tribunal to put forward a positive case that these restrictions amount to an object infringement. It's a very odd situation.

Now, we in general terms adopt the submissions that you have heard from all of the other appellants, and in particular we adopt the submission made by Mr Saini that this is a situation in which the OFT's expressly no longer standing by its pleaded defence, it concedes that its pleaded defence no longer represents its case.

In that situation, the OFT only has two choices, one of which is to concede the appeal and the other of which is to seek permission to amend its defence. And yet the OFT has not sought permission to amend its defence. Of course there has been a lot of discussion about jurisdiction under schedule 8, but in a sense we don't even get to schedule 8 because the current situation is that there is no pleaded case before this Tribunal putting forward the propositions that Mr Lasok is seeking to put forward, and no application has been made by the OFT to put forward such a case.

Now, we submit it's obvious why no application for permission to amend the defence has been made by the OFT, because if any such application were made, it would immediately bring the matter into focus and make it obvious why the application would have to be refused,

because the OFT would be asking the Tribunal to give it permission to exercise a discretion to permit the OFT to amend its defence after 28 days of hearings, after the factual evidence had concluded, in relation to a case which the OFT has itself not produced any evidence to support, no expert evidence, no theory of harm, which the OFT itself accepts would require completely new expert evidence, and in a situation in which -- again as the OFT accepted at paragraphs 79 and 80 of the speaking note -- the OFT accepts that it has not yet developed at all any analysis of how these two alleged restrictions apply on the facts to the individual retailer/manufacturer agreements.

We simply have no factual basis at all, from the perspective of Shell, of how it is said that Shell was engaged in what is now alleged to be the agreement or concerted practice with ITL and Gallaher. That's a matter of considerable significance for Shell in particular, because in response to your questioning, Madam, it was made ultimately clear by Mr Lasok that they do contend that there was an agreement or concerted practice between Shell and ITL to fix particular shelf prices, and without going through it, you will immediately see why that's a matter of considerable significance for Shell.

But if they were seeking permission to amend in a situation where no factual case at all is made out against any retailer, we submit it would be doomed to fail. So that's why we are in what Mr Saini aptly called the Alice in Wonderland world where they are seeking to persuade the Tribunal to continue with the appeal on the basis of a pleading that they now acknowledge they cannot sustain, but without even applying to amend that pleading.

Such a course, we do submit, would be not only plainly wrong but also in the public law context contrary to the most basic principles of good administration and natural justice and indeed would constitute an abuse of process.

Mr Lasok sought to characterise the issue as purely one of procedural fairness, whether or not the parties could be granted their rights of defence. You have heard a whole range of submissions as to why that is inadequate. In any event, procedural fairness is only one aspect of the concept of abuse of process. It is also for this Tribunal to ensure that its processes are operated in such a way as to maintain the integrity of this appellate system, and we submit that what is being put forward by the OFT fundamentally undermines the credibility and integrity of the system under the

Competition Act and before this Tribunal.

There are of course very significant practical difficulties in the way of what's been suggested, and we agree with what was said in particular by Mr Flynn about those. We would particularly stress a couple of points.

First, that these are purely historic infringements, dealing with events now almost a decade ago, it is not alleged that there is any continuing infringement or any continuing detriment to the public. Shell is in a situation, as the Tribunal knows, where one of our witnesses has moved to Australia. If a new factual case which has still not been annunciated or pleaded is at some future date to be put forward against Shell, we would then have to have the difficulty of pinning that person down, locating them, and seeking to take yet a further statement from them. We submit that it is simply unjust for us to be placed in that position now, so many years after the events.

There is a very strong public interest in both the proportionality of legal proceedings, the proportionality of the conduct of regulators, and the finality of litigation and certainty of litigation, and those public interests are intensely engaged by the course that the OFT urges upon you.

I began my submissions many days ago with

a reference to the film Kes. We are no longer in that territory. I need to take you back further in cinema history. We are now looking at Frankenstein. Mr Lasok seeks to dig up from the grave of his decision components -- his word -- of the decision and stitch them together. What you would have is not a living entity but a corpse, and I invite you to bury that corpse now.

THE CHAIRMAN: Thank you very much, Ms Rose.

We will take a break now and come back at 20 to 4.

