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

**IN PRIVATE**

Victoria House  
Bloomsbury Place  
London WC1A 2EB

26 October 2006

Before:  
SIR CHRISTOPHER BELLAMY  
(President)

GRAHAM MATHER  
VINDELYN SMITH-HILLMAN

BETWEEN:

**BRANNIGAN**

Applicant

- v -

**OFFICE OF FAIR TRADING**

Respondent

Mr. Terry Brannigan (assisted by Mr. Green of Edwin Coe) appeared for the Applicant.

Mr. Anneli Howard (instructed by the Treasury Solicitor) appeared for the Respondent.

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**PROCEEDINGS**

**IN PRIVATE**

1 THE PRESIDENT: Good afternoon, ladies and gentlemen. Let us establish who we have here.  
2 Hello, Mr. Brannigan, thank you for coming. You have Mr. Green with you – you are just  
3 helping, as it were, Mr. Green, is that right.

4 MR. GREEN: Yes, indeed.

5 THE PRESIDENT: Yes, thank you for that, we appreciate your presence; and Miss Howard for the  
6 OFT. Let us see where we can get to today because the situation in this case is not, I think,  
7 entirely straight forward. If I may say so, it seems to us that the first question is whether or not  
8 we have any jurisdiction at all, Mr. Brannigan, and that turns on whether or not there is an  
9 appealable Decision within the meaning of the Act. That I think is the first question.  
10 Assuming, for argument's sake, that question could be surmounted on the basis that the OFT's  
11 reinvestigation of your complaint and the analysis they put in arguably amounts to an  
12 appealable Decision, notwithstanding that it was expressed to be "without prejudice" and so  
13 forth, they have done the work – or some work on it – at long last, the next question is if it is  
14 an appealable Decision what are the grounds on which you appeal that appealable Decision?  
15 The sequence of events is that when you got that "Decision", if I can call it that just for  
16 argument's sake for the time being, your main complaint at that stage was that you had not  
17 been consulted before it was sent to you and I think no doubt that point was taken on advice,  
18 but that was the main point you took at that time – is that right?

19 MR. BRANNIGAN: Yes.

20 THE PRESIDENT: I am sure you will alert me if you are not following the discussion, or ask Mr.  
21 Green for help, at any time, do not feel inhibited about saying anything you want to say. So  
22 there is what I can call 'the consultation issue'. Then we get to a more recent letter that I think  
23 the Tribunal has had from you, though no doubt through your advisers, raising a further and  
24 possibly new argument about printing presses and effectively saying that Newsquest had a  
25 local monopoly on printing and that it was using its monopoly on the printing press when it  
26 refused to print you in East Sussex and made you go to Colchester, that was part of a way of  
27 damaging you in the market for the distribution of newspapers; that is the argument there.  
28 That is I think a new argument, or a new way of putting old arguments.

29 MR. BRANNIGAN: Yes, we have had new evidence to back that up.

30 THE PRESIDENT: You have the new evidence, you have Mr. Baker's evidence, at least indirectly,  
31 that the intention was to make life difficult for you.

32 MR. BRANNIGAN: Yes.

33 THE PRESIDENT: So we have the printing presses' argument. Have I correctly understood so far  
34 that those are the main arguments, or are there other, wider arguments that I have missed?

1 MR. BRANNIGAN: Can I just confirm you have received the ----  
2 THE PRESIDENT: I have indeed received that, Mr. Brannigan, thank you for reminding us. Just let  
3 me have another glance at that. (After a pause) So you have Mr. Baker, and basically what  
4 you invite us to decide in **this** piece of paper is that we have jurisdiction, or that there is an  
5 appealable Decision and let matters unfold from there, that is basically what you are asking us  
6 to do.  
7 MR. BRANNIGAN: Yes.  
8 THE PRESIDENT: But assuming there was an appealable Decision – perhaps Mr. Green can help  
9 us if necessary – the basic grounds upon which you would attack what the OFT has done is  
10 that you have had no opportunity to put in comments on their Decision, and that there is Mr.  
11 Baker’s evidence and the printing presses’ argument. Is that right, or is it wider than that, Mr.  
12 Green?  
13 MR. GREEN: Since the Appeal was first put in, I think in March, and things have progressed  
14 somewhat, in the way they did in the last hearing, my understanding at least, and I have  
15 discussed this with Mr. Brannigan, is that the current procedural position is that the hearing in  
16 April was adjourned and effectively this is the adjourned hearing.  
17 THE PRESIDENT: This is the adjourned hearing, yes, it is.  
18 MR. GREEN: The issue before the Tribunal on that occasion was, was there an admissible appeal,  
19 though it is a strike-out application on two grounds ----  
20 THE PRESIDENT: We still have that application.  
21 MR. GREEN: First, was it in time; and secondly, was there an admissible appeal – did the Tribunal  
22 have jurisdiction. That was then adjourned to effectively today on the basis that the OFT  
23 agreed to undertake a review of the paper work, as I understand it, where they are going to take  
24 it back in and have another look at it.  
25 THE PRESIDENT: Yes.  
26 MR. GREEN: But at the moment, as I understand it, procedurally the original Appeal is before the  
27 Tribunal which argued that there was an appealable Decision on the basis there was a non-  
28 infringement Decision sitting behind the decision to close on administrative priorities. That  
29 was at least partly based, and it was commented on at the last hearing and the letter of 6<sup>th</sup>  
30 February that talked about there never having been evidence of an infringement and that issue  
31 was gone into in some depth at the hearing on 28<sup>th</sup> April. I think actually, procedurally, that is  
32 in front of the Tribunal at the moment; that is still an issue in front of the Tribunal as to  
33 whether there was an appealable Decision in the first place when the OFT decided to close, and  
34 that has continued. But now what has intervened is the fact that having been taken back in and

1 the OFT having had another look at it, repeated the administrative decision but “without  
2 prejudice” ----

3 THE PRESIDENT: Whatever that may mean.

4 MR. GREEN: -- whatever that may mean, without prejudice to that view, expressed a view on the  
5 merits of the complaint in the first place. Now, the letter then sent by Mr. Brannigan to the  
6 OFT said “I understood that I might be consulted about that element of it before you made a  
7 decision”, in what might be regarded as the usual way, and the response to that was that you  
8 can make comments if you want, but you can appeal to the Tribunal.

9 In order to save his position somewhat that invitation was taken up and maybe in a way the  
10 Tribunal has two Appeals in front of it: first, in relation to the non-infringement Decision that  
11 would be said – on a *Claymore* basis – to lie behind the Decision to close on administrative  
12 priorities is the first Appeal, and I think that is the continuing Appeal.

13 The second Appeal to some extent is in response to the invite of the OFT that the Decision to  
14 close on the basis of non-infringement, the subsequent one in June – I think 9<sup>th</sup> June – could be  
15 appealed, so in a way that Appeal is in front of the Tribunal although I think nothing  
16 administratively has been done in relation to that particular Appeal.

17 THE PRESIDENT: What I am trying to get at is, assuming the jurisdiction arguments could be  
18 overcome, what points are taken on the merits? The OFT has now re-examined the complaint,  
19 or examined it for the first time to be more accurate, and has reached a view that it is highly  
20 questionable whether there is any dominance, and that even if there is dominance it might be  
21 difficult to establish abuses. I think probably at this stage the Tribunal is not uninterested in  
22 the question of dominance, and whether the OFT’s analysis in its re-assessment of the situation  
23 on dominance is put in issue or not, because we do not really have anything concrete to go on  
24 at the moment, and we are suppose to have a notice of appeal that sets out all the arguments  
25 and so forth.

