IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1188/1/1/11

Victoria House,
Bloomsbury Place,
London WC1A 2EB

7th November 2011

Before:

LORD CARLILE OF BERRIEW QC
(Chairman)
MARGOT DALY
CLARE POTTER

(Sitting as a Tribunal in England and Wales)

BETWEEN:

(1) TESCO STORES LIMITED
(2) TESCO HOLDINGS LIMITED
(3) TESCO PLC

Appellants

- v -

OFFICE OF FAIR TRADING

Respondent

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CASE MANAGEMENT CONFERENCE

APPEARANCES

Mr Mark Howard QC, Mr Daniel Piccinin (instructed by Freshfields Bruckhaus Deringer LLP) appeared on behalf of the Appellants.

Mr Stephen Morris QC, Miss Kassie Smith and Miss Josephine Davis (instructed by the General Counsel) appeared on behalf of the Respondent.

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THE CHAIRMAN: Good morning. Obviously we have read all the submissions that have been put in for this conference. It seems to us that the starting point is the trial date.

MR. HOWARD: Yes, it is.

THE CHAIRMAN: And that we should work backwards from there. We are, of course, open to persuasion, but I should say to you at the outset, however, that a trial date of September 2012 does not present many attractions to this Tribunal, which normally works to much, much shorter timetables than that. Our inclination would be towards a much earlier trial date than September of next year. This case has a long history which, on the face of it, should be brought to fruition sooner rather than later. I thought I would just say that at the outset and then over to you.

MR. HOWARD: Thank you, sir, that is a helpful indication. As you know, Tesco's position is that the matter should come on on 23rd January next year, which is the date that had been indicated to us the Tribunal was able to do. We suggest that there is no reason at all why that date should not be ordered.

One has got to look at two things if we are going for the 23rd January date. The first is whether or not the Office of Fair Trading should be kept to the timetable within the Rules, because if one sticks to the timetable within the Rules for service of their Defence, it would actually follow that you should be having a hearing at about that time. The second is whether the Office of Fair Trading is entitled to pray in aid something which they say has recently come to light, namely the availability of Mr. Morris. We say they should not.

If we take the first point, the position is as follows, as you know: the defence under the Rules is due to be served on 22nd November - that is to say six weeks after service of the notice of appeal (see Rule 14(1)). It is important if we could just look at the approach that the Tribunal has laid down, both in the Rules and the Guidelines and then in the authorities concerning what is the approach to timetabling before this Tribunal.

Could I ask you, first, to look at the Rule - perhaps everybody is familiar with it - just to bear in mind, first, that it is very important to see how the Rules apply first to the appellants in that Rule 8(2) provides that there is to be no extension of the time limit for the service of the notice of appeal unless satisfied that the circumstances are exceptional.

You may not want me to take you to it, but there is a recent authority of Mr. Justice Barling in a case called *Fish Holdings*. We have got copies of *Fish Holdings* and *Freeserve*, which we would like you to look at. It is worth seeing how strict it is on the appellants, in that what happened there was that basically somebody got the address of the CAT wrong. The net effect was, therefore, that they were out of time by a couple of days. If you have the

decision, you will see from para.3 that his Lordship says that by virtue of the combined effects of the Rules, etc, Fish Holdings accepts that the last day of the two month period for lodging an appeal was Monday, 23rd November, the next business day after 21st November, which fell on a Saturday. Then you will notice, sir, that the notice of appeal, in para.4, was actually received by the Tribunal on 26th November. His Lordship then goes through the various Rules and we can go on to p.5. At para.15 he recites Rule 8(1). At para.16 he says:

> "The Tribunal Rules are clear as to the time within which a notice of appeal has to be received. The importance of adhering to those time limits (which are for the benefit of all litigants as well as the Tribunal, and which are in the interests of legal certainty) has been emphasised on a good many occasions by the Tribunal …"

He refers to *Prater*, where Sir Christopher Bellamy QC said:

> "The time limit for commencing an appeal … is central to the Tribunal's Rules and the entire case management system operated by the Tribunal. In that context the need for clarity and certainty is paramount. The Tribunal receives a great number of complex and lengthy documents in many different kinds of cases, often within short deadlines. It is imperative that the present Rules observed."

Then his Lordship says he has anxiously considered whether the circumstances in which the time limit came to be missed can be regarded as exceptional, and I think you can then go over the page.

THE CHAIRMAN: Yes, I have read it now.

MR. HOWARD: In other words, it is very strict. Just putting that in context here, of course Tesco received the decision, which was a substantial document, which it had to reply to, and did reply to, in the two month limit for the notice of appeal. The document was 400 pages long, and put forward in many respects a fundamentally different case to that which was in the SO and the amended SO.

In relation to the position of the OFT in putting in its defence, the Guidelines issued by Tribunal provide helpful guidance in three paragraphs in particular. First, para.6.14 reiterates the position under Rule 8(2).

THE CHAIRMAN: Let us just find it. Can you tell my colleagues what page it is? It is 5482.

MR. HOWARD: Paragraph 6.14 - and you will see why I am cross-referring to this in a moment - makes it clear that Rule 8(2), the circumstances are exceptional, and then they refer to the possibilities of an extension of time for appealing are thus extremely limited, and you have got to prove, based upon ECJ jurisprudence, the existence of unforeseen circumstances or *force majeure*.

Then if you go forward to para.9.9 you will see:

> "In principle the Tribunal will treat requests for further time in which to file a defence in the same way as requests to extend the time for filing of the notice of appeal, that is to say an extension of time will only be granted if the circumstances are exceptional …"

Then there are two decisions of the Tribunal, which I imagine everybody is reasonably familiar with, but we have copies of them. If I could just briefly remind you of, first, *Napp*.

THE CHAIRMAN: The principle is set out there. If Mr. Morris wants to challenge the principle he will doubtless do so. I am not sure we need to read the authorities.

MR. HOWARD: Very well, but we have got *Napp* and *Freeserve* there.