(3.26 pm)

(A short break)

(3.45 pm)

THE CHAIRMAN: Mr Lasok, I am not sure what you are planning to cover in your remarks, but there are three points that we would be interested in particular in hearing what you have to say. The first is if you want to respond in any way to the points that Mr Howard and others have made about what was said by the OFT or by you on behalf of the OFT on Day 26 of the proceedings.

The second is if you have any comments on the question of remission of the matter to the OFT as a possible course for the Tribunal to take, given that ITL raised this in their skeleton argument.

The third is whether you accept the

characterisation that we have been discussing of the restraint in paragraph 2(a) as essentially being a resale price maintenance restraint.

Reply submissions by MR LASOK

MR LASOK: If I can take the remission point first, the OFT hasn't at this stage suggested remission. It was considering it at an earlier stage. But it took the view that we might as well, as it were, bank the progress that had already been made before the Tribunal in these proceedings and move on from there.

The alternative, because it involves the matter going back to the OFT, the issue of an SO and so on and so forth would simply be much more cumbersome and involve more time and more costs, it would be more onerous actually for everyone, not just the OFT but also for the appellants.

Now, I fully understand the forensic points made by the appellants this afternoon about the consequences if the matter were to proceed before the Tribunal. I have to say that one must express some polite scepticism about the suggestion that any witness of fact other than a tobacco buyer would have to be heard at least so far as the retailers are concerned, because on the face of it all these arrangements took place involving communications between the manufacturer and the tobacco

buyer, and in fact we have already got evidence from the tobacco buyers that the retailers considered appropriate to put forward as witnesses.

It is perfectly true and we accept that the experts would have to be asked to consider the current way the OFT sees the case, but we don't regard that as being particularly onerous.

So the upshot is that although one fully respects what people say about the next steps, one entertains some doubts as to whether or not there has been a bit of exaggeration about it. But in the round, in our submission, it would just be more efficient to proceed before the Tribunal and that's why we have not proposed remission.

THE CHAIRMAN: So do you accept that this is where we are, then: if we were to decide that the restraints in 2(a) and 2(b) are not part of the decision, in the sense that we decide to give to that term, and we cannot see at the moment how we could -- well, either we decide we then don't have jurisdiction to keep the appeals on foot for any purpose, or we decide we can't envisage now exercising our powers under paragraph 3(2)(e), that the consequence is that we should now bring these appeals to an end by allowing them and quashing the decision?

MR LASOK: Following that scenario, that's the decision that

the Tribunal would reach.

THE CHAIRMAN: Yes. Just to push that a bit further, we have a decision here against which only some of the addressees have appealed. I am not sure where that leaves us in terms of setting aside the decision where there are some addressees who have not appealed against the decision. Maybe that's a discussion for another day, if we get to that.

MR LASOK: That would be for another day, but technically the appeals would be allowed in relation obviously to the appellants. So that that means that the decision would be set aside to that extent only.

THE CHAIRMAN: Yes. Thank you.

MR LASOK: Now, the first question that you asked me was about what was said on Day 26, and the position was in the run-up to Day 26 and since then the OFT had been giving serious and ongoing consideration as to the proper way forward, and that wasn't a straightforward matter as it appeared to the OFT. There was a difference of emphasis between what was said on Day 26 and what was said on Day 27, but on Day 26 we made no particular concession, as in fact the Tribunal recorded in its judgment, and on Day 27 we articulated the position that we are arguing now.

I think that, so far as the phrase "departure from

the decision" is concerned which has been bandied about, one needs to bear in mind that the position of the OFT in relation to the use of that phrase has been consistent since it was first used, but a departure from the decision is not the same thing as saying that the matters in issue are not in the decision at all. That needs to be made abundantly clear. I specified yesterday what the departure was.

Now, the question about 2(a) and whether or not it's RPM. The way that the OFT looked at the case was and remains that it is not a simple RPM case, because a simple RPM or a classic RPM case is vertical in nature. Although I suppose it has to be said that there are a number of different views as to what the theory of harm lying behind RPM actually is, there is not one single view about it.

The feature which struck the OFT in the present case and still strikes the OFT is the horizontal aspects of the arrangements, because both under the case advanced in the decision and under the case that the OFT currently sees to be the case made out on the evidence, the feature that strikes one is this horizontal linking of the prices of competing brands. What actually happened, I think it's well worth bearing this in mind, is that in the decision in paragraph 220 I think it is,

the OFT specified which bits it had dropped from the allegations made at the time of the SO and the supplementary statement of objections.