26 MR. GREEN: I take that point entirely, Sir. The position is that indeed when the Appeal was  
27 started, it was started on the basis – I think we would all accept – of a rather thin letter of  
28 Appeal.

29 THE PRESIDENT: We have the original bundle that just arrived through the post last March when  
30 Mr. Brannigan wrote to us.

31 MR. GREEN: Indeed, I think that is taken as the Appeal notice, and I do not understand the OFT  
32 takes any point that maybe that is defective in certain ways – I think that point has not been  
33 taken. However, I would say this on behalf of Mr. Brannigan, if the Tribunal were to decide  
34 that indeed it did have the jurisdiction to deal with the non-infringement Decision that we

1 would suggest occurred – because certainly until the 9<sup>th</sup> June all that was there was the  
2 administrative decision – and that the non-infringement Decision is in a manner now reflected  
3 in that annex of 9<sup>th</sup> June, then I have to say that, subject to the Tribunal’s willingness, I think  
4 correctly we would want to put in a proper notice of appeal (a pleaded notice of appeal ) in  
5 relation to that Decision. Whatever “without prejudice means”, if it is now accepted that if the  
6 Tribunal had jurisdiction on the basis that was a non-infringement Decision – and here were  
7 the grounds for that non-infringement Decision – then I think Mr. Brannigan would want the  
8 opportunity to respond to that properly, and obviously put in a proper notice of appeal to put in  
9 issue those points made in it.

10 THE PRESIDENT: But how does that work, because we have the OFT’s re-examination on 9<sup>th</sup>  
11 June, there is technically two months in which to put in a notice of appeal. In the two months  
12 – just within the two months – came Mr. Brannigan’s letter complaining that he had not been  
13 consulted. Since then we have had the recent letter about the printing presses, but we have not  
14 so far had anything putting in issue, for example, the analysis of dominance. What is the  
15 reason for that?

16 MR. GREEN: If I may say on Mr. Brannigan’s behalf, the position he is faced with is that up until  
17 9<sup>th</sup> June all that he had in front of him was the decision to close on the basis of administrative  
18 priorities. He was appealing on the basis that what was lying behind that ----

19 MISS HOWARD: I am sorry, I do think he had copies of both the priorities’ letter and the s.25  
20 assessment on 9<sup>th</sup> June, both of those documents were sent ----

21 THE PRESIDENT: Yes, he did, I do not think the contrary is not being suggested.

22 MR. GREEN: Sorry, I was not saying to the contrary, no. I was saying that up until 9<sup>th</sup> June all that  
23 was in front of him was the administrative priorities’ decision and he was appealing on the  
24 basis that what lay behind that was a non-infringement decision.

25 THE PRESIDENT: Then he got the 9<sup>th</sup> June letter.

26 MR. GREEN: Then he got the 9<sup>th</sup> June letter. The 9<sup>th</sup> June was termed to be “without prejudice”,  
27 whatever that should mean, and he was asked to appeal it, or it was suggested that he should  
28 appeal it – I am not quite sure if the OFT say he can appeal it or not – but he did appeal it on  
29 the grounds that he had not been consulted about that.

30 THE PRESIDENT: He did not appeal it on the substance?

31 MR. GREEN: No, he has not appealed that on the substance, that is right, but he retains his appeal  
32 on the substance of a non-infringement decision ----

33 THE PRESIDENT: He can work out from the original bundle what points are taken.

34 MR. GREEN: Exactly. As I understand it – maybe I am wrong about this – I presume, and I am

1           sure this will be explained, the decision and the reasons set out on 9<sup>th</sup> June, if it be accepted,  
2           reflect the earlier decision on non-infringement, this is the reasons that we came to our  
3           conclusion on non-infringement at an earlier stage.

4   **THE PRESIDENT:** Yes, thank you, Mr. Green. If I can just pursue one point a little further with  
5           you? These proceedings have so far been proceeding by way of private hearings. We have not  
6           yet officially registered this case, and we have not gone through our intervention procedure. It  
7           is probably occurring to us that by now it is going to be very difficult to maintain that position  
8           – certainly if there is an appealable Decision, but probably even if there is not, or if there was a  
9           Judgment about it – and unless it was clear beyond a peradventure that there was no  
10          jurisdiction we would probably feel that we needed to register the case, give it a case number,  
11          make public today’s proceedings and the transcript of the previous hearing and put a proper  
12          notice of inviting interventions on our website, and invite interventions and allow the case then  
13          to unfold. Have you anticipated that that is the consequence of the case going ahead?

14   **MR. GREEN:** We have anticipated and we have discussed it. Mr. Brannigan’s concern is that in the  
15          event of these proceedings being made public he is concerned about the safety of documents  
16          that may be held by third parties and that is his only concern, otherwise I think he is content for  
17          it to become public.

18   **THE PRESIDENT:** For obvious reasons, as long as there was some prospect of an investigation  
19          being undertaken, it was thought by the Tribunal prudent to retain the matter as we have dealt  
20          with it up to now, but it seems to us at this stage, despite the risk to which you have just  
21          referred it is very difficult to go ahead any longer with the case as it stands. If that is right, that  
22          would also raise the question whether or not we could finally decide even admissibility without  
23          the interventions, I do not know. We might have to have the interventions first.

24   **MR. GREEN:** Yes.

25   **THE PRESIDENT:** Yes, that is helpful. Yes, Miss Howard, we have to try and sort this out as best  
26          we can.

27   **MISS HOWARD:** I had identified a number of issues that I could see as landmines ----

28   **THE PRESIDENT:** Yes, quite well then if your explosions will go off at various times as we try and  
29          thread our way through the field, as it were.

30   **MISS HOWARD:** I was wondering if I should try and clear some of the minor issues first before we  
31          get on to the questions of admissibility and the “notice of appeal”?

32   **THE PRESIDENT:** Yes, please.

33   **MISS HOWARD:** If I could start with the minor issues first – I will start with matters of minor  
34          importance.

1 THE PRESIDENT: Start with small things and work up slowly to the more difficult ones.

2 MISS HOWARD: Exactly, Sir. There are some procedural issues. We have some bundle extracts  
3 just to complete your bundles, and I am just going to hand those up. (Documents handed to the  
4 Tribunal)

5 THE PRESIDENT: Thank you very much. Thank you for that.

6 MISS HOWARD: The next issue is the position of Edwin Coe, and whether or not they are on the  
7 record, because the Office is experiencing quite extreme practical difficulties. I do not want to  
8 overstate them, but it does not know exactly who it should be serving documents on – whether  
9 it should be giving a separate copy to Edwin Coe. When it is receiving documents from Mr.  
10 Brannigan, they are often served on the Tribunal first and then the Office is receiving them two  
11 or three days' later through Edwin Coe; and it is very difficult for the priorities of the hearing  
12 itself to know exactly what Mr. David Green's position is when he stands up to make  
13 submissions on behalf of Mr. Brannigan.