The first thing you have to ask yourself in relation to this case, in so far as, if we take it in stages, when should the defence be served, is has the OFT pointed to any exceptional circumstances? That then also leads into the question of fixing the time for the hearing. Can I take you to Mr. Morris's more recent skeleton argument served on Friday evening, para.7. Paragraph 7(a), with respect to the OFT, sets out entirely the wrong approach, as you can see from the Tribunal's jurisprudence because he says:

> "It is desirable, of course, that this hearing comes on as soon as possible. There is no particular commercial or other urgency to the hearing of the appeal. This is not, for example, an urgent merger case."

He is right that it is not an urgent merger case, but there is a public interest in the early determination of appeals. The machinery of this Tribunal has been set up to that end. If you look at the position of Tesco it is, of course, in Tesco's interests that the case is disposed of. It says it has not been guilty of infringing conduct and it wishes to clear its name.

The second point at para.7(b) is the suggestion of a hearing at the earliest date following the Easter break. This, in our submission, is essentially just building in a delay in order to suit the convenience of the Office of Fair Trading. It is prejudicial to Tesco, firstly, because it has a delay which Tesco does not wish to and should not have to face; and secondly, it puts it in a position where it does not have leading counsel of its choice who has advised throughout.

Then they say at para.7(c) that they recognise that they opened the formal investigation in January and say that the issue now is the appeal. Of course, the position is that this case has been going on for now - by the time they issued their decision - seven and a half years.

That is a considerable period of time. Of course they have dropped a number of allegations, but they continue to make some of the core allegations.

The truth is that this case is a lot less complicated than many other types of case which the OFT and the Tribunal has to deal with. There are only two parties, they are no complex legal or economic issues in the case. It is essentially a dispute about facts and an interpretation of those facts. One can interpose here, if this case connotes exceptional circumstances whereby the OFT can say they are entitled to an extension of time for their defence, then it is actually quite difficult to see why they would not be entitled to say that in practically every single case. That is just entirely contrary to the whole thrust of what the Tribunal has told them in *Napp* and *Freeserve*.

Paragraphs 7(d) and (e) relate to the evidence which Tesco has submitted with its notice of appeal. The way in which the matters are put here is not entirely accurate. There are four statements. Three are less than 15 pages long. In fact, they place a lot of stress on Lisa Oldershaw's evidence. The difference between essentially what has happened previously and what is happening now is previously the witnesses cross-referred to the responses to the SO and the SSO and confirmed their agreement with what was there. Now, particularly in the case of Miss Oldershaw, she has gone through things in her own statement, but it is not a new case. In any event, what you will notice the OFT does not say is that they are proposing to do anything in response to this other than, no doubt, put in an analysis of why they say they do not accept it. It is very difficult to see why this is causing any difficulty, still less why this is said to make it into an exceptional circumstance.

Similarly, 7(f) and (g), they are saying there are some new points. We can argue about the extent to which they are or are not new points, but if you actually look at what the OFT is saying - one only has to peruse it - it quickly apparent that these are relatively minor points. They are very far from anything which could be said to be exceptional, nor do we have any explanation of what the difficulty is that this is said to cause. The answer is, there clearly is not any.

Then at para.7(h) they say:

> "Tesco has also recently indicated that it is anticipating serving further material in support of its appeal which may relate to pricing data. It has not been identified any detail as yet. The OFT understands it may involve input from an expert …"

and we have not confirmed when that material will be available.

The position is this - and all this consists of is that Tesco has been doing some number crunching on the pricing data which, if it were to be put in, we would expect would be

controversial - if the OFT is concerned about this, we are perfectly content not to put in this material, firstly; and secondly, if we are going to adduce it we would adduce it by this Friday. We are perfectly content to be in a position where the Tribunal either says, "We do not think you should put it in, or if you do put it in it should only be on terms that the OFT accepts that it does not cause it any difficulties". It is certainly not a point of particular significance to Tesco. What we were trying to do, and as was explained to the OFT, was to be helpful by simply doing some number crunching on the pricing data, but if it is regarded as controversial we do not need to put it in at all.

Point (i), they must be given an opportunity properly to consider and respond to all the matters. They are, within the time limit laid down in the Rules.

Paragraph (j) is an odd one. They say that we have divided the case into 14 strands, and that this is somehow going to cause a difficulty. All that we have done is to analyse the transactions which the OFT relies on in support of its allegation of an infringement. We say it is actually remarkable if the OFT has not previously done that, but if you are saying there a "hub and spoke" infringement, one would not need to take each one of the alleged transactions and communications to see exactly what the position was. That is all we have done, we have broken it down. Again, this cannot be presenting them with anything that they are not aware of.

Stopping there for a moment, we say there is no basis upon which the OFT has shown exceptional circumstances as to why they should not serve their defence in accordance with the timetable.

That then leads you to the question of, should we then have a hearing date on 23rd January?

The next point that is made is at (k) and (l), where essentially they say that Mr. Morris's lack of availability should govern the position. It is quite interesting to see what is said here. Look at 7(l), the last sentence:

> "Mr. Morris's lack of availability for the week commencing 23rd January and possibly part of the following week has only recently come to night."

We need to put this in context. We do not actually know what it is that is causing Mr. Morris not to be available, but let us assume it is a professional commitment.

MR. MORRIS: It is not a professional commitment.

MR. HOWARD: What is it?

THE CHAIRMAN: It is up to Mr. Morris whether he tells us or not. It is entirely a matter for him.

MR. MORRIS: I make the point merely that it was pointed out, I think in the original letter, that it was a personal matter. I will explain or say whatever I feel I am able to say in due course.

THE CHAIRMAN: Mr. Howard, can I help you to this extent: the Tribunal has a potential window which would be 6th February, which would leave those two weeks where Mr. Morris has difficulties free. If it were to be 6th February, because of the Tribunal's commitments, it would have to be a one week hearing, a gap of one week and then the hearing to resume and finish.

