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IN THE COMPETITION COMMISSION APPEAL TRIBUNAL

Case No. 1008/2/1/02

New Court,
Carey Street,
London WC2A.2JT

8th January, 2003

Before:
SIR CHRISTOPHER BELLAMY
(President)

MR PETER CLAYTON
MR PETER GRANT-HUTCHISON

BETWEEN:

CLAYMORE DAIRIES LIMITED AND EXPRESS DAIRIES PLC

Applicant

and

THE DIRECTOR GENERAL OF FAIR TRADING

Respondent

supported by

ROBERT WISEMAN & SONS LTD

Intervener

Mr Nicholas Green QC appeared for applicant.

Mr George Peretz (instructed by The Treasury Solicitor (Competition), Office of Fair Trading) appeared for the respondent.

Mr James Flynn appeared for the intervener.

Transcribed from the shorthand notes of
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PROCEEDINGS

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1 THE PRESIDENT: Good morning, ladies and gentlemen. May I just make one preliminary
2 comment before we start. We have been provided with large numbers of authorities. I am not
3 sure that anybody has really certified what the relevance of these authorities are or has drawn to
4 our attention specific passages that we need to look at. It is very difficult for the Tribunal to
5 cope with loads of authorities unless somebody tells us why we should be looking at particular
6 cases and for what proposition a particular authority is cited, so would you please bear that in
7 mind when developing your arguments to us, because we will not look at authorities unless we
8 are told why we should do so.
9 MR GREEN: Good morning, President, Mr Clayton and Mr Grant-Hutchison. As you know, I
10 appear today for the applicants; Mr George Peretz appears for the Director General; and Mr
11 James Flynn appears for Wiseman. Can I as a preliminary make a brief observation about
12 authorities? I think all parties have operated upon the assumption that anything referred to in a
13 skeleton argument should be in the authorities bundle. For my own part I intend to refer to two
14 authorities this morning, and two only; everything else I think is largely there for the Tribunal's
15 convenience or possible inconvenience at a later stage in coming to judgment, but I doubt that
16 any of us will be referring extensively to authorities.
17 I propose this morning to address the Tribunal on a limited number of factual issues
18 which bear upon what we submit is in effect the sole issue for the Tribunal, namely, whether
19 the Director's letter of 9th August constitutes an appealable decision, and I have nine relatively
20 brief submissions to make to you as to the substance of that letter.
21 THE PRESIDENT: Just let me get the letter out, Mr Green.
22 MR GREEN: It starts at volume 1, page 7, tab 1. I will summarise at the outset the nine points but
23 when I have dealt with those I propose to deal shortly with two policy issues, one relating to
24 floodgates and the issue whether if the Tribunal adopts what we say is its proper jurisdiction
25 this is likely to hamper or stymie the Director's work or lead to a flood of appeals, and then
26 secondly the relationship with judicial review. Other than that I propose to leave my
27 submissions to those that I have set out in writing and in the reply. The nine factual issues that
28 I wish to address this morning may be summarised as follows, and then I will deal with each in
29 turn.
30 Point 1: we submit that in relation to predatory pricing the Director stated explicitly that
31 there was no breach on the part of Wiseman.
32 Point 2, also in relation to predation: the Director General's explanation as to the
33 unavailability of sufficiently persuasive evidence in the last sentence of the relevant paragraph
34 we submit must be interpreted in substance as a statement that there was no proper evidence to
35 found a case of breach.
36 Point 3 concerns the inferences to be drawn from the fact that the Director General
37 closed the file and the conditions he attached to its being reopened.
38 Point 4 concerns the inferences to be drawn from the fact that the Director was of the

1 view that he had completed an exhaustive and comprehensive investigation.
2 Point 5 concerns the inferences to be drawn from the fact that the Director allowed
3 Wiseman's assurances to lapse.
4 Point 6: the inferences to be drawn from the Director's express statements to the
5 complainant about his position at the meeting on 19th June.
6 Point 7 concerns the proper analysis of the letter in so far as it concerns the Director's
7 position on discrimination.
8 Point 8 ;concerns the proper analysis of the letter in so far as it sets out the Director's
9 position on the exclusive supply contracts.
10 Point 9 concerns the weight to be attached to the Director's explanation in the letter that
11 he did not take a decision on the merits.
12 The first of those points concerns the language used by the Director in the decision
13 letter and I think it is helpful to have the letter in front of you. The relevant paragraph is found
14 on page 10 of the bundle under the heading "Predation" an d the words I wish to concentrate on
15 are those in the first sentence. There the Director says: "We found instances of pricing below
16 total cost, for example in the healthcare/ hospital sector, which appeared to diverge from
17 regular pricing behaviour, but we do not think these instances could support a conclusion that
18 Wiseman have engaged in predatory behaviour". We submit there are four inferences to be
19 drawn from that statement by the Director and they are as follows.
20 First, that there were a number of instances of sale below average total cost which
21 diverged from regular pricing behaviour.
22 Second is that one example, but it is only an example, of this pricing concerned the
23 healthcare/ hospital sector, but it is implicit in the statement that there are others as well.
24 Thirdly, that in relation to these instances, both in the healthcare and hospital sector
25 and otherwise, there can be no conclusion to the effect that Wiseman had engaged in predatory
26 conduct or behaviour.
27 THE PRESIDENT: "We do not think these instances could support a conclusion ..."?
28 MR GREEN: "... could support a conclusion that Wiseman had engaged in predatory behaviour."
29 The fourth point is deduced by inference from that, that in the incidences of pricing
30 above total cost a fortiori the Director equally did not think there was evidence that Wiseman
31 had engaged in predatory behaviour; we submit that is a necessary and inevitable inference to
32 be drawn from the fact that he had concentrated only on the pricing below total cost of which
33 he found in a number of incidences but in relation to the other incidences where pricing was
34 above total cost he plainly, although he does not say so expressly, concluded that there was no
35 predatory behaviour.
36 We submit that in relation to predation the express language adopted in the decision
37 letter is of non abuse. It is unequivocal language to the effect that the evidence they found does
38 not support a conclusion of predatory behaviour. We submit this is a finding of non breach

1 both in substance and in form. This finding, this paragraph, is an important one in the context
2 of the decision as a whole because there are only three very short paragraphs where the
3 Director has addressed the substance of the complaint and those three paragraphs are contained
4 in the second half of page 10 of the bundle under the headings "Predation", "Price
5 discrimination" and "Exclusive supply contracts".
6 THE PRESIDENT: So those are all under the rubric just before the subheading "Predation" which
7 says, "We are not, however, reaching any final view on this point because the evidence
8 gathered," etc.?
9 MR GREEN: Absolutely. We will come back to that. That is a separate point as to how you
10 compare and contrast the two different types of statement you find in the letter.
11 THE PRESIDENT: Yes.
12 MR GREEN: The remainder of this letter is concerned with two things, first the description of the
13 extensive steps which the Director took in the course of his inquiry and, secondly, what we
14 would submit are after the event statements that he has decided not to take any decision. These
15 are statements which do not go to the substance, they go to his explanation of what he thinks he
16 did or did not do and I will develop that point more fully later because it is necessary obviously
17 to look at the letter as a whole. But we do submit that if one wants to analyse what he actually
18 concluded it is the three paragraphs dealing with the substance of the complaint which are most
19 important. However, it is our submission that the first sentence under the heading "Predation"
20 in its own right standing alone gives rise to an appealable decision in relation to predatory
21 pricing.
22 Point 2 concerns the second sentence under the heading "Predation" starting with the word
23 "Furthermore". The word "Furthermore" indicates that the statement in this sentence of the
24 paragraph on predation is an additional reason to that in the preceding sentence. It indicates
25 that it is not intended to qualify or modify the clear statement set out in the first sentence and as
26 such we would submit that the second sentence of this paragraph must be read as a stand alone
27 reason for the Director's decision.
28 In this sentence the Director says as follows: "Furthermore, the investigation did not
29 uncover sufficiently persuasive evidence either way of intent to exclude competitors". We
30 submit that the proper analysis of a statement such as this is that the Director does not have
31 sufficient evidence to convict nor does he think he will ever get sufficient evidence to convict
32 and accordingly there is no point in making further enquiries.
33 If the Director General having investigated cannot prove a breach we submit that he is bound
34 to conclude that there is no breach and this brings me to what we submit is a very important
35 point of principle upon which the Director ---
36 THE PRESIDENT: Just a minute; I am writing this down. If he cannot prove a breach ---
37 MR GREEN: --- he is bound to conclude that there is
38 no breach.

1 THE PRESIDENT: Why cannot he just say, "I don't know"?
2 MR GREEN: In certain circumstances saying that he does not know, an admission of an inability to
3 decide, we submit necessarily will mean that he has insufficient evidence to convict, and the
4 reason that that is necessarily so turns upon understanding what is meant in any case, whether
5 this case or a civil case or a criminal case, by the standard of proof. I would like to address that
6 issue because we submit it is one of the issues at the centre of the Director's misconception
7 about what he is required to do and what in fact he did do.
8 In a civil case, if one can start with that by way of example, the failure of a claimant to meet
9 the standard or proof represented by the balance of probabilities means simply that the
10 defendant will be found by a court not to be in breach of whatever duty is in issue. An example
11 which I think exemplifies the point is the authority which I provided to the Tribunal yesterday
12 and I would like to just show it to you; it is one of the two authorities I intend to refer to.
13 THE PRESIDENT: You will have to tell us where it is.
14 MR GREEN: Yes. It is probably tab 27. It is R v Secretary of State for Health ex parte British
15 Association of European Pharmaceutical Distributors and Dowhurst Limited. It was a judicial
16 review, in brief, in which the applicant was a trade association of parallel importers of drugs
17 who brought proceedings against the Secretary of State for Health under Articles 81 and 82 and
18 also under Article 28 of the Treaty on restrictions relating to the free movement of goods. It
19 concerned the Pharmaceutical Price Regulation Scheme, otherwise known as the PPRS. The
20 details of the case are complex and it is not necessary to make the point to get into them in any
21 detail. Perhaps I could just summarise the case very shortly, and if you would like I can read
22 the headnote.
23 THE PRESIDENT: We can read the case. I think you could just take us to the passage you need.
24 MR GREEN: I am grateful. The relevant paragraphs are starting at paragraph 87 on page 490 of
25 the authority. You should have two authorities; one is the Court of Appeal and it is the High
26 Court authority. I have included the Court of Appeal for the sake of completeness but it is only
27 the High Court which I wish to refer to.
28 THE PRESIDENT: So it is paragraph 87, Mr Justice Thomas, "There is no evidence which
29 supported that assertion"?
30 MR GREEN: That is right, and what I would like to do is just read the relevant paragraphs.
31 THE PRESIDENT: How far do you want to read?
32 MR GREEN: 87 through to 89.
33 THE PRESIDENT: Shall we just read it quickly?
34 MR GREEN: Yes, indeed; thank you. (Pause)
35 THE PRESIDENT: Yes.
36 MR GREEN: The next paragraphs which are relevant are 104 to 106 which start on page 495 and
37 in reality you need only read from the middle of 104, starting, "The difficulty that the API
38 faced ..." (Pause)

1 THE PRESIDENT: So the learned judge is deciding it on the evidence.
2 MR GREEN: He is deciding it on the evidence and there are two other short sets of paragraphs that,
3 if you could, I would ask you to read; first, paragraph 123 on page 501. (Pause)
4 THE PRESIDENT: Yes.
5 MR GREEN: Then, finally, paragraphs 161 and 162 on pages 511 and 512. (Pause)
6 THE PRESIDENT: Yes.
7 MR GREEN: The upshot of the judgment was that the claimant, the applicant, failed to meet the
8 standard of proof required to substantiate an infringement but the judge recognised that the
9 evidence was peculiarly within the possession of the Department of Health, who at an earlier
10 stage had opposed successfully disclosure applications; the judge effectively came to the
11 conclusion that the allegation was not proven and emphasised (1) the limitations of the
12 administrative court dealing with cases such as this but also the importance of the government
13 making available the correct sort of information so that parallel importers could successfully
14 determine whether the PPRS scheme was being used for a lawful or unlawful purpose. But
15 notwithstanding all of that he found in paragraph 162 that the modulation provisions were not
16 in breach of Articles 28 or 81 and in at least some respect this case is analogous. It was a case
17 in which a decision maker, here the administrative court, concluded that the evidence was
18 insufficient to prove the breach; that necessarily meant that there was no breach in legal terms
19 notwithstanding that he had doubts as to whether or not there was in fact a breach had further
20 evidence been available from the government. If one likes, it is one of those raree cases where
21 the judge expresses lingering doubts or lingering question marks but nonetheless is forced to
22 conclude that there was no breach of Article 81 or Article 28.
23 We submit that whether the judge was right or wrong, and you will see from the Court of
24 Appeal's judgment that they upheld the decision on slightly different grounds, the analysis in a
25 civil case is that if the applicant fails to meet the standard of proof, regardless of whether the
26 decision maker harbours some legal doubts, lingering doubts, the defendant is entitled to be
27 acquitted and the applicant's case is rejected. This was at the end of the investigation, it was the
28 end of the trial, the hearing, all the evidence had been put forward, and the adjudicator
29 therefore said, "No breach". Put another way, a finding of insufficient evidence equals in legal
30 terms, measured against a proper standard of proof, a decision by the court of no breach, in
31 other words, an acquittal.
32 The second authority I would like to show you is at tab 8 of the same bundle and it is the
33 Director's very recent decision in the BSkyB case. His formal decision is not yet on the website
34 but he has published a detailed summary and the point of this authority is that it exemplifies
35 how the decision maker should react to questions of proof and questions of doubt which may or
36 may not exist in his own mind.
37 There were three allegations made in this case by complainants of BSkyB, namely, that it
38 engaged in a margin squeeze; secondly, that it had engaged in mixed bundling; and, thirdly,

1 that it had engaged in abusive discounts; and these three allegations are summarised in relation
2 to margin squeeze at 4.8 of the summary statement. I think I need only refer you to paragraphs
3 4.14 and 4.15. Here the Director says as follows:
4 "The result of the analysis was borderline. For some of the period examined (and also for a
5 while before the Competition Act came into force) Disco ..."
6 -- that was the distribution company which the Director hypothesised needed to exist for the
7 purpose of analysis; they separated out the broadcasting from the distribution functions of
8 BSkyB --
9 "... made a loss, albeit a relatively small one. But during the period loss turned to a profit.
10 "Conclusion: It follows from the borderline result that the OFT has insufficient grounds to
11 find that BSkyB has infringed the Competition Act by abusing its dominance through operating
12 a margin squeeze."
13 Turning, then, to mixed bundling, the description of the allegation is in 4.17:
14 "Mixed bundling refers to the situation where two or more products are offered together at a
15 price less than the sum of the individual product prices, i.e. there are discounts for the purchase
16 of additional products."
17 And the Director's conclusion is at 4.24. He sets out his analysis in the preceding paragraphs,
18 he says:
19 "Accordingly in relation to the mixed bundling allegation the OFT has insufficient grounds
20 to find that BSkyB has infringed the Competition Act."
21 In relation to discounts he came to a slightly different conclusion. His view was more
22 emphatic, as is reflected in paragraph 4.28:
23 "The OFT's analysis found that there is no evidence that competition downstream has been
24 affected by discounts. Although there is a theoretical possibility of anticompetitive foreclosure
25 of channel suppliers arising from the PBR discount, the OFT's analysis also concluded that the
26 structure of the discount in the period examined was unlikely in practice to have affected
27 competition in this way.
28 "Conclusion: Accordingly the OFT concluded that: BSkyB had not infringed the Act in
29 respect of the discounts it offered to distributors."
30 In paragraph 5.1 the Director says:
31 "The conclusions of the OFT's analysis are that BSkyB has a dominant position in the
32 markets for the wholesale supply of certain premium sports and film channels. With a
33 borderline result there are insufficient grounds for finding that BSkyB had abused a dominant
34 position by exerting an anticompetitive margin squeeze against rival distributors of pay TV.
35 There are insufficient grounds for finding that BSkyB had abused a dominant position in
36 respect of the mixed bundling of its channels. BSkyB had not infringed the Act in respect of
37 the discounts it offered to distributors."
38 And then an important sentence:

1 "Therefore BSkyB has not been found in breach of competition law."
2 The Director was addressing his mind to three different types of evidential issue; first, a
3 borderline case where there was evidence going both ways but one infers he felt there was
4 insufficient evidence, applying the Napp standard, to ground a conviction; secondly, a case
5 where there were simply insufficient grounds or insufficient evidence; and, thirdly, a more
6 emphatic conclusion that there was no infringement; but each of those three different analyses
7 resulted in a finding of non breach of competition law, not an equivocal, "We don't know," but,
8 properly analysed, insufficient evidence means no breach, borderline case means no breach
9 and, plainly, on infringement means no breach.
10 Turning, then, to the Director's actual decision in this case, the Director in his decision letter
11 says, "The investigation did not uncover sufficiently persuasive evidence either way". Whether
12 you put the proposition as an either way proposition, it nonetheless has necessarily within it the
13 proposition that the Director could not establish breach. It may have been a borderline case but
14 if he cannot prove a breach to the requisite legal standard in law we submit that certain
15 consequences follow, which is what he is saying, he cannot meet the standard of proof required
16 in law, and I think it is common ground between us and the Director that the standard is that set
17 out in the Napp judgment. We submit that certain consequences will follow from such a
18 statement.
19 First of all, if you are a defendant, in this case Wiseman, you are entitled to be acquitted. If
20 the Director cannot prove his case against you then you are entitled to have the sword of
21 Damocles lifted from your head.
22 Secondly, if you are a complainant your case should be rejected. This is an important
23 safeguard for a complainant because the rejection of the complaint on the merits gives rise to a
24 right of appeal and if you are a regulator sitting in between the complainant and the defendant
25 you should conclude either that there is or there is no breach.
26 These conclusions do not alter because the regulator may entertain lingering doubts, which is
27 what the Director suggests occurred in this case. The existence of lingering doubts is quite
28 inherent in the very notion of a legal standard of proof. Indeed, the concept of a standard of
29 proof is a hurdle which a decision maker must surmount and is in itself a reflection of a wider
30 principle of legal certainty. It creates a border between two opposite findings, breach and non
31 breach, and it therefore ensures that decision makers know whether to find a breach or to
32 acquit.
33 One can test the proposition in the following way. In a civil case, where a claimant need
34 only prove liability on the balance of probability, in other words, to mathematically speaking a
35 standard of 50.1 per cent, there is a very substantial chance that the court would go the other
36 way. If for the sake of argument a claimant manages to establish liability to a mathematical
37 standard of 50 per cent he fails, albeit that there is a 50 per cent chance that the decision would
38 go the other way, substantial lingering doubts as to the result, but that is inherent in the very

