IN THE COMPETITION APPEAL TRIBUNAL

Case Nos.1197/1/1/12
1200/1/1/12

Victoria House,
Bloomsbury Place,
London WC1A 2EB

30 November 2012

Before:
MARCUS SMITH QC
(Chairman)

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) SOMERFIELD STORES LIMITED
(2) CO-OPERATIVE GROUP FOOD LIMITED Applicants

-v-

OFFICE OF FAIR TRADING Respondents

- and -

(1) GALLAHER GROUP LIMITED
(2) GALLAHER LIMITED Applicants

- v -

OFFICE OF FAIR TRADING Respondent

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H E A R I N G

APPEARANCES

Mr. Rhodri Thompson QC and Mr. Christopher Brown (instructed by Burges Salmon LLP) appeared on behalf of the Applicants (Somerfield Stores Limited and Co-Operative Group Food Limited).

Mr. Jon Turner QC and Mr. Alistair Lindsey (instructed by Slaughter & May) appeared on behalf of the Applicants (Gallaher Group Limited and Gallaher Limited).

Mr. Daniel Beard, Mr. Andrew Henshaw and Mr. Brendan McGurk (instructed by General Counsel of the Office of Fair Trading) appeared on behalf of the Respondent.

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THE CHAIRMAN: Good morning all. Before you start it might be helpful if I identified a couple of points arising out of the recent submissions. First, thank you all for your written submissions which I have read and taken into account. Looking at the submissions it occurred to me that the statement of general principles that Somerfield identified in para. 56 of its July application were rather very helpful and I was inclined to regard them as such. That said, I also take the point that was made, I think, by all parties that these cases do really turn on their own facts, and this is very much a question of discretion than deciding legal point.

I did want to make one observation on a point that was also made by Somerfield that none of the previous decisions regarding exceptional circumstances bears any close resemblance to the present facts. It did seem to me that whilst that was probably true for four out of the five cases it was perhaps less true of *RG Carter*. I simply say it for these reasons, and there are the following parallels: in this case and in *RG Carter* the OFT issued a decision that was addressed to multiple addressees. Secondly, that decision contained elements that were common to the legal position of all addresses so that the outcome of an appeal by some addresses who appealed might be capable of being read across to the cases of non-appealing addressees. Thirdly, some addresses appealed and others did not; and fourthly, the addresses who appealed were sufficiently successful in their appeals so as to render the decision of the non-appealing addresses and in hindsight a bad one. Query how far that goes, because I do understand that both Gallaher and Somerfield say that their cases fall squarely without *Carter* but it did seem to me that, at least to that extent there was a parallel between these cases and *RG Carter*.

Finally, I appreciate that it was the Tribunal who set the hare running regarding the early resolution agreement and I notice that caused a certain degree of concern on the part of both Somerfield and Gallaher. I want to make absolutely clear that any Judgment that will be handed down will not be taking any position on whether the earlier resolution agreements are or are not capable of being set aside, or whether any penalty can be recovered pursuant to a restitutionary claim; those are not matters for me and I am certainly not inclined to tread on the toes of any other Tribunal that will have to grapple with such difficult questions.

However, it is my sense that to this extent at least the early resolution agreements are relevant. First, they are agreements which brought the proceedings to a contingent close, and by "contingent" I obviously have in mind that a right to appeal was retained by both Somerfield and Gallaher under the terms of those agreements. But in circumstances where

it could be envisaged there were an appeal to be brought it might be successful, so it could be said – I think the OFT probably is going so far as to say this – that by entering into these agreements and by not appealing when it had the chance to Somerfield and Gallaher were quite consciously trading a discounting penalty for the prospects of succeeding on appeal and that is a factor that is relevant to the question of exceptional circumstances.

Finally, I just had one point which I would be grateful if Somerfield and Gallaher could address in their submissions, which is the extent to which the applications stand or fall together.

Reading the submissions it seemed to me that if Somerfield won and succeeded in its application then that would probably read across to Gallaher's position, but that the converse is not true and that if Gallaher succeeded then that was neutral as far as Somerfield was concerned, because Gallaher was suggesting, quite independently of everything else, that it was the subject of a misreading of the decision which is not, as I understand it, Somerfield's case. Again, no need to answer that now, but if, in the course of your submissions you could address that I would be most grateful.

On that basis I think it is Mr. Thompson to start.

MR. THOMPSON: I am grateful, sir, and I am grateful for all those indications. I will not try and deal with them immediately although, having said that I think that the last one probably is common ground and I think that is partly why I am going first because our ground, I think, is adopted by Gallaher, whereas we are not pursuing the first ground that Gallaher pursues.

I hope you have six bundles, which have been recently updated, and you should also have two slim pieces of paper which you do not need to look at now but which I have handed up and I hope will assist as we go along.

THE CHAIRMAN: I have them here, yes, thank you.

MR. THOMPSON: There has obviously been some correspondence with the Tribunal but I am not proposing to go that, and I do not think we have any particular observations about the *Emerson* case, although we are grateful for having brought to our attention, and we not that Lord Justice Mummery, who presided in that case, was also the presiding Judge in *Deutsche Bahn* but it was addressing a different issue.

These are applications brought under Rules 8(2) and 19(2)(i) of the Tribunal's Rules. The applicants ask the Tribunal to exercise its power to extend the time limit for bringing an appeal against the OFT's Tobacco Decision dated 15th April 2010. The standard time limit under the Rules is two months.

The OFT has indicated in correspondence that it takes no issue on a period of almost exactly a year that has no elapsed since November 2011 when a remarkable event occurred and on which Somerfield's application is based. I do not think we need to look at that but there was an exchange of emails and that is at bundle 4, I, p.1549.

The period in dispute between Somerfield and the OFT is thus some 17 months, from mid-June 2010 to early November 2011. The Rules make it clear that an extension of time may be permitted if, but only if, there are exceptional circumstances and that is at bundle 5, J 2, 1641.

There are logically two questions to address: first, are there exceptional circumstances here, and secondly, if so should the Tribunal exercise its discretion to extend time for this appeal? I would submit on the ground we advance the answer to the first question is obviously "yes". The conduct of the OFT that led to the collapse of its defence, and its conduct thereafter do indeed reveal exceptional, indeed, extraordinary circumstances and an extraordinary state of affairs.

So far as the second question is concerned, I submit that this is a rare if not unique case where the policy principles that normally weigh against a late appeal, notably the principle of legal certainty here weigh in favour of a late appeal. That would finally put this whole sorry saga out of its misery. More constructively it would make it finally clear beyond equivocation that the OFT has not established any infringement of the Competition Rules in this case. Any other result would perpetuate a legally incoherent situation.

In addition, it is seriously unfair and wrong as a matter of policy for the UK public authorities to seek to uphold a public law decision and to retain money that was extracted from companies on the basis of that decision in circumstances where, first of all those authorities have themselves publicly admitted that that decision lacked any legal foundation; and secondly, that the basis they now advance in support of the Decision was never put to the addressees of the Decision and has never been the subject of a fair procedure.