MR. HOWARD: The difficulty is this, as I think you have seen in the skeleton arguments: I am due to start a major trial in the Commercial Court on 23rd April. It is a very similar dispute to the one that is currently going on, *Berezovsky v. Abramovich*. It is *Cherney v. Deripaska*, and I act for Mr. Cherney. The difficulty is that I am currently committed in the CAT until 21st December on the *Tobacco* appeals, where I act for Imperial Tobacco. Then I have committed myself to *Cherney v. Deripaska*, as you will understand, for the whole period running up to the trial. I have been released on the basis that we understood that this hearing could take place on 23rd January until 10th February, but I do not believe that I would be able to be released for a later period.

THE CHAIRMAN: It does raise the possibility of your being available for the period from whenever in January up to 6th February, and then, in fact, there would be a one week gap where you would have another week in which you were available, and then up to two weeks, and then you would be entirely free.

MR. HOWARD: I thought, sir, you were suggesting that we would not be starting this hearing until 6th February.

THE CHAIRMAN: Yes, 6th February for one week, then a one week, and then finish the hearing from 20th February.

MR. HOWARD: The difficulty at the moment is that, as a result of negotiations between my clerk and the firm of solicitors instructing me in the *Cherney v. Deripaska* matter, they have reluctantly agreed to release me for a particular period. I consulted my clerk this morning as to whether it was likely that they would release me at a later date and his view was that it was highly unlikely they would agree to do so.

THE CHAIRMAN: Off the top of my head, I find it difficult to understand why replacing one three week period with another, which still leaves you the three weeks albeit at a slightly different time, and then two clear months up to the trial really causes a difficulty that one's clerk cannot negotiate one out of.

MR. HOWARD: Obviously it is invidious, as it were, for me to go too much into my personal practice, but I think the difficulty is this: I am not available to my clients prior to Christmas. I am then, as you would expect, away briefly over the Christmas period. I then, for my sins, have been summoned for jury service, which commences on 9th January for two weeks. I think that the clients have taken the view, "We do not mind effectively if you do not start work on our case until 10th February, we will let you out for that period of time".

THE CHAIRMAN: Normally one can defer jury service.

MR. HOWARD: I have already deferred it once.

THE CHAIRMAN: You have done it once already.

MR. HOWARD: I have deferred it once as a result of the *Tobacco* case. You get a letter back saying you cannot do it again.

THE CHAIRMAN: I do understand that.

MR. HOWARD: I am squeezed. You are right say, "Why would they not?" The answer is that they were pretty reluctant in the first place, and I anticipate they are simply going to say, "No, we have briefed you", and that is true, they have briefed me, and so I am, as it were, at their mercy. It is not a position where I can say, "Be reasonable", they are entitled to say, "You are on the hook and it is our time, we are not prepared to change it". That is really the bottom line. It is not a situation where I am able to say ----

THE CHAIRMAN: We will take that into account, but I say this to all counsel: this Tribunal is not going to be held prisoner by counsel's engagements on either side. The Tribunal will timetable its cases as convenient, giving whatever weight we can to counsel's commitments.

MR. HOWARD: Sir, that I understand. What I would say is this: having discovered that there was a potential window of 23rd January from the Tribunal, we have then taken active steps to secure my availability. So the position is ----

THE CHAIRMAN: You were not told that we were going to hear the case on 23rd January. You knew there was an application by the other side to have that date vacated. You should not take it for granted that we are going to take hearings ----

MR. HOWARD: I was not suggesting that. In fact, the options that were presented were the 23rd, which we knew was available potentially for the Tribunal, or the OFT's position in their skeleton was after Easter, which is a date that they knew I could not do, and then the alternative position which I can do is 24th September. This investigation has been going on for seven and a half years - and unless there was some overriding or overarching reason why the matter could not come on on 23rd January, in my submission, it would be somewhat unfortunate from Tesco's perspective if that date could not be made available. At the

moment, obviously I do not know what it is that is governing the 23rd January or 6th February. I am not sure I can expand upon that.

THE CHAIRMAN: I think we may have to hear Mr. Morris about this.

MR. HOWARD: What I would say is that what one should not be doing is shifting off 23rd January because of Mr. Morris's position, in my submission, and I say that for this reason ----

THE CHAIRMAN: But we should stay on it because of your position?

MR. HOWARD: There is a good reason why the OFT should not be entitled to do this, and it is this, particularly in this case: when the OFT issued its decision they were fully aware that it was highly likely there would be an appeal. One of the reasons they were aware of that was this: not only had they seen what had happened in the SO responses, but in the summer of this year - in fact, earlier in 2011 - Tesco made it clear to the OFT that it was contemplating interviewing various witnesses who, in the light of other things, were now more amenable to be interviewed. They told the OFT that and they then submitted further evidence, first, on 27th July, and apparently Mr. Fingleton, on behalf of the OFT, had reached his decision on 26th July. Those statements were returned on 29th July, and they were re-submitted on 4th August and returned on 5th August, and then the decision came out on 10th August. It must have been obvious to the OFT that this matter was likely to go on appeal.

When they issue their decision, the Office of Fair Trading must contemplate the timetable that the Rules lays down. The OFT should have taken steps to secure Mr. Morris's availability, if his availability was important. What has recently come to light suggests that no steps were taken last summer to secure his availability. What is more, Mr. Morris is not the only leading counsel on their team who has been involved in this. Mr. Tim Ward QC we know was involved in 2008 because we see him involved in interviewing various witnesses. The OFT, when it issues its decision, should ensure that it has resources, including counsel, available for potential appeals if the identity of a particular counsel is important to it.

In our submission, Tesco is not in the same position. It does not determine when the decision comes out. Here it received the decision in August, and it has taken steps to secure availability of its counsel for a hearing date in accordance with the Tribunal's Rules and machinery.

If you were to accede to the OFT request not to hear the case on 23rd January, taking into account the position of Mr. Morris, then, in our submission, it would be unfair that Tesco's position should be prejudiced by lack of availability of counsel.

That is what I wanted to say in relation to the general timetabling point. There may be one or two points of detail on the timetable which we may have to deal with.

THE CHAIRMAN: We need to establish the trial date before we start working backwards. Mr. Morris? Can I be clear as to who is instructed on behalf of the OFT? Is Mr. Ward still in the case?