Paragraph 220 doesn't refer to RPM as an allegation that was dropped. That largely explains why it is that when you get into the sequence in section 6 which is 6.241 to 6.254. The previous paragraph was 2.120, if I got that wrong.

When you get into the sequence in section 6 at 241 to 254, you have a discussion there which I referred to yesterday that led to a conclusion in 254 that the infringing agreements shared an element that one sees in RPM. So that the position of the OFT is that even the restriction in 2(a) isn't what you could loosely describe as a straight RPM allegation, because it's got this horizontal element, it isn't concerned with the absolute level of prices, it's more concerned with the relativities.

Now, a resale price maintenance case is not the same as a parity and differential case. So although you have a restraint that relates to specific pricing points, these specific pricing points are there not as a means of, if you like, overriding the retailer's strategy in terms of its placing of its prices by comparison with its competitors; it's there because of the

manufacturer's concern to achieve a relativity within the retailer's stores between that manufacturer's brand and the competing manufacturer's brand.

So that's why, although we have got -- if you look at it in terms of a literal understanding of the words "retail", "price", "maintenance", you have "retail", "price", "maintenance", but I was going to make a joke, and I think I ought to forebear from that, because it was a joke about a film, but we have had too many of those.

The point simply is that because it's got this horizontal element and it's concerned with parities and differentials between competing linked brands it's not your classic RPM, and that's the position of the OFT in relation to in fact the two restraints that we have, or two restrictions that we have identified, whether you call them paragraph 2 or paragraph 10 doesn't really matter.

So that's the answer to that question, but I don't know whether I've answered it fully.

THE CHAIRMAN: I think you have, and I think that that is why you say that the same theory of harm as is described in the decision is the harm that results from a combination now of this resale price maintenance and the way that the market operates, whereas you used to

say that it derives purely from the restraints accepted under the trading relationship.

MR LASOK: If one uses that to describe the alteration of the case from one in which it is the retailer, as it were, who does the work to one in which, as in the first restriction, 2(a) or 10(a), you look at it as an agreement or concerted practice between the manufacturer and the retailer whereby the retailer prices in accordance with the instructions and the requests of the manufacturer for the purpose of achieving the manufacturer's parity and differential strategy.

The two restrictions go hand in hand, because you need both of them in order to achieve the end result. In a straight RPM case you wouldn't need the restriction 2(b) in order to --

THE CHAIRMAN: That's helpful, because we noticed there wasn't either an "and" or an "or" at the end of 2(a) but you say that one reads it as an "and".

MR LASOK: Yes.

THE CHAIRMAN: Yes, thank you.

MR LASOK: Perhaps because we are discussing the theory of harm, it may be useful to fill out certain details that appear not to have been fully assimilated by ITL. The way we see it is that the manufacturer was in

a situation in which it wanted to implement a parity and differential policy, and thus far there is no contest on the facts. The ordinary and natural consequence of that kind of policy is, as we see it, to reduce the rival manufacturer's incentives to lower prices and increase the rival manufacturer's incentives to increase the prices. Now, that's the current case, the current way in which the OFT sees the infringement. Again, thus far we are not dealing with anything new, with anything that differs from what was in the decision.

The manufacturer implemented the parities and differentials itself through the use of instructions to the retailers. It couldn't implement the policy if the retailer was independently pricing. In other words, if the retailer, acting independently, was effectively standing in the way of the manufacturer achieving its intention, which was to control the shelf prices so as to ensure that they were in line with the parity and differential requirements.

So the manufacturer needed to ensure compliance by the retailer so that the P&D strategy could be implemented. That led to what we perceive to be now the two elements that we have described in paragraph 2 or paragraph 10, of whichever document that one is looking at.

As I've said, this is not a straight RPM case, and it's also a case which is based upon a combination of both of those restrictions.

Given the implementation of the strategy in that way, the harm that results from the restrictions is actually the same as that identified by Professor Shaffer in his reports, and you end up with the same situation in which the P&Ds alter the rival manufacturer's expectations about how the manufacturer with the parity and differential agreement with the -- or the concerted practice with the retailer will react to price changes.