I now turn to my core submissions. I can set them out and that will form the structure for the submissions I wish to make. First of all, under the heading "The threshold requirement of exceptional circumstances", that is clearly met. I make four points. First of all, the expression itself should be given its natural meaning. Secondly, and this is the most substantial part of what I will be dealing with, the facts speak for themselves and are truly exceptional. The OFT has acted in a wholly unprecedented, unforeseeable and procedurally unfair way since November 2011 in maintaining the Decision as against Somerfield,

notwithstanding three factors. First of all, it publicly conceded in a formal statement to the Tribunal on 3rd November 2011 that the Decision could not be defended on its own terms. Secondly, the basis on which it subsequently sought to defend the Decision before the Tribunal was a new case that had never been put to Somerfield. Thirdly, the OFT has confirmed that this new case will never be put to Somerfield.

If one just thinks about the second and third limbs of that, that is quite an extraordinary situation, particularly the third one. Imagine if the OFT had pursued this case against Somerfield. Could it have fined us again by reference to the second new case? Could it have retained the money? What it has done here is, instead of doing that, it has ducked out but it has tried to retain the money, and, in my submission, that is a quite extraordinary and unfair situation. It cannot be in a better situation than if it had pursued the money.

Supposing the new case is no good either. Could it really have pursued it, failed, but kept the money? Or, if it had been any good, could it have pursued it, fined us again and still retained the money? In my submission, the whole situation is really ridiculous and unfair.

Thirdly, the case of the Tribunal in earlier cases does not preclude a finding of exceptional circumstances on these facts.

Fourthly, the other cases on which the OFT relies are irrelevant to the question before the Tribunal and so plainly do not preclude that finding. I will primarily look at the *Wood Pulp* and the *Shannon* cases.

Secondly, and this is the second main submission ----

THE CHAIRMAN: Just pausing there, looking at your submission at 1(2)(a), the public concession, suppose the OFT had not made a public concession but had just pushed on regardless and been, as no doubt it would have been, the subject of a swingeing finding at the end of the day, that it was wrong, would you say that made any difference at all?

MR. THOMPSON: It would have been a different situation entirely, yes, it would have been a finding by the Tribunal on the merits. There was no finding by the Tribunal on the merits here. It was a finding by concession. Indeed, that is the entire basis for why we say it is exceptional. It is true that we took the risk that we did not appeal and somebody else would succeed. We did not take the risk that the case that the OFT would rely on would be a different case to that that had been put to us.

Secondly, the Tribunal should exercise its discretion in favour of an extension of time, and we say that the exceptional circumstances are a good positive reason why. Then in terms of the factors that might otherwise count against it, we make three points. The issue of legal certainty exceptionally favours an extension of time in these circumstances, and we make

the point that we have dealt with in some detail in our reply, that the UK statutory regime is legally incoherent for the Decision that has been set aside by concession and in toto, or completely, remains legally binding on non-appellants, and that is most acute in relation to follow on factions. I am not saying that is going to happen, but it raises an important point of principle.

Next, and this is relevant to the particular facts here, the OFT's legal stance since November 2011 maintaining a Decision in force against Somerfield that is based on a theory of harm that the OFT has, itself, publicly abandoned is legally incoherent. A particular authority that is highly relevant to this submission is the approach of the OFT itself and the Tribunal in the *Mastercard* case, where I think it was taken for granted that he OFT could not simply leave the decision in place, for example, against a bank that had not appealed, when it had completely abandoned the basis for that decision.

Secondly, we would say there is no 'floodgates' risk, and that is because the two factors that apply in full force, there have to be exceptional circumstances, and we say that is satisfied on the facts. Likewise, the question of whether an extension is justified in an individual case would remain a matter of discretion.

Then finally, we make the point that the fact that we did not originally appeal the Decision does not preclude the exercise of discretion in Somerfield's favour in the light of the exceptional and unforeseeable circumstances on which it relies which arose after that Decision was made.

Can I now go to these points in more detail. The first one I think I can take quite quickly, particularly in the light of the indication from the Tribunal about para.56. I think that the ground rules, as it were, are fairly well agreed. I will simply say that the threshold is the existence of exceptional circumstances, and that this is a familiar expression that is used in a number of regulatory contexts. I know that the Tribunal is very familiar with that, and there is a case in the bundles on very different facts about evidence in appeals in relation to Telecoms cases which the Tribunal will probably recall. It is tab 14 of B5J, the authorities, and at para.90 you said that the expression "exceptional circumstances" is not unfamiliar, and then you found exceptional circumstances on those particular facts, as far as I can see, essentially because it was thought to be consistent with basic justice. In my submission, "exceptional circumstances" is an ordinary expression which you had given its ordinary meaning. In particular, and this is a point that we go into in some detail in our written submissions, there is no reason to exclude events occurring after the expiry of the initial two month period from the category of potentially exceptional circumstances.

It may be worth just looking at one authority on that, which is the *Miom* case at B6J, tab 27, p.2371. I do not think one needs to worry about the facts. It is paras.54 and 55. I think Mr. Beard said I am trying to water down the test. The purpose of this is not to water down the test, it is to try and give some sort of structure to the test. In my submission, the two stage structure is the same here: is there a good reason for an extension, and it is fair and just? Our test is, are there exceptional circumstances and how should the Tribunal exercise its discretion. Then para.55:

> "What is a good reason for an extension cannot be defined …"

Then it gives various quotes, and in particular:

> "… 'special circumstances which create a real reason why the statutory limitation should not take effect' …"

I am perfectly happy to replace "special" with "exceptional" but otherwise in my submission that is a helpful summary of the approach that should be adopted, and there is no reason to exclude in principle events taking place after the period.

We give a couple of perhaps rather extreme examples from the criminal law at para.62 of our application. In principle, there is no reason why something similar should not arise in the competition field, e.g. hopefully unthinkably if an official was found to have been acting for improper motives, or perhaps more plausibly, if an OFT witness was found actually to have been dishonest or to have been acting for improper motive, we say that is not excluded in principle. I think, without going to it, your Judgment in *Carter* left open the fact that there might be exceptional circumstances that allowed a case to be opened sometime after the event and we say that this is such a case.

Turning to the main point: we say the facts speak for themselves and are truly exceptional. We say that something truly exceptional did indeed happen in November 2011 and that these remarkable events could not have been foreseen by Somerfield, when it made an initial decision not to appeal against the decisions. We make the points under four headings: The Conduct of the OFT itself at the November 2011 hearings, days 26 to 29, Subsequent Events, events after that and after the Judgment. Thirdly, The Relevance of the Judgment for the Decision in relation to Somerfield; and then fourthly, in conclusion, The Underlying Basis for this Application, which is really the core of my submissions.