14 THE PRESIDENT: Yes, quite.

15 MISS HOWARD: We feel it is important to set some parameters for the hearing and we do not want  
16 to inquire into the arrangement between them ----

17 THE PRESIDENT: Well can we see if we can sort that out now? Mr. Green, I have understood you  
18 to be here as a friend today, a sort of *McKenzie* friend, but we ought formally to establish  
19 whether Edwin Coe & Co. is in some sense on the record, or acting for Mr. Brannigan?

20 MR. GREEN: Well, as Mr. Brannigan has made clear in his submission that we have done this to  
21 assist him in this process. We have not gone formally on the record, and I appreciate the  
22 difficulties of the OFT, I am not shy of that. Whether we will go on the record I think to some  
23 extent depends on what happens as a result of today. I am conscious of it and I think there are  
24 other cases where we have subsequently gone on the record and I think, depending on today,  
25 the other point I might mention is that Mr. Rayment himself also assisted on the last occasion  
26 on a *pro bono* basis, and has assisted I think on the way as we have dealt with things. I think  
27 certainly I could not commit him in any way to that continuation. I am not quite sure of what  
28 he would want in the circumstances, but putting it in this rather wide way I am very conscious  
29 of it and I understand the problems.

30 THE PRESIDENT: I do not know what the Tribunal's practice is, Mr. Registrar, but strictly  
31 speaking, it is Mr. Brannigan personally upon whom things are served and with whom we are  
32 in communication, is that right?

33 THE REGISTRAR: It is.

34 THE PRESIDENT: So I think that is the strict position, Miss Howard, it is Mr. Brannigan to whom

1 correspondence needs to be addressed.

2 MISS HOWARD: And is there any sort of parameters we can have for service of documents on the  
3 Office, just that they should be served at the same time as the Tribunal?

4 THE PRESIDENT: I think, Mr. Brannigan, that is a polite request from the Office that in future if  
5 you send something to us will you please copy it to the OFT at the same time and vice-versa,  
6 that would help.

7 MR. BRANNIGAN: Yes.

8 MISS HOWARD: Thank you. The next issue I had in my minefield was the situation that we are  
9 faced with with having two appeals going on at the same time. It is not really clear to any of  
10 the parties what the status is between the previous letter/*quasi* decision and the application  
11 against it and the present one. The Office's position was that we see this hearing as a  
12 continuation of the private hearing of 28<sup>th</sup> April, but we feel the simplest way to deal with it  
13 would be that our decision of 7<sup>th</sup> June has taken over the events, and because we analysed all  
14 the previous materials that were submitted as part of the original complaint, and took account  
15 of the new materials that were submitted as part of the revised complaint it really has  
16 consumed all the previous issues and really that is the material decision going forward.  
17 If the Tribunal takes a different view and regards the earlier decision, which I understand Mr.  
18 Brannigan wants to rely on in some respects, we would like the clarification of a Ruling as to  
19 the status of the first application and whether or not that is a valid notice of appeal.

20 THE PRESIDENT: Well what he wants to do – and we need to think about whether or not he can do  
21 it – is in relation to the substance of the matter, if we ever get that far, bring in the various  
22 matters that he raised in the original bundle that he sent to us on 12<sup>th</sup> March of this year. If  
23 those matters are before the Tribunal, they are probably before the Tribunal either indirectly as  
24 a result of 7<sup>th</sup> June decision, or directly as a result of the initial decision if that was an  
25 appealable decision. Whether it matters very much which it is I am not completely sure. We  
26 would probably want to try to find a way of making sure that relevant material was before the  
27 Tribunal in whatever is the most procedural route to follow.

28 MISS HOWARD: Of course. Maybe now is the stage to come on to the meatier issues.

29 THE PRESIDENT: Yes, so shall we just park that one for the time being, but we have noted it, yes.

30 MISS HOWARD: The structure that I had for my submissions: first, I was going to deal with the  
31 status of 8<sup>th</sup>/9<sup>th</sup> August letter, as I will call it – whether it is against an appealable decision,  
32 whether it is a valid notice of appeal.

33 THE PRESIDENT: The letter of 8<sup>th</sup> August, yes.

34 MISS HOWARD: The second issue was that if jurisdiction was established what steps need to be

1 taken to remedy and to bring everything before the Tribunal.

2 THE PRESIDENT: Just sort it all out so we can it can be handled, yes.

3 MISS HOWARD: Our position is that the decision – and we accept that it is a form of decision – the  
4 letter 7<sup>th</sup> June, is not an appealable decision for the purposes of s.46(3). Under s.46(3)  
5 decisions rejecting complaints are not as such in their terms included within that statutory  
6 language.

7 THE PRESIDENT: This is basically your skeleton?

8 MISS HOWARD: Yes, if it would assist you I am really referring to para.12 of my skeleton.

9 THE PRESIDENT: Just let me turn it up. (After a pause) Yes, I think we have the argument that  
10 you put forward there.

11 MISS HOWARD: I will not take you through all the case law that I have quoted there. The real  
12 essential issue is the *Claymore* questions, namely, has the Office asked itself whether, in this  
13 case, the Chapter 1 or the Chapter II prohibition were infringed, and what answer did the  
14 Office give?

15 On 9<sup>th</sup> June the Office sent its letter, and there were in effect two decisions under the cover of  
16 one letter. One was a decision administrative priorities – I do not know if you want me to  
17 summarise the contents of that decision very briefly?

18 THE PRESIDENT: At the moment I think we are taking the view that the administrative priorities'  
19 part of this case, whatever one may or may not think about the way that is framed, does not  
20 necessarily help us very much on whether that part of the case is appealable or not. That is  
21 probably not going to be a fruitful line of inquiry for the purpose of establishing whether or not  
22 we have an appealable decision. It may be more fruitful to investigate the second of the two  
23 decisions to decide whether that is appealable.

24 MISS HOWARD: I have referred to that as the “s.25 assessment”. I do not think you can  
25 completely segregate those two documents, you have to analyse the comparative status of each  
26 of those documents. Mr. Brannigan has referred to this decision being “without prejudice”. I  
27 would just like to clarify that the actual letter itself of 9<sup>th</sup> June was not sent “without prejudice”  
28 in the technical term that lawyers are familiar with, it was not a settlement letter. When he is  
29 referring to “without prejudice” what the Office intended to mean by that was that the s.25  
30 assessment was without prejudice to its primary position that the case did not attract the  
31 administrative priorities under the first part of the letter. That is set out in a paragraph of the  
32 letter itself – if you want me to take you to that provision? If you look at the core bundle it is  
33 at tab 12.

34 THE PRESIDENT: Core bundle for today, because we now have two core bundles, one from last

1 time and one from this time.

2 MISS HOWARD: I have “Brannigan 1” and “Brannigan 2”.

3 THE PRESIDENT: Yes, we can sort out, I think, which is which. Tab 12 of Brannigan 2?

4 MISS HOWARD: Yes. It is not paginated, but there is ----

5 THE PRESIDENT: It is actually marked “volume 1, but never mind”.

6 MISS HOWARD: The reason this is marked “volume 1” is there are two bundles for “Brannigan 2”,

7 there is a core bundle of correspondence, and a second bundle of authorities.

8 THE PRESIDENT: Yes.

9 MISS HOWARD: The paragraph I wanted to refer you to was para.1 and it is really the last

10 sentence: “This assessment is provided without prejudice to the OFT’s assessment as against

11 its administrative priorities”.