In that respect, I ought for the sake of completeness again to clarify what seems to be somewhat obscure. In paragraph 51 of yesterday's speaking note we made it crystal clear the fact that our case had departed from the case made out in paragraph 40 of the skeleton argument, because paragraph 51 at the very end, or from the last sentence, says:

"The difference between the case made out in the decision and the refined case lies in a different understanding of what was agreed or concerted between the manufacturer and the retailer."

Now, if you go to -- just as a practical illustration of this -- the skeleton, which is in core

bundle 4, I think, it's tab 45 at page 24. {C4/45/24}.

Just for a moment focusing, because this is a reply, and what I want actually to do is simply to respond to a submission made earlier today by counsel for ITL, and he focused on paragraph 40(a). So 40(a) is:

"If the retail price of Gallaher's brand increases then the retail price of ITL's rival brand must also increase."

Then we have a footnote which sets out the documents that were cited by the OFT and that appear in the decision as being relevant to that particular way of looking at the restraint that had featured in the decision.

Just pausing there for a moment, today -- I think the transcript reference is page 3 at lines 13 to 25 -- counsel for ITL said that it was risible to suggest that ITL would have intended what was said in paragraph 40(a) to happen. Now, that means that he was submitting to the Tribunal that any suggestion that ITL had composed or sent the documents in footnote 41 would be risible. The problem is that --

MR HOWARD: I hesitate to rise, but that is not what I have submitted. If Mr Lasok wants to make absurd suggestions, fine, but that's not what I submitted. It's his reply.

MR LASOK: So he said that it was risible to suppose that paragraph 40(a) was a possibility, but the problem is in the footnote we actually see ITL seeking to achieve the result that he describe as risible.

THE CHAIRMAN: One of the few things we don't have to decide is whether the restraint in paragraph 40(a) was made out on the facts as we have so far heard them.

MR LASOK: If you look at the documents cited in footnote 41, you will see these are the ones where an instruction or request is made to move a price. The reason for going to this is to show you that in a sort of rather crystal clear way that the departure from the case made out in the decision doesn't concern a departure from the true meaning, if you like, or what one gleans from the evidence. It is instead a different interpretation of what the evidence shows.

It is undoubtedly a departure in that sense, because it is undoubtedly the case -- and we have made this crystal clear -- that the way that evidence was interpreted in paragraph 40(a) which we are taking by way of example is not the way that the OFT thinks that that evidence is to be interpreted in the light of the evidence as a whole. It produces a different conclusion as to how the P&D strategy actually worked through the particular agreements or concerted practices entered

into between the manufacturer and the retailer.

In some respects, that exemplifies the problem that is before the Tribunal, because it is one of those situations in fact which is much closer to some of the illustrations that the Tribunal has been putting to counsel for the parties and some of the counsel seem to appreciate. The difficulty we have here is a situation in which -- let's try and reduce it to a rather simple case -- the OFT adopts a decision and finds an object infringement based on certain matters of fact and an analysis of the facts, which produces the conclusion set out in the decision that restriction X existed. You then have an appeal, and in the course of the appeal a wider view of the evidence is taken because there is additional material that's put before the Tribunal.

Let's suppose that the Tribunal then concludes, in the light of that evidence, that it is indeed presented with an object infringement. An object infringement of the type or sort or genus described in the decision. It arises out of the same factual matrix but there is a difference, and the difference lies in the description of the restriction.

That description of the description doesn't radically alter the theory of harm because it's the same kind of harm. There may be some tweaking with the

details of it, but it's the same kind of thing.

However, an alternative case based on this other restriction is not set out in the decision. So that's the situation, and the parties before the Tribunal put forward differing views as to how the matter is to be resolved, because the appellants say "Well, we have to have finality, the fact of the matter is that the OFT analysed the matter in a particular way and it's lost, therefore the appeals ought to be allowed and we come to an end of the proceedings".

The OFT puts forward a different way of dealing with the matter, and the OFT is also seeking finality, because what it too would like to see is to achieve finality in relation to the basic question whether or not there was an infringement of the Chapter 1 prohibition.

Now, the rhetorical question is: what then does the Tribunal do? And the reality of the position is that that, reduced to its essentials, is the problem before the Tribunal today, because that's a fairly accurate description of what has actually happened. We can all argue about which bits are out of the decision and in the decision, and we can say "Well, maybe the whole of it is out of the decision" because the critical part of the reasoning which is the description of the

restriction wasn't in the decision as an articulated restriction which had attached to it a theory of harm that produced a connection between the beginning, if you like, of the decision and the end of it. We can all have a debate about that.