Taking the first heading: "The Conduct of the OFT on days 26 to 29". We say that although the sequence of events is well-known and described in detail in paras. 34 to 42 of the Judgment, which I am sure you have read with some care, and it is also described in

Somerfield's application, they are critical to the issues raised on this application, and therefore warrant brief repetition.

Just looking at our application it is really para.3 We set out three elements, which are the three elements I have already referred to. First, the abandonment of the theory of harm. We say that was a common period of harm which the OFT was at pains to say applied to all the 20 infringements in the case, so it took away what I think was called, by Mr. Howard for Imperial, called the "central plank" and indeed, effectively the entire theory of harm collapsed on the basis of which an American economist, Professor Shaffer, had advanced his theories.

The next stage, the second element, was to try to persuade the Tribunal to take on the role of primary decision maker, on the basis of an unpleaded refined case, which was put before the Tribunal in the form of short note, it was effectively two pages of a note which was mainly about the jurisdiction of the Tribunal under Schedule 8.

Thirdly, and we say this is also an extraordinary element, that having said that its new case was the refined case, it did not in fact attempt to investigate it, and so the whole thing was just left hanging in the air on the basis of a couple of sheets of paper and no proper investigation at all.

I note in this respect, and this is a point of distinction with *RG Carter*, that the circumstances on which we rely primarily at least as exceptional, are not the Judgment of the Tribunal but the conduct of the OFT recorded in that Judgment. This is not a case based on a finding of disputed fact or law by the Tribunal, apart from the essentially irrelevant question about the power of the Tribunal to run a new case, but that is not the issue here. What it relies on is an extraordinary sequence of events that occurred during and after a hearing before the Tribunal, and that is why we think it is worth looking at the primary evidence, and that is why I have handed up that note setting out the position in some detail. We say it is this combination of three features, the ones I have mentioned and that are set out at para.3 of the application, that is both exceptional, and we also say that it would give rise to a serious injustice if Somerfield was precluded from appealing against the Decision.

In summary, the OFT has not sought to defend the reasoning in the Decision since 3rd November 2011, but it has sought to justify the outcome of the case by reference to a different case that was never put to Somerfield, that is now indicated will never be put to Somerfield. That is both an exceptional and an unfair situation and one that, as a matter of

policy, we say the Tribunal should not condone by precluding Somerfield from challenging the OFT's conduct.

We say the three stages of the OFT's extraordinary behaviour are clearly evidenced by the transcripts of days 27 to 29, the order that was made by the Tribunal on 7th November 2011, and the written submission of the OFT at 9th November 2011 which we have dealt with in the annex to the note. So if we could now go to that? We have put the transcripts into the bundles, but they are quite difficult to navigate and we have simply lifted them out as word processed documents in to the text, so we may have to go to the transcripts themselves but I am hoping not.

We start at para.2: The OFT's concession that it did not intend to defend the Decision on the basis of the theory of harm contained in that Decision was initially made in a formal statement to the Tribunal at the start of Day 26, 3rd November 2011. Just by way of introduction, the Tribunal will be aware from cases such as *Mastercard* and *EWS* that the theory of harm is the core element in a Decision and that there can be no infringement of the competition rules, particularly in an object case otherwise than by reference to a sound and convincing theory of harm. This was therefore a fundamental abandonment of the legal and economic basis of the Decision. One sees this in the introductory wording, which we have not highlighted, Mr. Lasok explains what he was doing. It is perhaps unfortunate Mr. Lasok is not here, but anyway Mr. Beard will have to do what he can with reference to what actually happened. He was asked to specify which constraints apply in relation to each of the infringing agreements. What he said was this:

> "The OFT considers that each of the infringing agreements operated on the basis that when the rival manufacturer's brand went up in price, the price of the link competing brand of the manufacturer, which had the P&E agreement was to be raised by the retailer to suit."

I do not think I need to read the rest. That is the central plank. The basic idea was that one manufacturer put up its price, the retailer put up its price and then it was constrained to put up the price of the competing brand. Then there was a more complicated position in relation to downward movements.

Then at 18 and following Mr. Lasok says this, obviously on a considered basis:

> "The OFT has considered the evidence that has emerged in the course of the proceedings, and it appears to the OFT in the light of the evidence that each and every one of the specific circumstances relied on in the Decision in the support of

> the finding of an object infringement may or may not be established to the appropriate legal standard."

He has some sort of bravado left, but basically that is a complete concession that the case fails because "may or may not" is not the right standard for a finding under the Competition Rules. So formally he caves at line 24 of the statement.

He then goes on, and I have given you the full formal statement that was made to make two important points. The second point he makes is in the highlighted passage in lines 4 to 19 of p.2. He says: "First of all, if the Tribunal were to find that the subject of these appeals that none of the constraints in para. 40", you will recall that is the theory of harm defended in the appeal, "… were present it does not follow that there was no object infringement." So that is a double negative there.

> "In other words, putting matters in the statutory language, for reasons the Tribunal will well understand in a minute or two, there are reasonable grounds for suspecting an object infringement."

There he is using the statutory wording for opening an investigation and it is obviously deliberate because it is straight out of the Act. Then 16 to 19 is a departure from the Decision as currently formulated, he says in a somewhat insouciant way, although he says:

> "The suspected infringement that appears on the face of the evidence is the same in nature as that found in the Decision."

What he is saying there is, in fact, in fairly thin code but what is required here is a new investigation.

What does the OFT then says should happen. He then says:

> "The procedural question that then arises is whether these appeals can and should be dealt with by the Tribunal in exercise of its powers under Schedule 8."

So he is thinking there is one route out of this, the Tribunal could deal with this. Then he goes on: "… expanding the case in the Decision to the alternative that derives from the evidence." That was the case that was ultimately thrown out as unacceptable, a new Decision by the CAT acting as primary decision maker. Then the other alternative is set out in the bold wording: "An alternative", in fact this was the only alternative that he gave:

> "… is that the OFT should amend the Decision by removing the infringing agreements currently before the Tribunal and if it considers it appropriate to do so on further consideration issue a new statement of objection that is more broadly based, but seeks to capture all the alternatives that the evidence has thrown up."

So again new investigation needed – what I might call the *Mastercard* solution, a perfectly right and proper way to conduct themselves.

Over the page, having considered the Schedule 8 and in the final part, this is how he ended his formal statement:

> "If the Tribunal decides that that solution is not appropriate the OFT's current view is that it would amend its Decision as I have indicated, consider the issue, a new Statement of Objections in the light of any submissions made to it by the appellants and if a new Statement of Objections are issued the administrative procedure would then follow as normal, and the OFT would obviously consider any submissions of the parties in response to the new statement of objections with an entirely open mind."