1 notion of a standard of proof. If the claimant creeps over the standard and manages to achieve
2 50.1 per cent then there was a 49.9 per cent chance that the defendant should have been let off,
3 substantial lingering doubts, but nonetheless the judge has to decide because it is inherent in the
4 notion of a standard of proof.
5 This proposition holds true and is even more starkly demonstrated by a case where the
6 standard of proof is higher such as in the present case. In civil cases one can put the standard
7 of proof in mathematical terms because the balance of probabilities reflects a mathematical
8 proposition. The Napp formulae of clear convincing evidence is not capable of mathematical
9 formulae, nor is the criminal standard of beyond all reasonable doubt, but let me hypothesise
10 and call it somewhere between 60 and 65 per cent for the purpose of the argument. If the
11 Director feels that he can get over the civil standard, he can get to 55 per cent or 58 per cent, he
12 cannot meet the Napp standard and he must acquit, even though he is 58 per cent convinced
13 that there is a breach. That is because there is a high standard imposed on the Director; he may
14 have lingering doubts that there is an infringement, he may feel that on balance there is an
15 infringement, but because he is required to establish the case to a high level, whatever that
16 might be, he feels that he cannot in all propriety go forward and take a negative decision
17 against the company.
18 My point is simply this, that it is always inherent in such a case that the Director will have
19 certain lingering doubts as to the correctness of what he is going to do but that is simply innate
20 in every decision that a Director takes, unless he can come to the view that he is so 100 per cent
21 certain that there is no doubt whatsoever in his mind.
22 THE PRESIDENT: Is the Director in a position analogous to that judge in the civil court or the
23 criminal court where the judge has to decide it, that is what he is there for, what he is paid to
24 do? The Director has many other responsibilities only one of which is dealing with complaints.
25 Is he obliged to decide it on a complaint?
26 MR GREEN: In certain circumstances we submit he is.
27 THE PRESIDENT: We had better explore what those circumstances are at some stage.
28 MR GREEN: Certainly, I intend to do that. My submission here is that the Director, having come
29 to the end of his investigation, has concluded that he has insufficient evidence. I will deal with
30 the question of the extent of the investigation later but let me foreshadow the argument.
31 If for the sake of argument the Director had embarked upon an investigation, had
32 completed it to the tune of 30 per cent or 50 per cent, had lingering doubts as to what to do, he
33 did not know whether there was breach or non breach, but then stopped, that might be quite
34 different from a situation where the Director has completed his investigation and the only thing
35 that is left is for the Director to make up his mind. In those circumstances, if his factual
36 conclusion is that the evidence is insufficiently persuasive to establish breach then that is
37 tantamount to a finding of non breach. We submit that is the only proper analysis you can have
38 of the facts as they stand in this case that he had got to the end of the line, he decided that the

1 evidence was insufficiently persuasive; we then submit that the corollary of that is that he
2 necessarily must have found non breach, and indeed there are certain documents which suggest
3 that is precisely what he did in fact think, but I will come to those shortly.
4 It seems to us this was really why the Tribunal in the Napp case devoted time to the question
5 of standard of proof. The reason that the Tribunal did that in that case was, amongst other
6 things, not only to decide the facts of that particular case but also to give guidance to decision
7 makers as to what their target was, and indeed we made submissions to the Tribunal about the
8 requisite standard and what it should be. One of the purposes was to enable directors and
9 decision makers to have a target in mind when they were measuring evidence and no doubt the
10 Director has taken that very much to heart. The Director, as is clear from the facts of this case,
11 was very obviously aware of the Napp standard of proof, he referred to it in discussions with
12 the complainant, and his analysis of the evidence we say must be seen in that context.
13 That brings me to point 3, which is the inferences which one draws from the fact that the
14 Director has closed the file, which we submit is an act consistent with a decision of no breach.
15 We also necessarily accept that the mere closing of a file is not in its own right determinative
16 because the Director can close the file for many other reasons, and so in its own right it is not a
17 sufficient ground to turn a decision into an appealable decision, but on the facts of this case it
18 has more to it than the mere closing of the file.
19 The first thing to note about the notion of the closing of a file is that it is an act which can be
20 contrasted with a case where the Director for instance leaves the file open so that at any time it
21 can be progressed, so it is not an entirely neutral fact, albeit it is not sufficient in its own right
22 to give an answer. But in the present case there is an additional facet of the decision to close
23 the file which is especially relevant because here the Director indicated that the condition
24 precedent to the file being reopened was that the complainant should provide compelling
25 evidence, in other words, evidence which was sufficient to enable the Director to move
26 immediately to a finding of breach, and this is a higher hurdle to meet than the standard we
27 would submit is the normal standard, namely, a material change of circumstance or a new fact
28 or a material development.
29 If I could just show you what the Director said to the complainant, it is volume 2, tab 23, the
30 letter of 15th August from Mr Lawrie to Mr Power of Ashursts. A small part of this is
31 redacted.
32 THE PRESIDENT: Yes, we have a note of that.
33 MR GREEN: And I think it is unredacted from the words, I think that it must go without saying,"
34 so I will read only from there but obviously the entire letter needs to be seen in context. There
35 is nothing, for Mr Flynn's sake, in the preceding paragraph which bears upon this issue, I think
36 I can confirm that.
37 "I think that it must go without saying that the OFT will consider all complaints about and
38 evidence of abuse under the Competition Act 1998 that is submitted to us. However, I think it

1 only right to express my own view that in this case, given its history over the last three to four
2 years, we would need to have persuasive if not compelling evidence of abuse before we would
3 be likely to devote significant administrative resources to further investigation of Wiseman's
4 behaviour in the market."
5 The gist of what is being said, which flows from the expression, "we would need to have
6 persuasive if not compelling evidence," is that they are going to require from the complainant
7 something more than a material change of circumstance; although it is expressed as a negative,
8 "we would need to have persuasive if not compelling," when someone writes in those terms one
9 is generally saying, "We're not going to reopen this file easily or readily unless you come up
10 with some pretty compelling stuff". That is the normal use of that sort of language; they do
11 not use the language of a material change of circumstance or a new fact.
12 One reads that in the context of the preceding words, which are, "given its history over the
13 last three to four years," in other words, "We've carried out an exhaustive and comprehensive
14 investigation, so has the Competition Commission, and having got nowhere we are jolly well
15 not going to reopen this file". M r Lawrie does, to be fair, express the view as being a personal
16 one but I think it is implicit in the first sentence of the second paragraph that it was a view he
17 had expressed after consulting with his colleagues and it was a carefully considered view.
18 This letter I think can be read in the context of two other documents both of which show that
19 the Director's view of this case was that further investigation would not be likely to lead to a
20 decision of infringement, and if I could ask you to go back to volume 1, tab 2, this is the letter
21 of 6th September and I think it is unredacted, looking at Mr Flynn's copy. It is the middle
22 paragraph:
23 "We do not consider that section 47 of the Act applies in this case. The Director General
24 took the administrative decision to close the file on the investigation into whether Wiseman
25 Dairies had infringed the Chapter 2 prohibition in the Act on the grounds that it was not
26 sufficiently promising in terms of a likely decision of infringement to warrant the commitment
27 of further resources."
28 If one goes back to page 12 in the same bundle, which is the Director's press release, the
29 Director then says, in the third paragraph down:
30 "However, after an extensive and thorough investigation the OFT takes the view that further
31 investigation is unlikely to lead to a finding of abuse. In these circumstances the OFT cannot
32 justify proceeding with the case."
33 In the Director's view, therefore, further work will not lead to a decision of breach, and this
34 confirms the Director's view was that he would never be in a position to establish breach, not
35 least because they had conducted an inquiry over three or four years and had not generated
36 sufficiently persuasive evidence to find breach at the end of that investigation. The press
37 release and the letter place in context the statement made by Mr Lawrie that the file once closed
38 will prove exceptionally difficult, once again, to prise open.

1 On point 3 can I draw together some short conclusions. First, the fact that the file is closed
2 reflects and supports the conclusion that the Director's substantive decision was one of no
3 breach. Secondly, the fact that the Director went out of his way to emphasise to the
4 complainant that a higher than usual obstacle stood in the way of the file being reopened also,
5 we submit, corroborates the conclusion that the decision was in substance one of non breach.
6 Thirdly, the context to that statement was, as explained by Mr Lawrie, that the Director had
7 conducted an inquiry over many years and there was in practical terms nowhere left for the
8 Director to go in his view which would enable him to establish abuse. Fourthly, it is of course
9 true and not disputed that the mere fact that the file was closed does not per se create an
10 appealable decision, but when coupled to this very high condition precedent attached to its
11 reopening it forms a consideration of a fact which attracts considerable weight when placed in
12 the scales. It is a significant fact which we suggest the Tribunal can have regard to when
13 examining the substance of the letter.
14 This brings me to point 4, which concerns the inferences to be drawn from the fact that the
15 Director himself considered that his investigation was comprehensive and that no further
16 expenditure of resources would generate sufficient evidence to convict Wiseman. I wish to
17 divide my points into two on this, first of all as to the extent of the investigation and secondly
18 as to the inferences to be drawn. So far as extent is concerned we have set out very fully in our
19 skeleton argument at paragraphs 83 to 88 the chronology of the investigation and this shows
20 that on any view the Director's enquiries were very comprehensive.
21 It is apparent from the decision letter and indeed from the Director's own enquiry that he was
22 able to arrive at firm conclusions on such matters as product market and all that entails,
23 geographical market, average total cost, average variable cost, the extent of pricing below
24 average total cost and the market segments in which that occurred, and it follows the extent of
25 pricing above average total cost. He was also able to make findings about the extent of
26 differential prices and its extent and indeed he was able to form a view as to whether certain
27 incidences of pricing deviated from normal competition. It is hence apparent from both the
28 chronology of what steps were actually taken and from the conclusions which are set out in the
29 letter that the Director had conducted a thorough and comprehensive review. I think it is also
30 relevant that the Director's travails supplemented the labours of the Competition Commission, a
31 fact he explicitly refers to in relation to the exclusive supply contracts, as is stated on page 10
32 of the bundle in that page of the letter.
33 Neither the Director nor Wiseman are therefore able to suggest to the Tribunal that the
34 Director had not in his view reached the end of the line, and indeed it was for this reason the
35 Director was able to say that no further work would enable him to make a finding of abuse in
36 the letter from Mrs Bloom to Mr Parr on 6th September, which is volume 1, tab 2. In that he
37 was able to say that the ground upon which the Director took his decision to close the file was
38 that the case was not sufficiently promising in terms of an infringement decision. It was not

1 equivocal, it was in terms of a finding of abuse, a negative decision; he could not find abuse
2 however much further work he was inclined to incur, but he was not inclined to incur any
3 because he had already come, so far as he was concerned, to the end of the road, and it is
4 notable that the Director had not suggested any further steps which he could have taken which
5 would have advanced his inquiry. Indeed, from the transcript of the meeting on 19th June it is
6 clear that the Director was of the view that even then there were no further steps that he felt
7 able to take which would advance his inquiry.
8 So we submit this was an extensive and comprehensive inquiry and the Director had reached
9 the end of the road. What are the relevances of this? First, if a Director or a decision maker
10 concludes a full investigation and at that juncture, at that point in time, has not generated the
11 evidence to find guilt then any resultant decision is in substance to be treated as a non
12 infringement decision. He is saying, "I have investigated. I have not found sufficient evidence.
13 I will not be able to find sufficient evidence if I go on".
14 This position is to be contrasted with an investigation conducted by a Director which runs
15 only, let us say, a third or half of the way before the Director downs tools. It is a quite different
16 factual situation. Hence the fact that the Director has himself concluded that he has reached the
17 end of the investigation, that there is nowhere else to go, is an important legal consideration
18 affecting the substance of the case. The cumulative effect of the evidence should be weighed at
19 this point and the Director should come to a decision either way.
20 We submit it is not sufficient for the Director, objectively speaking, at this point in the
21 inquiry, to simply duck the question. If his publicly stated position is that he has nowhere
22 further to go in the investigation and he has insufficient evidence to convict then the substance
23 of his conclusion is that there is no breach and indeed that is in effect what he concluded in the
24 BSkyB case.
25 That brings me to the fifth point which concerns the inferences to be drawn from the
26 Director's decision to allow the Wiseman assurances to lapse. Can I just show you the relevant
27 documents before making my submissions on them. First of all, there is the decision letter,
28 volume 1, page 8, under the heading "Voluntary assurances". You will recollect from the facts
29 that Wiseman offered voluntary assurances to the Directorate at an early stage in the
30 investigation and these lapsed with the decision letter, and here the Director says, under the
31 heading "Voluntary assurances":
32 "We note your reservations regarding the interim assurances that we accepted from Wiseman
33 in lieu of an interim measures direction. As we have already indicated to you, Wiseman fully
34 complied with them as monitored by Arthur Andersen LLP. One implication of our decision
35 not to proceed with the case is that the assurances will now lapse. Clause 9 of the assurances
36 states that they will cease to have effect on the date the Director has completed his investigation
37 into the matter. That is the date of this letter, 9th August 2002. We set out below a summary
38 of our investigation to date in relation to the alleged abuse by Wiseman."

1 Before moving on from the letter can I just particularly draw your attention to the second
2 paragraph and the reference to clause 9 of the assurances that I will take you to in a moment.
3 The Director here is incorporating the logic of clause 9 into his decision and it is this letter, this
4 decision letter, which triggers the operation of clause 9.
5 THE PRESIDENT: So he is saying there that he has completed his investigation.
6 MR GREEN: He says he has completed his investigation but clause 9, as you will see, says
7 something in addition which is of considerable significance.
8 Before moving on to clause 9 itself would you turn to page 12, please, which is the
9 contemporaneous press release of 9th August where in the last paragraph he says:
10 "As a result of the voluntary assurances given by Wiseman (see press release 39/01) on
11 milk sales beginning on 30th September 2001 will lapse from the date of closure of the
12 investigation on 9th August 2002."
13 That then takes one to the terms of clause 9 of the assurances which are at tab 15, page
14 440 of the bundle. That is clause 9. The context is set out on page 438 and I would like to start
15 with the context, please. The context is under the heading, in capitals, "Assurances given to the
16 Director General," and here the Director says:
17 "Whereas the Director General of Fair Trading ('the Director') has a reasonable
18 suspicion that the conduct of Robert Wiseman Dairies plc and Robert Wiseman & Sons
19 Limited, (collectively Wiseman), has infringed the prohibition imposed by section 18 of the
20 Competition Act 1998 ('the Act'); whereas the Director considers that it is necessary for him to
21 act as a matter of urgency for the purpose (a) of preventing serious irreparable damage to a
22 particular person or category of person or (b) of protecting the public interest; whereas the
23 Director has given written notice to Wiseman pursuant to section 35(3) of the Act indicating
24 the nature of proposed interim directions and considered written and oral representations made
25 by Wiseman; whereas Wiseman without prejudice to its defence is willing to offer assurances
26 to the Director that meet the Director's concerns on the need for an interim remedy in respect of
27 a suspected infringement of the Act"
28 Clause 9 on the next but one page states the conditions that must exist before the
29 Director will allow the assurances to lapse and at paragraph 9 the Director says:
30 "These assurances shall come into effect on the date on which they are signed by
31 Wiseman and shall continue to have effect during the period in which the Director has a
32 reasonable suspicion that Wiseman has infringed the prohibition imposed by section 18 of the
33 Act and ending on the earlier of (1) the date on which the Director has completed his
34 investigation into the matter or (2) the date on which they are varied, superseded or replaced."
35 So not only does he admit that he has completed his investigation but he will only lift
36 the assurances once he no longer has a reasonable suspicion of infringement. The assurances
37 have now lapsed and it is necessarily to be inferred that the Director believes that in substance
38 he is no longer entitled to hold a reasonable suspicion of breach. The assurances were not

1 varied, superseded or replaced in accordance with clause 9.2. The lapsing of the assurances
2 was triggered by the decision on 9th August pursuant to which the Director had completed his
3 investigation, and he incorporates the reasoning of clause 9 into his decision letter.
4 The voluntary assurances are of course not a statutory assurance. It is not an assurance
5 contemplated by section 35, this was in lieu of that statutory interim measure, but the Director
6 crucially has incorporated the reasoning of clause 9 into his letter, without modification,
7 without variation, and clause 9 is explicitly stated to have been satisfied in his decision letter.
8 That can only, and I emphasise "only", be upon the basis that the Director no longer has a
9 reasonable suspicion that Wiseman has infringed the prohibition. If that is the case, we submit
10 that he has taken a decision of no breach.
11 THE PRESIDENT: I was just glancing at section 35 of the Act, interim measures: the section
12 applies if the Director has a reasonable suspicion that Chapter 2 prohibition has been infringed
13 but has not completed his investigation of the matter.
14 MR GREEN: Yes.
15 THE PRESIDENT: You could argue from that that if he has completed his investigation of the
16 matter the conditions for the continuation of interim measures are not in fact satisfied, whether
17 or not he has still got the suspicion he has completed his investigation.
18 MR GREEN: Yes, one could certainly argue that, which is why I have taken pains to emphasise
19 that the language that he has used in clause 9 was incorporated into the decision letter without
20 variation, modification, without suggesting that it was in any way to be varied. This was a non
21 statutory interim measure, it was a voluntary interim measure, and it operates outside the scope
22 of section 35, and if it has any legal basis it would be contractual rather than statutory or it
23 would sound as a legitimate expectation in public law or something of that nature.
24 THE PRESIDENT: Yes.
25 MR GREEN: And Wiseman would be perfectly entitled to say that as a result of the Director
26 having permitted the assurances to lapse by definition on his own terminology and his own
27 language he is no longer entitled to say that he has a reasonable suspicion of infringement.
28 THE PRESIDENT: Yes.
29 MR GREEN: The Director could in his decision letter to the complainant have said,
30 "Notwithstanding the terms of clause 9 we still have a lingering doubt," but he did not say that.
31 He said it in other parts, and we will come back to the relevance of his other parts, but he quite
32 clearly said in relation to the voluntary assurances that they were not modified in any way and
33 in my submission it is not open to the Director now to say, "Well, implicitly we suggested in
34 some way that we had varied the terms of clause 9," because nowhere is there a variation of
35 clause 9 and what it entails. This was a contractual or public law statement by the Director that
36 he would release Wiseman from the assurances once he no longer had reasonable suspicions of
37 an infringement.
38 Whether you take that statement in isolation or whether you take it in conjunction with

1 the other facts, we submit this points very clearly in favour of a conclusion that the Director
2 found in substance no breach.
3 THE PRESIDENT: I am just wondering to myself, perhaps not quite knowing where it takes one
4 yet, what the scheme of section 35 is. It lightly suggests the matter of first impression that the
5 assumption is that the Director will start off with a reasonable suspicion and then at that stage
6 he has not yet completed his investigation but the sense is that when he does complete his
7 investigation the idea of a reasonable suspicion sort of drops away and he will come to a view,
8 as it were, one way or the other.
9 MR GREEN: Yes, one way or the other; he either decides there is a breach and he adopts a
10 direction, in which case the interim measure being by its nature provisional falls away and the
11 definitive direction takes its place, or he concludes no breach, in which case he no longer has
12 reasonable suspicions for concluding an infringement and he necessarily, inferentially or
13 expressly is taken to have decided that there is no infringement. In this case the Director says
14 at the end of the extensive inquiry he was still sitting on the fence; that is not consistent with
15 the statutory regime but, more importantly, this was extra-statutory, it either sounds in contract
16 or in public law, but on its terms the sensible reading of it is that he will allow the assurances to
17 lapse once he no longer has a reasonable suspicion, and one adds to that as context the fact that
18 he had concluded his investigation, that he was most unwilling to reopen the file, that he
19 explicitly states that he has insufficient evidence to found an abuse and there is no reason to
20 believe that were he to continue with his investigation he would be able to find an abuse.
21 THE PRESIDENT: Yes.
22 MR GREEN: That brings me to the sixth point which concerns the fact that the Director's staff
23 informed the complainant that they were of the view that there was no breach and that in all
24 fairness they should explicitly say so in a decision so that the applicant, the complainant as was,
25 could bring this case to the Tribunal. We have set out in our submissions in detail the relevant
26 paragraphs of the transcript but I would like to just pick up one or two points in the transcript
27 without going into the detail in any length. The transcript is volume 2, tab 24, and 641 is the
28 relevant page.
29 The relevant part of the transcript is found on pages 652 through to 654. Perhaps I
30 could ask the Tribunal just to read 652 through to the end. Just for identification purposes, the
31 dramatis personae is found on page 641 but the main protagonists here are Mr Donald Mason,
32 that is DM; Mr Nigel Parr from Ashursts, NP; then further down on page 652, MH is Mr Matt
33 Hughes from Ashursts; at the bottom on the next page, BL is Mr Bob Lawrie; and then there is
34 Mr Mark Williams, who is MW, in the middle of 653.
35 THE PRESIDENT: So you want us to read from 652 through to 654?
36 MR GREEN: If you would, please. (Pause)
37 I think there are really only two conclusions to be drawn from this. There are many
38 points one could deduce from it but so far as relevant first of all Dr Mason does say, and this is

at the top of 653, "We are of the view that we should now bite the bullet and now make a non infringement decision". The second point comes from the paragraph on page 652 from Dr Mason, who is effectively saying that the only fair thing to do is to take a non infringement decision which the complainant could then appeal. Read fairly and in the round, nothing in this transcript, which was contemporaneous and is not challenged as to its accuracy, is suggesting that the Director was of the view that there was a breach or that he was undecided. The Director was hoping that the complainant would provide evidence to make the Director change his mind but in the Director's considered view nothing advanced by Express or Claymore was treated by the Director as being new or sufficient to change his mind from one of innocence to one of studied agnosticism.