12 THE PRESIDENT: Meaning “in the alternative”?

13 MISS HOWARD: It is a subsidiary position and that the administrative priorities’ assessment takes

14 precedence, that is the primary assessment. The reason for that, as the Office explains, in the

15 administrative priorities’ section – I have actually handed up a copy to the Registrar ----

16 THE PRESIDENT: Yes, that does not actually come in the bundle.

17 MISS HOWARD: There were two copies of a s.25 assessment in the bundle, so that just replaces

18 one of those copies. In that assessment, the Office explains that regardless of its position under

19 s.25 it would still have found that it did not meet the administrative priorities. That is at

20 para.26, under heading 6. Even if the OFT had concluded that there were reasonable grounds

21 to suspect an infringement it would need to assess the case in the terms of its administrative

22 priorities.

23 THE PRESIDENT: There is a certain overlap, is there not, even if one does distinguish between

24 administrative priorities and assessment of the case, there are certain respects in which they

25 overlap, is there not – the strength of the evidence being an obvious one.

26 MISS HOWARD: Yes, there is, but we would submit that the s.25 assessment has to be seen in

27 context because of the unusual procedural circumstances that arose. This is not a standard

28 procedure that the OFT would follow in the normal course of events.

29 THE PRESIDENT: No.

30 MISS HOWARD: It arose out of the private hearing of 28<sup>th</sup> April and was really given pursuant to

31 the commitment that Mr. Vincent Smith gave, both in his capacity as a representative of the

32 Office and also in his personal capacity; he regarded that as a personal promise to Mr.

33 Brannigan and he wanted to fulfil that promise by assessing the complaint as diligently as he

34 possibly could. The OFT in theory could have just reviewed the complaint, reviewed the

1 additional materials and then issued an administrative priorities' letter.

2 THE PRESIDENT: Had they done that that would not have been in accordance with the Tribunal's  
3 understanding of what Mr. Smith's ----

4 MISS HOWARD: And the Office did not want to do that.

5 THE PRESIDENT: -- undertaking was and it was an undertaking given by Mr. Smith before the  
6 Tribunal on behalf of the OFT. He obviously had ostensible authority to give it, so the Office,  
7 I am sure, did entirely the correct thing in going into the merits of the complaint, and we are  
8 very grateful to them for having done so.

9 MISS HOWARD: There is another layer of complexity in the fact that Mr. Brannigan is a litigant in  
10 person, and at that stage the options of enforcement were open to him. So taking account of  
11 his pecuniary situation, and the limited resources that he had, the Office wanted to give him as  
12 much assistance as they could, and gave this assessment really to give clarity to his case and  
13 what options were open to him, so that was the context in which the s.25 assessment was  
14 given.

15 THE PRESIDENT: It is an unusual set of circumstances, that is certainly so.

16 MISS HOWARD: The Office's position is that that s.25 assessment should not be treated as an  
17 unappealable decision or as a decision of non-infringement, and there is a difference between  
18 the s.25 test for reasonable suspicion and the test that occurs at a later stage of actually finding  
19 an infringement. The s.25 test is taken at a very preliminary stage of the proceedings, the  
20 Office does not have the full materials available to it. It is done purely on the basis of the  
21 materials in the complaint and, although the Office may carry out some provisional inquiries of  
22 its own into the market importantly it has not involved wider parties, has not notified the  
23 undertakings that are accused of the infringements, and it has not given them an opportunity to  
24 put forward their point of view. So in that respect it is an incomplete and provisional  
25 assessment where the office is not in a position of saying it has strong and compelling evidence  
26 of the standard necessary to prove an infringement at the final stage of a full investigation.

27 THE PRESIDENT: That takes one to the kind of argument which we do not need to go over again  
28 today that was behind *Bettercare*, *Freeserve* and *Claymore* as to whether you can properly  
29 infer the reverse, that what is effectively being said is that there is no case here under Chapter  
30 II.

31 MISS HOWARD: Yes, and we touched upon that in the last hearing, the private hearing.

32 THE PRESIDENT: Yes. On the evidence you then had, as it were?

33 MISS HOWARD: That is right. Our simplest submission is that this s.25 assessment, when seen in  
34 context should not be treated as a non-infringement decision for the purpose of s.46(3) and

1 indeed even if the Office had concluded that there was a reasonable suspicion it would still  
2 have rejected the case on the basis of its administrative priorities. Unless you have any other  
3 questions that I can assist you on I will move to my second submission.

4 THE PRESIDENT: No, I think we have the shape of the argument on that part of the case.

5 MISS HOWARD: I am grateful, Sir. The next issue that we need to assess is whether or not the  
6 letter of 8<sup>th</sup>/9<sup>th</sup> August is a valid notice of appeal. I have three big issues here.

7 THE PRESIDENT: Sorry, just before we go on, it is implicit in what you submit that you maintain  
8 the position that you maintained at the earlier hearing that the original letter of February, or  
9 January 2006 I think it was, was not an appealable decision either.

10 MISS HOWARD: Yes, thank you. So aside from the point of admissibility and whether there is a  
11 valid ground of appeal on the basis of an unappealable decision, I think there are three main  
12 issues that we need to address about the new letter or “notice of appeal”. First, whether the  
13 original ground (the consultation ground) is a valid ground of appeal.

14 THE PRESIDENT: Whether it is a ground of appeal, or whether if raised it would be a sustainable  
15 ground.

16 MISS HOWARD: Yes.

17 THE PRESIDENT: Which?

18 MISS HOWARD: Whether it is – I call it – an operative ground of appeal.

19 THE PRESIDENT: Yes, at the moment we are just on whether or not it is a ground, and not whether  
20 it is correct.

21 MISS HOWARD: I do not really want to go into the substance of it.

22 THE PRESIDENT: No, quite.

23 MISS HOWARD: But whether it is a ground of appeal. Secondly, whether Mr. Brannigan should  
24 be permitted under Rule 11(3), to amend his notice of appeal so as to introduce new grounds  
25 and new evidence. Thirdly, assuming the Tribunal were to admit it as notice of appeal what  
26 steps need to be taken to bring it into compliance with the formal and substantive requirements  
27 in Rule 8.

28 The first argument about whether the consultation ground is a valid ground I will deal with that  
29 quite briefly. It is not really clear from the letter whether Mr. Brannigan sees that as an error  
30 of law or an error of fact or as a sort of procedural error that cuts across both issues and it is  
31 hard to see how it would be operative. Basically what we are arguing is that the Office gave  
32 the s.25 assessment not within the statutory framework but within the framework of the  
33 proceedings that followed on from the hearing of 28<sup>th</sup> April and it may have been that the  
34 parties were at cross purposes and had different understandings of what the directions were,

1 but the office felt that it had to update the Tribunal and give its position reconsider the  
2 complaint and issue its decision. It did not understand that there was a consultation process  
3 allowed in the timetable that had been set by the Tribunal. If there was a failure to consult ----

4 THE PRESIDENT: But this is on the merits rather than on the substance.

5 MISS HOWARD: Yes, I do not want to go too deeply into the merits, but if there was a failure to  
6 consult where would that take Mr. Brannigan because it would not actually be operative in  
7 vitiating the findings in the decision, it would be a procedural error that the Office would have  
8 to retake the decision and probably come up ----

9 THE PRESIDENT: Well you would have to consult him, see what he came up with and then see  
10 where you went from there.