When one reduces it to simplicity, that actually is the situation that we are confronted with, and that's the reason why the OFT has taken the view that the proper way of dealing with the problem is as we propose.

I am going to make a related point about this which concerns the debate that has taken place about the true meaning of schedule 8, paragraph 3(2). This is this is the bit where it is said that the Tribunal decides the appeals on the merits and by reference to the grounds in the notice of appeal.

If one construes that provision as stating that the Tribunal decides the appeal on the merits and only by reference to the grounds stated in the notice of appeal, which is not actually what the provision says but is a narrow interpretation of the provision, you still end up in our submission with a situation in which, when the appellant challenges a particular aspect of the decision in order to succeed in its appeal, the Tribunal has nonetheless to decide the question at issue on its merits, and that is not a decision we

submit is based upon some kind of combat between two opposing views because although the issue is raised in the notice of appeal, that's to say the ground in the notice of appeal says, for example, the finding of the decision as to the restriction that was accepted by whoever it is is incorrect. That's the issue, the ground.

But the problem is if the Tribunal takes too narrow a view of its jurisdiction and comes to the conclusion that its jurisdiction is concerned basically with deciding which of two theories is right and which wrong, or rather an even narrower one, which is whether or not a challenge is successful, if you forget everything else, you don't end up with a decision on the merits, because these things are not necessarily what is commonly described as a binary question. And you can get situations in which, in the course of the proceedings, when the evidence is looked at, let's say, a third possibility emerges. In our submission, it's not for the Tribunal to say "Well, because in the grounds, in the notice of appeal, only one possibility is raised", it's rather a negative than a positive, "but yet when we look at the merits of the case, we conclude that there is another possibility that has emerged, we close our minds to that and instead we focus only on how

the pleadings have defined the issue between the parties".

Because if you go down that route, you are then deciding appeals by reference to formal pleading positions but not by reference to the underlying merits, and that is one of the reasons why, in our submission, the focus of the appellants on things like pleading points and on the idea of a model for the Tribunal proceedings being the model used in straightforward civil proceedings or anything else like that is erroneous.

That of course is a point that emerged earlier on in the case law of the Tribunal when the Tribunal was actually looking at the problems that emerged when the evidence before the Tribunal is different from the evidence that was before the regulator, because then at that point you may be moving away from positions adopted both by the regulator and by the appellant.

THE CHAIRMAN: Yes, but that doesn't matter, to move away from the decision, to an extent; it's moving away from the appeal that objection is taken to here.

MR LASOK: That's quite right, but as I've submitted, the difficulty is if you say that the ground of appeal acts not so as to identify the issue or the part of the decision that is challenged, but it is instead something

else, the ground is the only reason why, or something of that nature. The problem is that you will not then be able to decide appeals on the merits, particularly in situations in which, as a result of the nature of the administrative processes, the group or class of evidence that the Tribunal receives on an appeal may not be the same as the group or class of evidence that the regulator is looking at, because the regulator of course doesn't have the power to get people to make statements to it if they don't want to, the regulator doesn't have power to cross-examine.

Whereas, before the Tribunal, it is commonly the case that the Tribunal has a broader class of evidence that it can look at. As soon as you have this situation in which the material that the Tribunal is working with is broader in class than the material that the regulator can work with, you are going to encounter these situations in which the facts or the conclusions of fact that one draws from the evidence may not be the same as the conclusions that the regulator originally drew, or indeed the conclusions that the appellant has drawn. And the problem is that the function of the Tribunal is not to decide which of A and B has the better case, it's not that kind of a game. The function of the Tribunal, in our submission, is to decide the case on the merits,

and that's how the system works in connection with the enforcement of the competition legislation.

That brings me to the reliance placed on the Floe case in the Court of Appeal. Most of the debate in Floe was about a question of the existence of any powers that the Tribunal has once an appeal has been disposed of. So most of Floe is not relevant to the central part of the debate that has been conducted over the last two days, but what is significant in our submission is the description of the options open to the Tribunal, which is in I think paragraph 25 of Floe, because that is a description of what it is open to the Tribunal to do.