So that was the OFT's position at the start of Day 26, they were saying that if the OFT cannot pursue its theory of harm there are two ways forward. The Tribunal could act as primary decision maker, a route that was ultimately found to be unacceptable, or alternatively they would have to scrap large parts if not all of the Decision, have a new Statement of Objections and listen to the case that was put against that Statement of Objections, and in my submission that would obviously have applied as much to Somerfield as to Imperial. It would have been ridiculous to maintain the Decision after it had been discredited and abandoned by the OFT in the way that it is suggesting.

That was stage one, and in my submission that was a perfectly proper thing for the OFT to do and the right course at that point would have been the *Mastercard* solution, either the Tribunal would have set aside the Decision and if the OFT wanted to investigate this matter they could have done, or else the OFT clearly thought that they could do it themselves; they could scrap bits and then bring a new case if that is what they wanted to do.

Where things start to go off the rails and become truly extraordinary is that they were not prepared to do that.

Over the weekend the OFT seems to have had a change of heart and this arose in relation to an order that was made by the Tribunal which I am not sure is in the bundles, but it is obviously available, and the core part is set out at para.3:

> "In respect of each of the 15 bilateral agreements, which are the subject of these appeals, the OFT shall indicate in writing by 4 o'clock on 9th November whether it continues to contest the appeals and, if so, on what factual and legal basis."

The Tribunal was obviously being cautious as indeed it was in *Mastercard* and saying: "Come on, OFT, what exactly is your case given these extraordinary cases?" The refined

case was produced as part of a short note produced in response to that order, but it did not in fact do what was requested. The note did not differentiate between the 15 bilateral agreements as requested, but it set out a new case in very short summary, and that is now in the bundles and would be worth looking at. Bundle 4 now has a rather fat tab 15, and if we go to p.1468R, you will see that this was addressed to the Registrar and was by reference to the Tribunal's order.

The introduction one sees on the next page. So having apparently caved on the theory of harm on Day 26, 1(a) says:

> "First, the OFT confirms that it contests the appeals in relation to each of the Infringing Agreements that is the subject of the appeals."

and secondly on the basis of their object infringements, and in terms of the facts the evidence is consistent with findings made in the Decision and with the OFT's refined case set out below. That seems to be a rather curious finding that the facts were okay and that they were now going to defend it on the basis of the refined case, so they do not actually say they are not going to defend it on the basis of the existing decision, but I think that is what they are really saying there.

THE CHAIRMAN: Yes, and no doubt Mr. Beard will be able to help if this is wrong, but it seemed to me that you have put it fairly fairly, that the facts in the Decision are relied upon not in support of the original theory of harm but in support of a refined theory of harm which was described by the Tribunal as a "refined" case.

MR. THOMPSON: One might have thought of a different adjective but "refined" but anyway "refined" is the adjective that has been used and so we will stick with the adjective "refined". It was certainly a new case.

MR. BEARD: If it assists, that is not quite the position. We can go to the Judgment in due course, but if it does assist Mr. Thompson, obviously the refined case was being put forward at this stage and there is a further speaking note here that details how it interacts with what has specifically been referred to as the summary of the case to date, which is what was referred to as the para.40 restraints, and the interaction between the refined case and parts of those para. 40 restraints are talked about further then and, indeed, are canvassed in the Judgment.

THE CHAIRMAN: Thank you.

MR. THOMPSON: In my submission the fact that the OFT put in a speaking note to gloss this in a way sort of illustrates the somewhat chaotic situation that arose. This was the nearest to a formal statement in response to an order and during the exchanges between Mr. Lasok and

Miss Rose, Mr. Lasok made it plain that the case in the speaking note was the same as the case in the refined case, so I am assuming that this was the case and I think this was the case the Tribunal set out in the Judgment as well.

Paragraph 2 of this document, without any reference to any individual agreement, contrary to the terms of the order, set out two restrictions which were said to be evidenced on the facts, and para.6 of this note is perhaps the most important, because it appears to abandon the theory of harm again in that it says:

> "The articulation of the infringement set out above differs from the description given in the Decision in that it is not a consequence of the Infringing Agreements that, following a price change instigated by one manufacturer, the retailer was required to change the retail price of a competing manufacturer's brand in order to maintain or realign the first manufacturer's P&D requirement."

So it is actually the opposite of the case defended in the Decision. Basically, whereas the Decision applied where there were changes in the wholesale price, the refined case is basically the opposite and says that they apply where there is not a change in the wholesale price. So it is actually the most flagrant change of position that one could really imagine in a case.

On 11th November, which was day 27, the hearing resumed to consider what should be done in the light of the refined case document. There was considerable criticism from the appellants. I think it is put fairly modestly in the judgment and that is a fairly cautious account of what happened. They submitted the theory contained in the Decision had been abandoned completely and that the refined case, such as it was, was completely new, had not been the subject of any deliberations, either before the Tribunal or even at this administrative stage. I think, since we have got it open, it is worth turning to 1468AH, which is a few pages further on. It is towards the bottom of the right hand column of the left hand page. Mr. Howard is speaking for Imperial, and he says:

> "Now, think about where we are here. We have a theory of harm which has not been articulated, other than at best in these paragraphs 9 and 10 in relation to this infringement …"

He is referring to the speaking note there.

> "… it's not been the subject of any deliberations at the SO stage, and yet we are the appellants, we have to call our evidence first, how on earth can this operate within the confines or operate properly under the procedures that you have to consider? But that's all, if you like, for another day."

So that was just his preliminary reaction, that the whole thing is completely ridiculous, it is all back to front and upside down.

Following the various submissions, the Tribunal directed that the parties file detailed written submissions on whether the appeal should be allowed. One finds that a couple of pages on, p.84 of the transcript, 1468AV, towards the bottom right, and Miss Rose says:

> "We consider it's very regrettable that we are still so unclear about what the OFT's case is. We also see the force of Mr. Howard's arguments, and we note that when Mr. Lasok stood up last Thursday to expound the case, it was not on the hoof but in response to questions from the Tribunal on the Monday beforehand. His statement on Thursday was a statement that the appellants and the Tribunal were entitled to treat as the OFT's considered position. Yet it is clear that it seems to bear little relation to the case now put forward in the Wednesday submissions."

The position was that there was a complete uncertainty about what the OFT was up to. On 17th November, so that is a few days later after an adjournment, the parties presented their oral submissions on whether the OFT's refined case was within the four walls of the Decision, and, if so, whether the Tribunal should exercise its discretion to take on the role of decision maker. We have set out at some length passages from the submissions that were, in fact, made by Imperial, but they were effectively adopted by all the appellants, and the essential point that is being made you can see in the first quote in the headline passage:

> "If you put the broad question, is the infringing agreement arising from the restraints in para.2 of the Wednesday document the same as the infringing agreement which is described in the Decision, the answer is no."

Then further down:

> "If you want to say, well, if it is not that infringing agreement it is a different infringing agreement, you cannot say that is within the Decision, or a reflection of the Decision. It may be that you want to try and strip out something from what you have already said and say, there is a fact which I could rely on, which is a different allegation, but it is not the same allegation, it is actually quite difficult to do justice to the point beyond saying that."