11 MISS HOWARD: We would probably end up in the same position at the end of the process.

12 THE PRESIDENT: You might or you might not depending on what ----

13 MISS HOWARD: Depending on what was submitted. We would suggest that if you look at the  
14 proceedings as a whole, the original decision in this case was given in 2004. It was then  
15 reactivated by the freedom of information request in 2005. It has now been reactivated by  
16 further information being given and having to be taken into account and at some stage there  
17 has to be some finality and there has to be some certainty and if the Appeal if it is going to go  
18 forward should go forward and it would not really be an efficient use of resources to go down  
19 that way.

20 THE PRESIDENT: Even if it was a procedural error it is an error without practical consequences  
21 and one should not give any formal relief in that regard or make any consequential orders, that  
22 is basically what you are saying.

23 MISS HOWARD: Yes. Thank you. The second point I am coming to is whether Mr. Brannigan  
24 should be allowed to amend his notice of appeal and, Sir, you raised two issues that have been  
25 introduced. First, the consultation ground has been developed and expounded upon in the  
26 letter of 13<sup>th</sup> October; and secondly, there is a new argument about the printing press market.  
27 We suggest that the third issue is the evidence from Mr. Baker.

28 THE PRESIDENT: Yes, you are going to deal with those in turn, are you?

29 MISS HOWARD: Yes. I am not going to cite the requirements of 11(3) to you, but Mr. Brannigan  
30 has not established the reasons why those grounds and that evidence were only just put in now.

31 THE PRESIDENT: We are talking about the letter of 13<sup>th</sup> October.

32 MISS HOWARD: Yes.

33 THE PRESIDENT: Just let me remind myself of that letter before we go any further.

34 MISS HOWARD: We have just handed that letter up to the Bench, I think it is at tab 22.

1 THE PRESIDENT: I have it in front of me in a different bundle. Just let us see what this now adds.  
2 He says it is wrong in substance.

3 MISS HOWARD: Yes. Sir, it is not clear exactly how far this letter is supposed to go because he is  
4 enlarging it into the issues of substance. He seems to be attacking the market definition – the  
5 advertising market – saying that that should have been defined on a local basis rather than a  
6 regional basis and then he introduces a new market definition in the form of the printing  
7 services.

8 THE PRESIDENT: Can you just take us through it and identify what it is you say this letter is  
9 saying? I am on matters relevant to substantive appeal, and then there is the information about  
10 Mr. Baker.

11 MISS HOWARD: Do you mind if I take it through paragraph by paragraph?

12 THE PRESIDENT: Yes, you take us in the order that you think we should be taken.

13 MISS HOWARD: On the first page he is explaining in more detail his original complaint that he  
14 was not consulted. Then, over the page, on p.2 in the second paragraph he introduces an attack  
15 not just on procedural grounds but on the substance of the decision.

16 THE PRESIDENT: “I also believe the decision of no infringement is wrong in substance and seek to  
17 appeal it.” But he does not really say ----

18 MISS HOWARD: But he does not really go into the grounds for the attack on substance.

19 THE PRESIDENT: -- on what basis that it was wrong in substance.

20 MISS HOWARD: Exactly.

21 THE PRESIDENT: So if he is saying it is wrong in substance – not identified. Occasionally, Mr.  
22 Brannigan, we talk about you as if you were not here, please bear with us, it is just the funny  
23 way we have of running things.

24 MISS HOWARD: And if my understanding is not correct, please correct it afterwards. He then  
25 introduces the new evidence from Mr. Kevin Baker.

26 THE PRESIDENT: We have Mr. Baker, yes.

27 MISS HOWARD: But it is not clear to which ground that evidence is being relied on in support.  
28 Now, in opening, Mr. Green suggested ----

29 THE PRESIDENT: He says: “It is relevant to the entire question of abuse.”

30 MISS HOWARD: But it is not clear which head – if you remember in the original complaint there  
31 were 10 to 12 heads of abuse that were alleged.

32 THE PRESIDENT: It sheds light on Newsquest’s intention – it is basically going to intention, I  
33 think. He is saying it informs us as to what they intended to do.

34 MISS HOWARD: It could be taken as contextual evidence that remains in the background and is the

1 background context for all the conduct that is alleged to have been an infringement, or it could  
2 go specifically to the “printing slots” head of abuse.

3 THE PRESIDENT: It could be either, and I suspect it is probably both is the intention.

4 MISS HOWARD: Mr. Green earlier, in opening, said that this evidence backed up the new  
5 argument on printing presses. At the moment that is not clear from this document, we cannot  
6 see how it relates to the printing press definition. That evidence continues for the whole of  
7 pp.2 and 3, an indirect hearsay statement on behalf of Mr. Baker.

8 Over the page, at para.4, and I am looking half way down para.6, which starts: “I understand  
9 that the OFT had concluded ...” Mr. Brannigan then says: “I disagree with the conclusion that  
10 Newsquest was not dominant in the market.”

11 THE PRESIDENT: He disagrees with that, yes.

12 MISS HOWARD: And it is not clear whether this is part of dominance, or whether this is a separate  
13 allegation. He then contests market definition saying that it was not just purely the market for  
14 advertising space, but also the market for printing services. That market definition has never  
15 been raised before in any of the complaints.

16 THE PRESIDENT: This is a new market.

17 MISS HOWARD: This is an entirely new ----

18 THE PRESIDENT: Yes, market for printing services – new.

19 MISS HOWARD: The rest of the letter deals in more detail with information about the printing  
20 services market. Then on p.6 of the third paragraph to the end Mr. Brannigan says that: “His  
21 refusal to print my titles so close to the launch date amounted to an abuse of dominant  
22 position.” So there he appeared to be contesting ----

23 THE PRESIDENT: We are back to the printing point?

24 MISS HOWARD: Yes. Sir, we say that that letter seeks to enlarge the original complaint in three  
25 main ways. First, it expands upon the consultation ground, secondly, it converts the appeal  
26 from a procedural appeal into a substantive appeal, particularly on dominance and abuse.  
27 Thirdly, it introduces new evidence; and fourthly it introduces an entirely new market  
28 definition.

29 THE PRESIDENT: I do not know whether this would be one way of looking at it, one could say that  
30 the letter includes some further argument on the consultation point already raised, it appears to  
31 suggest that there is something wrong in substance with the OFT’s assessment – to use a  
32 neutral phrase for the moment – but does not actually specify in any detail what is wrong with  
33 the existing substance, and then adds really a new ground, that this basically printing presses as  
34 well, and that dominance in that market, the actions can also be linked back in terms of abuse

1 to the printing market.

2 MISS HOWARD: We would agree with that, yes. If I might just take you to the Tribunal's Rules,  
3 Rule 11(3), and give you some brief submissions on those? I am not going to cite them, but  
4 you may want to bring them up in front of you.

5 THE PRESIDENT: No, but let us remind ourselves of them because we do not look at them  
6 necessarily every day of the week.