In this regard he does address this matter in his decision letter, and if I could ask you to flick back to volume 1, page 8, at the top of the page, page 8 of the bundle, the Director says as follows:

"We also took careful study of the memorandum you submitted on 19th June."

That is contemporaneous with this meeting, the transcript of which I have just referred to.

"However, we did not find in it evidence that would help to support a conclusive finding of abuse of a dominant position by Wiseman. We carefully reviewed your legal and economic analysis and we took account of the data you provided about your own prices and costs in our investigation of the case. However, despite this effort we did not find evidence to help us in reaching a definitive conclusion."

And that must be a definitive conclusion of breach because that is what is referred to in the first paragraph.

"We explain briefly why below. The price and cost information submitted by Express/Claymore was helpful in providing a benchmark against which we have been able to verify the accuracy of the information in our hands. It also enabled us to test some of our hypotheses. We regret, however, that the submission did not contain any new information regarding the alleged behaviour of Wiseman and did not therefore assist us in reaching any firm conclusions."

The relevance of that to the present is as follows. It is clear that nothing of a material nature occurred between 19th June and 9th August when the decision was taken which led him to alter his position as set out in the 19th June exchange, yet the 19th June exchange was an expression of non infringement.

If in fact the Director's position had altered between 19th June and 9th August when he adopted his decision one would have found a statement to the effect that the Director found the applicant's submissions of facts and law persuasive and had the effect of changing his mind away from non infringement to agnosticism. But, on the contrary, one finds in the decision letter a statement that the very best efforts of the complainant fell on stony ground, they

1 changed nothing. Therefore the correct analysis of the Director's position, and again he refers
2 to the 19th June exchange in his decision letter, so it is relevant context, is that his real position
3 is a reflection of his position expressed orally on 19th June, and this we submit is a reasonable
4 and convincing explanation of what actually happened. Again that is a factual matter which we
5 submit goes squarely to the substance not least because the relevance of the 19th June exchange
6 is recorded in the decision letter.
7 Turning to point 7, I am moving from predation which was really the banner for all my
8 previous submissions now to price discrimination, and so far as price discrimination is
9 concerned I can be short because the points that I have made in relation to predation apply in
10 very large measure to the Director's conclusions on price discrimination.
11 You will see from the decision letter that the wording used by the Director differs from
12 the wording used in relation to predatory pricing, and it is only fair to point that out. The
13 relevant page of bundle 1 is 10. In relation to price discrimination, which includes
14 exclusionary or excessive pricing,he says only as follows:
15 "We also found evidence of price discrimination. However, there is insufficient
16 evidence to come to the conclusion as to whether or not it departs significantly from normal
17 competitive behaviour, it constitutes targeted pricing or has exploitative or exclusionary
18 effects."
19 We know from this that the Director did find evidence of price discrimination by a
20 dominant undertaking; however, he was unable to determine whether the differentiation was a
21 significant departure from normal competition on the basis of the evidence, he found
22 insufficient evidence to come to a conclusion that there was a significant departure from normal
23 competitive behaviour. In the absence of evidence of a sufficient quality plainly, we submit, it
24 was not possible for him to find breach; that we submit is the correct analysis of this part of the
25 decision.
26 This conclusion is consistent with the fact that, as I submitted earlier, the Director has
27 closed the file on a permanent or quasi permanent basis by imposing this vigorous condition
28 precedent to it being reopened which in the Director's mind the applicant will find impossible
29 to satisfy. Therefore I rely here upon the points I made in relation to my point 3. Equally, the
30 conclusion of non breach is supported by the fact that the Director's findings followed an
31 exhaustive investigation; nowhere has he suggested that he believed there were further or
32 incremental steps to be taken which would lead him to find abuse. Again that was my point 4
33 and we submit it applies here. Equally, the conclusion of no breach is buttressed by the fact
34 that Wiseman has been released from its undertakings; this was my point 5, it applies equally.
35 And the conclusion is finally reinforced by the fact that the statement made by the Director and
36 his officials on 19th June apply equally to price discrimination as to any other conduct; this
37 was my point 6, again it applies.
38 We submit further in relation to price discrimination that the fact that the Director was

able to conclude with regard to predatory pricing that the instances he found could not support a conclusion that Wiseman had engaged in predatory behaviour is also relevant to price discrimination. The Director was concerned with exclusionary price discrimination and predatory pricing below total cost coupled to an exclusionary intent can be abusive. There is plainly a very clear nexus between his conclusions on predation and his conclusions on price discrimination. Indeed his conclusion vis-a-vis predatory pricing implicitly recognises different levels of price, some below and some above average total price. It is not clear from the reasoning why his analysis of predatory pricing and price discrimination should in any way lead to a different result and indeed we submit it did not.

This brings me to point 8 concerning the exclusive supply contracts and very much the same points are made here. All the Director says in relation to exclusive supply contracts is:

"As you know, these were covered in detail by the Competition Commission and we studied its report and conclusions carefully. We also looked closely at the material you provided in your letter of 5th August in relation to Aberness. We looked at whether the all Scotland deals entered into by Wiseman were in fact based on exclusive supply, either explicitly or by offering additional incentives for exclusivity. However, the evidence available was not sufficiently persuasive to lead us to think that we would be able to make a finding as to whether or not the contracts in question amounted to an abuse."

Properly read, that last sentence is no more than, "We have insufficient evidence to establish an abuse," and for all the reasons that I have submitted earlier he thinks he never will get sufficient evidence because he has come to the end of his investigative road and he is clear in his own mind that no further steps could be taken which would lead him to generate a negative decision against Wiseman. All the reasons in my points 2 through to 6 apply here equally and the only additional matters which may be briefly mentioned are as follows.

First, the Director took account of the Competition Commission conclusions. He obviously had access to the transcripts of the oral hearing and the Commission's conclusions and findings and that buttresses the submission that we have made that the investigation was exhaustive.

Secondly, he explains that he examined both the form and the substance of the contracts and at the conclusion of his investigation, having paid full regard to the Competition Commission's report and findings, he still did not have sufficiently persuasive evidence. We submit that that is quite close to the position which the Director adopted in relation to BSkyB as a matter of analysis, insufficient evidence after a lengthy investigation, and in one case it led to no breach; here he has described himself as sitting on the fence.

Thirdly, as with price discrimination, we submit that his conclusion on predatory pricing bears upon the exclusive supply contract situation because it would have been evidence of unlawful intent in relation to predatory pricing.

That is all I wish to say about exclusive supply contracts.

1 The ninth point I wish to make, the last point before I deal very briefly with two policy
2 issues, is the Director's explanation that he did not take a decision on the merits. This really
3 involves looking at what the Director says he actually did and how you measure his statement
4 that he took no decision. The Tribunal has addressed this in both Bettercare and Freeserve and
5 I am not going to go into the law. The Tribunal has quite rightly said this is a matter of
6 substance, not form. The question is what weight does the Tribunal or should the Tribunal give
7 to the Director's statements.
8 We submit that statements such as are found in this letter carry little or no weight when
9 the test is one of substance over form, and I would like to make the following points.
10 First, it is correct to say that substance does triumph over form, and this follows from a
11 legal reason which is that the Tribunal must determine its own jurisdiction. Jurisdiction or
12 admissibility in this case is a threshold issue which the Tribunal must, we submit, rule on as a
13 matter of black or white. It is not like a judicial review where there can be shades of doubt; the
14 Tribunal either has jurisdiction or it does not have jurisdiction and it must determine the matter,
15 and it cannot be deflected from that task by the language used by the Director. Indeed that is
16 how we understand the Tribunal's rulings in Bettercare and Freeserve; they reflect the legal
17 principle, namely, that questions of jurisdiction must be decided as a matter of substance and
18 not form.
19 Secondly, the pith and substance of the decision letter on the merits is found in the
20 three short paragraphs that I have analysed in relation to predation, price discrimination and
21 exclusive supply contracts. These paragraphs set out the Director's conclusions on the alleged
22 abuses. The other paragraphs are explanations of where the Director believes he has got to,
23 having made these findings on the substance.
24 The best example I think of the tension between the Director's position is found in
25 relation to the introduction to the alleged abuses and his finding on predation, which is on page
26 10. On the one hand he says, "We are not, however, reaching any final view on these points
27 because the evidence gathered during the investigation is not sufficiently persuasive as to the
28 existence or absence of infringement," but then in the very next sentence he says, "We do not
29 think these instances could support a conclusion that Wiseman had engaged in predatory
30 behaviour".
31 Those are inconsistent statements. One is, "We do not think there is any evidence to
32 find breach. We could never support a conclusion" -- "support" is a relevant word here -- "that
33 Wiseman had engaged in predatory behaviour"; that is inconsistent with his prior sentence
34 which says, "We're sitting on the fence". One is a statement of substance, the other is not, and
35 for all the reasons that I have given the statements by the Director that there was no decision
36 have to be read in context: the extent of the investigation, the stage that he had reached,
37 whether he thought he could ever get to a finding of abuse -- the answer to that is no -- the
38 position he adopted in the assurances, and so on, all of those are relevant contexts in analysing

1 the Director's statement that he remained sitting on the fence.
2 Finally in relation to this I wish to address a very short point raised by the interveners
3 in their statement whereby they suggest that it is part of our case that the Director has acted in
4 bad faith. This is a false suggestion. It is no part of the applicant's case that the Director has
5 acted in bad faith. The requisite test of substance over form does not incorporate as an
6 ingredient whether the Director's final position was motivated by good or bad faith. We are
7 perfectly entitled to point out what we suggest are inconsistencies in his approach and factors
8 we say go to the substance of the matter, but the mere fact of inconsistency does not connote
9 bad faith.
10 Our submission is that the Director's decision letter contains a misdirection by him as
11 to the legal position and in particular as to what he in fact actually did. If I can just give you
12 some examples, he misinterpreted or he simply overlooked the legal inference to be drawn from
13 the clear statement that Wiseman was not guilty of an abuse in relation to predation. Secondly,
14 he misdirected himself as to the legal implications of arriving at a conclusion that the evidence
15 was not nor would ever be likely to generate sufficient to convict Wiseman according to the
16 Napp standard. Thirdly, he misdirected himself as to the proper inferences to be drawn from
17 clause 9 of the assurances which he incorporated by reference into his decision letter.
18 We would submit that he also misdirected himself as to paragraph 83 of the Tribunal's
19 judgment in Bettercare. He appears to have treated this as a definitive statement of types of
20 case where he cannot be appealed. I wonder if I could just remind you of what was said in
21 paragraph 83 of Bettercare. I realise I have misrepresented the position to the Tribunal and this
22 is the third authority I am referring to, but it is only one paragraph of an authority I am sure you
23 have well in mind. Bettercare is tab 1 of the applicant's authorities and paragraph 83 is on page
24 23 of the internal numbering of the judgment. In paragraph 83 the Tribunal gave some
25 examples of cases where there might not be an appealable decision. Here the Tribunal stated:
26 "In addressing the central issue it is not in our view helpful to use the concept of a
27 decision to reject a complaint because such a term is ambiguous. The Director may decide to
28 reject a complaint for many reasons. For example, he may have other cases that he wishes to
29 pursue in priority. He may have insufficient information to decide whether there is an
30 infringement or not. He may suspect that there is an infringement but a case does not appear
31 sufficiently promising or the economic activity concerned sufficiently important to warrant the
32 commitment of further resources."
33 And then:
34 "None of these cases necessarily give rise to a decision by the Director as to whether a
35 relevant prohibition is infringed."
36 The Tribunal deliberately inserted the word "necessarily" because you were not laying
37 down cast iron categories of non appealable decision, you were quite properly saying that each
38 case will turn upon its facts but these are fact situations which might give rise to non appealable

1 decisions. But the Director not least in his defence trots out the mantra, "The case does not
2 appear sufficiently promising to warrant the commitment of further resources," and says, "Well,
3 this is sufficient to turn the decision into something which is non appealable". With respect, we
4 believe that to be misfounded. Each case must be viewed on its own merits and the substance
5 of this case we say reflects a negative decision.
6 THE PRESIDENT: This phrase is found in Mrs Bloom's letter of 6th September.
7 MR GREEN: Yes.
8 THE PRESIDENT: I am not sure the phrase as such is found in the decision letter.
9 MR GREEN: One finds language which is similar.
10 THE PRESIDENT: Yes, it is found there. So it is a reasonable inference, I would have thought, that
11 the author of the letter of 9th August and 6th September had in mind paragraph 83 of
12 Bettercare.
13 MR GREEN: I think that is a reasonable inference. Those are my nine points. I would like briefly
14 to take up no more than just a few minutes on two policy issues and then I am finished.
15 The first is the so called floodgates point. We have made available to both the Director
16 and the Intervener certain statistics which Ashursts prepared from the European Commission's
17 website and I hope the Tribunal has copies of them.
18 THE PRESIDENT: I am not sure I have or if I have I know where to find them. It is page 29; yes.
19 MR GREEN: The statistics are interesting in their own right but they form the basis of a very short
20 point which I wish to make which is that on any view there could never be a risk of a floodgate
21 of appeals to the Tribunal or in the event that the Tribunal exercises a proper and robust
22 jurisdiction a stifling or stymieing of the Director's work. The statistics show the number of
23 cases which the European Commission Antitrust Division DG Comp deal with and the number
24 of cases going to the CFI.
25 If one just takes very rough figures, because the point is demonstrated by looking at the
26 figures in the round, the statistics show that the Director of General for Competition opens
27 approximately up to 500 cases per annum and it then closes between 350 and 500 cases per
28 annum. Of the cases which it closes it takes formal case closure decisions in about 70 cases
29 and informal case closure decisions in 300 to 500 cases per annum. Of course the Commission
30 receives complaints from all undertakings across the whole of the European Community, not
31 just the United Kingdom, yet from this there are only between 10 and 20 cases going to the CFI
32 on competition matters per annum and of these under half are complainants' appeals.
33 Howsoever one looks at these statistics, it is plain that the CFI with its broader
34 jurisdiction than this Tribunal, because it can review the correctness in a judicial review sense
35 of automet type decisions, has a really quite small number of cases to deal with on an annual
36 basis. In the present case in this country the Director takes only a tiny fraction of the decisions
37 which the Director General for Competition in Brussels takes and that includes formal or non
38 formal decisions. The CFI has a wider jurisdiction in that it is not limited in the way that this

1 Tribunal is and the clear inference is that there will never be a great flurry or welter of
2 complaint cases coming to the Tribunal, howsoever wide the Tribunal's jurisdiction is.
3 We do accept that in principle there will be categories of case where no appealable
4 decision has been taken, and if I could just ask you to look at paragraph 72 of our skeleton
5 argument, we have set out somewhat tentatively a list of categories of case where one could
6 contemplate at least a thoroughly respectable argument that no decision would have been taken.
7
8 There were very many categories. We have noticed that the Tribunal embarked upon a
9 similar exercise in Bettercare and Freeserve and we have tried to think of a few more examples.
10 It is dangerous to be too categoric about these because the Tribunal might find itself with a
11 peculiar set of facts falling into one of these categories at a later date but they all on the face of
12 them would appear to give rise to situations whereby the Director can properly say that he
13 stopped short of a full investigation for perfectly sound policy or other reasons.
14 None of those come close to the facts of the present case and if and in so far as it is
15 suggested that were the Tribunal to take jurisdiction in this case it would open the floodgates or
16 cause an unreasonable burden upon the Director we would suggest that simply is not a
17 justifiable suggestion.
18 The very final point I wish to address concerns judicial review. We have submitted,
19 and I do not intend to comment upon it, a short advice from Scottish counsel on the position in
20 Scotland. There really seems to us to be one central point in relation to judicial review and the
21 relevance of the judicial review point for today is simply this, that the Tribunal should adopt a
22 position on jurisdiction which minimises the scope for judicial review. I say that for this
23 reason.
24 THE PRESIDENT: That we should adopt a position which minimises - ?
25 MR GREEN: Minimises the scope for judicial review. The reason for this is that judicial review is
26 an ancillary jurisdiction because the administrative court will inevitably expect appellants to
27 exhaust their statutory remedies first, and that would be the same in England or in Scotland. If
28 an applicant went direct to the administrative court without coming to this Tribunal first it
29 would be kicked out unceremoniously at the initial stage. Therefore the administrative court
30 will deal only with those cases which by definition do not involve a decision on the merits
31 because otherwise the case would come to this Tribunal. It deals with the category of case
32 which would necessarily fall outside the scope of the Act.
33 What that means is that the role of the administrative court is to see whether the
34 Director should as a matter of administrative law have taken a decision which then should come
35 to this Tribunal.
36 THE PRESIDENT: Yes.
37 MR GREEN: Its jurisdiction is therefore collateral and circular. That being the case, if a narrow
38 view is taken by this Tribunal of its own jurisdiction one simply commits important cases,