MR. MORRIS: Mr. Ward is still in the case but taking a lesser role. All I can say is that Mr. Ward is somebody who has recently taken silk.

THE CHAIRMAN: We are very familiar with Mr. Ward here. He is an outstanding competition law counsel.

MR. MORRIS: Yes, sir. Can I deal with my availability first just to clarify the matter, so that you are aware of the precise position?

THE CHAIRMAN: Yes, of course you may.

MR. MORRIS: My availability is due to a personal matter which unfortunately I am not able to move. Sir, I hope you will understand, as it is a personal matter, I am not in a position to say any more about it. It is something of which I have only became aware recently and since the appeal was filed. We would respectfully submit that if the Tribunal considers that it is appropriate to take account of Tesco's concerns relating to the availability of their own leading counsel then it is equally appropriate for it to take account of the OFT's similar concerns arising from my availability. Sir, you have also pointed out that the opposite may apply equally, if you do not take account of one you should not take account of the other - "sauce for the goose" is the simple argument.

THE CHAIRMAN: We can take account of both and decide what is most convenient for the Tribunal, can we not? That is often the position that has to be taken.

MR. MORRIS: That is obviously what the Tribunal will do, but what I am saying is that every argument that my learned friend makes about my availability, we say rebounds back to him.

THE CHAIRMAN: Just on dates, do I take it from what you have said that if the Tribunal were to fix this for 6th February you would be available?

MR. MORRIS: I would be available. We may have observations to make about whether a split trial in that way with a break is necessarily the best way of proceeding, but in terms of pure availability the answer to your question is yes.

May I address the final suggestion on my availability that was made by Mr. Howard, that the OFT should have timed the taking of its decision and should have taken its decision in circumstances where they needed to anticipate my availability. The first and obvious point is that at the time of the decision my unavailability was not known. The second point is that

at the time of any decision - this is a nine party decision - the OFT does not know whether, first, there will be any appeals; and secondly, if so, how many appeals. There are nine parties, there is no way of predicting how many may appeal and what the consequences of the number of appellants would be for the timetable of any appeal. We suggest that that argument concerning consideration of my availability or leading counsel's availability at the time of the taking of the decision is impracticable and really not one which takes the matter any further. That deals with my availability.

May I come back to our starting position. As you will have seen, our position is that a trial in this case should take place between the end of April and the end of July. We say that is the earliest sensible practical date for the hearing. The OFT can do September too. Tesco is stating that its preference is for a trial commencing on 23rd January, but it also puts forward an alternative September date. It cannot do any time between early to mid-February and September because of Mr. Howard's own commitments to another case. We submit that the Tribunal should consider, and is obviously considering, whether in all circumstances a period of April to September is a sensible period, and then consider, if it does consider that is a sensible and practicable period taking account of everything, whether it should take into account Tesco's concerns about the availability of its counsel.

As far as 23rd January is concerned, we say that this is not an appropriate date for four reasons. Firstly, we say that preparation for the case will be complex and time consuming - I will come back and develop each of these points, if I am. Secondly, the hearing date of 23rd January imposes an unfairly tight deadline for interlocutory steps and in particular for the OFT's defence. Thirdly, there is the issue of my availability, which I have dealt with. Fourthly, whilst, sir, we fully recognise that the Tribunal is the master of its own procedure and it is for the Tribunal to move cases along, there is no urgent need, or no specified need for urgency in this case, and Tesco, we submit, offers no real reason why it wants this case to come on on 23rd January rather than in September.

The first point is the issues in the case. The case involves a highly detailed examination of an array of factual issues covering in minute detail almost daily two periods of two months in 2002 and 2003. Last month Tesco has submitted for the very first time substantial new evidence. That is the first point under the first point, and the second point is that Tesco has had ample time in the course of this investigation to put in the evidence which it now seeks to rely upon for the very first time.

As far as the new evidence is concerned, what is said in Tesco's skeleton and by Mr. Howard is not correct. Tesco has submitted six new witness statements running to a

total of 114 pages of narrative. That is the narrative of the witness statements. In the administrative phase Tesco submitted four witness statements running to a combined total of 15 pages. Miss Oldershaw is the principal witness and is, and is and always has been a, if not the, key witness in the case. She has been available to Tesco since 2007 when the statement of objections was issued. Tesco has now submitted for the first time a detailed witness statement running to 168 paragraphs. I take into account entirely the point that Mr. Howard makes that her first witness statement made in the administrative procedure was a cross verification to paragraphs in the written submissions, but that is not remotely the same as a detailed personal account of her recollection of events which we now have. What is said there will ultimately require, and is requiring, very careful consideration by the Office of Fair Trading and the Tribunal.

We have also in our written submissions at para.7(f) and (g), which I think you have, indicated by way of illustration a number of new points raised in the notice of appeal.

THE CHAIRMAN: Yes, we have seen those.

MR. MORRIS: You have seen those, and they are by way of illustration - and I can give you another three, four, five, six, should I need to, but they were given by way of illustration. There is a lot of new material.

The second proposition is that Tesco has had ample time to put in evidence. The idea that Tesco has had to start from a standing start in August when the decision was issued (10th August) is, in our respectful submission, absurd. In the course of the administrative procedure, if I may give you these details, Tesco had a total period of almost six months in which to prepare and submit its evidence, including any witness evidence it wished to rely on, in response to the statement of objections and the supplementary statement of objections. It had 11 weeks for the statement of objections and 13 weeks in total for the supplementary statement of objections. It did include pro forma witness statements from Mr. Scouler and Miss Oldershaw, but they were pro forma and they did not condescend upon detail.

Secondly, and more importantly, it has had, and has taken four years to produce the detailed witness statement evidence from its own employees, Mr. Scouler and Miss Oldershaw, upon which it now seeks to rely. At no stage between the SO in September 2007 and the notice of appeal in October 2011 has it offered this evidence.