7 MISS HOWARD: You may also want your finger in the Guide to Proceedings at para.6.21.

8 THE PRESIDENT: Yes.

9 MISS HOWARD: We have really two submissions. First, Mr. Brannigan has not really explained  
10 what issues, if any, have come to light since he wrote his letter of 8<sup>th</sup>/9<sup>th</sup> August, or why it was  
11 not practicable to include these matters in the original letter, or he has not demonstrated  
12 exceptional circumstances. We would be wary of treating a litigant in person in that situation  
13 as an exceptional circumstance in and of itself. That practice is not followed in the High Court  
14 or the Court of Appeal, and it would enable all litigant in person to keep amending their notice  
15 of appeal at any stage in the proceedings, and would not lead to the efficient administration of  
16 justice, we would submit.

17 In the Guide at para. 6.21 the Tribunal has set out its policy of expecting appellants to develop  
18 all their grounds of appeal with any supporting documents in the original notice, and wholly  
19 new grounds should not arise during the course of proceedings. Again at para.6.45 the  
20 Tribunal has indicated the possibilities for introducing new issues are very limited, and it will  
21 exclude matters that could have been reasonably included in the original notice and have not.

22 THE PRESIDENT: Yes, it is 6.44, I think.

23 MISS HOWARD: I am obliged, Sir. Against that, the Office recognises that Mr. Brannigan is a  
24 litigant in person and that some leniency should be shown towards him, but we would like an  
25 explanation of the circumstances for the late submission.

26 The area that we really would like to have some control over the scope of the appeal if it were  
27 to go forward would be the introduction of the new market definition, because the Office  
28 considers that it is unfair to expose the Office to criticism for failing to take account of  
29 something that was not even put to it in the original ----

30 THE PRESIDENT: You did not think anyone would criticise the Office for not dealing with  
31 something that had not been raised.

32 MISS HOWARD: Thank you, and in fact the Tribunal has made that point in *Freeserve* and in  
33 *Albion Water* as well. I do not have a copy of *Freeserve* in the bundle, I have the later version,  
34 but in the 2003 Judgment of *Freeserve* at para.116, the Tribunal stated that the original

1 complaint actually sets the framework for the appeal.

2 THE PRESIDENT: It is framework, yes.

3 MISS HOWARD: And actually appeal is not an occasion to launch what is, in effect, an entirely  
4 new complaint.

5 THE PRESIDENT: No.

6 MISS HOWARD: And the Office would stand by that Judgment. Subject to that, I was going to  
7 move to the third issue, which is what steps need to be taken to remedy the letter.

8 THE PRESIDENT: Yes, thank you.

9 MISS HOWARD: The Office is not going to object to formal defects.

10 THE PRESIDENT: That is a very proper attitude.

11 MISS HOWARD: Thank you. It is quite clear the letter does not comply with Rules 8(4) and  
12 8(6) ----

13 THE PRESIDENT: Just let me flip back to remind myself what those are?

14 MISS HOWARD: I have a long list here – let us say it is pretty much all of them.

15 THE PRESIDENT: Every rule you can think of!

16 MISS HOWARD: I have also built in some of the extra requirements that have been put into the  
17 Guide as well.

18 THE PRESIDENT: Shall we just run down the list?

19 MISS HOWARD: First, we have no concise statement of the facts in one place.

20 THE PRESIDENT: That is 8(4).

21 MISS HOWARD: We have no detailed summary of the grounds, that is 8(4) as well, but you also  
22 look at para.2(2) of Schedule 8, so we do need sufficient detail of the provisions of the Act that  
23 have been challenged, and the clear identification of the errors of facts or law, or discretion. A  
24 succinct presentation of the arguments under each head of complaint; that is Guide 6.19. A  
25 clear statement of the relief sought, and then there are formalities, such as the schedule of  
26 supporting documents, the annexed copy of the decision, all the supporting documents in  
27 chronological order in the bundle, together with witness statements, and also an explanation of  
28 how that evidence is relied on, which grounds it is relied on in support, and which paragraphs  
29 specifically are relied on; authorities, and compliance with the Practice Direction, and the  
30 requisite number of copies for the Tribunal.

31 Practically speaking, translating all those legal requirements into a practical application, what  
32 the Office would like to see, in order to put the Office into a position where it can adequately  
33 respond to the notice of appeal is for Mr. Brannigan to serve a revised notice complying with  
34 all those requirements, and bringing all his material together in one document, and the office

1           would have no objection to him raising the materials he relied on in the first appeal and putting  
2           them all together in one place.

3   THE PRESIDENT: But we now need to have it properly sorted out ----

4   MISS HOWARD: Yes, exactly.

5   THE PRESIDENT: -- so that the thing can run on a structured basis.

6   MISS HOWARD: At the moment in the complaint Mr. Brannigan has introduced hearsay evidence  
7           of what witnesses have said. Whether he swears his complaint as a witness statement, whether  
8           he produces his own witness statement, we do need direct evidence from some of the witnesses  
9           as well, and I have identified some of the individuals he has named in his complaint, such the  
10          Brannigan employees, the personnel from Halifax, the personnel from Absolute Storage, and  
11          the employee from the Green Tree Surgeons – they are just examples, but there do need to be  
12          proper witness statements so those witnesses can be tested on their evidence.

13   THE PRESIDENT: Yes, well he will no doubt do what he can, but if he cannot do enough then we  
14          would have to consider whether to issue a witness summons and bring them along and see  
15          what they had to say.

16   MISS HOWARD: Exactly. And a witness summons may be appropriate for Mr. Baker, if he is  
17          feeling reluctant because of his confidentiality agreement.

18          There is a deal of uncertainty about the scope of the appeal as currently stated in the  
19          documents. For example, it is not clear whether the allegations are directed specifically just to  
20          Newsquest or to Johnston as well. The revised complaint that was submitted after the hearing  
21          only concerned Newsquest in the main. There was an allegation of collective dominance, but  
22          there was no direct allegation against Johnston as there was in previous documents. It would  
23          be useful if the Tribunal could contain the scope of the appeal, particularly for interventions.

24   THE PRESIDENT: That is a perfectly reasonable position.

25   MISS HOWARD: The other request that the Office would make is whether the Tribunal would  
26          consider cutting down some of the allegations to exclude those that are clearly unfounded, and  
27          indeed the ones that were accepted to be unfounded by Mr. Brannigan’s counsel at the last  
28          hearing.

29   THE PRESIDENT: Yes, you would have to recall for me what those were, but I have at the back of  
30          my mind, for example, the allegations about the use of the word “life” ----

31   MISS HOWARD: Yes.

32   THE PRESIDENT: -- might be quite difficult to bring in directly.

33   MISS HOWARD: There also wide ranging allegations about defamation and plagiarism that are not  
34          really competition law issues.

1 THE PRESIDENT: Yes, I think there is a distinction here between what the basic allegation is and  
2 the surrounding factual circumstances, and they may still be relevant as part of the surrounding  
3 factual circumstances by way of background, not necessarily founding independent allegations  
4 of abuse.

5 MISS HOWARD: You might want to see ----

6 THE PRESIDENT: I do not know yet, we do not know until we have got further into it.

7 MISS HOWARD: Then if you were going to go down that line, then obviously setting a timetable.

8 At the moment we have assessed admissibility and an appealable decision as part of the status  
9 of the letter of 8<sup>th</sup>/9<sup>th</sup> August. We would also need to consider whether that should be  
10 considered in itself as a self-standing issue, as a preliminary issue for any hearing as well;  
11 because at the moment we have done it, particularly in the context of this particular letter in the  
12 procedure in the hearing – I am just exploring this – but would it also be a preliminary issue, or  
13 would the Tribunal give a Ruling on admissibility to start with and then go forward? In other  
14 cases such as *Cityhook* and *Casting Book* it has been deferred as a preliminary issue for the  
15 main hearing.