1 where the Director has come to the end of his investigation into the murky and uncertain world
2 of the administrative court, and one has seen from the pharmaceutical parallel import case that -
3 --
4 THE PRESIDENT: It may be uncertain but I do not think you can describe it as murky.
5 MR GREEN: Maybe "murky" was a bit strong; it certainly felt murky in the pharmaceutical
6 imports case. Five days of evidence, an immense amount of economic analysis and statistics,
7 and the court still felt unable to come to a firm conclusion. It is a difficult jurisdiction at the
8 best of times but the pharmaceutical case, whilst illustrating the problems of judicial review and
9 competition law, and, to be quite frank, the reason I read you one of the paragraphs where the
10 judge says, "This ought to go to a different forum. That is the last time I ever want to see a case
11 like this," was really to highlight the difficulties that that court ---
12 THE PRESIDENT: We do not know what forum he had in mind.
13 MR GREEN: He preferred anything but him, frankly, but that is not the point which is relevant
14 here. The point which is relevant for today is that the administrative court's jurisdiction is
15 simply to ensure that the decision taken by the Director is one which comes to this Tribunal,
16 and it is not an independent means of the complainant obtaining redress.
17 That completes my submissions, and obviously I am happy to answer any questions
18 which the Tribunal has, but those are my primary submissions.
19 THE PRESIDENT: Do you want to say anything further about the other jurisdiction, whether this is
20 to be treated as a Scottish case or not?
21 MR GREEN: I think we are happy to allow the Tribunal to come to its own view on that. We have
22 seen what Mr Flynn has said. We understand that of course this is a case which involves a
23 Scottish defendant, Wiseman, and a Scottish market, but on the other hand it concerns an
24 English company seeking to enter the Scottish market. We are I think content to allow the
25 Tribunal to come to its own view on that. There are various points made in the Scottish silk's
26 opinion and those are there to be read.
27 THE PRESIDENT: Is any point taken about the implications as regards the legal team in the event
28 of an appeal going to the Scottish courts?
29 MR GREEN: That is something which has concerned us obviously in this case and other cases.
30 The position as it presently stands, as I think I may have suggested, I think it was in this case, is
31 that certainly so far as counsel is concerned in the Scottish courts, the Scottish courts do not as
32 matters stand permit English counsel to be called to the Scottish bar for the purpose of a single
33 case, even when it is an appeal from a Tribunal involving Scottish jurisdiction but which is
34 determined by English counsel, and that is a problem which the English bar faces at the
35 moment.
36 THE PRESIDENT: Is there some procedure for getting permission from the Inner House as a matter
37 of grace?
38 MR GREEN: There is a procedure but the way things presently stand -- I have to be a bit careful in

1 what I say because it is a matter in which the Scottish bar and the English bar are at
2 loggerheads.
3 THE PRESIDENT: No, I was just seeking information at the moment.
4 MR GREEN: It is a matter which the Scottish and English Bars are at loggerheads over at the
5 moment. The English bar is prepared to allow Scottish counsel to come and do a case for the
6 day here and to be introduced to the court and to facilitate being called to the English bar for
7 the day of the case, but the Scottish bar at the moment says no. At the moment it is an issue on
8 the agenda between the two bars; it is a practical problem and the answer so far has been no
9 from the Scottish bar. In principle I think it can occur but the convention ---
10 THE PRESIDENT: Is it a matter for the Scottish bar or is it a matter for the courts?
11 MR GRANT-HUTCHISON: That is what I was about to ask. Is it properly a matter for the Scottish
12 bar or is it more properly a matter for the Scottish courts?
13 MR GREEN: It may be a matter for the Scottish courts. We understand the convention is that the
14 Scottish courts will not entertain the application unless someone from the Scottish bar
15 introduces and welcomes the English counsel to the court.
16 MR GRANT-HUTCHISON: I am open to correction but I was given to understand that some
17 months ago in an employment law matter the Inner House was petitioned to allow leave for
18 English counsel to appear and it was ultimately resolved simply because the application came
19 too late and would cause prejudice, but my understanding is the matter can still be reopened.
20 MR GREEN: Your information is more up to date than mine. My knowledge is through the Bar
21 Council here and I simply know that it is an issue on the agenda.
22 THE PRESIDENT: Anyway, your overall position is to leave it for the Tribunal to determine.
23 MR GREEN: Our overall position is to leave it to the Tribunal, consistent with economy of costs in
24 so far as possible.
25 THE PRESIDENT: Thank you, Mr Green. I do not think there is anything particularly we want to
26 raise at this stage. Mr Peretz, do you want to bat for 10 minutes or would you rather start at 10
27 to 2?
28 MR PERETZ: I am conscious of the time. It may be more sensible for me to start at 10 to 2; I am
29 going to be longer than quarter of an hour.
30 THE PRESIDENT: Yes, that is probably a reasonable course to take. Very well; we will say 5 to 2.
31 (**Adjourned for a short time**)
32 THE PRESIDENT: Yes, Mr Peretz?
33 MR PERETZ: Before I come to the precise question before the Tribunal, I hope it will assist the
34 Tribunal if I set the contested decision in its legal and factual context, perhaps addressing to
35 some extent the invitation we were all given in the case management conference at the
36 beginning of December.
37 The first point I want to make in that context is to look at the legal effect of the
38 contested decision upon the applicants, and upon Wiseman. In the Director's submission those

1 effects are limited - certainly when compared to the effect of an infringement decision on the
2 undertaking in question. The applicants retain the right to bring proceedings in the civil courts -
3 presumably in this case in Scotland - against Wiseman, seeking damages and any other relief
4 including interdicts. Their ability to do so is not hindered in any real way by the contested
5 decision. The applicants also retain the right to produce further evidence to the Director and to
6 seek to persuade him to reopen the investigation if they can manage to do so. The Director has
7 never said - using Mr Green's words in opening - that it would be "impossible" for him to
8 reopen the investigation or that he would "never" do so. The position is, as stated in Mr
9 Lawrie's letter, that if evidence is produced to the Director, then he may reopen the matter and
10 that investigation could, in due course, lead to penalties being imposed upon Wiseman for its
11 infringement.
12 THE PRESIDENT: Or if new evidence, could reopen?
13 MR PERETZ: Yes. It is plain that the Director is entitled to analyse any further evidence produced
14 to him against the background of his investigations so far, and the practical reality is that the
15 evidence would have to be more than suggestive - it would have to be quite strong - for him to
16 revise the conclusions that he has reached against the basis of a fairly comprehensive
17 investigation to date. But, nonetheless, the possibility remains, and it is distinctly more than a
18 theoretical possibility.
19 THE PRESIDENT: Yes.
20 MR PERETZ: As for Wiseman, far from being "effectively exculpated" as the applicant suggested
21 at paragraph 9.6 of their skeleton, it remains liable to civil action for damages or other relief,
22 and it also remains liable to the possibility that the investigation might at a later stage be
23 reopened and it may be penalised for its conduct in respect of the period covered by the
24 investigation.
25 As for the lifting of the voluntary assurances given by Wiseman, I would make the
26 following points:
27 First, those assurances were not enforceable as such. The sanctions for the breach
28 would have been the imposition of a statutory s.35 interim measures' direction. Breach of the
29 assurances might also conceivably have led to an aggravation of the penalty paid had a final
30 infringement decision been made.
31 THE PRESIDENT: Yes.
32 MR PERETZ: But those were the sanctions. Secondly, it is inaccurate to describe those assurances
33 as having been "lifted" by some decision of the Director. If one looks at paragraph 9.1 of the
34 assurances, and perhaps it might be worth turning to them, they are at attachment 15 in annex 1,
35 volume 2, the relevant page being page 440.
36 THE PRESIDENT: Yes.
37 MR PERETZ: If one looks at paragraph 9 one sees the natural construction of this paragraph is that
38 the assurances come to an end at the point when the Director ceases to have a reasonable

1 suspicion or, and that is the effect here of the word "and" in the last line of the headpiece to
2 paragraph 9, when the Director completes his investigation - paragraph 5.1 - those two
3 conditions are cumulative, hence the use of the word "and". So even if the Director retains a
4 reasonable suspicion that Wiseman has infringed the Act, which is in fact the position in this
5 case, the fact that he has ended his investigation means - by virtue of clause 9 of those
6 assurances - that those assurances on their terms come to an end. That is simply the logical
7 consequence of the completion of the investigation.
8 THE PRESIDENT: Are you submitting that he does have a reasonable suspicion that Wiseman---
9 MR PERETZ: Yes, that continues. Indeed, the contested Decision itself records evidence which
10 tends to show, or goes towards showing that there may have been an infringement. The test for
11 a reasonable suspicion is, of course, a relatively low one.
12 THE PRESIDENT: Perhaps you are going to come on in a moment to the views attributed to Dr
13 Mason in that particular note. If that note is accurate it might be a little difficult for the Director
14 to still maintain that he had a reasonable suspicion there had been an infringement, when his
15 staff are saying that as far as they are concerned they are unable to find an infringement. I
16 think the evidence does not support an infringement.
17 MR PERETZ: Yes, the effect of what Dr Mason said is that there is insufficient evidence to
18 establish an infringement to the necessary *Napp* standard.
19 THE PRESIDENT: Yes.
20 MR PERETZ: That, of itself, does not dispose of the position. There may continue to be a
21 reasonable suspicion that there was an infringement.
22 THE PRESIDENT: It is conceivable the Director has a suspicion. The question may then be
23 whether it is still a reasonable suspicion, if the evidence is not sufficient to support the
24 suspicion.
25 MR PERETZ: One can imagine situations where one reasonably suspects something which one has
26 reached a conclusion that one cannot prove. The example I gave in my skeleton, which was
27 picked up by Mr Green in his, in an entirely different context obviously, was the question of
28 whether life exists on other planets. One might reasonably suspect that it does, but that is an
29 entirely separate question from the question of whether one can prove that it does. I do not see
30 any inconsistency between those two positions.
31 THE PRESIDENT: It might be partly a timing point, because you might start off suspecting
32 something and then investigate it, and by the time you had finished investigating it you might
33 be clearer as to which side of the line it falls.
34 MR PERETZ: Indeed, and after an investigation one might find that one's reasonable suspicions
35 were completely allayed, and there was no further ground for reasonably suspecting anything.
36 That is not the situation in this case. The situation in this case is that after a very thorough
37 investigation the Director has reached the view that he cannot - certainly on the material before
38 him - establish an infringement to the necessary strong and compelling standard. But that is not

1 of itself inconsistent with the proposition that he continues to entertain reasonable suspicion,
2 bearing in mind that that reasonable suspicion threshold is a fairly low one. As I said, as the
3 contested decision itself records there is some evidence pointing in the direction of
4 infringement.
5 THE PRESIDENT: Yes, very well.
6 MR PERETZ: A second issue I wish to deal with is a light motif running more through the
7 applicants' written case than in anything Mr Green has said this morning but which I still feel I
8 need to deal with, which is that the contested decision should be regarded in some sense as
9 determining the applicants' civil rights and obligations for the purposes of Article 6 of the
10 European Convention on Human Rights. That proposition, which is not supported by any
11 authority is simply false.
12 Two points appear to be relied on in this context. First, which is referred to in
13 paragraph 36(c) of Mr Green's skeleton is that s.58 of the 1998 Act provides that a finding of
14 fact made by the Director is binding on parties to subsequent civil litigation under the 1998
15 Act. However, it is hard, if not impossible, to identify anything, at any rate in contested
16 Decision, that is a finding of fact prejudicial to the applicants in the necessary sense. Further,
17 the civil courts have the power to direct that s.58 should not apply, and could well do so - it is a
18 matter, of course, for argument in the civil courts rather than perhaps something that the
19 Tribunal should determine. But in our submission they might well do so in a case where the
20 applicants wished seriously to argue that the finding of fact was wrong; where the applicants
21 produce new evidence, or for one reason or another the applicants could not reasonably have
22 been expected to challenge the finding of fact, and one could imagine a case where a finding of
23 fact was fairly incidental to the case and it simply would not have been a proportionate use of
24 resources to seek to appeal the Decision on that basis.
25 The second point relied on in connection with Mr Green's Article 6 point is that the
26 contested Decision could be relied upon in subsequent civil litigation by Wiseman to show, as
27 he puts it, that the matter was very complicated and that the Regulators were throwing up their
28 hands in despair. With respect, it is difficult to see, however, that that could get Wiseman very
29 far. The courts would have to, and no doubt would, properly consider any such claim -
30 whatever the court's enthusiasm for the task with which it was confronted might be, and no
31 doubt the prospect of hearing Mr Green's and Mr Flynn's advocacy would rekindle the court's
32 enthusiasm for hearing the case.
33 Moreover, it is entirely possible that in a few years' time it will be possible for
34 competition law issues that arise in civil proceedings to be transferred from the allegedly
35 unenthusiastic High Court to this very Tribunal under regulations made pursuant to s.16(1) of
36 the 2002 Act. It is unlikely that this Tribunal, in civil proceedings, would be deterred by the
37 existence of a prior decision of this nature by the Director from making findings of liability
38 against the undertakings concerned where it thought that that was the right answer to the case

1 before it.
2 None of this, however, amounts to a case that the contested Decision involves a
3 determination of rights for the purposes of Article 6, and I perhaps might briefly refer the court
4 to the *ex parte C* case, which is at 2000 HRLR 400 tab 43 of the authorities' bundle - your
5 bundle 8.
6 If one turns to the penultimate page, towards the bottom, the third paragraph up - this
7 paragraph is, in fact, a paragraph in quotes from the well known case of *Fayed v United*
8 *Kingdom*, where Mr Al Fayed sought to argue that his Article 6 rights were determined by---
9 THE PRESIDENT: Sorry, which page are we on?
10 MR PERETZ: The penultimate page.
11 THE PRESIDENT: *Fayed v United Kingdom*, yes.
12 MR PERETZ: Yes, and then there is a passage in quotes, which comes from *Fayed v United*
13 *Kingdom*, but that was the well known case in which Mr Fayed sought to argue that a
14 Companies Act Report involving him determined his civil rights or obligations for these
15 purposes, and the court ruled that the result of the proceedings in question must be directly
16 decisive of such a right or obligation, mere tenuous connections or remote consequences not
17 being sufficient to bring Article 6(1) into play.
18 THE PRESIDENT: Yes.
19 MR PERETZ: And it was noted that the DTI's Report in that case would not be dispositive of
20 anything, it did not make a legal determination as to criminal/civil liability concerning the
21 Fayed brothers, and particularly concerning the latter's civil right to honour and reputation.
22 This case in which this extract was quoted - I do not need to go through it in any detail,
23 but this was a case in which a person who had been placed on an index kept by the Secretary of
24 State for Health recording people against whom there was reason to believe that they might be
25 unsuitable to work with children. This person was placed on the register and he sought to argue
26 that his being placed on the register determined his Article 6 rights and obligations because it
27 made it rather difficult for him to get employment. The court noted that, as a matter of practical
28 reality, it might well make it rather difficult for him to get employment in certain fields, but that
29 that of itself did not involve an Article 6 determination.
30 One can conclude that the mere fact - if it be a fact - that in some respects the
31 prosecution of a civil claim by the applicant was made more difficult as a result of the contested
32 decision does not, of itself, establish that there is an Article 6 determination here.
33 THE PRESIDENT: The court leaves it open as to whether there might be a change after the Human
34 Rights Act comes into force. Is that right?
35 MR PERETZ: Yes, this case actually arose pre-Human Rights Act, but the argument was simply an
36 argument on the Convention as it stood prior to the implementation of the Human Rights Act.
37 So presumably the court wanted to leave open as a possibility the fact of incorporation might
38 change the position.