In fact, the matter was debated quite extensively, and one finds on the next page a very pertinent quotation:

> "Just ask oneself this: what is Imperial purportedly being fined £112 million for? What are they supposed to report to their shareholders? Just understanding

why, if they were to pay the fine, would they be being paying it, because I have been found to be guilty of participating in this or these infringing agreements. If I want to challenge it, how can I challenge that. I have not been fined for something else. That is what I have been fined for."

Then there is a reference to the factual matrix, and a reference also to the *EWS* case. Then further down:

"I mean the basis of this Decision, line 9, at p.101, of course not only exposes parties to the fines, but also could expose them to somebody else coming and saying, 'Based upon that I am entitled to claim damages against you'. The basis for that has to be what has been found to be infringing conduct, not something else where you say, 'Well, there was a finding of fact by the Office of Fair Trading about something."

If one then turns on to p.103, you see:

"Just imagine the situation if Mr. Lasok, instead of being what I would describe as somewhat coy and evasive about the position, actually came forward and said, 'We acknowledge the Decision cannot stand, but we are interested in pursuing other matters and we would like to put forward a reformulated or a new case in front of you and for you to consider it'. In my submission, the only thing the Tribunal could properly do in that situation is to say that the appeal has to be allowed because you are not supporting the Decision. It is not our function to conduct an investigation. If you really believe it is in the public interest to conduct an investigation, OFT, that is a matter for you. "

That is exactly the position that Mr. Lasok himself was taking on day 26. Really, in my submission, it is quite a good account of what was happening. You see it again on p.104 over the page towards the bottom.

"We are at the stage where the OFT, when you actually analyse both their concessions and what their case now is, is saying the Decision as it stands cannot stand. I do not support it any longer. Therefore, the appellants' notice of appeal has to succeed."

So the question there, what they are actually saying is, "I want to keep this alive to prove a different case".

Then finally, over the page, you will see passages that went on on the following day, day 29. First of all, at p.8, you will see p.41:

"What is clear, in fact, the theories of harm are completely different because, and this is what the OFT just ignores, the central plank has gone. So that what we are now left with is you take away all of that and you are simply left with a theory of harm which is based, in so far as one can understand … based upon saying there is a duopoly and this is going to create greater transparency than having RRPs, "

Then it goes on saying, "How on earth are you going to work that out, it has not been properly articulated.

Then, finally, towards the bottom, he considers how could this have been pursued properly, and you see that on p.43 to 45 of the day 29 transcript. First of all, Mr. Howard asked the question:

"What I do want to make is this point at this stage, and to consider this: assume for the moment that the Office of Fair Trading was permitted to amend its defence in order to run a [new] case on a new infringement, The simple answer is it's not actually allowed to do that, and that's why – although that's actually what it's trying to do, it doesn't come out and say it.

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

So that is really going back to the day 26 position, which, in my submission, is the honest position that the case was shot to bits and what the OFT wanted to do was try and prove the case in front of the Tribunal, but the proper course would have been to reopen the case, if that is what they wanted to do.

Finally, you see at the bottom:

"… this is not a basis on which you can come to court and seek amendment.

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

In my submission, those are very important passages which, although they are at greater length than what was found in the Tribunal, they do accurately set out what the position was. The OFT was abandoning its substantive theory of harm, it wanted to run a new theory of harm. Ideally, it wanted the Tribunal to do the work for it, because the appeal was already on foot, but when that failed the proper course was the one set out in day 26, to open a new case, if that is what they wanted to do, and abandon the old case in an honest and straightforward way.

However, the third limb of our case on the facts is, in my submission, also crucial, and one finds that shortly stated on the last page of this note. The failure by the OFT to address its refined case to Somerfield. It starts from the judgment that the Tribunal clearly and correctly found that the refined case restraints were not part of or within the infringing agreement condemned in the Decision, and it therefore had no jurisdiction to hear an appeal defended by reference to that new and different case. One sees that at para.61, 95(a) of the judgment. We say that that negative finding, which was about the theory of harm, necessarily applies as much to the so-called infringing agreements involving Somerfield and indeed Gallaher, as to those between the six original appellants. It was a general finding in respect of the meaning and context of the Decision. We say that the day 26 analysis by the OFT itself clearly indicated that at that point the OFT should have removed the infringing agreements, and if it wanted to pursue the refined case it should have pursued that.

However, crucially, the case on the refined case restraints was never advanced against Somerfield at all. Obviously it was not advanced before the Tribunal because Somerfield was not there. It was not advanced at the administrative stage before the Decision. It was not in the Decision, and it has not been advanced since the Judgment. The OFT has made it clear on 8th March 2012 that after careful consideration – so obviously it has thought about it – the OFT does not intend to issue a new statement of objections in the Tobacco case. That is at B4, I18, 1553-4.

We say the overall position is that the Decision is now completely unsupported. The OFT has conceded its old case is hopeless. It has recognised the proper course in such

circumstances is to start again, but for whatever reason it has decided not to do that, but to hide behind the procedural rules and hope it gets away with it.

So, drawing this together by reference to those facts, I emphasise three particular features: first of all, that the OFT's difficulties that emerged on day 26 were longstanding and of the OFT's own making. The Tribunal was at pains to point out at paras.80 to 85 of the Judgment that the difficulties in the OFT's case did not arise from the evidence or from evidence that could not have been obtained by the OFT prior to the appeal. On the contrary, the Tribunal found the evidence of the witnesses was consistent with the documentary record and that the only witness called on behalf of the OFT gave evidence that was consistent with the available documentary evidence and could have been clarified by the OFT itself at any time since the preparation of her statement in 20005. As I think I have said, that is paras.80 to 85 of the Judgment, B4 pp.1501 to 1503 of tab 15.

Secondly, and this is a point which goes directly to a submission made by Mr. Beard, the OFT was not simply seeking permission here to amend its defence in the light of the evidence. At no stage did the OFT seek to amend its defence or to argue that the new case that it wished to run could be seen as simply an amendment or modification of its pleaded defence. The new case was very far from the conventional conduct of litigation to which the OFT sought to liken it in its written case in relation to this application – that is para.70 of its response at B1, tab C, p.102. You will recall that Mr. Howard rightly said that it would have been a joke if the OFT had tried to amend its defence by reference to the refined case because it was so completely different.

Then, thirdly, and this is really very important, the conduct of the OFT after day 26 was blatantly contrary to its procedural obligations and the rights of defence of appellants and non-appellants alike. The contrast between the lengthy process of several years that had led to the original statement of objections and decision, and the two page document presented as the OFT's refined case, was a very stark one. There was no attempt by the OFT to explain or justify such a wholesale abandonment of any pretence to due process or compliance with the OFT's own procedural rules. On the contrary, in its initial statement of concession on day 26, the OFT had apparently accepted that if the Tribunal were not prepared to determine the case itself the proper course would have been to withdraw or radically amend the Decision after an additional administrative stage offering appropriate protections to the rights of defence, and we saw that. Although the OFT subsequently resiled from that suggestion, it would have been the correct procedural course if the OFT wished to pursue its refined case, as reflected in *Mastercard*, for the OFT to have set aside

or had the Decision set aside, and for it to recommence its administrative procedures on an amended basis.