It's not a description that is limited to any particular factual situation, such as appeals that concern non-infringement decisions, it's a general description and similarly in relation to Albion Water, although Albion arose out of a non-infringement decision, the Tribunal and indeed the Court of Appeal have actually taken care to cast their description of the Tribunal's jurisdiction and its powers in general terms and not by reference to particular factual situations. Indeed, that's one of the points that the Tribunal was very, very careful to do in, I think it was Albion Water itself, it might also have done it in Burgess. The Tribunal may acknowledge that the issue

that it's considering has arisen in the context of a non-infringement decision, but what it then does is to look at the extent of the jurisdiction in a more general way, and that was exactly the approach that was followed by the Court of Appeal in Floe and in Albion Water.

Then that brings me to the EWS case, which was the Enron case. In our submission, that's not relevant. In that case there was a specific issue that was before the Court of Appeal, which was: what exactly was the infringement that was binding and that therefore generated a damages claim? There are other provision of the Act which deal with things like which findings are binding. But the point in EWS was the necessity to identify the infringement specifically for the purpose of generating a damages claim that, by reason of its follow-on nature, would not involve any reconsideration of the decision that had been made.

Now, that is foreign to the debate that we are conducting before the Tribunal. At its most obvious we are not seeking to identify here a decision that is binding on the Tribunal, because ex hypothesi the Tribunal is here to consider the legality of the OFT's decision. More particularly, when one looks at the appeal process, the appeal process in which the Tribunal is engaged is not a process in which one

seeks to identify some particular part of the decision as being the infringement decision, and then you look at nothing else, because the Tribunal actually has to look at the entirety of the decision.

The Tribunal will, I think, be relieved to know that I am rapidly coming to an end, but there are a number of these miscellaneous points that I need to deal with.

I should say that I forgot to mention when I was looking at the OFT's view of the anticompetitive nature of these arrangements that, although the appellants have tended to apply the paragraph 2 or paragraph 10 restrictions by reference to downward movements, they are in fact concerned with upwards or downward movements, and that's something that, perhaps it was a Freudian slip on the part of the appellants, but it is something that one does need to bear in mind.

A related point concerning the theory of harm is the 2(b) restriction. It was suggested on behalf of the Co-op that there was something in paragraph 40 of the Co-op defence on this point, but I read paragraph 40 and I can't see what the relevance of paragraph 40 is.

So far as ITL is concerned, it asserted -- and the reference in the transcript is Day 28, page 130, lines 9 to 15 -- that the 2(b) restriction was not in the decision "in the sense of there being any theory of

harm."

Now, sensibly, ITL didn't dispute the fact that the 2(b) restriction is actually in the decision, because it is in there, repeated in a number of places. But on the theory of harm point, in our submission one needs to bear in mind that the description of the restrictive nature of the infringement which is set out in paragraph 6.205 and following of the decision deals with the restrictive nature of the infringing agreements. The approach taken in the decision was to look at the infringing agreements and consider them as a whole. That explains why what you don't find in the decision is the articulation of separate theories of harm for each restriction contained in the infringing agreements, each one taken in isolation. Because what the decision did was to wrap them all up together in the infringing agreements and analyse the restrictions in the infringing agreements as a whole.

If the analysis had been done restriction by restriction, then probably we wouldn't be having this debate at all.

THE CHAIRMAN: Are you saying, then, that if one looks at 10(b) and then you look at old 40(a) to (d), that what 10 or 2(b) is saying is that each of those four restraints in old paragraph 40 did exist but the

restraints only operated in respect of retailer led retail price changes and not manufacturer led retail price changes?

MR LASOK: You see, I had read 40 as referring to manufacturer led.

THE CHAIRMAN: Oh.

MR LASOK: Anyway ...

THE CHAIRMAN: Well, I had read it in your favour, I think, and I think I did make this point at some stage, that, as I understood it, 40, so far as the restraints are concerned, putting aside the theory of harm for the moment, dealt with both increases of retail price or decreases both triggered by -- Mr Howard is shaking his head. Let me just finish anyway. Both -- or didn't distinguish, if I can put it like that, between manufacturer led and retail led.

MR HOWARD: I think you can see from 41, it is actually clear, and I think this is common ground. 40 is only dealing with the situation where something is induced by the manufacturers, that's why 41 -- that's why we have the debate about that, that is dealing with the position of the retailers, doing something of their own accord.