1 Of course the extract from *Fayed v United Kingdom* is an extract from Strasbourg case
2 law.
3 THE PRESIDENT: Yes.
4 MR PERETZ: A further broad point I want to make is that there is no *a priori* reason why judicial
5 review is not an appropriate challenge in a case like this.
6 At paragraph 62 of Mr Green's skeleton argument - again a point he did not pick up this
7 morning - he seeks to suggest that there might be a dispute as to the *locus standi* of the
8 complainants to bring Judicial Review proceedings against a contested decision. With respect,
9 we can see no basis upon which it could properly be said that the complainants here would not
10 have *locus standi*. The DGFT would certainly not suggest otherwise, and if Mr Flynn were
11 tempted into taking the point on behalf of Wiseman I would respectfully suggest he was on to a
12 loser.
13 The standard of review, or degree of scrutiny applied in Judicial Review, is a very
14 flexible standard, applied at different levels in different types of cases. Judicial Review courts
15 are open, in appropriate cases, to arguments that the standard of scrutiny should be high, or put
16 another way that only a small margin of discretion should be allowed in relation to certain
17 issues. They are not, as certainly the applicants' skeleton seems to suggest at times, painted into
18 a corner such that they could only give an inappropriately low degree of scrutiny to decisions
19 such as this.
20 Even in *ex parte Percival* [tab 26, applicants' bundle] where the issue arose as to the
21 appropriate level of judicial scrutiny of the Bar Council in relation to its professional
22 disciplinary jurisdiction the courts themselves acknowledged that those strictly defined limits
23 should be set to the Judicial Review of prosecuting authorities in a broad sense but that a
24 flexible standard should be applied having regard to the powers, functions and procedures of
25 the Body concerned, in a manner in which it is proceeded in a particular case, and those words
26 can be found at paragraphs E to F at page 234 of the report - I do not think I need to take you to
27 that.
28 Cases such as *Khawaja*, which is cited at length in the skeleton of Mr Green, showed
29 that where there are compelling arguments for a high degree of scrutiny, cases involving
30 fundamental rights and liberties, the Judicial Review courts will apply a strict standard of
31 review. Now, of course, the Director would argue in Judicial Review Proceedings that cases
32 such as *Khawaja*, involving decisions concerning fundamental rights and liberties are not, to
33 put it mildly, of any obvious relevance in cases such as this when nobody's fundamental rights
34 and liberties are at stake. But if Mr Green wished to deploy his advocacy skills to persuade the
35 Judicial Review court otherwise, in a sense good luck to him and the door is certainly open for
36 him to try to persuade the Judicial Review court that that is the case.
37 Looking at the Community Law position, which it is suggested may have some
38 relevance to the question of whether Judicial Review offers an appropriate degree of scrutiny,

1 there is no Community Law reason why Judicial Review scrutiny should be regarded as
2 inadequate. Appeals from the Commission go to a court charged with hearing appeals by
3 private parties to a wide variety of Acts of the Community Institutions, and the jurisdictional
4 basis upon which that is done, Article 230 EC, involves headings of review, such as lack of
5 competence, infringement of an essential procedural requirement, infringement of the Treaty or
6 any rule relating to its application, misuse of powers, that are not obviously dissimilar, putting
7 it that way, to the classic formulations upon which Judicial Review is carried out in this
8 country.
9 Indeed, in complainants' challenges there is Community Law authority for the
10 proposition that the Judicial Review employed in complainants' challenges is somewhat lighter
11 than would certainly be the case in an infringement decision. Perhaps I can take the Tribunal to
12 paragraph 80 of *Automec 2* which is at tab 3, volume 10, page 2276. I do not think I need to
13 read it.
14 THE PRESIDENT: No, it is a restatement of the classic approach.
15 MR PERETZ: But on that basis the Court of First Instance has been able to exercise, as the
16 applicants themselves argue in the skeleton argument, for example at paragraph 36(d) of the
17 skeleton, an effective degree of supervision over decisions by the Commission - decisions on
18 the type of issue in this case, and indeed otherwise.
19 In short, in the Director's submission the applicants' pessimism about the ability of the
20 Judicial Review courts properly to hold the Director to account for complainant's appeals'
21 cases, is unjustified.
22 Mr Green raised the point that it could be envisaged that in some cases it could be a
23 challenge to a complaint rejection decision first of all going to the Judicial Review court at one
24 stage, perhaps being remitted to the Director, the investigation continuing and an appealable
25 Decision later being taken and then that Decision being appealed to this Tribunal, so that at
26 different points one would have two different courts looking at the same investigation - if one
27 can put it that way. However, that is simply a consequence of the fact that not all complaint
28 rejection decisions are appealable to this Tribunal, a fact which follows from *Bettercare* and
29 *Freeserve*, and is common ground between the parties.
30 One can, if one likes, describe the role of the Judicial Review courts, vis a vis that of
31 the Tribunal, as collateral and subsidiary, but it is certainly not clear to us what is supposed to
32 follow from there.
33 The final broad point that I wish to make is to look briefly at the approach to scrutiny,
34 or the level of scrutiny that the Tribunal should adopt in relation to decisions such as this,
35 compared to the Judicial Review approach. One approaches this exercise somewhat tentatively
36 because, of course, there is no Judicial Review authority as to the appropriate level of scrutiny
37 to be employed in cases such as this, and the Tribunal is well aware there is no tribunal
38 authority on that either. So one is inevitably speculating to some extent. I am also conscious

1 that the issue of the level of scrutiny is going to arise before this Tribunal in the *Freeserve* case-
2 --
3 THE PRESIDENT: Yes.
4 MR PERETZ: ---and what I say about what the appropriate level of scrutiny might be before this
5 Tribunal should be taken without prejudice to anything that the Director General of
6 Telecommunications may submit in that case.
7 THE PRESIDENT: You say in your skeleton that it is probably going to be much the same.
8 MR PERETZ: Indeed.
9 THE PRESIDENT: And that is your submission?
10 MR PERETZ: Yes, and there are a number of reasons why, in our submission, the level of scrutiny
11 of this Tribunal should be limited. I am happy to develop those or to move on to something
12 else.
13 THE PRESIDENT: If it is in your skeleton I do not think you particularly need to develop it, Mr
14 Peretz, but of course we are listening hard to everything you say, by all means do it if you wish.
15 MR PERETZ: No I am happy to leave it on that basis.
16 THE PRESIDENT: Yes.
17 MR PERETZ: I can now turn to the central issue in the case. On a proper reading of s.46(3)(b) is
18 the contested Decision a "*...Decision as to whether the Chapter 11 prohibition has been*
19 *infringed*." It is plain, and accepted by everybody, that there are two potential routes of
20 challenge to decisions of the Director - which is the right one depends on the nature of the
21 decision - and the routes are appeal to this Tribunal, or applications for Judicial Review to the
22 appropriate administrative courts in one of the three UK jurisdictions.
23 One also sees from *Bettercare* that complaint rejection decisions may go down either
24 route, depending on the grounds on which the complaint is rejected. *Bettercare* paragraph 84
25 refers to decisions on the ground that there is no infringement as being appealable to this
26 Tribunal, in contra-distinction to a number of examples given in paragraph 83 and those
27 examples, of course, are not to be read as a Statute, but are given as lists of indicative
28 examples. The question before the Tribunal is how one applies that distinction to the contested
29 decision. In the Director's case it is straightforward, on a plain reading of the contested decision
30 the Director refrains from finding either an infringement, or that there is no infringement. He
31 remains agnostic - noting the existence of evidence that tends towards the conclusion of
32 infringement----
33 THE PRESIDENT: Sorry, the Director is agnostic?
34 MR PERETZ: Yes, noting the existence of evidence, pointing towards a conclusion of
35 infringement while taking the view that that evidence is insufficient to produce a finding of
36 infringement that is sufficiently persuasive to the *Napp* strong and convincing standard.
37 THE PRESIDENT: Yes.
38 MR PERETZ: And that, in the Director's submission, does not amount to a decision as to whether

1 the Chapter II prohibition has been infringed. Since I have referred to paragraph 83 of
2 *Bettercare* - a point was taken that the letter replicates, or incorporates some of the wording
3 from paragraph 83 of *Bettercare*. In our submission nothing is to be attached to that. It is not
4 suggested that there is anything written in the letter in bad faith. What that wording is is a good
5 faith attempt to describe the Director's reasoning as he understands it to be.
6 THE PRESIDENT: Correct me if I am wrong but would the Tribunal be right to infer that the letter
7 in question was probably written on legal advice with the *Bettercare* judgment in the mind of
8 the writer of the letter.
9 MR PERETZ: I think it is fairly obvious that any letter of such importance would be written with
10 the benefit of legal advice. I do not think I am giving anything away by saying that.
11 THE PRESIDENT: I am not trying to discover what the advice was. The Tribunal was not born
12 yesterday, and it would seem a reasonable inference that if the letter was carefully drafted, not
13 in any improper way, to take advantage of Bettercare but at least to seek to bring oneself within
14 one of the exceptions, or one of the situations apparently contemplated in *Bettercare*.
15 MR PERETZ: It was vital that the letter accurately and precisely----
16 THE PRESIDENT: Of course.
17 MR PERETZ: ---reflect the reasoning that lay behind the Decision.
18 THE PRESIDENT: And you have explained that reasoning just a moment ago very clearly noting
19 the existence of evidence pointing towards infringement while taking the view the evidence
20 was insufficient to produce a finding of infringement to the *Napp* standard.
21 MR PERETZ: Yes, and the role of a lawyer in this context is going to be to point out that the
22 language might not be completely unambiguous, for example, might not accurately reflect what
23 the decision maker actually intended to say. It is a perfectly proper role for a legal adviser to
24 take.
25 THE PRESIDENT: No one is criticising the way the letter came to be written, or the process
26 followed, or the state of mind of those concerned, we are just trying to get to the bottom of
27 what the letter was driving at really, and I think you have just explained it to us.
28 MR PERETZ: There are essentially two attacks by the applicants on the Director's fairly straight
29 forward case. One is to argue that once an investigation has got beyond a certain point, as it has
30 been put variously, that it has gone to the end of the line, or reached its natural ending then a
31 decision to close the file on the basis that there is insufficient evidence to prove an infringement
32 is, as a matter of logic, a finding that there is no infringement.
33 At paragraph 83 of Mr Green's skeleton I might just note that he says that the extent of
34 the investigation has some relevance to the question of whether the Decision is appealable but
35 the true position that has developed this morning appears to be that the applicants regard the
36 extent of the investigation as the key factor lying behind their submission, that the contested
37 Decision should be regarded in substance as a non-infringement decision.
38 Now there are a number of difficulties with that submission. First, on what factual basis

1 is it being said that the investigation has reached, quotes, "the end of the line", or, quotes, "it's
2 natural ending"? Neither of those phrases is used in the contested Decision, nor did the Director
3 accept that either phrase applies. The contested Decision does not claim that no more could be
4 done, nor does the defence.
5 THE PRESIDENT: He does say in various places that the investigation is "closed".
6 MR PERETZ: Yes, but of course that is quite different from saying that no more could be done.
7 THE PRESIDENT: Yes.
8 MR PERETZ: An investigation may be closed at an extremely early stage and I think Mr Green
9 accepts that at an extremely early stage of an investigation the analysis may be rather different.
10 THE PRESIDENT: Yes.
11 MR PERETZ: I would perhaps note that, of course, the question of whether any further steps would
12 have been reasonable steps for the Director to have taken may well arise here or elsewhere and
13 nothing I say should be interpreted as accepting that further steps would have been reasonable,
14 but there are clearly further steps that could have been taken. Indeed, the applicants themselves,
15 in the application, identify further steps that could, and in their view should, have been taken. I
16 do not need to take you to them, but examples can be found at paragraphs 7.121(d) and 7.140
17 of the application. 7.121(d) suggests that the Director should have served further s.26 notices
18 on certain ex-customers of Claymore.
19 So that brings one to a deeper question, what exactly is meant by an investigation that
20 has reached the end of the line. It is rather difficult to conceive of an investigation where every
21 single question that could conceivably be asked has been asked and every single avenue of
22 inquiry has been completely explored to the bitter end. That leads one to ask how thorough
23 does the investigation have to be before it is said to reach the end of the line for Mr Green's
24 purposes. The uncertainty matters, because if it is right that case closure decisions reached after
25 investigation that has reached the end of the line should be regarded as in substance findings
26 that there is no infringement, then the test for appealability hangs on the concept of the
27 thoroughness of the investigation - whether it has reached the end of the line.
28 In the Director's submission, the test for distinguishing appealable from unappealable
29 decisions should be clear and capable of being applied by third parties who may, unlike the
30 position of the applicants in this case, not have been very much involved in the case, and may
31 not have a very clear view of the extent of the Director's investigations, particularly having
32 regard to the strict time limits that applied to appeals before this Tribunal and indeed in Judicial
33 Review. Any test that relies on the vague concept of end of the line investigations in our
34 submission simply fails to live up to that standard.
35 Nor is it at all clear in principle why the thoroughness of the investigation should make
36 any difference to the question of whether in reality the decision in question is a decision as to
37 whether the Chapter II prohibition has been infringed. There is no *a priori* reason why the
38 DGFT should find it easier to reach a firm view one way or the other just because he has

1 concluded an extensive investigation. As we all know from our own experience, even when one
2 gets deeply into a complex factual question one often finds that one remains in some doubt,
3 and perhaps even greater doubt, as to what the right answer is. The fact that the Director has
4 been able to reach a firm view in a rather shorter time in a number of other cases listed at
5 paragraph 87 of the skeleton, really tells one very little.
6 THE PRESIDENT: I think the question is not so much what the test is because the test, and I
7 paraphrase, is whether the Director has either expressly or by necessary implication taken a
8 decision on the substance, the question is what are the facts that support that possibility?
9 MR PERETZ: Yes.
10 THE PRESIDENT: And Mr Green, I think, is pointing to the extent of the investigation as one of
11 the factors that might support that possibility, or this view does support the possibility.
12 MR PERETZ: Yes, and my point in reply is simply the point that I have just made that even after
13 an extensive investigation you can still be in two minds.
14 THE PRESIDENT: We are still confused but at a deeper level!
15 MR PERETZ: Indeed - I am not sure I would put it like that!
16 THE PRESIDENT: Yes?
17 MR PERETZ: Lying behind all this may also be the submission that at some point, once the
18 investigation has got to a certain stage the complainant and Mr Green also refers to the subject
19 of the investigation as having some sort of right to a decision as to whether the Chapter II
20 prohibition has been infringed or not.
21 In our submission there is simply no such right, and if one looks at Community level
22 that position is clearly established in cases such as *GEMA* and *Automec 2* - paragraphs 75 and
23 76 of *Automec 2* set out the position and refer back to the *GEMA* case. I do not think I need to
24 take the Tribunal to them.
25 The position is no different even where the Commission has already carried out a
26 substantial investigation and one can refer to the *Tremblay* case at tab A of the Intervener's
27 bundle. Again, I do not think I need to take the Tribunal there.
28 The second basis for the attack on the Director's case is to assert that on a proper
29 analysis the contested Decision itself somehow reveals that much to the Director's surprise what
30 he was taking was a non-infringement decision. In that context Mr Green has disavowed, and
31 we are grateful for that, any suggestion of bad faith by the Director. They therefore accept that
32 the reasons given in the 9th August letter were genuine and in no sense a sham. As I understand
33 his case he basis his argument on the text of the contested Decision, rather than alleging that the
34 reasons were not real reasons.
35 THE PRESIDENT: You have explained to us that the wording of the letter is the Director's effort to
36 explain that he notes the existence of evidence pointing towards infringement, but takes the
37 view that that evidence is insufficient to produce a finding of infringement to the necessary
38 standard.

1 MR PERETZ: Yes.

2 THE PRESIDENT: And the question is whether that amounts to a Decision under the act or not.

3 MR PERETZ: Indeed.

4 In that connection one needs to start by noting that there is, certainly in our submission,
5 a middle ground between a finding of infringement and a finding of non-infringement. Those
6 two states of mind are not different sides of the same coin as it were.

7 The Director can, in particular, decide not to decide. The fundamental error in Mr
8 Green's position is that he equates the role and function of the Director to that of a judicial
9 Body charged with deciding cases put before it in adversarial litigation.

10 As Mr Green rightly observes, a judicial Body faced with---

11 THE PRESIDENT: Yes, it is unfortunately the case.

12 MR PERETZ: Indeed, one sometimes has sympathy with the judiciary, but that is the judicial
13 calling to decide cases put before the court, however complicated, and however difficult they
14 may be. When the court finds that the claimant, or the Crown in criminal cases, has not met the
15 necessary standard of proof to establish its case, it necessarily finds for the defendant. In
16 contrast, and in somewhat mixed metaphors, the Director is entitled to retire from the fray
17 without coming down off the fence - particularly if he feels that to continue further with
18 investigating and considering the case would involve a disproportionate expenditure of
19 resources.

20 In that connection it is helpful to refer to s.22 and s.24 of the Act. These provisions
21 deal with the possibility of notification for a decision by a person who is concerned that their
22 conduct might be regarded as infringing the Chapter II prohibition. In Chapter I: *"A person who
23 applies for conduct to be considered under this section must (a) notify the Director of it; and
24 (b)apply to him for the decision"*.

25 Then s.22(2) *"On an application under this section, the Director may make a decision
26 as to (a) whether the Chapter II prohibition has been infringed"*, and then paragraph (b) deals
27 with exclusions.

28 Mr Flynn remarks in his Notice of Intervention that it would have been perfectly
29 possible, and indeed would remain possible, for Wiseman to notify the conduct issue in this
30 investigation to the Director under s.22 for a decision.

31 One then sees at s.24 that if the Director has determined an application under s.22 by
32 making a decision that the conduct has not infringed the Chapter II prohibition, certain legal
33 consequences then follow.

34 The first legal consequence is that he is debarred from reopening the matter without
35 there being a material change in circumstances, or reasonable suspicion that there was
36 incomplete, false, or misleading information before him. He is also debarred from imposing a
37 penalty in respect of the period before he moves to reopen the matter under s.24(2) with the
38 exception if the undertaking might have provided him with materially false information.

1 Now, if one takes the case where perhaps at the same time that this complaint be made
2 Wiseman had chosen to notify the conduct under investigation to the Director it appears to be
3 the consequence of the applicants' submissions that in this case the consequence of the decision
4 that has actually been taken would be, since it is described as a non-infringement decision, that
5 the provisions of s.24 would apply, and in our submission that is simply a bizarre consequence
6 of the applicants' logic.
7 THE PRESIDENT: There has not been an application under s.22, has there?
8 MR PERETZ: No, the submission is based on the possibility that there could well have been, which
9 is not---
10 THE PRESIDENT: There could have been, I see.
11 MR PERETZ: There is no reason at all why, as soon as it learned about the complaint, Wiseman
12 should not have put in a notification, and no reason at all why it should not do so now. I hasten
13 to add that I am not sure the Director would welcome such a notification. Nevertheless, the
14 possibility certainly exists.
15 MR FLYNN: I doubt if it is going to be made.
16 MR PERETZ: In our submission those sections demonstrate that a decision that the prohibition has
17 not been infringed, at least for the purposes of s.22 and 24, involves more than a failure to find
18 sufficient evidence to prove the converse. In our submission a non-infringement decision, a
19 decision that the prohibition has not been infringed, consists of a positive assessment and that
20 could be expressed, or could be by necessary implication one concedes that, that the
21 undertaking concerned has not infringed the prohibition. It is after that type of positive
22 assessment that the s.24 provisional immunity protection is appropriate, and that protection
23 would simply be inappropriate where the Director had merely found insufficient evidence to
24 establish an infringement to the stronger, compelling standard.
25 It follows that where the Director's assessment asserts, expressly or by necessary
26 implication neither a positive claim that an undertaking has infringed the prohibition, nor a
27 positive claim that it has not, a decision is not to be classed as a decision as to whether the
28 Chapter II prohibition has been infringed.
29 THE PRESIDENT: Just to understand the submission - a decision that there is insufficient evidence
30 to find an infringement is not, in your submission, a decision as to whether the Chapter II
31 prohibition has been infringed within the meaning of 46(3)?
32 MR PERETZ: Yes, and what one is looking for is a positive statement, a positive assessment that
33 there is no infringement. The non-infringement case such as the *Claritas* case, the *ICL Senstar*
34 case (in the authorities' bundle) are all plain examples of what are incontestably non-
35 infringement decisions in that case. They make positive claims that Post Office, that ICL have
36 not infringed the prohibition for one or other reason.
37 THE PRESIDENT: Are you going to take us to *BSkyB* at some point?
38 MR PERETZ: I was not proposing to take you to *BSkyB*, no, but I am perfectly happy to turn to it if