Thirdly, effectively, what happened in July about the submission of witness statements at the last minute is a red herring as far as this key evidence from its own employees is concerned. The evidence which it sought to submit in July 2011 came from witnesses from

processors - from Dairy Crest and McLelland. In addition to having had four years to gather that evidence the OFT submits that it was entirely justified in not submitting that evidence submitted, significantly, eight months out of time; and I was going to say at the eleventh hour, but in fact it was not the eleventh hour, it was several minutes after midnight, because the decision had been taken. In our submission, at the very least Tesco was dilatory in not seeking to submit that evidence earlier.

In those circumstances, we submit that in view of the time taken by Tesco to gather and submit this key evidence it is wholly unreasonable for Tesco to now seek to limit so drastically the time available to the OFT to consider and respond to that evidence.

That deals with the position about the new evidence and the need to respond to it.

The timetable arising from a 23rd January hearing would, we submit, be too tight. This would involve a period of ten weeks from the first case management conference today to the start of a three week witness trial. The ten weeks is calculated by excluding the Christmas period, which no doubt, if Tesco have their way, they will so structure that it will be the OFT who will be working over Christmas rather than them. The trial of 23rd January necessarily means, I think it is accepted, that there could be no extension of time at all for Office of Fair Trading's defence. We submit that, in the light of this highly important and detailed new factual evidence, this is a case where it would be appropriate to grant an extension of time for the defence. Whilst I am fully aware that the Tribunal will take into account its approach to extensions of time for the defence, all I can is that it is not unknown for this Tribunal to allow time for the service of a defence, in circumstances particularly where the factual evidence relied upon now in the appeal is different from the evidence that was relied upon in the administrative phase. That arose very plainly in the '*Replica Kit*' case where one of the parties, Allsports, put in a wholly new case and new witness statements, and that is precisely the sort of circumstance where it would, we submit, be appropriate for there to be an extension.

You have the point about the further pricing evidence which Mr. Howard has clarified to some extent. He says that it will be put in by Friday, and on that basis we would have less than two weeks to deal with it. It may be that it is a side issue, but nevertheless that further pricing evidence might be something which the OFT would want to look at and might want to get its expert to see whether it is agreed with.

There is a further point in relation to the tightness of the timetable, and it is this, sir: on 3rd November, three to four weeks after the filing of the notice of appeal, Tesco has made a

request to the OFT for the unredaction of a substantial number of documents - 49 documents, I believe.

The OFT, of course, is wholly familiar with that process, as is this Tribunal. These are third party materials. In the time available, the Office of Fair Trading has identified that there are between eight and 11 third parties that it will have to contact to notify them of this request for unredaction and to give those third parties the opportunity to write in to you, sir, to make decisions about the unredaction process. I cannot tell you how long the process will take. We understand that it might take a month. There are two stages. One is to decide what is and is not to be Unredacted; and the second stage is setting up the confidentiality ring and working out what unredacted material can go to whom and what redacted material goes to others within the ring. We do not see any difficulty with that, and we are not in any way going to be obstructive. We will obviously assist the Tribunal and assist Tesco. I invite you to take into account that that is a process which will necessarily take some considerable time.

I should also point out that numbers 48 and 49 in that schedule are applications for disclosure of leniency applications that were made by Arla and Asda. I am not in a position to say at this stage what the Office of Fair Trading's position is on that. Regardless of that, it can be envisaged that Arla and Asda may well have something to say about it. Those are important issues, disclosure of leniency material.

The point I make is this: first of all, it is plain that if we have to do a defence by 22nd November none of this unredaction process would be sorted out by then. It might be said, "Well, that does not matter", but at some stage we would wish to know, following unredaction, what it is that Tesco might wish to rely on in the unredacted materials. How does that fit in with a timetable where we are being asked to put in our skeleton argument by 9th January?

I cannot at this stage give you an estimate as how to long the unredaction process will take, but it is something which, we submit, makes this timetable unreasonably and unworkably tight.

I would also make one further observation on that aspect and it is this: Tesco, if it was really concerned about getting this hearing on 23rd January, could have made this request for unredaction of materials on putting its notice of appeal in on 10th October. Instead it has waited over three weeks to do that.

The final point - you have my submissions on my availability, not submissions, it is just a fact of the case - is the question of urgency. I am not sure I can expand it any further other

than saying that in our skeleton we did not intend in any way to detract from your task and your objective, which is to move things along. We fully recognise that. We have put forward dates which we submit meet that objective. We say that if this trial started at the beginning of April - let us leave aside availability of counsel - that would fully satisfy the Tribunal's objectives in speedy resolution, in moving things forward efficiently in this case, taking account of all the matters I have raised about what is in issue and the process.

Having said that, we do ask rhetorically: what reason is there in the present case to progress these proceedings at what we submit will be a breakneck speed? Tesco has not put forward any reason of substance at all as to why this case must be heard in January. Indeed, the very fact that Tesco is putting forward, as its second choice, a September hearing date indicates that in truth it would be content with such a date, and indicates in truth that if Mr. Howard is unavailable that would be its preferred date. Tesco has never been in a hurry in this case. It certainly was not in a hurry earlier this year about its additional evidence when it took from January, when it told the OFT that it was looking for additional evidence, to July to submit that evidence. We submit that in those circumstances and fully into account the Tribunal's position, there is no reason for what we would say is, in reality, an expedited hearing in this case.

THE CHAIRMAN: Thank you very much. Do you want to reply?

MR. HOWARD: Just very, very briefly. Counsel's availability, it is actually self-evident that Mr. Ward is, in fact, available. He is a very competent competition silk and there is absolutely no reason, therefore, why the question of Mr. Morris's position should even enter into it. It, in fact, appears that Mr. Morris was not booked at any stage for this case. Be that as it may, that is a decision that the OFT, themselves, have taken.