THE CHAIRMAN: I see, so you read 41 as meaning insofar as those restraints apply for retailer led, those fall within the category of constraints that are all

constraints placed on the infringing agreements but not within those four permutations, it's not put very--

MR HOWARD: 2(b), if it was in the skeleton at all, was in paragraph 41.

THE CHAIRMAN: Right. So I have misunderstood that, then.

MR HOWARD: You will remember my point was, made on more than one occasion, is that none of that, what is in paragraph 41, is part of the decision.

MR LASOK: The problem with that is that's completely wrong. My learned friend has never attempted to make that point good.

MR HOWARD: I have made it repeatedly and I have asked Mr Lasok repeatedly to show us where in the decision that featured, and he has never once sought to do it and it would be a very odd thing now in the reply to do it.

MR LASOK: This is getting ridiculous.

THE CHAIRMAN: Wait a minute. Perhaps it doesn't make any difference, if you accept, Mr Lasok, that the true issue is whether 2(b) gives rise to the same harm as is covered in the theory of harm in the decision.

MR LASOK: 2(b) applies to the same harm, and 2(b) is in the decision, it always has been in the decision. One of the difficulties with Mr Howard's case is that, if you are trying to contend that 2(b) isn't in the decision, then you have to read paragraphs like 6.7 and 6.108 in

an extremely weird way. So, for example, if you go to 6.7, it says at the end of the first line:

"The restriction on a retailer's ability to determine its retail prices for competing tobacco products imposed by each of the infringing agreements was, by its very nature, capable of restricting competition."

It goes on:

"In particular, the manufacturer's parity and differential requirements precluded the retailer ..."

and so forth.

In order to arrive at Mr Howard's interpretation of 6.7, you have to read that as saying something like: otherwise than in respect of a retailer initiated change of price, the restriction on a retailer's ability and so forth. You would have to introduce words into all this that are not there.

A similar thing occurs in relation to 6.108.

THE CHAIRMAN: Well, we will need to go back to look at the decision, but it may be that the distinction that I am trying to draw isn't actually an important one.

MR LASOK: That's for the Tribunal. I think it's much easier at this stage to make the point that if one looks at the -- and I can make it generally, I've given you two examples, 6.7 and 6.108 -- paragraphs like that and

tried to read them in such a way as to leave out 2(b), you would have to introduce words that simply are not there. Their ordinary and natural meaning is such that they comprise 2(b) and there cannot really be any serious dispute about the fact that 2(b) was part of the infringing agreements. The reality is that if you hadn't had 2(b), then the parity and differential strategy would have fallen apart. What would have actually happened is that the appellants would have used that argument as their prime argument in the appeals, and that never happened.

DR SCOTT: And to be fair, we did talk about the steady state situation with a number of the witnesses.

MR LASOK: Yes, quite so.

Now, that I think brings me to a brief observation about Fiona Corfield, because counsel for ITL represented that his favourite case said something that in fact it doesn't say. So far as a witness is concerned, if a party calls that witness, there is nothing to prevent the party from submitting that the witness has made a mistake or has forgotten something. What is not generally permitted is to attack the credit or credibility of the witness, and there are processes you do for that.

But the Court of Appeal case he cited is quite

helpful on that point, because it makes it clear that there is nothing to prevent the OFT from pointing out that Ms Corfield's evidence has to be seen in the round, and if she made a mistake, then she made a mistake.

Going back to paragraph 40, one has to bear in mind it was actually concerned with summarising in an abstract and stylised way what ITL had set out in its skeleton argument, and it was concerned with the question of implementation of a parity and differential arrangement. It doesn't refer to who's implementing it, although the footnotes refer to documents that include manufacturer led price movements.

Then I think I ought to make this point: in relation to some of the pleading points that have been made, in our submission this is not a case in which an amendment of the defence is at all relevant, because it's actually concerned with the decision rather than the defence.

There is a point about independent investigations. The phrase "independent", "roving", "freewheeling investigations" have been bandied around, but it needs to be borne in mind that we are not proposing an independent, roving or freewheeling investigation. What we are actually raising is the continuation of the proceedings for the purpose of addressing the evidence that has emerged in these appeals concerning this

particular decision and these particular infringing agreements. So it has not got this sort of free ranging character that has been suggested by the parties.