16 THE PRESIDENT: One is somewhat thinking aloud, Miss Howard, at the moment, without taking a  
17 position – at the moment you are inviting us to exercise our powers under Rule 10, which is the  
18 summary dismissal power.

19 MISS HOWARD: Yes.

20 THE PRESIDENT: It may be, for one reason or another, that we are a bit reluctant to feel that it is  
21 so strong that Rule 10 kicks in, i.e. that we might be a bit reluctant to do it under Rule 10. If  
22 we cannot do it under Rule 10, or do not feel we can do it under Rule 10, then, as I say, we  
23 would probably have to make these proceedings public, publish a notice and then it rolls on. I  
24 suppose it is still a possibility that, even if we could not act under Rule 10, at a later stage we  
25 might find after all either that it was not admissible, or that it was unfounded.

26 MISS HOWARD: And indeed, if you were to go forward with an appeal the interveners might very  
27 well ----

28 THE PRESIDENT: The interveners might have something to say on admissibility.

29 MISS HOWARD: Especially when they have been excluded from this debate so far.

30 THE PRESIDENT: It was done for good reasons but it is not a particularly comfortable position for  
31 the Tribunal to have all this going on without the interveners.

32 MISS HOWARD: In that event, assuming the appeal went forward, the Office would ask for it to be  
33 treated as a preliminary issue.

34 THE PRESIDENT: Well then at that stage we would have to decide whether, in terms of the Court

1 of First Instance, we joined it to the merits or did it together, or did it step by step or what.

2 MISS HOWARD: But it should be dealt with – yes.

3 THE PRESIDENT: Yes.

4 MISS HOWARD: I think you are with me on that point.

5 THE PRESIDENT: Yes, well that is for later, yes.

6 MISS HOWARD: Unless I can help you further, those were my submissions.

7 THE PRESIDENT: Yes, that is fine, thank you. Now, how are we going to handle all that, Mr.

8 Brannigan and Mr. Green? What we really want to know, and it may be that you cannot really  
9 help us, but what we really want to know is that in the letter of 13<sup>th</sup> October it is said that “Mr.  
10 Brannigan believes the OFT’s decision that there is no infringement is wrong in substance”,  
11 leaving aside now for the moment the printing press side of things, and that later on, on p.4  
12 there is a statement that “I disagree with the OFT’s conclusion that Newsquest was not  
13 dominant in the market”, what are the points that lie behind that? What, if we may use the  
14 expression: “on the merits” – assuming all the procedural questions can be overcome and the  
15 matter put in order and all the rest of it – is there a case on the substance that should go  
16 forward and, in particular, what is the dominance argument, I think particularly in relation to  
17 Newsquest in Uckfield? That is the question in our mind.

18 We have a situation where the “Uckfield Leader” was launched in Uckfield where Newsquest  
19 is not the leading supplier, as I understand it, it is the second or third, with only a 7 per cent.  
20 readership at the time, with the “Sussex Express” having a larger readership, and if the launch  
21 of the “Uckfield Leader” is the principle alleged abuse, then it needs to be attached to a  
22 dominant position enjoyed by Newsquest in some relevant market, and that is the point that  
23 one needs to concentrate on at the moment. I do not know whether you can help us at all on  
24 that, because we cannot keep deferring this and deferring this. Somebody at some point has to  
25 come out and say what the argument is.

26 MR. GREEN: Yes, I agree entirely that in some way this whole process needs to be brought  
27 together, and exactly what are the substantive issues that need to be ----

28 THE PRESIDENT: Well we do not want to particularly raise Mr. Brannigan’s hopes, or take his  
29 time if, at the end of the day, the prospects of the case are not as strong as might at one stage  
30 have been thought – or might be, I just do not know. But there is clearly no point in it for  
31 anybody going on with a case that is not going to get anywhere unless we know what the  
32 arguments are.

33 MR. GREEN: I understand that entirely, and I think Mr. Brannigan hears what you say. I fear that I  
34 am not sure I can help you in those terms at this point, but I do understand and I think we have

1 had discussions previously about those questions. I think it would be wrong of me to relate  
2 those at the moment because they are unformulated. I think all I can say is that I appreciate the  
3 question but cannot really take it much further today.

4 THE PRESIDENT: Yes, I see.

5 MR. GREEN: I suppose what I might say is that in our position – I am not sure we are officers of  
6 the Tribunal, but I think we have to take responsible position in relation to any appeal process  
7 – and if it were to be that we were to conclude as advisers that really, ultimately, it was  
8 difficult to maintain a position about abuse in the market of a dominant position, I think we  
9 would obviously have to advise Mr. Brannigan to that effect, relying to some extent on our  
10 professional duties to the Tribunal, I think, and to the client.

11 THE PRESIDENT: Yes, well we have a number of competing considerations, have we not? We  
12 want to be as fair as we can to Mr. Brannigan, he has had a most difficult time over the last few  
13 years. We have to be realistic about what the evidence is and what the law is. We have to bear  
14 in mind the position of the public authority and their resources and the general need to not  
15 unreasonably continue with legal proceedings if, at the end of the day, it is not going to lead  
16 anywhere, all of which has to be balanced up. I think at the moment on the underlying issues  
17 at least one question in our mind is – it is only a question, and I mention it as a question and  
18 perhaps Mr. Brannigan will want to come in at some position – we have the curious position  
19 that we have “Uckfield Life” and “Lewes Life”, it is not very clear to us whether there is an  
20 allegation against Johnston Press as regards Lewes – they seem to be the two paid for titles in  
21 Lewes, and certainly the revised complaint concentrated on Newsquest. But if we leave Lewes  
22 on one side, we then go to Uckfield – I know you may want to look at East Sussex as a whole,  
23 and surrounding areas in West Sussex as well, and Haywards Heath and so forth – if you just  
24 look at Uckfield we have Johnston Press as no.1 and Newsquest with a relatively small  
25 readership in that area, but they are the alleged predator. So in order to hook that “aggressive”  
26 action, if we use that word for the moment, to an abuse of dominance, we have to find some  
27 dominance to hook it on to, and the joint market shares of Johnson and Newsquest, even in  
28 East Sussex, seem to be – roughly speaking – level pegging at 37/38 per cent. So a question in  
29 the Tribunal’s mind would be: where does dominance come in? Is it a sort of joint dominance?  
30 Is there some allegation that these two, if they do not actively concert at least are acting in a  
31 way that is not contrary to each other’s interests so that we can look at both of them? Or do we  
32 look at Newsquest individually, and if we do look at Newsquest individually how do you get to  
33 the position of dominance for Newsquest, when it has clearly got at least one powerful  
34 competitor i.e. Johnston that might make it difficult to establish dominance? That is the

1 intellectual part of the argument that I have not seen yet, I think, spelt out.

2 MR. GREEN: No, I think it is not spelt out at the moment. I think it would be wrong of me to offer  
3 any comment here because of these becoming public proceedings, and the effect that might  
4 have at some subsequent point. I think all I can say, other than what Mr. Brannigan wants to  
5 say, is that I understand the problem.