1 that would assist.
2 THE PRESIDENT: Well, it is just that something has been made of it this morning so perhaps we
3 had better look at it. Someone needs to remind me in which bundle I now find it.
4 MR PERETZ: It is tab 8, bundle 10 in your numbering.
5 THE PRESIDENT: It may be difficult because we have not yet got the full Decision, we have only
6 the summary, and it is a different case.
7 MR PERETZ: One in which I should add I am not instructed by the OFT.
8 THE PRESIDENT: No, so you may not be able to take it very far, but I am assuming that this
9 regarded as a decision, it is 157 pages plus annexes. Apparently, if you turn to the end of it,
10 which is page 10 of tab 8, we have three different situations - this is now all according to the
11 applicants. We have apparently a borderline result that there are insufficient grounds. Then we
12 have a finding there are insufficient grounds, and then we have a finding that BSkyB has not
13 infringed. Then you have a conclusion that therefore BSkyB has not been found in breach of
14 competition law.
15 MR PERETZ: Yes.
16 THE PRESIDENT: They say well, that shows that there can be cases where a decision is taken that
17 there are insufficient grounds and that can be for all intents and purposes an appealable
18 decision. That is the case that is made.
19 MR PERETZ: I think all I am in a position to say is that we would accept that looking at those
20 bullet points in 5, the finding in the second bullet point would not involve a decision as to
21 whether the Chapter II prohibition has been infringed, neither would the third bullet point. One
22 would accept that the fourth bullet point would be such---
23 THE PRESIDENT: I do not know whether you have any instructions on this specific point, Mr
24 Peretz---
25 MR PERETZ: I am, of course, in some difficulty since this is not my case and this is, of course, not
26 the Decision itself---
27 THE PRESIDENT: No.
28 MR PERETZ: ---but simply a summary of it, and I am slightly disinclined to speculate as to what is
29 in that Decision which I have not seen, but that is certainly my understanding of the position.
30 Mr Green made something of the tailpiece to paragraph 5.1, but in our submission that is
31 nothing more than a very robust summary in a document intended for public edification, rather
32 than perhaps lawyer's document, of broadly where the Director General has got to.
33 THE PRESIDENT: So your position having, I assume, taken instructions from those behind you
34 who are able to assist, is that surrounded by all the caveats you mentioned bullet points 2 and 3
35 are probably not appealable, but bullet point 4 is?
36 MR PERETZ: Yes, on the assumption, which of course is a false assumption, that this represents
37 the full text of the Decision.
38 THE PRESIDENT: Yes, if one had read the full Decision your submission might either be

1 reinforced or undermined depending on what is in the main Decision.
2 MR PERETZ: Indeed, and I would not want to prejudice anybody from the OFT---
3 THE PRESIDENT: You do not want to take any definitive position.
4 MR PERETZ: No. I think those behind me are broadly content with what I have said.
5 THE PRESIDENT: You had just better check whether anyone is not content.
6 MR PERETZ: No, I think I have really said all that I can say---
7 THE PRESIDENT: No one is objecting to what you have said so far?
8 MR PERETZ: I am not getting any cries of disagreement.
9 THE PRESIDENT: Fine.
10 MR PERETZ: Against that background one can see that most of the analysis in Mr Green's opening
11 argument simply falls away. His argument, really throughout, relied on the proposition that a
12 failure to find sufficient evidence to establish an infringement to the *Napp* clear and compelling
13 standard was *ipso facto* a non-infringement decision and for the reasons I have just given that is
14 simply not the case.
15 I should perhaps turn to really the high point of Mr Green's textual analysis of the letter
16 which is an analysis of the passage upon----
17 THE PRESIDENT: In *BSkyB* then hypothetically part of the Decision is Judicially Reviewable, and
18 part of it is appealable to the Tribunal, is that so?
19 MR PERETZ: Yes, subject to the caveats which I would have thought to go---
20 THE PRESIDENT: Subject to the caveats you---
21 MR PERETZ: That would be the analysis. But with respect that result follows from the fact that
22 there are two complaint rejection Decisions that are subject potentially to two forms of
23 challenge. There are inevitably going to be mixed Decisions, whatever test one adopts once one
24 has accepted that, which in a sense are mixed, which involve conclusions going either way, and
25 the existence of mixed decisions should not perhaps affect where one draws the line.
26 If I can turn to the 9th August Decision letter itself to look at the passage relied on
27 heavily by Mr Greed, dealing with predation.
28 THE PRESIDENT: Yes.
29 MR PERETZ: I have extracted mine, but I gather it is in volume 2. I might perhaps start by
30 reminding the Tribunal that at paragraph 91 of the *Freeserve* Decision that the Tribunal
31 cautioned against subjecting Decision letters to too precise a textual analysis. In our submission
32 that has formed a significant part of Mr Green's case. But looking at the paragraph dealing with
33 predation under the heading "Predation", on page 10, the thrust of Mr Green's submission was
34 that the passage, the words beginning "But we...", "But we do not think that these are instances
35 that could support the conclusion that Wiseman had engaged in predatory behaviour", were in
36 his submission a finding that there was no evidence of predatory behaviour and hence a non-
37 infringement Decision.
38 In our submission those words simply do not bear that meaning when read fairly and in

1 context. What is being said here is that the instances of pricing below total cost identified were
2 insufficient to provide sufficiently robust support to the *Napp* standard for the proposition that
3 there would be predatory behaviour.
4 MR PERETZ: Yes, and the context in which that sentence appears is, of course, following the
5 previous paragraph which in a sense qualifies the paragraphs that follow, and certainly in the
6 light of which the paragraphs that follow should be interpreted to the effect that in general
7 terms the evidence gathered during investigation was not sufficiently persuasive as to the
8 existence or absence of an infringement.
9 Of course, an allegation of predatory pricing, particularly one involving pricing below
10 total cost, but above average variable cost would involve a second hurdle - the hurdle of intent
11 to exclude - and it is in the second sentence there beginning "Furthermore..." that it turns its
12 attention to that second hurdle.
13 THE PRESIDENT: And do we read that in the same way as though the Director is saying that there
14 may be something pointing in one direction, but there is not enough to prove intent to the *Napp*
15 standard?
16 MR PERETZ: Yes, that sentence also records, laconically but sufficiently, that there was evidence
17 the other way - it refers to "either way":
18 "*Furthermore the investigation did not uncover sufficiently persuasive evidence either*
19 *way of intent to exclude competitors*".
20 So insufficient to prove intent, insufficient to disprove intent.
21 One is strengthened in that construction by the fact that it is simply obviously the case
22 that instances of pricing below total cost are evidence which goes some way towards showing
23 that there is predatory pricing. Obviously there are many other hurdles to be jumped, but it is
24 simply inconceivable that the officials could have meant that evidence of this kind was no
25 evidence at all. There plainly is some evidence tending in that direction.
26 THE PRESIDENT: Well the impression I am getting - correct me if I am wrong - is that the
27 Director's general position, simplifying a little, is that there was some evidence but not enough
28 for a conviction---
29 MR PERETZ: Indeed.
30 THE PRESIDENT: ---therefore he closed his investigation and that is not an appealable Decision.
31 MR PERETZ: Indeed.
32 THE PRESIDENT: That is what it comes to.
33 MR PERETZ: Yes.
34 It is therefore simply not the case that the Director has in some sense mis-directed
35 himself as to what he has done, and rather to his own surprise made a non-infringement
36 decision. There is no positive assertion here that Wiseman has not infringed the prohibition in
37 any of the relevant respects.
38 The final point I need to deal with is the note, not a transcript a note, of the meeting

1 with Dr Mason on 19th June.
2 THE PRESIDENT: That is where?
3 MR PERETZ: I am afraid again I have extracted it. It is tab 24, volume 3. It starts at page 641 but if
4 I can turn to page 652. One simply notes first of all in the third paragraph up "DM" - Dr Mason
5 - simply states "*We are currently minded... but if we remained unconvinced the only fair thing*
6 *we could do would be to make a non-infringement decision*." That is a statement of his current
7 view, expressly. It was not intended to rule out the possibility that a different view might be
8 taken at some later stage. Mr Flynn helpfully refers me to the top of page 653, where again Dr
9 Mason says: "*The only useful next step is for us to decide what we are going to do*." Of course
10 Dr Mason is not a lawyer, and he was not purporting to express any reliable legal advice as to
11 whether the decision that he had in mind, which he expressly observes might not be the
12 decision that was eventually taken, would be appealable or not. The test, as we are all
13 discovering, is not entirely easy to apply.
14 Dr Mason's views as to whether the decision he was minded to take would be
15 appealable is simply irrelevant to the question of whether, as a matter of law, it is appealable.
16 I think, with respect, that is all I wish to say about that note.
17 THE PRESIDENT: Yes, thank you.
18 MR PERETZ: Other than, as I said, to remind the Tribunal that in so far as the precise words have
19 any relevance here it is a note rather than a transcript.
20 THE PRESIDENT: Yes.
21 MR PERETZ: Two very minor points to conclude. First, we are entirely content as a statement of
22 Scots' law with the note prepared by Neil Brailsford QC on behalf of the applicants. There is no
23 difficulty with that, we are content for that to be taken as an accurate statement.
24 A couple of factual comments about the applicants' skeleton which perhaps for the
25 record ought to be corrected. It is probably helpful just to turn up the applicants' skeleton. At
26 paragraph 16 there are two points: under "(a)" it may be relevant to note that the charging of
27 excessive prices found by the Reporting side of the Competition Commission lasts from the
28 period '96 to '98.
29 THE PRESIDENT: A number of these things drop away in the present case.
30 MR PERETZ: Yes, and then on "(d)" it is reported here that the Competition Commission found
31 that there was a seeking and obtaining of an exclusive supply agreement. If one looks at
32 paragraph 2.103 of the full report - I do not intend to take us there - one finds that it is, to put it
33 mildly, not clear that there was a finding that an exclusive supply agreement was obtained.
34 THE PRESIDENT: Yes.
35 MR PERETZ: Then the final point related to the table at paragraph 85, and it sets out the
36 chronology of the investigation. Line 4 - the investigation started on the 26th rather than 16th
37 October, that appears in the 9th August letter. The investigation started when the Competition
38 Commission Report was received, of course, as it was well in advance of publication by the

1 Office of Fair Trading.
2 THE PRESIDENT: So the situation is that he got the Report?
3 MR PERETZ: He got the Report in advance of publication, it was published later in December.
4 THE PRESIDENT: And started--
5 MR PERETZ: And started the investigation at some point after he had received it.
6 THE PRESIDENT: Yes.
7 MR PERETZ: And then, to some extent this is a quibble, but two lines down: "*25th June, 2001*
8 *OFT press release giving Wiseman notice that...*" Of course the press release simply recorded
9 that Wiseman had been given notice that. Wiseman was not given the bad news in a press
10 release.
11 Unless there is anything further I can help you with, that is all I propose to say.
12 THE PRESIDENT: No. Thank you, Mr Peretz. Yes, Mr Flynn?
13 MR FLYNN: Sir, if I may just make a few points to supplement those that Mr Peretz has made. I
14 have been crossing out things in my notes as we have been going along where he has
15 anticipated what I was going to say.
16 THE PRESIDENT: Yes.
17 MR FLYNN: Would it help the Tribunal just to raise again the issue of location---
18 THE PRESIDENT: Yes, please.
19 MR FLYNN: ---because we are hearing two preliminary issues, and that I think was the first.
20 THE PRESIDENT: The situation I think we are in at the moment is that the applicants have a
21 preference for England and Wales, but would leave it to the Tribunal to decide. The Director is
22 neutral but points to various advantages and/or connections with Scotland.
23 MR FLYNN: And Wiseman has a preference for England for the two reasons, one of which has
24 been mentioned which is that if we were to go on appeal on this Judgment, or any other
25 Judgment from the Tribunal in these proceedings, to the Inner House, we would in practice
26 have to instruct Scottish lawyers and that would undoubtedly be an additional and considerable
27 expense for Wiseman, and indeed for the other parties, and we do suggest that that is a
28 consideration the Tribunal should bear in mind.
29 THE PRESIDENT: Yes.
30 MR FLYNN: This is not an allegation of restrictive practices at the Scottish Bar it is simply a
31 practical matter that we would inevitably have to involve Scottish lawyers who were familiar
32 with the practice, procedure, and the law applied by the Inner House - there is just no way
33 round it.
34 The additional point is one that I made at the case management conference, that
35 although it is not possible to foresee all the possible permutations if the Tribunal were to
36 declare itself a Tribunal sitting in Scotland appeals would go then to Scotland. There are, of
37 course, the Judicial Review proceedings started in England, and indeed there is another set
38 raising interlinked issues.

1 THE PRESIDENT: I am sorry, there is...?
2 MR FLYNN: There is another set of Judicial Review Proceedings.
3 THE PRESIDENT: A secondary Judicial Review?
4 MR FLYNN: A second Judicial Review and I believe a second intended application to the Tribunal
5 in relation to the Chapter I Decision, the Director's decision to lay aside the investigation in the
6 Chapter I issue as well.
7 THE PRESIDENT: Is that right, Mr Green?
8 MR GREEN: Yes, it is.
9 THE PRESIDENT: Have you lodged a second Judicial Review?
10 MR GREEN: The second Judicial Review, in order to preserve time it was lodged just before
11 Christmas, and we are hoping that that can be stayed pending a determination by this Tribunal
12 of this issue which will obviously provide some guidance, and then we have to consider the
13 timing of the application to this Tribunal, also in relation to the second----
14 THE PRESIDENT: When does time run out for an appeal to this Tribunal?
15 MR GREEN: 4th February.
16 THE PRESIDENT: Right. Unless you make some special application you are unlikely to get a
17 Judgment out of us by 4th February.
18 MR GREEN: We fully understand that. I do not think we are suggesting you will be able to
19 produce your Judgment by then, but we have to consider whether or not to put in a
20 precautionary application, or whether there is any exception or application we make for an
21 extension of time before we can put one in. We have to consider whether that is possible, but
22 we are not inviting the Tribunal to rush its Judgment on this simply to take account of our
23 administrative problems on the second application.
24 THE PRESIDENT: Well I think we just leave that where it lies. There are certain limited
25 possibilities for extending time.
26 MR GREEN: We recognise that is our problem.
27 THE PRESIDENT: Yes, so Chapter I, which we have not really thought about today----
28 MR FLYNN: Well we cannot.
29 THE PRESIDENT: ---which we cannot, but it is floating around in the main application, as it were,
30 as one of the issues---
31 MR FLYNN: Absolutely.
32 THE PRESIDENT: ---is perhaps getting a bit closer in time than we thought. We are reminded that
33 that is an upcoming, live issue.
34 MR FLYNN: That is right, Sir, and it is possible, for example, if Express lose here and appeal and
35 go to Scotland, and lose on appeal in Scotland, then the Judicial Review activates there could
36 be an appeal by any party from the outcome of that Judicial Review, and you could have two
37 appeal courts making decisions that are hard to reconcile, for taking a different view of what it
38 is the Director has decided, or the basis on which he has decided it, and I am not going to

1 indulge in regulatory, or intervener's stargazing, but one can just see that there are lots of
2 possible complications and those, in my submission, are points that the Tribunal can and should
3 take into account in making up its mind under Rule 16. It seems to me that those are
4 considerations which the Tribunal can take into account, and in our submission they should
5 weigh heavily.
6 THE PRESIDENT: Just before we leave this I want to have a quick look at Rule 16 to remind
7 myself what it says. [**Pause for reading**] "*All matters which appear to it to be relevant*", so
8 "*principal place of business",* and where the conduct took place are the particular matters
9 mentioned, both of which would tend to point to Scotland, I think, though it is true that Express
10 is an English company. Wiseman is registered in Scotland, is that right?
11 MR FLYNN: Both Wiseman Companies are Scottish companies.
12 THE PRESIDENT: Yes. And Scotland is Wiseman's principal place of business, is it not?
13 MR FLYNN: Yes, it is, although it is spreading Southwards! [**Laughter**]
14 MR CLAYTON: Claymore is a Scottish Company.
15 THE PRESIDENT: But you say "Having regard to all matters which appear to it to be relevant" that
16 includes the considerations you are putting to us at the moment?
17 MR FLYNN: Yes.
18 THE PRESIDENT: Yes, I see.
19 MR FLYNN: And there is also the suggestion in Part 3 of the Rule that the Tribunal can have
20 regard to matters of cost and convenience, and so forth. I recognise that is for a different
21 purpose but it is an indication of the things which a Tribunal can take into account. Of course,
22 we recognise that in many ways this is a Scottish case, there is no doubt about it, Wiseman is
23 not trying to get away from that or in any way ashamed of it, it is simply a practical matter to
24 which I have referred.
25 MR GRANT-HUTCHISON: But is this not a problem that is really inherent in having UK
26 jurisdiction, when one party can always choose to use a Judicial Review in another country? It
27 will happen in every case.
28 MR FLYNN: Well, Sir, yes it is. I think it is inherent, and one of the issues the Tribunal is
29 grappling with in the whole of this case is the relationship - the perhaps uneasy relationship -
30 between the Tribunal's jurisdiction and the jurisdiction of the administrative court, and it is
31 perfectly open to Express to bring these Judicial Review proceedings in Scotland, that could
32 also have happened, and the Director would not have been in a position to complain about it.
33 But there are cases where matters that have occurred in Scotland, regulatory matters that have
34 occurred in Scotland, have been judicially reviewed in the administrative court here and it is
35 just something that happens.
36 THE PRESIDENT: What have you got in mind, Mr Flynn?
37 MR FLYNN: Well, I have, in fact, an example of the *Scottish Electricity* case, and I could make
38 copies available to the Tribunal - I can hand them up now or leave them later. The point is the

1 point that I have made, that regulatory scrutiny in Scotland, nevertheless being determined by
2 the English administrative court.
3 MR GRANT-HUTCHISON: Or perhaps more accurately in this case being determined by one party
4 choosing to do a Judicial Review in one country? It is a form of forum shopping perhaps?
5 MR FLYNN: Well I would not describe it as "forum shopping", sir, in the sense that it is open to
6 the Tribunal to go either way. Ultimately the decision on this point is one for the Tribunal, but I
7 am simply suggesting considerations which the Tribunal might wish to take into consideration
8 to outweigh what otherwise might point pretty clearly in the direction of Scotland.
9 MR GRANT-HUTCHISON: Indeed.
10 THE PRESIDENT: In the *Scottish Electricity* case you have in mind, is there a jurisdictional point
11 taken in that, or is there---
12 MR FLYNN: No.
13 THE PRESIDENT: No, it is just something that happens?
14 MR FLYNN: It is just something that happens.
15 THE PRESIDENT: Well it would probably be useful for you just to hand it in to the Registrar and
16 we will read it. Yes?
17 MR FLYNN: Turning then to the other preliminary issue, the admissibility point. Our submission
18 is that the approach is that in *Freeserve* and *Bettercare* which involves the Tribunal looking at
19 all the relevant facts to see what it is that the Director has actually has actually decided, and as
20 Mr Peretz has said not indulging in too close a textual analysis, but look at all the facts in the
21 round. But what the Tribunal is not considering is what the Director could have decided, or has
22 decided in other cases, or possibly what it might have indicated to Express that it was
23 proposing to decide.
24 Our submission, in short, is when you have carried out that exercise, particularly by
25 putting the two letters of 9th August in their context, the reality of the position is that the
26 Director suspected an infringement. He says today he still has grounds for suspecting an
27 infringement, and he plainly believes that they are reasonable grounds. I think Mr Green is
28 reading too much into it to say that by the fact that the assurances fell away, as they were
29 always intended to do should the Director's inquiry come to an end, that he is thereby
30 disclaiming any possibility of entertaining a reasonable suspicion for infringement.
31 So at the date of 9th of August letters he considered that, despite the inquiry he had
32 carried out, he could not prove the existence of any infringement to the *Napp* standard - to the
33 high standard that the Tribunal properly requires. What he has decided to do is to lay aside his
34 investigations and not proceed to a decision.
35 We say, and it is echoed by Mr Peretz today, that this is broadly analogous to a
36 decision not to prosecute in criminal law, and it is a step which is open to the Director at any
37 time, short of issuing a Decision. So it could happen - it did not in this case, but it could happen
38 - even if he had issued a Rule 14 Notice. He could issue a Rule 14 Notice and then take the

1 view that he was not going to proceed to a final decision for whatever reason.