In fact, of course, the Tribunal did not have to grapple with the impossible procedural difficulties that would have ensued had the Tribunal been prepared to allow the OFT to defend the Decision on the basis of the refined case. Those difficulties did not arise because the Tribunal found that the scope of the Decision did not include the refined case.

I have spent some time on the events in November. Just to summarise the position in relation to subsequent events, which I think I have also touched on, since the collapse of its defence of the Decision, we say the OFT has compounded the bizarre nature of its conduct before the Tribunal by indicating that it does not, in fact, to develop or pursue the so-called refined case that it sought to advance before the Tribunal by means of a new statement of objections – that is at B4, I18, 1553-4, but it does nonetheless intend to maintain that the original Decision, which it has, itself, now conceded never to have had a proper legal, factual or economic basis, remains valid and binding on the non-appellants, including Gallaher and Somerfield. We say that is an entirely unprecedented, unreasonable and indeed quite improper approach for a public body such as the OFT to adopt, contrasting unfavourably with its conduct in the earlier cases, notably *Mastercard*. We say that the Tribunal should not endorse or condone the injustice of the OFT's approach by precluding Somerfield from bringing a late challenge to the now discredited Decision.

That is my first two sub-headings in relation to the core submissions, and I think we will proceed more rapidly from now on. In fact, I have got two short submissions that I will make which I guess are also in the heading of "The Facts". The first is that we say that there is a degree of relevance of the findings in the Judgment for the decision in relation to Somerfield, and we put it in this way: first of all, we say that the Tribunal recalls that the Decision concerned 20 agreements between two manufacturers and ten retailers, and the OFT contended that each of the 20 agreements comprised an infringement by object of the Chapter I prohibition on the basis of a common theory of harm, and one finds that, for example, at para.1.4 of the Decision, which is at B3/H14/895.

The appeal directly concerned 15 of those agreements. Of those 15 agreements considered by the Tribunal, ten involved at least one of the non-appellants, the five agreements between Gallaher, an appellant retailer, and five other agreements between Imperial and a non-appellant retailer, including the Imperial Somerfield agreement. So only five of the 20 were not directly in issue in appeals heard by the Tribunal. Indeed, given the OFT's further concession in relation to TM Retail, it now appears that only four of the 20 agreements can

realistically remain in issue, of which one was the immunity applicant, Sainsbury. So as for the 10 green bottles I think we are down to three green bottles still hanging on the wall.

The reasoning of the OFT in the Decision and in its defence of the Decision were both entirely general in nature. Despite being repeatedly asked to clarify its case the OFT drew no distinction between any of the 20 agreements. That was true even in the OFT's note setting out the so-called "refined" case.

Likewise, though the Judgment was naturally only addressed to the parties to the appeal it set aside the decision as a whole. Neither the OFT's defence, nor its refined case, nor the Judgment itself drew any material distinction between the 10 agreements to which Imperial was party, the five agreements to which Gallaher was party with an appellant retailer, and the remaining five agreements to which neither Imperial nor any of the appellant retailers was party. One sees that, for example, at para.96 of the Judgment. That reflected both the reasoning of the Decision and the entire basis on which the OFT had defended the case, the common theory of harm said to apply to all of the infringing agreements.

As such, the terms of the Judgment reflected the fact that the OFT had conceded that it could not defend the underlying basis for any part of the Decision that there had been an infringement of the Chapter 1 prohibition. The Tribunal was not ultimately required to reach any view on the merits of the case, one sees that at para.3 of the Judgment.

The OFT's wholesale concession inevitably applied as much to the agreements involving non-appellants and those involving the appellants. In summary, the reality of the matter was that the OFT was belatedly forced to recognise that the entire basis for the Decision, defended by the OFT, before the Tribunal had been shot to pieces. We say that that is relevant to the exercise of your discretion, the extent to which the Decision had been shot down in substance by the appeal.

Just to conclude on the facts, and our underlying basis for the application, we reiterate that it turns on three features. First, the Decision was set aside in the Judgment on the basis of a concession that it could not establish the factual basis for the theory of harm and, as a result, the Tribunal was not called on to make any independent findings on the merits, so the appeals in effect succeeded by concession.

Secondly, after Day 26 the OFT sought to avoid the success of the appeals not by defending them on the merits but by advancing a new legal and economic case. Thirdly, the OFT has never, in fact, been prepared to pursue this case against the non-appellants at all, nor has it attempted to develop a case against any of the original addressees of the decision beyond the bare allegations set out in the refined case note.

We say the cumulative effect of this unique combination of features is that the sole case that the OFT ultimately sought to advance in this matter, whatever its merits, is not one that has ever been put to Somerfield. Somerfield has never had a chance to meet that case. It has never had the chance to scrutinise its factual basis, nor its economic credentials, nor to consider whether either limb of that case might be regarded as passing the stringent requirements of an object infringement.

The ERA between Somerfield and the OFT was not based on this case which was never put to Somerfield and, of course, crucially, no decision was ever taken by the OFT on this basis. Somerfield's fine was not imposed on this basis. Somerfield never had any opportunity to appeal against a decision based on the OFT's refined case. Neither the OFT nor the Tribunal has ever reached any concluded view as to whether or not it forms the credible basis for a finding of infringement or, indeed, for a statement of objections. We submit that this is a truly exceptional state of affairs. Had Somerfield known at the time when it was considering whether or not to appeal that the OFT was advancing the two restrictions described by the OFT as its refined case restraints, rather than the case actually contained in the Decision, and defended on the appeal, it might well have appealed, we cannot know. Somerfield's decision would have been taken on a completely different basis from the Decision it in fact took. We think we can put this really quite high. Unless the Tribunal grant permission to bring an appeal out of time Somerfield will have been deprived of essential rights of any party to litigation, never mind a party to criminal regulatory proceedings leading to very heavy fines. First, to know the case that is being advanced against you, secondly, to be able to take an informed decision whether you accept or challenge that case and, thirdly, to make an informed decision whether or not to appeal against an adverse finding based on a correct understanding of the legal and factual basis on which you have been fined. These were not matters that Somerfield knew, or could have known, until the OFT produced its refined case note on 9th November 2011.

We submit that these factual features are truly exceptional and justify an extension of time for this appeal.

I have taken some time on the facts because, as I think the Tribunal put initially, this is really a very fact sensitive issue. Everyone, I think, accepts that the test is a high one, these cases are all *sui generis* in a sense, and one has to decide, even when it is five minutes or ten minutes late for lodging the appeal whether there is a good reason for it and so they are very fact sensitive.