As to the question of the timetable more generally, what you have not heard from Mr. Morris is any submission that there any exceptional circumstances in this case to justify an extension of time. That has to be the starting point, what is laid down in the Tribunal's guidelines and laid in the authorities has to be the starting point. The OFT needs to explain that. For instance, simply to say Miss Oldershaw's witness statement is now 168 paragraphs does not explain, "What is it, why is that causing you a difficulty? What are you proposing to do that in response to that?" For instance, if one thinks of normal litigation in the High Court, somebody who is seeking an extension of time for some reason, they come along to court and say, "Now I have seen this, what I need to do is go and take evidence from this person, take evidence from that person, and it is going to take me time". That is not what the OFT is saying. All they seem to be saying is, "The drafting of our defence is

going to be a more complicated exercise than we had previously anticipated". We do not accept that is the case at all, but there is absolutely nothing being put forward which actually explains why they need an extension of time.

I would respectfully suggest that the Tribunal should be wary of a tendency - this case, I would say, marks that - by the OFT to just assume that it can have extensions of time, a rather what I would describe as a lackadaisical approach. It would be most unfortunate if the impression is left that appellants - we see what happened in the *Fish Holdings* case - if they are out of time by three days, that is it, because they have made a mistake as to the correct address, and the Tribunal says, "Sorry, that is not exceptional", but the OFT can just come along and say, "This all requires quite a lot of work and we should not be put to having to do a lot of work".

As to the question of the redactions, the position was not entirely accurately described. Tesco, in fact, asked for the documents in unredacted form over two years ago in the course of the administrative process. As I understand it, it is not actually anticipated that this is going to give rise to any difficulties because obviously, yes, you have to write to the people who have confidence, but at the end of the day the Tribunal is well used to dealing with confidentiality rings, and at the end of the day this is not a complicated process, bearing in mind there is only one other party here, Tesco, and one would just have to have a confidentiality ring which applies essentially to a very limited number of people who are involved on Tesco's side in this. It is not something that needs to be sorted out prior to the service of the defence. In so far as the unredacted documents require Tesco to say anything further, then it will be saying something further either in its reply or in its skeleton argument. We have the redacted documents. The purpose of seeing them in their unredacted form is so that you have a proper appreciation of what the complete document shows. It is nothing more than that.

We would respectfully suggest that no one is actually proposing what Mr. Morris describes as "breakneck speed". What one is actually proposing is proceeding in accordance with the machinery in the Rules and what the Tribunal is expecting.

At the end of the day one comes back to this: this is a relatively - compared to other cases that come before this Tribunal - straightforward case. It is in some respects rather similar to an old-fashioned County Court case in the sense that one is going to have to assess credibility of witnesses against documents, and so on. It is not, as I said before and Mr. Morris has not said anything to the contrary effect, a case where one would have complicated economic evidence - obviously the Tribunal is well versed in dealing with that

- where you have experts on both sides. That is the sort of thing that makes a more complex hearing. At the end of the day, the principal witnesses - Miss Oldershaw is one, and there are various others - you are going to have to assess their reliability and credibility. That is actually what it amounts to. The sooner that is done the better, I do not shrink from that. We say that 23rd January, which was the date which had previously been indicated, is one that we can do.

The final point I would make about that - I fully accept that the Tribunal is the master of its own procedure, and that your setting of a date should not, *prima facie*, be around counsel's availability. If the Tribunal is of the view that the case ought to come on in the early part of the New Year, I would respectfully suggest that it would be unfortunate to put Tesco in a position where a delay of two weeks, for instance, is going to mean that probably I would not be available, if the Tribunal was able to accommodate the 23rd January. Obviously, if it is completely impossible then that goes out of the window, but there is not actually anything, as I understand it, that is being put forward as to why the pushing things off to 6th February would be more suitable than 23rd January.

That is what I want to say by way of reply.

THE CHAIRMAN: Just bear with me for a moment. We will withdraw in a moment to discuss among ourselves the trial date. (The Tribunal conferred) We will retire and return with a trial date in due course, and then we can deal with other matters.

MR. MORRIS: Sir, if I may?

THE CHAIRMAN: Yes, Mr. Morris.

MR. MORRIS: There is one other matter which I should raise, and it is a matter which I think you should take into consideration. It arises out of some of the points that Mr. Howard made and obviously he will, if he wishes to, respond. You have our reasons why 23rd January is not workable. There is a further consideration and it is this: the OFT is considering the position as to whether it proposes to call witnesses. A January trial date, and indeed most likely a 6th February trial date, may very well close off the possibility of such witness evidence being called. The OFT will be unlikely to be in a position to serve any such witness evidence at the time it serves ----

THE CHAIRMAN: What sort of witness evidence are we talking about?

MR. MORRIS: This is rebuttal witness evidence, evidence responding to the witness evidence from Miss Oldershaw and the new evidence. This has the possibility of working unfairness and may ----

THE CHAIRMAN: How many witnesses have been identified by now as to the rebuttal witnesses you are likely to call? It must have been considered.

MR. MORRIS: We have considered it, we have not taken any view as to whether it is likely that we will call them, but we have identified at least potentially three.

THE CHAIRMAN: You have identified three possibles, but no consideration has been given as to the likelihood of calling them.

MR. MORRIS: Consideration has been given and is currently being given.

THE CHAIRMAN: It sounds like a slow ratiocinatory process to me, but no doubt there are reasons for that.

MR. MORRIS: The Office is endeavouring to deal with it as urgently as it can. It has spent ----

THE CHAIRMAN: Have these witnesses been contacted yet?

MR. MORRIS: Sir, if I may, I would prefer not to be put in a position where I have to disclose any more than that. Can I make this observation? Obviously, we will have to be in a position to notify the position in relation to witnesses at the time of our defence. Whilst I entirely understand your concerns about this, we would submit that it is not appropriate or necessary for the Office to say more than that it is currently considering the matter until the point of the defence.

THE CHAIRMAN: It is up to them what they say. The weight we give to it may depend on what we are told, which if it is not very much is not going to be very much.

MR. MORRIS: I raise the matter, and I thought it appropriate to do so before you retire.

THE CHAIRMAN: Thank you very much.

MR. HOWARD: I just want to say this: I actually regard this as pretty outrageous. They do not put this forward when Mr. Morris makes his submission. They are required to say what the exceptional circumstances are. They have had the notice of appeal since 10th October. Are they just assuming that the Tribunal is going to give them an extension.