2 In doing what he has done the Director has not taken a decision, he has not come to the
3 view that there is no infringement. In reality Express know this, as their letter to the Press,
4 which we exhibited through our skeleton argument, shows. As I understand the position it is
5 exactly the same in *BSkyB*, on which Mr Green was placing some reliance. I adopt what Mr
6 Peretz has to say about that short summary of the Director's position, and obviously it is only a
7 summary, but the Tribunal will remember there are three bullet points.

8 THE PRESIDENT: Yes.

9 MR FLYNN: One says "borderline", one says "Not enough evidence for an infringement" and one
10 says "No infringement", and then it concludes that BSkyB has not been found to be in breach of
11 the Chapter II prohibition. Exactly the same could be said here. The Director could have made
12 exactly the same statement, Wiseman has not been found to be in breach of the Competition
13 Act. That is clearly saying "I have not made a positive infringement decision", but it is reading
14 too much into it to say necessarily, and without looking at the context, "I have made a non-
15 infringement decision".

16 So Wiseman submits that this position that I have just sketched in, and really it echoes
17 what Mr Peretz has said, and this is very important, is completely different from what happened
18 in *Bettercare*, and particularly in *Freeserve*, because in those cases reading the letters and
19 putting them in their context, it is plain that the Director was in no doubt that there was no
20 infringement. That was the view he reached. It was clear to him that he would have taken the
21 position, indeed he thought the only position he was taking was that there was no scope for
22 beginning an investigation under s.25. He had a look and he did not have a suspicion. That was
23 particularly clear in *Freeserve*, he thought there was no evidence whatsoever of any possible
24 infringement.

25 In my submission he does not have to make a positive assertion in his case closure
26 letter, or press release, or whatever, that there is an infringement, you have to look at the whole
27 thing in context. But this case is completely different, where he suspected an infringement, he
28 believed the s.25 threshold had been passed, he still considers that there is evidence pointing in
29 the direction of an infringement, as his closure letters make absolutely clear and his position is
30 he has not been able to gather enough evidence to be sure of issuing an infringement decision
31 convicting Wiseman to an extent that would pass muster in this room on appeal.

32 The vital issue, it seems to me, that the Tribunal should grapple with is whether the
33 Director is obliged to reach a final view in these investigations. In my submission he is not.
34 Like any prosecuting authority and in indeed, in *Bettercare* and *Freeserve* the Tribunal had
35 recognised that he has a discretion not to proceed to a decision.

36 THE PRESIDENT: The view he has reached, on the way the argument has gone so far, is "What I
37 have got is not enough to prove an infringement, and I do not think it useful to carry on beyond
38 this stage".

1 MR FLYNN: And "I am not going to devote my limited resources to that".
2 THE PRESIDENT: Because he says, for example, in the Press release, that "further investigation is
3 unlikely to lead to a finding of abuse." So he is not quite saying it in so many words, but the
4 general impression is that he is trying to look at everything he can reasonably look at, and
5 although there may be other things he might look at, I suppose, he has really said "well I have
6 looked at an awful lot one way and another - this thing has been going on for a long time - I
7 have not now got enough and I am going to stop".
8 MR FLYNN: That is the position, and that in my submission should not be equated with a decision
9 that there is no infringement, regrettably enough from Wiseman's point of view.
10 THE PRESIDENT: Yes, well that is the issue in the case.
11 MR FLYNN: Well, the issue in the case is whether he can decide not to decide, which is---
12 THE PRESIDENT: Well, has he decided not to decide? Or has he decided that there is not sufficient
13 evidence? It is one thing to say "I cannot decide whether this evidence is sufficient or not, and I
14 am going to decide not to decide whether it is sufficient", is one possibility. Another possibility
15 is that "I do decide,and what I decide is although there is some evidence there is not enough
16 evidence".
17 MR FLYNN: There are two ways the case is being put, I think. One is, having done what he has
18 done he has, by necessary implication, taken a decision that there is no infringement, and to get
19 to that position I think that he is obliged to "*acquit* if he cannot convict" - to use the language
20 used by Mr Green earlier - and there is no such obligation. There is no entitlement to a decision
21 under the Act, there is no legal obligation on him to reach that position.
22 On construing what he has written with what he has said, and the record in the round,
23 my submission is that it is not tenable to say that in reality the view he has reached, however he
24 has expressed it, is that Wiseman has not infringed. So which ever way the case is put it seems
25 to me he is entitled to say "I have not got enough. I think there is something pointing in the
26 direction of an infringement, I have not got enough and I am going to stop there".
27 THE PRESIDENT: Yes.
28 MR FLYNN: Mr Green says two things: one is that that means, in effect, he has decided that there
29 is no infringement, and I say as a matter of construction that is an unreasonable conclusion; or,
30 by definition as a matter of law that must be equated with an acquittal decision in court, or he is
31 obliged to come to the sort of view that a Civil Judge is obliged to come to.
32 THE PRESIDENT: Mr Green, I think, is submitting that if the Director forms a view at a given
33 stage that the evidence is insufficient to produce a finding of infringement to the *Napp*
34 standard, that is a decision as to whether Chapter II prohibition has been infringed within the
35 meaning of s.46(3)(b). That is his submission, but the words "whether Chapter II prohibition
36 has been infringed", are wide enough to encompass a situation where the Director forms a view
37 that there is insufficient evidence to prove it.
38 MR FLYNN: That is the alternative argument which I think was not mentioned today, although is

1 in the skeleton. The Statutory construction----
2 THE PRESIDENT: No, this is not the maybe/maybe not argument, that is a different argument. He
3 is saying that a conclusion that I cannot prove an infringement for insufficient evidence, if that
4 is what we have here, is a decision as to whether the Chapter II prohibition, i.e. had not been
5 infringed because there is insufficient evidence. That is the argument.
6 MR FLYNN: The answer on this side is that he is entitled to say "I do not know whether it is or it
7 is not". That is what it says, and there is no basis in law for the Tribunal having to read it as a
8 yes/no, red light or green light - it can be amber and this is amber. We are in the amber zone.
9 THE PRESIDENT: Yes?
10 MR FLYNN: To summarise that, I do submit that the crucial distinction between the Director as a
11 prosecutor and a Judicial authority.
12 THE PRESIDENT: Yes.
13 MR FLYNN: He has a wider choice and a wider range of options open to him than conviction or
14 acquittal, or the Scottish non-proven verdict. He can do more than that. He is entitled simply to
15 lay down tools.
16 THE PRESIDENT: Yes.
17 MR FLYNN: In so far as Express's case is that the letters do not reflect the position taken by the
18 Director, in that the Director's position is in reality that expressed by Dr Mason in the meeting,
19 for which we know of their note, whilst disclaiming any intention to allege bad faith, they do
20 say you have to look behind equivocal wording of the letter or wording that is crafted to fit
21 within the corners of *Bettercare*, to find out what the real reasoning is.
22 In fact, Mr Peretz has pointed out by quoting from their note of the meeting what Dr
23 Mason apparently said is rather more equivocal than is ascribed to him anyway. He is much
24 more open minded about what actually happened. But, in any event, we support the Director in
25 saying that whatever Dr Mason may, or may not have envisaged at that meeting, the question is
26 what decision ultimately did the Director take, and you cannot regard 9th August letters, nor
27 can you selectively quote parts from it, saying "This is the real Decision and the rest is
28 explanation of the Decision." I think it is described as "after the event rationalisation". This is
29 not after the event, this is the event itself.It is all part of the decision. These letters are part of
30 decision, the context of which the Tribunal has to review.
31 On the extensiveness and exhaustiveness of the inquiry, our submission is that that is
32 simply not a relevant issue. The question the Tribunal has to answer is what conclusion did the
33 Director come to at the end of it? Precisely the same questions in Freeserve, and there was a
34 very short or practically no investigation.
35 THE PRESIDENT: Yes.
36 MR FLYNN: But the fact there is a long inquiry here is, in our submission, an indication of the
37 difficulty the Director has had, the difficulty of the issues he has been looking at and those
38 same issues have led to the Competition Commission split down the middle which, in our

1 submission, provides a useful reality check or sanity check as far as assessing the credibility of
2 the Director's position that he has not been able to make up his mind whether or not there is
3 sufficiently convincing evidence of an infringement. That supports the Director's analysis and
4 not Express's.
5 The end of the road test is not a workable test for the Tribunal to apply. How do you
6 know when he has reached the end of the road? How do you know when he has gone 30 per
7 cent. down the road, or 50 per cent. down the road? Mr Green was talking in percentage terms
8 earlier. There were plainly other things the Director could have done - it was suggested to him
9 by Express at the 9th June meeting as well as in the application as I understand it. There were
10 other things he could have done, he has decided not to do them, and he has decided that it
11 would not have been reasonable, he is not going to devote his resources to that.
12 In fact, the situation we have is not that far removed - Mr Green would not agree with
13 me, but it is not that far removed - from the situation described in his skeleton in paragraph
14 72.5 which I will read, if that is easier than you turning it up. In his list of Decisions the
15 Director may take that arguably are not redeemable, he says: "The Director may examine a
16 complaint and consider the issues to be on their face worthy of further investigation. After a
17 preliminary investigation it becomes evident that pursuing the case would involve substantial
18 additional investigation, and the Director concludes that, as a matter of priority and the optimal
19 use of finite resources he does not wish to continue. He accordingly closes his file".
20 Leaving aside words like "preliminary" and "substantial additional" that is more or less
21 what happened here. I say to Mr Green that "preliminary" has no technical meaning here -
22 preliminary to what? Preliminary to issuing a decision? Preliminary to issuing a Rule 14
23 notice? Anything can be preliminary. Preliminary is not a measure of degree, it is more like
24 when it happens in the sequence of events, and what has happened here is that after an
25 investigation of whatever length, the Director has reached the view that he, as a matter of
26 priority or the optimal use of resources, he is not going to continue, even though he thought
27 there were some merits and it was worthy of some investigation.
28 Mr Peretz has given the Community case law examples so I do not need to go into
29 those, but *GEMA* and *Tremblay* for example, was a case where the Commission laid aside an
30 investigation after about ten years after the matters I think originally raised in the *GEMA* case -
31 copyright issues. The Commission had gone a very long way down the line but simply
32 discontinued without taking a formal decision. So the length, or whether it is preliminary,
33 which I suggest is a misnoma, is irrelevant, and that is what you said in *Freeserve* [para 100]
34 which is quoted in full in paragraph 76 of Mr Green's skeleton. The relevant fact is that he has
35 ended his investigation and the question is on what grounds, and why?
36 I am going to pass over Mr Lawrie's letter and the assurances, which have already been
37 mentioned. The assurances were simply an agreed way forward to avoid the necessity for the
38 Director taking measures under s.35 and they fall away when the investigation is closed, in our

1 submission, irrespective of the state of his mind as to what he suspects.
2 I am also not going to spend time on the civil rights' arguments, I entirely agree with
3 what Mr Peretz has to say. It is perverse of Express to seek a decision which would actually
4 make it more difficult for them to exercise those rights, and I say that, having gambled by
5 going down route A complaint route, that obviously implies a risk that it will not come up with
6 the answer they want, and the fact that makes it more difficult for them if they take route B in
7 their civil proceedings is just the way it is. It is not affecting their civil right.
8 Sir, our submission is that the Tribunal must disclaim jurisdiction in this case, and the
9 matter should go over to the administrative court.
10 On a couple of the wider issues that the Tribunal had raised, the split jurisdiction
11 between the Tribunal and the administrative court - our principal submission is that whatever
12 the rights or wrongs or the sense of that, that is how the legislator intends it to be, and Express
13 notes that the Tribunal is a creature of Statute, it does not have inherent jurisdiction. It has to
14 take the jurisdiction that has been conferred on it. It may not be sensible in relation to mixed
15 decisions such as BSkyB may be. The Tribunal may well wish to express views. They have the
16 Hansard excerpt that we attached to skeleton shows that there is a relatively simple mechanism
17 for the respective roles to be adjusted. We are where we are, if I can put it that simple way.
18 In any event, Judicial Review is not to be dismissed too lightly. We rather anticipate
19 that Express's tune will change as to the scope and utility of Judicial Review, should the matter
20 come before the administrative court in all its murkiness.
21 Mr Peretz has also drawn attention to a passage I was going to draw to your attention in
22 the *Percival* case, that shows, contrary to what Mr Green said at paragraph 64 of his skeleton,
23 that *Percival* is not to be regarded as typical, because what the court there says there is a whole
24 variety of decisions in which decisions not to prosecute can be reviewed and we are not laying
25 down hard and fast rules as to what the standard of review should be. In the version of the
26 report which is in our bundle of authorities, at pages 340H to 341C.
27 On standard of review, which the Tribunal indicated was an issue that it might wish to
28 be addressed on, if I may, Sir, it seems to me that this is better taken should we go into a second
29 phase in these proceedings, but I would observe that any such review, should this application
30 be declared admissible, inevitably is going to be bedeviled by the fact that the Director did not
31 think that he was issuing a non-infringement decision and did not reason it to the extent that he
32 would have done if he had. That is going to make life extremely complicated. It is not the sort
33 of decision that Dr Mason apparently envisaged should the Director come down that way. It
34 seems to me in those circumstances likely that the Tribunal is going to have to remit on the
35 basis that it is not properly reasoned, or is in some other way defective. It is going to have its
36 work cut out to carry out any kind of full merits review.
37 THE PRESIDENT: Yes.
38 MR FLYNN: So, Sir, nothing about the alternative argument which we flagged and is in our

1 skeleton. May I say on Wiseman's behalf we do not respond to the allegations that have been
2 made by Express in these proceedings, and elsewhere, but Wiseman's view has always been
3 that if Express are losing money in Scotland that is because of the business model that they
4 have chosen and the analysis of that is to be found in the report of two members of the
5 Competition Commission, particularly paragraphs 2.18, 2.134 and 2.146 which we commend to
6 your reading.
7 In summary, Sir, the Director has not, in fact, reached a non-infringement decision.
8 There is no reason in law to say that he has reached such a decision because he is not to be
9 equated with a Judicial authority.
10 THE PRESIDENT: Thank you very much. I think we will rise for five minutes.
11 [**Short break**]
12 THE PRESIDENT: Yes, Mr Green. I think it is for you in case you have any final observations. We
13 have no questions we want to put.
14 MR GREEN: I have a relatively small number of observations. I hope I will not be more than ten
15 minutes.
16 THE PRESIDENT: Yes.
17 MR GREEN: Sir, you put to Mr Peretz a summary of the test in *Bettercare* and *Freeserve*, which
18 we understand comes from paragraph 96 of *Freeserve* in which the Tribunal said that "If, when
19 rejecting or closing the file on a complaint, the substance of the matters viewed objectively..."
20 and these are the crucial words "...is that the Director has decided, either expressly or by
21 necessary implication, that on the material before him there is no infringement of the Chapter II
22 prohibition, then he has taken a decision".
23 Now, Sir, your formulation of the issue as to whether the Director in his decision must
24 be viewed as having concluded that on the evidence there is insufficient to meet the *Napp*
25 standard falls squarely within the definition of an appealable decision in paragraph 96. One
26 does not have to reformulate your articulation of that principle to any great degree for it to fall
27 squarely within the rubric of paragraph 96. That is precisely what we say occurred in this case,
28 the Director concluded - at least in relation to price discrimination and exclusive supply
29 contracts - there was insufficient evidence. He went further, in relation to predation, and I will
30 not go over that, but there is a relevant factor also from *Freeserve* paragraph 88, which also
31 bears upon the BSkyB point, and Mr Peretz's submission----
32 THE PRESIDENT: *Freeserve* paragraph 88?
33 MR GREEN: 88, and Mr Peretz's submission that on the basis of BSkyB part could go to the
34 administrative court, and part could go here. There, the Tribunal - and I am referring to
35 paragraph 88 - said: "
36 *In our view it would be highly surprising if in one and the same document a conclusion*
37 *to the effect that the material before the Director does not provide evidence of anti-competitive*
38 *behaviour signifies in one part of the document that the Director has taken appealable decision*

1 *that means something different in another part of the document. That respectively seems to us*
2 *to be contrary to commonsense*."
3 Extending somewhat from that, if the Director has found no abuse then that poisons or
4 taints any other finding that he has made, because it would be an extraordinary consequence if,
5 on predation, the issue came to the Tribunal but on the closely related issues of price
6 discrimination on exclusive supply we were forced to go to the administrative court. That is an
7 end result which we would view as extremely undesirable, and a very unfortunate one for the
8 Tribunal to be forced to find.
9 But our case does not just turn on the standard of proof and the explicit statement in
10 relation to predation. We do rely upon the combination of factors which we say affect the
11 substance. This brings me to the point made by Mr Peretz and Mr Flynn as to the extent of an
12 investigation. We simply submit that on the facts of this case the Director did come to the end
13 of the road. There really cannot, sensibly, be any doubt about that given the length of the
14 investigation and the steps, and importantly what he was able to conclude about product market
15 and cost structures, prices below cost structures. When one simply examines what he did
16 conclude, it is plain that he really had come to the end of the road, and that is why he was able
17 to say that there were no further steps that realistically he could take which would enable him
18 to find abuse, it is because he got to the end of the road.
19 This case is really quite different from the case where the Director moves a third or a
20 half of the way down the road. In those cases he may genuinely be able to say "I don't know
21 whether further effort would enable me to take a decision or not take a decision, but for other
22 policy related reasons I am downing tools". His position here was that no further effort would
23 generate sufficient evidence to satisfy that *Napp* standard. In some respects that is identical to
24 the *Freeserve* case where the Director said "Having carried out a preliminary investigation I am
25 quite convinced that no further effort will enable me to change my mind". The question is has
26 he got to that point? That is the relevance of the extent of any particular investigation.
27 I pick up a number of short points made by Mr Peretz first of all. So far as the civil
28 consequences of the Director's decision can I just ask you - not now but later - to look at our
29 skeleton paragraph 36(c) and 65. What we say is that if the Director takes a decision either
30 way, either breach or no breach, that does trigger *prima facie* the consequences set out in s.58
31 of the Act, namely, that both as between the parties and as between third parties, the High
32 Court is bound, in the absence of an application to the court, to ignore the findings of the
33 Director. So a finding either way does *prima facie* have immediate civil consequences, and
34 those cannot be ignored.
35 It is different in a case where no decision has been taken and as to that if there is no
36 decision such that there can be no appeal then what we say simply is that it is almost inevitable
37 that in a case such as this Mr Flynn would be standing there saying "Look, the Competition
38 Commission could not make their minds up, the Director General could not make his mind up -