6 THE PRESIDENT: Yes. Did you follow the drift of that last interchange, Mr. Brannigan?

7 MR. BRANNIGAN: Yes. First of all, apologies if I do not quite understand everything today.

8 THE PRESIDENT: No, you are doing very well, do not worry. You have to understand we have to  
9 operate within a certain framework and whatever our sympathies are we have to stick to the  
10 framework we have.

11 MR. BRANNIGAN: I will try and act as though I have been advised through previous solicitors and  
12 so on as to what market to define, what readership to do, and listening today I think probably  
13 the biggest way I can explain Newsquest's dominance is the financial dominance they have  
14 throughout East Sussex. For instance the "Sussex Express", the Johnston title that covers East  
15 Sussex specifically Lewes and Uckfield, they actually generate £18,000 per week, when I was  
16 working for them, just before I launched my newspapers. With just alone the "Evening Argos"  
17 I believe they do about £10,000 - £20,000 per day and that does not count their leader titles.  
18 The "Evening Argos" is a paper that covers the whole of East Sussex. I am just a layman, I  
19 don't really know what markets to define ----

20 THE PRESIDENT: You tell us how you see it because that is as relevant as any other legal analysis;  
21 we must start with the facts.

22 MR. BRANNIGAN: If a general reader in East Sussex was asked "Who is the biggest newspaper  
23 player in the County?" they would automatically say "Newsquest" in every respect, through  
24 the leader titles, the free titles: the "Daily Argos" six days a week, through their printing  
25 capabilities, through the extra ventures they can do through their dominance in the market. I  
26 do not know if that helps or not.

27 THE PRESIDENT: Thank you, that is relevant. When we get to Uckfield, however, on the  
28 readership figures that you put in, the figures that stick in my mind, I think, were Sussex  
29 Express 22 per cent., Argos 7 per cent., maybe you can help us on what those figures are – if  
30 "Argos" is coming out every day and "Sussex Express" is once a week – it is a paid for paper,  
31 is not, "Sussex Express"?

32 MR. BRANNIGAN: Yes.

33 THE PRESIDENT: How do those readership figures work? Is "Argos" a bit marginal in that field,  
34 or what? If it is relevant to look at Uckfield by itself – Uckfield is a pretty small place.

1 MR. BRANNIGAN: Yes, well I do not know how the market should be defined for me to get  
2 justice, but I suppose the strongest area for the “Evening Argos” is the core is in Brighton and  
3 working out from Brighton, and then Uckfield is further across the county from Brighton. 7  
4 percent of the “Argos” would be daily readership, and then the “Sussex Express” every Friday,  
5 that is their weekly. I do not know how to compare the two apart from the financial gains in  
6 each area – whether Uckfield should be done independently or not, I will just be advised as to  
7 how to ----

8 THE PRESIDENT: Yes, I see. (After a pause) The Tribunal will just rise for a minute and consider  
9 the position.

10 (The hearing adjourned at 4.15 p.m. and resumed at 4.30 p.m.)

11 THE PRESIDENT: The Tribunal is not prepared to strike this case out at this stage under Rule 10.  
12 It seems to us that the position is not sufficiently clear for it to be right for the Tribunal to  
13 exercise what is essentially a summary power under Rule 10 to bring these proceedings to a  
14 halt. The Tribunal does not propose to give detailed Judgment tonight, but we will give our  
15 reasons in due course.

16 The consequence of that is that for the moment this Appeal continues. The Appellant, Mr.  
17 Brannigan, then needs to put the Appeal in order in terms of Rule 9 of the Tribunal Rules so  
18 that we have a full statement of the grounds of the Appeal as far as the substance is concerned,  
19 bearing in mind the comments that have rightly been made on behalf of the OFT in that  
20 respect. At that stage, depending on what is or is not pleaded in the new notice of appeal, the  
21 Tribunal can then decide issues that might or might not arise under Rule 11(3) as to whether or  
22 not new material is being introduced, but it seems to us premature to decide that question until  
23 we have a new notice of appeal.

24 So there will be 28 days for the appellant to put in a revised notice of appeal and that should, as  
25 it were, consolidate everything that has gone up to now and make clear what exactly the case is  
26 on the substance. We bear in mind the comments that Mr. Brannigan has made on the  
27 question of what he considers to be the market power of Newsquest, which appears to depend  
28 particularly on its Brighton base and other areas in which it is strong. Those kinds of  
29 considerations may or may not be relevant to considerations of market power in East Sussex if  
30 that is the right market, or indeed in Uckfield, notwithstanding the apparently smaller market  
31 share that Newsquest apparently has in Uckfield, but those are all matters upon which we have  
32 no view at the moment; and we take the view that this Appeal should go forward.

33 The consequence of that is that the Tribunal will need to publish the proceedings at the earlier  
34 hearing that took place before the Tribunal last April, the transcript of today and, it necessarily

1 follows, that we need to publish the OFT's letter of 10<sup>th</sup> June 2006 and the two annexes to that  
2 letter. There will also have to be published notices of intervention in accordance with Rule 15  
3 to give any interested parties the chance to intervene before the Tribunal put forward their  
4 point of view if they so wish, and that will proceed in the normal way, in parallel with the  
5 preparation of a new notice of appeal by the Appellant.

6 That, I think is probably all we need to decide as far as today is concerned. We reserve the  
7 costs of this occasion.

8 The only decision the Tribunal has effectively taken has been not to strike it out. We have not  
9 decided yet in any final way the question of admissibility or, still less, the question of  
10 substance.

11 Mr. Brannigan, the effect of that – if I may summarise it – is that for the moment this case goes  
12 ahead. That does not mean to say that the result is necessarily going to be favourable to you  
13 but at the moment it goes ahead.

14 MISS HOWARD: Just to clarify the position about Edwin Coe, I understand he may need to liaise  
15 with Mr. Rayment as to whether they are coming on the record in the light of the Tribunal's  
16 ruling.

17 THE PRESIDENT: Yes, along with other matters that have been in the air I think we do need to  
18 have a bit of clarity on that, Mr. Green, if you would be so kind. But for the moment I think we  
19 need to continue probably, Mr. Registrar, to correspond directly with Mr. Brannigan unless and  
20 until we are advised to the contrary.

21 Very well, I assume you would like a Judgment on the Rule 10 point, Miss Howard, or are you  
22 content just for the moment for the matter to go on?

23 MISS HOWARD: We will reserve our position on Rule 10 until we see ----

24 THE PRESIDENT: I am sorry?

25 MISS HOWARD: We will reserve our position until we see the notice of appeal and then apply  
26 then.

27 THE PRESIDENT: For a Judgment?

28 MISS HOWARD: Sorry, yes, I would like a Judgment on Rule 10. Were you referring to the  
29 previous letter under the first appeal or the letter of 13<sup>th</sup>?

30 THE PRESIDENT: Well it is both, really, is it not?

31 MISS HOWARD: Yes. I got the impression from your Ruling that you were deferring the matter  
32 until you had actually seen the notice of appeal and then would decide ----

33 THE PRESIDENT: We are not ruling on admissibility today, or ruling on substance. All we are  
34 saying is that we cannot bring the case to a halt today, therefore the case needs to assume the