THE CHAIRMAN: We will consider your submissions.

(Short break)

THE CHAIRMAN: We have considered the submissions that have been made. We understand why Tesco wish this reputational case to be heard in early course, and that accords with the general practice of the Tribunal. We observe that this is a matter which has been in the brewing for several years now, and although there may have been some adjustments to the way in which it is presented evidentially there are unlikely to be any very major new issues. We have taken into account matters about the availability of counsel. We find it a little difficult to understand why, in the case of Mr. Howard, if three particular weeks are

substituted by three other particular weeks, it is not possible to deal with his succeeding case without losing the brief. In the end, in any event, the Tribunal has to keep to good case management principles and timely hearings.

In those circumstances, we have decided that the hearing of this case will start on 6th February. We will sit for that week. The following week we cannot sit because of unavailability of a member of the Tribunal. We will then sit the following week and for however long it takes to finish the liability aspect of this case.

So far as penalty is concerned, if we have to consider it, our view is that we should deal with the penalty aspect of the case as soon as possible after completing the liability aspect of the case, given that it seems to us that penalty will not take up a great deal of time. Indeed, we would express the view at this stage that penalty, if it needs to be heard, should be completed within two weeks, and there should be limits on the length of skeletons on that subject and on the length of submissions. We can deal with that later, having given that preliminary indication of the way we would propose to deal with penalty if necessary,

Perhaps this is the moment to say that we are not going to place a limit on skeletons for the liability hearing, but if skeletons are over 40 pages long then we would require a summary of the main points of not more than five pages of, I had better say it, A4 at 12 point - I cannot read 8 point these days!

That is our starting point. If we were to work backwards from there, we have in mind the matters raised by Mr. Howard in relation to exceptionality, and he referred to the President's decision in late 2009. I am bound to say that there have been cases since then in which extensions of time for the filing of the defence have been given, even if it was not strictly exceptional. The Tribunal's suggestion would be that there should be a modest extension of time of two weeks to 6th December for the filing of the defence, and the timetable should be considered in that context between that date and the hearing date before the Tribunal.

I am looking, Mr. Howard and indeed Mr. Morris, at para.5 of Tesco's submissions for the CMC. It would seem to me, if we are working on a starting date of 6th February next year, and an extension of time for the defence to 6th December of this year, that the date in para.(a) should be 20th December, the date in para.(b) should be 6th January, in (c) the 20th January, in (d) the 23rd January, and in (e) the 30th January. Any observations?

MR. MORRIS: May I make some observations about the order of the skeleton arguments which Mr. Howard submits should be the Office of Fair Trading to go first? We submit it should be the other way round. We do not know whether Tesco will or will not lodge a reply, but

on the basis that it does not we would submit that there is very little point in us having our defence and then having our skeleton. In any event, we would submit that really the appellant should go first on its skeleton. If that were something which the Tribunal was minded to accept, we might then factor in a timetable which actually joins a reply and appellant's skeleton together, which might enable a different time window.

We would also submit that if you were going to go down that route, we would ask for 13th December for our defence, rather than 6th December, which is a three week extension rather than two weeks. We would then say reply and appellant's skeleton on 10th January, or perhaps even move that back a little bit, and then the OFT's skeleton a week later or perhaps two weeks later. The order we would suggest is defence, reply and appellant's skeleton, OFT's skeleton, and on the timetable we were just given it might be that that middle stage might even be 17th January - the 10th and the 24th, we are suggesting.

THE CHAIRMAN: Which step are you looking at?

MR. MORRIS: It is step (b), reply would be 10th January, and step (e) would be Tesco's skeleton, which would go with it, also 10th January, and then the OFT's skeleton on 24th January.

THE CHAIRMAN: I will consider that. Mr. Howard ----

MR. HOWARD: Yes, I have got some comments on that.

THE CHAIRMAN: Can I just say before you make your comments, given that you are going to receive the defence - and I have been seduced by your written advocacy, I think - is it not logical that you should serve your skeleton argument first?

MR. HOWARD: The reason we have suggested that we serve it sequentially with the OFT going first was because we anticipate serving a reply, and then the OFT's skeleton would take account of what we have said in our reply and then our skeleton would deal with that. That is how we would suggest one deals with it. The alternative is to have exchange of skeletons.

THE CHAIRMAN: That is not going to help the Tribunal, I think. It is helpful to the Tribunal's preparation for the hearing to have sequential skeletons.

MR. HOWARD: Obviously it is a matter for the Tribunal ultimately. It is really looking at how one can fairly deal with it. If we just look at the timetable for a moment, we respectfully suggest 6th December should stick as the defence. It is simply the OFT trying yet again to gain more time. It is important, the defence, because we need to actually see as soon as possible - and that is already a two week extension - what the OFT's position is and which parts of their decision they do seek to uphold. Paragraph 5(a), the 20th, that is fine. We are content with serving the reply on the date that you have suggested, namely 6th January. If

your view was that we should go first with our skeleton then we would suggest that the idea that there should be a two week gap between our skeleton and the OFT's skeleton is somewhat rich. If we are going to have to go first, I would suggest that we had at least until 17th January.

THE CHAIRMAN: Can (b) and (e) be rolled up into one event - Tesco's reply and, if necessary, evidence in reply and your skeleton, they could be rolled up into one event, which would give you more time?

MR. HOWARD: They could be, but we would need more time is basically my point. Bearing in mind the Christmas holiday, we would suggest that we would take until 17th January for that, and the OFT would then have until 24th January for their skeleton. Again, they can be doing substantial work on their skeleton after they have served their defence. One does not just start writing the document from seeing the other side's skeleton, even if it is going to be responsive.

THE CHAIRMAN: The bundle of authorities, that can be the last thing, can it not?

MR. MORRIS: The bundle of authorities, that is something that we can factor in.

THE CHAIRMAN: As long as the bundle of authorities comes in in a form that is usable to the Tribunal, and not simply three large lever arch files with no flags, no highlighting and no nothing, it really does not matter.