1 how on earth is Express and Claymore going to be able to satisfy a standard of proof in this
2 case when two specialist Regulators, after four to five years investigation have been throwing
3 their hands up in despair? That is the consequence which applies when you have had a lengthy
4 regulatory investigation where the Regulators say in despair "We know not which way to go.
5 Take it to the High Court if you dare". It is a deeply unattractive position but we accept that in
6 principle it is a different situation to that which arises when a formal decision is taken of breach
7 or no breach which then does trigger the s.59 consequences.
8 One of the relevances of that does lead into Article 6 of the convention.
9 THE PRESIDENT: You say this has triggered s.58?
10 MR GREEN: We say it would do, yes. We say it is a decision of non-breach and therefore it
11 triggers a s.58 consequence. If we are wrong then in a sense Mr Flynn has the powerful
12 prejudice point to make in the high court that two Regulators threw their hands up in despair,
13 how on earth is the poor, benighted High Court Judge to resolve the matter in those
14 circumstances, but that is a different point.
15 THE PRESIDENT: Yes.
16 MR GREEN: So far as Judicial Review is concerned, and *locus standi*, there are two issues which
17 have to be separated. The first - and I do not think there is any disagreement between the parties
18 on this - there is the jurisdiction of the administrative court where there has been no decision as
19 a collateral or ancillary one, and it is simply the court reviewing the decision of the Director not
20 to take any decision. The necessary consequence of that is that if the applicant succeeds in the
21 administrative court the matter is remitted to the Director for him to reconsider possibly
22 whether or not he should retake the Decision which could then come to you. It does not
23 necessarily mean that it will ever come to you but it is one of the reasons why, on this collateral
24 or ancillary jurisdiction, it really is a very sterile exercise, or at least risks being so. That is the
25 situation you have to grapple with on the preliminary issue.
26 So far as a merits' review is concerned, that is a quite different issue, but I do in that
27 context just wish to ask you to look at the Court of Appeals' observation on the problems which
28 the administrative court confront in the PPRS case. I did not show you the Court of Appeal this
29 morning---
30 THE PRESIDENT: No.
31 MR GREEN: ---but in the context of my learned friend's submissions I would ask you to look at
32 paragraphs 34 and 35.
33 The Court of Appeal's Judgment, after a very lengthy appeal was that the issue could
34 not really be resolved, and really Judicial Review was an inappropriate forum for determining
35 complex issues such as this under Articles 28 or 81, and really it all ought to go to the European
36 Commission.
37 THE PRESIDENT: Where are you?
38 MR GREEN: Paragraphs 34 and 35, which is: "*There is another reason why the relief sought*

1 *should not be granted. Judicial Review is not the most convenient means to consider the*
2 *legality of the 1999 scheme. As we pointed out a voluntary scheme has existed since 1957.*
3 *Modulation first occurred when the first price reduction was required in 1983 and it existed in*
4 *the 1993 scheme, and in theory it can result in the detrimental effect and/or a beneficial effect*
5 *on parallel imports. There was some evidence as to whether the modulation has hindered*
6 *parallel imports but it is not possible to know from that evidence whether there has been a net*
7 *detrimental effect over the years since 1983. However, the evidence does show that the United*
8 *Kingdom market share of parallel imports moved from 3 per cent in 1994 to 7 per cent 1998 to*
9 *10.5 per cent by September, 1999 and to 12.4 per cent by August 2000. The appellants'*
10 *submissions were based upon theory but what actually happened over the years could throw*
11 *light upon the potential effect of the 1999 scheme. An investigation into the effect of the PPRS*
12 *scheme since 1983 would be difficult if not impossible in Judicial Review proceedings with only*
13 *the present parties involved. It could, however, be done by the Commission. This we believe is*
14 *the appropriate Body to investigate the legality of the 1999 scheme and if necessary take*
15 *action.*"
16 It is relevant also, when considering the appetite of the administrative court for these
17 sorts of cases, to bear in mind paragraph 38 where the Court of Appeal respectfully disagreed
18 with the conclusion of the High Court that there really could not be a restriction of competition
19 flowing from the PPRS, notwithstanding that they plainly had these lingering doubts when they
20 used that phrase, they still considered that Judicial Review was an inapposite route for
21 determining complex, economic questions.
22 That is not strictly relevant because it is dealing with the substantive merits, but it is
23 certainly relevant to the policy issue, should this Tribunal be taking a broad yet realistic view of
24 its jurisdiction so as to minimise---
25 THE PRESIDENT: I have not fully mastered yet, Mr Green, what exactly is going on in this case,
26 but I think the allegation was that there were breaches of what is now Article 28 [formerly
27 Article 30] and Article 81 [formerly Article 85]----
28 MR GREEN: Yes.
29 THE PRESIDENT: ---that those allegations involved effectively factual assertions.
30 MR GREEN: Yes.
31 THE PRESIDENT: And both Thomas J. in the court below and the Court of Appeal are uneasy as to
32 whether that sort of factual economic investigation is really one that can be undertaken in the
33 context of the Judicial Review?
34 MR GREEN: Yes, that is right.
35 THE PRESIDENT: That is what has happened here?
36 MR GREEN: That is indeed it, yes, and the court was careful not to exonerate the Secretary of
37 State, but they were just deeply uneasy about the administrative court and then the Court of
38 Appeal having to grapple with issues of an economic nature such as this.

1 THE PRESIDENT: Yes. I do not know if it is often used, but there are procedures in Judicial
2 Review where you can direct that the action continue as if it were done by writ and order
3 discovery----
4 MR GREEN: Yes, the only occasion I can think of where it happened in the *Factor Dane* damages'
5 case once the matter came back from Luxembourg.
6 THE PRESIDENT: Yes.
7 MR GREEN: The Divisional Court turned the case into a writ action and required the Government,
8 and the plaintiffs, to plead out their case. It happens quite rarely.
9 THE PRESIDENT: Yes.
10 MR GREEN: But it does happen from time to time.
11 THE PRESIDENT: Yes.
12 MR GREEN: The only other point I make in relation to Judicial Review, and I unashamedly make
13 it because it is a pure point of prejudice. It comes out of Mr Flynn's annex to his skeleton. Lord
14 Kingsland in the House of Lords made the point and I think he used the phrase "Judicial
15 Review is no remedy at all", when debating the Enterprise Act. Of course he had to withdraw
16 his amendment in the circumstances of that particular incidence.
17 One stray matter which I wish to refer you to in the context of the suggestion, if indeed
18 there is a suggestion, that the investigation was not complete. In the transcript of the June
19 meeting Mr Davidson [Chief Executive of Express Dairies] put the point to Mr Mason that he
20 has not completed his investigation and it was emphatically rejected by Mr Mason. Pages 653
21 at the bottom, and 654. It is a factual matter which we say is relevant to the extent of the
22 investigation and it confirms what we say is a clear inference to be drawn from all of the
23 evidence that the investigation was - at least to the Director General's satisfaction - completed.
24 The fact that there may, or may not be further steps which somebody else thinks he should take
25 is neither here nor there. The question is whether he thinks he has come to the end of the road.
26 It is a matter for the Tribunal on the assessment of the merits whether he is right or wrong, but
27 the purpose of determining whether he thinks he has sufficient information and evidence to
28 meet the *Napp* standard, what is relevant is his view as to whether he has got to the end of his
29 inquiry and whether any further steps could be productive.
30 The next point I wish to address is the right to a decision. We do not suggest that any
31 party necessarily has a right to a decision. We say two things: first, the question in this case on
32 the basis of a *Freeserve* paragraph 96 is whether in substance the Director actually - whether
33 expressly or impliedly - did take a decision, not whether he has a duty to take a decision. The
34 question is whether in substance he did, and his views on whether he did or did not are plainly
35 not relevant when you are looking at substance, and here the investigation ended and he formed
36 a view which he recorded in his decision that he had insufficient evidence to convict.
37 THE PRESIDENT: Yes.
38 MR GREEN: The second point to make which is in response to Mr Peretz's point that the Director

1 is not a court and therefore not bound to act, again misses the point. The question is not the
2 Director's status, but this Tribunal's jurisdiction and this involves an analysis of the substance
3 of what actually happened. His comment focuses on entirely the wrong exercise. We are here
4 engaged in deciding your jurisdiction, not the Director's duty to act or not act. As I submitted
5 earlier, and I do not think it is controversial, any court or tribunal has a duty to determine its
6 own jurisdiction, which is precisely what we are doing in this preliminary issue.
7 The notion of an implicit decision identified in *Freeserve* recognises that the Tribunal
8 might find an appealable decision when the Director says that he did not take one - that is why
9 one has the notion of an implicit decision in contra distinction to an express decision.
10 On *BSkyB* with great respect, s.5, and the finding of a statement by the Director that
11 there was no breach in all of the three circumstances referred to, we would assume is a
12 reflection of the decision. All we can say is that the decision is due to be on the website shortly
13 and really the best anybody can do is await the decision and if necessary assist the Tribunal, if
14 there is anything to be said, or any variant of the submissions made today. But I must say, I am
15 somewhat uneasy about Mr Peretz making submissions about the scope of the decision without
16 us having seen it, and I do not think he is suggesting that you should take matters on
17 instructions, but we really ought to see the Decision, and in the absence of that all we do have
18 is the summary statement.
19 THE PRESIDENT: Excuse me for a moment, Mr Green, do we know when that Decision may be on
20 the website?
21 MR PERETZ: No, we do not, and of course, it is not entirely in our hands, because the problem is
22 getting the various parties involved to sign-off on confidentiality matters, which is not entirely
23 in the OFT's hands.
24 MR GREEN: The website simply says "In the next few days", but of course that can be open
25 ended.
26 THE PRESIDENT: It has been saying that for some time.
27 MR PERETZ: It could be a while, yes.
28 MR GREEN: We would certainly, if it was out within a reasonable time and it was consistent with
29 the argument we have made - indeed anybody who thinks it is inconsistent - we would think it
30 worthwhile making submissions to the Tribunal, possibly short submissions in writing, but we
31 do not wish to delay the Tribunal in its deliberations. It is an example of what we say the
32 Director's approach is and should be.
33 THE PRESIDENT: Well it will take the Tribunal at least four weeks to finalise its Judgment in this
34 case, so on the assumption that the *BSkyB* Decision will be available in something like that
35 timescale, I think everybody probably has liberty to write to us with any points they wish to
36 make on that Decision if it turns out to be relevant.
37 MR GREEN: We are grateful for that.
38 THE PRESIDENT: We would then have to give the other parties a chance to comment on what was

1 said, obviously. I think within the timescale envisaged for this Judgment that is probably
2 possible, so long as it does not take months and months for *BSkyB* to be sorted out.
3 MR GREEN: Very briefly, on 19th June meeting - its relevance lies in the fact that it is explicitly
4 referred to in the Decision and it is said by my learned friends that the statement of Dr Mason
5 was equivocal, but with respect it was not equivocal. What he said was we are of the view that
6 we should now bite the bullet and make a non-infringement decision. The Director General
7 does not say that the transcript is inaccurate, and of course Wiseman are not in a position to
8 comment because they were not there.
9 A very short point on the decision not to prosecute, and that line of cases. Of course,
10 this is not a precise analogy because in the Competition Act third parties, disappointed
11 complainants have an explicit right to bring proceedings before the Tribunal and there is a
12 mechanism set up for them in s.47 to enable them to do that. Whether that is a satisfactory
13 procedure is an entirely different matter but the important point is that the Act contemplates
14 explicitly third parties and complainants having the right of appeal. It is not suggested that,
15 save in the most exceptional circumstances, that a victim of crime can actually have the merits
16 of the crime determined by the court. All it can do is try and get the prosecutor to prosecute.
17 Two very final points. Can I echo a point that Mr Flynn made about the "what next?"?
18 On the hypothesis that the Tribunal concludes that this is an admissible appeal, the thought has
19 certainly occurred to us as it has obviously occurred to Mr Flynn that the Director may decide
20 that if the Tribunal concludes that his Decision is a non-infringement Decision - whereas he has
21 stated it is a non-decision - he really does not have any reasoning which he can support the
22 Decision on. Now, it is plainly a matter he would have to consider in the light of any Judgment.
23 Can we simply say in relation to that that if the Tribunal is with us on the application and that
24 it is an admissible appeal we would welcome the opportunity to debate with the Tribunal the
25 next steps, and indeed to discuss with the other parties possibly what next realistic steps might
26 be taken and therefore unlike, for example in *Aberdeen Journals* where the Tribunal gave
27 directions as to what should happen after the first hearing, there may be some benefit in the
28 parties having a breathing space to consider the matter more openly with the Tribunal. That
29 obviously is a matter ultimately for the Tribunal.
30 THE PRESIDENT: Yes.
31 MR GREEN: Very finally, can I just add to the confusion over location by introducing a point of
32 law which I have to confess I do not know the answer to but it may bear upon the question of
33 jurisdiction and location. It is this: we are engaged at the moment in a preliminary issue to
34 determine whether you have jurisdiction. We are not engaged in a case where you have decided
35 you have jurisdiction yet. As matters stand we are therefore in a form of limbo.
36 The question arises whether or not any decision that the Tribunal takes now, for
37 example, that it has no jurisdiction could ever be appealable under the Act. That turns upon the
38 meaning of the word "decision" in s.49 and the meaning of "proceedings" in Rule 16. If I could

1 just identify what the problem is: in s.49 of the Act says that an appeal lies on a point of law
2 arising from a decision of an appeal tribunal.
3 THE PRESIDENT: Yes.
4 MR GREEN: The question is: what is meant by "decision". If 'decision' there is defined in terms of
5 s.46 it means an appealable decision. The question which then arises is the decision referred to
6 in s.49 wider than the decision in s.46. If it is then a decision by the Tribunal that it has no
7 jurisdiction could be a decision which is appealed within the meaning of s.49. If it is not, then
8 the normal route for a tribunal which misdirects itself as to its jurisdiction is Judicial Review,
9 because there would then be no statutory route to either the English Court of Appeal, or to the
10 Court of Session. At least the question then becomes a more vexed one, whether it is Judicial
11 Review or whether you can go to the Court of Appeal, there may be answers in some of the
12 tribunals' legislation, but we are begging the question as to whether the process we are engaged
13 in now, and any decision of the Tribunal on our submissions, actually engages the Statutory
14 route of appeal at all.l
15 THE PRESIDENT: I do not particularly have any problem with the idea that a decision of an appeal
16 tribunal declining jurisdiction is the decision of an appeal tribunal within s.49(1). It cannot be
17 the same as a s.46 appealable decision because that is talking about decisions by the Director.
18 MR GREEN: Well that is certainly true, s.46 decisions do not determine the sorts of decisions that
19 the----
20 THE PRESIDENT: There are number of conundrums behind it, are there not? If we decided we had
21 no jurisdiction how could we decide that we were a Tribunal sitting in Scotland, or anywhere
22 for that matter?
23 MR GREEN: That is why I have thrown this into the melting pot. If you decline jurisdiction then
24 the issue does not arise. The question is where do we go then to appeal your decision, or
25 whoever is disappointed.
26 THE PRESIDENT: If we accepted jurisdiction, and if we held for argument's sake we were a
27 tribunal - it does not matter for the purposes of the example - if we held we were a tribunal
28 sitting in one or other of the two possible jurisdictions---
29 MR GREEN: Yes.
30 THE PRESIDENT: To which jurisdiction would somebody who disagreed with that conclusion
31 appeal?
32 MR GREEN: The analysis then, assuming the disappointed party would be saying that you were
33 acting *ultra vires*, you were acting outside of your Statutory powers because you had no right to
34 take the appeal. Now, they are saying it cannot be a s.46 decision on the applicant, or the
35 appellant's argument because you have misdirected yourself as to your jurisdiction - you are
36 stepping in when you had no right to step in. At least one of the routes for curbing the excesses
37 of any tribunal is the administrative court. But this is part of the conundrum which, as you
38 rightly identified. Some guidance may come from the Tribunal Rules, although of course this

1 is secondary legislation.
2 THE PRESIDENT: What you are saying is that if we held that we had jurisdiction, somebody who
3 agreed with that could simply say that we were acting *ultra vires*?
4 MR GREEN: Someone who disagreed would have to say that in order to disabuse you of the notion
5 that you had jurisdiction.
6 THE PRESIDENT: Yes. And therefore the question of whether we were English or Scottish would
7 not arise really?
8 MR GREEN: Well until such time as an appellate body had decided you were right, and if they
9 decided you were right, *ex hypothesi* you were right from the moment you so decided.
10 THE PRESIDENT: I suppose the logical consequence on that view is that the party challenging the
11 decision would presumably have a choice of forum?
12 MR GREEN: Well the question is whether they would have a right.
13 THE PRESIDENT: Because the Scottish courts could equally determine our jurisdiction as could
14 the English courts?
15 MR GREEN: Oh yes, by Judicial Review.
16 THE PRESIDENT: Yes.
17 MR GREEN: Query - is the Statutory right of appeal then engaged?
18 THE PRESIDENT: Do we need to decide this?
19 MR GREEN: Probably not at this stage. I have thrown it in just to cause trouble!
20 THE PRESIDENT: Yes.
21 MR GREEN: The only other guidance which one has on the issue comes from Rule 16 which refers
22 to the location of proceedings, but the question is whether the proceedings contemplated are
23 those on the merits and there is some suggestion that they are because the proceedings flow out
24 of the application and the defence, and you only get to that stage in the proceedings once you
25 have accepted jurisdiction, but I think that is less significant because this is subordinate
26 legislation and really the true inspiration, I think, has to come from the Act itself.
27 THE PRESIDENT: We have not, technically speaking, got the defence yet.
28 MR GREEN: No. I have been somewhat facetious in saying that I am not going to provide an
29 answer, I mean my real position is we obviously need to see what your Ruling is and then we
30 would have to consider in the light of that - all parties would need to consider ---
31 THE PRESIDENT: If we held we were a Tribunal sitting in Scotland, would it in theory be open to
32 someone who disagreed with that to appeal to the Court of Appeal in England on the basis that
33 we should have held we were a Tribunal sitting in England?
34 MR GREEN: If you were rightly seized of the matter----
35 THE PRESIDENT: Assuming that s.49 was wide enough, in other words which court does the
36 jurisdiction point go to - either or both, if you see what I mean?
37 MR GREEN: Yes. All I can say is I hope that one does not arise.
38 THE PRESIDENT: Yes, well, thank you.

1 MR GREEN: Unless I can assist you further?
2 THE PRESIDENT: No, thank you. We would like to thank everybody who has helped us today with
3 this case, not only those in the front row, on whom the major burden has fallen, but all those
4 sitting behind them and who have been assisting in the case one way or another. Thank you
5 very much indeed. We will reserve our Judgment until a later date.
6 (**The hearing concluded at 4.15 pm**)
7