Turning to the case law, we say first that the various cases decided by the Tribunal in respect of short extensions on procedural grounds or as a result of administrative errors by parties or their legal representatives are of no real assistance to the Tribunal in determining the present application. The general principles I think are not in dispute and I think the Tribunal has indicated that.

We say that the only case that requires any more detailed examination, and that is indeed the point that the Tribunal has put to us already, is the *RG Carter* case which is heavily relied on by the OFT in both its response and its rejoinder, and we have obviously put that matter in some detail in paras. 16 to 25 of our reply, B1 pages 117 to 122, so I will not go back to that but I will try and summarise the main points that we make.

We say in summary the OFT has sought to avoid or play down the clear points of distinction between the facts of *RG Carter* and the present facts. The first one is that the OFT made no concession in the earlier construction cases that it was unable to establish the factual basis for its legal or economic case in any of the very large number of distinct infringements found in that decision. By contrast the OFT was forced publicly to admit that its entire legal and economic case against all the respondents to the Decision rested on factual foundations that it could not establish.

The second point of distinction is that unlike Somerfield *RG Carter* did not take its decision not to appeal on the basis of an understanding of the OFT's legal and economic case in the Decision, which the OFT then fundamentally modified. This was not, for example, a case where, during the construction appeals, the OFT said in respect of agreements to which RJ Carter had been a party, as in this case Imperial and Somerfield, that it could not establish a factual case of cover pricing, but that in fact that facts revealed geographic market sharing for example. RG Carter was not therefore in Somerfield's position of not knowing how it would have reacted had it known the radically different case that the OFT would ultimately maintain in defence of the Decision.

Thirdly, and this is perhaps the simplest point, *RG Carter* was simply a case about finding methodology. RG Carter did not seek to contest either the factual findings made against it by the OFT or the legal and economic basis for the findings of infringement. The earlier cases had been factually completely distinct and did not challenge the OFT's legal or economic case either, so there were two points wrapped up in there. First, the construction case was a lot of micro-decisions about a lot of individual facts which had no overlap between them at all except that they were about cover pricing, but also RG Carter's

individual case was simply about the level of its fine, it did not contest that it had been party to an infringement.

So overall we say RG Carter's application was not based on a concession of a radical change of position by the OFT of direct relevance to the legal and economic basis on which it had been found guilty of an infringement of a Chapter 1 prohibition. RG Carter simply wished to rely on legal rulings of the Tribunal concerning fining methodology in respect of cases involving different facts and different parties and, indeed, one can test that by thinking of the decision that was made at about the same time in the construction recruitment forum case, the appeal in *Eden Brown v Hayes*. RG Carter had no more reason to seek an extension of time by reference to the other construction appeal Judgments, though it would have done if it had relied on the Judgment of Mr. Justice Roth in the *Eden Brown* case and come along and said: "There's an interesting point of law decided in another case that would have helped me and now I want to bring it". The fact that it was in the construction case was really neither here nor there because it was completely different facts it just happened to have a common point of law.

As such, the Tribunal inevitably and correctly found that there was nothing exceptional at all about the fact that RG Carter regretted its decision not to challenge its own fine and, likewise, the fact that the OFT was found by the Tribunal to have applied its fining discretion on a mistaken basis was not in any way exceptional. It reflected the ordinary exercise of the Tribunal's appellate jurisdiction provided for in Schedule 8 to the 1998 Act. We say that the position in this case, which concerns extraordinary and unforeseeable conduct by the OFT, not ordinary and predictable conduct by the Tribunal is plainly and obviously completely different.

There are two other cases that the OFT rely on that I think require at least a brief comment although obviously Mr. Beard may wish to develop them. The *Wood Pulp* case, and we make two points about *Wood Pulp*. We say first of all, it concerned a refusal by the EU Commission to reconsider an infringement decision at the request of an undertaking that had not sought to appeal against that decision, and we say that as such it is not a case at all about extension of time for an appeal against a Decision of the OFT, it is a case about a collateral attack on an unappealed Decision of the EU Commission, so we say it is of no help.

Secondly, we say it is not a case about the meaning of exceptional circumstances, or the exercise of discretion in English law, it is a case about the limits of EU public law; we say therefore it is completely irrelevant to the issues that thwart the Decision on this application.

The only point open to the OFT by reference to *Wood Pulp* is that there is an analogy between the status of a Decision that has not been appealed under EU law and that of a Decision that has not been appealed under UK law. However, that is not a point of disagreement between Somerfield and the OFT, indeed it is precisely because the Decision remains formally valid against Somerfield, notwithstanding the fact that it has been set aside completely against five other retailers and Imperial that this application has proved necessary at all.

The other case which I think the Tribunal will recall is the *Shannon* case, and we say the OFT relies on a number of *dicta* in other jurisdictions but we say they do not really take it any further. They say there have to be exceptional circumstances and we say that is what the Rules say anyway, so we do not see that particularly assists.

The only case that warrants further discussion is *Shannon* where one of a pair of alleged conspirators sought to take advantage of the fact that his co-conspirator was found not guilty of the substantive offence by a jury with the consequence that the conspiracy charge was dropped against the co-conspirator. We have dealt with that again at paras. 26 to 31 of our reply, but there are two points in particular that we would take.

First, the prosecutor did not concede at trial that there was no factual basis for legal a legal case advanced against either conspirator, the substantive case against one conspirator was rejected by the jury on the facts. Secondly, the prosecutor did not seek to maintain its case on a different theoretical basis that had not previously been advanced. This was not, for example, a case where the prosecutor sought to argue at trial that although it could not maintain the case the defendants were guilty of conspiracy to handle stolen goods, the prosecution should continue anyway on the basis that the facts would support a finding of a conspiracy to commit a burglary.

Indeed, comparing the facts of *Shannon* to the points made above by reference to the present case serves only to emphasise the extraordinary position that now prevails. The punishment of Shannon was not maintained by reference to a new and unproven case advanced against his co-conspirator for the first time at trial that had never been put to Shannon, but the Appeal Court refused even to consider and that Shannon never knew about it and never had a chance to challenge. The House of Lords in *Shannon* was never asked to contemplate such an extraordinary sequence of events or its legal implications or Mr. Shannon's procedural rights.

That is what we say about the exceptional circumstances, and it is essentially a question on the fact and we say that the three cumulative elements are truly exceptional and create an unfair situation.