MR. HOWARD: I think you can take it that we will take charge of the bundle of authorities and that Freshfields will do a Rolls-Royce job.

THE CHAIRMAN: I am sure it will be done beautifully.

MR. HOWARD: I think the parties have already reached a sensible arrangement about the bundles, to ensure that you actually have, as it were, a proper chronological bundle rather than documents spread out all over the place, which is problematic.

THE CHAIRMAN: Can I ask that all (not bundles obviously) the skeletons, the defence, any reply - in other words, any documents that may fall loosely into the broad definition of "advocacy" - be sent to the Tribunal in electronic form as well as in hard copy, and may I request that, if possible, electronic form should be Word form. I heard someone suggest the other day that it is a good tactic to serve all documents going to the court in Word form and to the other side in PDF form. I understand readily the tactic behind it, but if it could all be shared in Word or similar form - in other words, in a 'cuttable' and 'pasteable' form - then that would be very helpful to all of us, to everybody in the room. Can that be done, please?

MR. HOWARD: Yes, I am sure it can.

THE CHAIRMAN: We are going to give you a timetable in a moment or two, but does anybody else want to say any more about it? Let me try and help you - it may be deeply unhelpful - by telling you what I have in mind, and this I have not discussed with my colleagues so they will nudge me if they think this is not helpful. I have in mind that the defence should be filed by 13th December, which is an extension of some order. Then step (a) the 20th December in relation to witnesses, step (b), the reply, etc, and step (e), Tesco's skeleton, 13th January, step (d) the OFT's skeleton 20th January, and the bundle by 30th January. We think that is manageable. I know it means that a lot of work is going to have to be done, but we think it is manageable and we do not think it is "breakneck", and it what, in our view, the parties should have expected to be the kind of thing the Tribunal would order.

We shall so order.

What else do we need to consider? I just want to look at the agenda again. There are no interveners, are there, so we do not need to consider interventions. I am looking at the agenda that was issued by the Tribunal. We do not need to deal with the timetable of interventions. We have dealt with the other aspects on the first page of the agenda.

MR. MORRIS: Can I just raise one matter?

THE CHAIRMAN: Yes.

MR. MORRIS: At 2(d) in relation to penalty, we heard what was said about that. It may be that it does not have to be decided now, but it was not clear to me whether you envisaged awaiting judgment on liability before a penalty hearing, or whether there would be a separate hearing before.

THE CHAIRMAN: We do not necessarily envisage awaiting judgment, as in full judgment, but it may be that a decision can be given.

MR. MORRIS: I just raise that. The question is, given where we are on penalty, does the Tribunal require our defence to plead to penalty at this stage, or would it prefer us to leave it for the time being?

THE CHAIRMAN: I think I would rather leave it to discrete documents on penalty.

MR. MORRIS: After liability.

THE CHAIRMAN: Subject to the indicative limitations which I mentioned earlier.

MR. HOWARD: Did I correctly understand what you meant was that you would give the judgment on liability and then in the light of that we will fix a hearing ----

THE CHAIRMAN: We will give a decision on liability rather than necessarily the full judgment. Then we would wish to proceed to deal with penalty, if appropriate, promptly.

MR. HOWARD: In the event that you uphold the appeal then that component goes away, but if you dismiss the appeal I suppose one would ----

THE CHAIRMAN: Then it may be that you will not be dealing with the penalty aspect of the case.

MR. HOWARD: I am probably not going to be dealing with any aspect of the case, but whoever is will then have to consider the position. There may be other issues that arise at that stage as to whether one can deal with it without seeing the decision itself.

THE CHAIRMAN: My preference, as a matter of good case management, would be to move on to penalty perhaps the following week. I recognise that it may not be possible to do that. I think we are clear that we would not delay the penalty aspect, if it is to be considered, for any reasons connected with the availability of counsel, given the panoply of super-competent counsel whose names appear or have been mentioned in various aspects of this case.

MR. HOWARD: The point I was making is that it is unlikely that I am going to deal with the liability hearing, so that was not a point about counsel's availability, it was really a point as to submissions that one would regard as appropriate on penalty, if we ever got there, and it may be more appropriate to make those submissions in the light of the findings of fact and in accordance with your decision.

THE CHAIRMAN: It may be, but I would be shocked, Mr. Howard, if we came to the end of a liability hearing and then, if Tesco lost, we would then be told that nobody had given any thought to the penalty aspects.

MR. HOWARD: No, no, I was not suggesting that.

THE CHAIRMAN: I would have thought that *de bene esse*, if you will forgive the expression, the penalty documents would be more or less ready to fire subject, of course, to issues that arose during the liability hearing, if relevant.

MR. HOWARD: Yes. I was not seeking to say anything controversial, I was just trying to clarify that what you intended was that we were going to await at least the decision ----

THE CHAIRMAN: We are not going to have a rolled up hearing. That is the short answer.

MR. HOWARD: That was the only point I was making, and obviously how we proceed at that stage will simply be a matter of deciding where we have got to.

THE CHAIRMAN: To try and be even clearer, we are not going to have a rolled up hearing. If we decide against Tesco and in favour of the OFT on liability, then there will be a short hearing on penalty which will follow within a short time based on, to use the word again, short pleadings and short submissions.

MR. MORRIS: The only point I was making was that, as I understand it, we, in this defence that we will be dealing with before Christmas, will not address penalty?

THE CHAIRMAN: No. The matter of a confidentiality ring has been raised with me.

MR. MORRIS: I am not sure where we are. I think we think it is going to be all right essentially, and is something that I think is being dealt with between those instructing me and those instructing my learned friend.

THE CHAIRMAN: Could this be dealt with administratively? If any orders in relation to a confidentiality ring are required then it can be dealt with, I think, on paper. Are you content with that, Mr. Howard?

MR. HOWARD: Yes, certainly.

MR. MORRIS: The Tribunal may be receiving matters in relation to unredactions, but that will obviously take its course.

THE CHAIRMAN: These are routine matters. We are perfectly happy to deal with that. Anything else? No. Thank you very much.