Finally, I think that I need to make this point, it has a preamble to it. In the heat of the moment one tends to sometimes make an observation that sounds good at the time, but in retrospect perhaps it's not as fine sounding as it was when it was first uttered. So when advocates do this kind of thing, it's not the kind of thing that I am particularly worried about. That's the end of the preamble. The OFT has asked me to say this: it finds it regrettable that counsel for ITL has considered it appropriate to make a number of serious allegations suggesting that the OFT lacks propriety in its conduct of proceedings, including the proceedings before this Tribunal. The OFT considers that it takes its responsibilities as a public body very seriously, both in the administrative process and when it is defending an appeal before the Tribunal. If you just give me a minute, I'll check if there is anything else that I need to say. (Pause).

Those are my submissions.

THE CHAIRMAN: That should conclude the proceedings, unless there is anyone who is really burning to say anything. Mr Howard, you are burning, yes.

Further submissions by MR HOWARD

MR HOWARD: I literally want to spend one minute, because there are two points, other than that last point, that emerge from what Mr Lasok said.

One, it just occurred to me why Mr Lasok's submissions are directing you down the wrong route, and that's his submission to what on the merits means, and it's a total misunderstanding of the statutory provisions. You need to contrast an on the merits appeal, the CPR 52.11, which provides that an appeal generally, and that was one of the changes in the CPR, will be limited to a review. There is a difference that in the Court of Appeal the general approach is review, occasionally it's re-hearing. And that's the point about a merits appeal, it allows you to look at the evidence completely, you are not simply deciding, you are not simply reviewing the decision of the OFT. So it's not meant to give you this wide-ranging jurisdiction. You have probably already understood that.

The other point on 2(b), I just refer you to Day 1 of the transcript, page 152, when I explained what the position was in relation to paragraph 41, and you will also see the exchange with the Tribunal on pages 154 to 156, and particularly the Chairman said to me:

"Because the theory of harm is based on competition at the wholesale level and not at the retail level."

To which I answered:

"Exactly. That's the whole thing."

And that's what the OFT's decision and Professor Shaffer's report was about.

THE CHAIRMAN: Do you mean Day 1, the first day of this whole trial?

MR HOWARD: I do.

THE CHAIRMAN: What are you referring to? Paragraph 51 of what, though?

MR HOWARD: Paragraph 41 of the OFT's skeleton. I addressed why paragraph 41 was not part of the case.

THE CHAIRMAN: Yes.

MR HOWARD: Where we got to is you make the point to me:

"Because the theory of harm is based on competition at the wholesale level and not at the retail level."

And that's the whole point.

Finally I don't think I need to respond to the point that Mr Lasok made, other than to say I entirely stand by every single submission I have made, including submissions about the unsatisfactory way in which the OFT has conducted these proceedings. I do not withdraw a single word of criticism, and I would expect in your judgment in due course that you will have something to

say about the way in which these proceedings have been conducted.

THE CHAIRMAN: We will now then retire to consider what we are going to do. We appreciate, of course, the parties will want to know as soon as possible where they stand in relation to the continuation of these appeals, and we will therefore endeavour to produce a ruling as quickly as possible, although you will appreciate these issues are quite complex. We therefore continue with the adjournment of the hearing for the time being.

Finally may we just thank the parties for their submissions and all the hard work that's gone into this case thus far, and we will let you know through the usual channels when we are ready to hand down the ruling.

MR HOWARD: Firstly, can I thank you, but secondly, is it fair for us to assume that we are released in the sense that one obviously has one's diary booked.

THE CHAIRMAN: If you want to come back tomorrow, Mr Howard, you can, but we won't be here!

MR HOWARD: Not least because it's a Saturday and on Monday I have other things to do. I am simply saying that obviously we shouldn't regard days which previously were sitting days as days that we have to keep free for the moment.

(Pause)

THE CHAIRMAN: I don't wish to say anything that prejudges of course the outcome of the submissions we have just heard, but I think that realistically, even if we were to decide that this was going to continue in some form, there would need to be a further CMC to discuss in what way it was going to continue and what the timetable was going to be. And we would, if necessary, fix that CMC, having regard to counsel's commitments as at the time that we come to fix it. We don't expect everyone to keep free the days that were otherwise fixed for this hearing in case of that eventuality. I think that's the most I can say.

MR HOWARD: Thank you very much.

(4.50 pm)

(The court adjourned)

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