I think I can deal with the issue of discretion more quickly because it obviously feeds in from the factual material we have already touched on. The first point we make is that the positive reasons for allowing an appeal to proceed are obvious. The entire Decision has already been set aside on the basis of a concession by the OFT that it cannot defend the legal or economic case on which its theory of harm was based. Somerfield has never had a chance to defend itself against the new theory of harm on the basis of which the OFT ultimately sought to justify the Decision. It is therefore plainly unjust for the original decision to remain in place, and for the public authorities to retain money paid on the basis of that decision, and one sees that for example in the guidance of the Tribunal in *Mastercard*. I think Mr. Turner is going to go to *Mastercard* so I do not think I need to go to it, but I do rely on it. It is a new tab J36 of bundle B6, and I rely in particular on paras. 23, 25 and 31. We say that the appeal to the Tribunal is the obvious and indeed only complete means laid down by Parliament to rectify the somewhat bizarre situation that now prevails.

We say that there are essentially three categories of argument against this conclusion, and we say that none of them are any good on the facts of the present case. The first point I think is that the OFT contends that it is contrary to the principle of legal certainty to allow an appeal out of time in this sort of case. Secondly, underlying this may be an argument for floodgate risk if a late appeal is permitted in such a case. Thirdly, there is no good explanation for Somerfield's failure to appeal during the initial two month period and we say that none of these points provides a good reason to direct an appeal being allowed to proceed on the particular facts of the present case.

So first we say that Somerfield accepts, in relation to legal certainty, that that principle does underlie the application of strict time limits for the bringing of appeals. However, the Tribunal rules themselves recognise that this strict approach is subject to exceptions. This case offers an opportunity to define the relevant legal principles more closely than by reference to very particular facts.

We essentially make two points, one is a point of principle and one is a point of fact. The point of principle is that we say the principle of legal certainty operates differently where a Decision has been annulled *in toto* or as a whole from where it has been annulled only in

respect of individual fines or individual participation in an infringement, its existence is not challenged on an appeal.

Where a Decision is annulled *in toto* there is an obvious tension between an appellate court or Tribunal ruling that no infringement at all has been proved, and the continuing validity of a Decision to the opposite effect as against other addressees of the same Decision. We say that such a legally incoherent situation is in fact the opposite of legally certain as the present facts illustrate in a very acute form. To take the most obvious example: the OFT's case against the ITL Somerfield agreement. That has been admitted publicly by the OFT to have no foundation, and has been set aside as against ITL on the basis of this concession. Yet that identical case remains at least formally valid against Somerfield. This is an obvious point of distinction with the *RG Carter* Ruling. Though the Tribunal found in several other cases that the approach of the imposition of penalty is adopted in the construction Decision are being legally flawed, there was no suggestion that there had been no infringements at all proved by the OFT in that case, or the admitted conduct of RG Carter had not been shown by the OFT to contravene the Chapter 1 prohibition.

This issue of incoherence was clearly of concern to the Court of Appeal in the *Deutsche Bahn* Judgment, and one finds that at B5, J17 at 1849 to 1850, paras. 18 to 19. I know that the Tribunal his familiar with the facts of this case. The Court of Appeal expresses concern that the effect of a successful appeal, setting aside the Decision as a whole, would be that there would be no defence to liability even though the Decision had been set aside completely.

This is spelled out in more detail at paras. 112 to 114 where the Court of Appeal distinguishes between a decision of a particular party or a particular addressee and a decision against the Decision as a whole. At para. 119 Lord Justice Mummery expresses concerns about the practical implications of bringing these cases when there is still a question about whether or not there has been any infringement.

I know the Tribunal is very familiar with sections 47A and 48A of the 1998 Act, and we say the position of legal incoherence or uncertainty is particularly acute under the Act given that findings in administrative proceedings are binding in subsequent civil litigation under s. 47A and, indeed, 47B and 58A of the 1998 Act, so both in the CAT and in the High Court. So the paradoxical consequence is that a finding of infringement by the OFT that has been specifically set aside by the Tribunal, for example as against Imperial can remain valid and binding in civil litigation, for example, as against Somerfield, by the operation of primary legislation and a further consequence is that where a party in the position of Somerfield to

be found liable in damages for loss caused as a result of the agreement it had with Imperial it could not seek a contribution from Imperial and that, I think, was part of the concern expressed by Lord Justice Mummery at para. 119.

We say these are difficult and important points of principle. We submit that the effect of these anomalies is that normal considerations of legal certainty favouring short time limits strictly observed fall to be balanced by the fact that such an approach creates a legally incoherent situation that can only be amended by allowing a late appeal. The issue for the Tribunal is then to balance the two considerations in the exercise of its discretion.

Then, as a matter of fact, we say there is another important countervailing factor in respect of legal certainty on the present facts arising from the OFT's *volte face*. The effect of the OFT's change of position before the Tribunal was that the OFT itself disavowed the legal and economic case advanced in the Decision as the basis for the finding of infringement, relying instead on a different case recorded on two sheets of paper and ruled to be inadmissible as the basis for defending the Decision. So we say, as a matter of fact, there is here a radical legal uncertainty about the basis on which the Decision is now remaining in force as against parties such as Somerfield and what, if anything, that Decision now decides given that its own author has publicly disowned its contents but has not been prepared to withdraw it in the way that it did in *Mastercard*, and we say that is quite a distinct situation and one that raises quite distinct issues in relation to legal certainty.

The other two points I think I can deal with quite quickly. First, we say there are no floodgates risk. We submit that the mere fact that there are exceptional circumstances here does not imply that there would be exceptional circumstances in another case. We think it is unlikely the OFT would wish to argue that the present facts are ever likely to recur. I would imagine it would be in the stuff of nightmares.

On the present facts it is the combination of the fact that the OFT has itself conceded that the finding of infringement in the Decision cannot be sustained, and secondly that it sought to sustain the Decision not on its merits but by reference to a new and different case falling outside the scope of the decision and never put to Somerfield that constitutes the exceptional basis for the application to be granted.

Joining up with the previous submission on legal certainty we do not contend that an extension of time should be allowed in all cases or automatically where it is found on an appeal by some but not all addressees of an OFT or Commission Decision but no infringement of the Competition Rules has been established. We merely argue that that is

an important countervailing factor to balance the usual considerations of legal certainty as the Court of Appeal really in *Deutsche Bahn* illustrates.

The jurisdictional requirements of exceptional circumstances remain in place, so will still only be in such circumstances that the Tribunal will have jurisdiction to extend time. There is nothing intrinsically exceptional about the setting aside of a Decision in its entirety against certain addressees. On the contrary, as *Deutsche Bahn* found that is one of three possible categories of appeal against a competitional Decision, the others being appeals against an individual fine and appeals against a finding of participation in a multi-party infringement, where the broader case is not under challenge.

In addition, even if the jurisdictional requirement of exceptional circumstances is satisfied, the question of whether an extension of time is justified in any individual case remains a matter for the Tribunal's discretion. It is common ground that this will rarely be the case, so there is no floodgates risk. But here, for the reasons set out above, Somerfield contends that this is truly an exceptional case. Not only does the Tribunal exceptionally have jurisdiction to allow a late appeal but it should, again exceptionally, exercise its discretion to bring this unfortunate saga to an end. That would reflect the legal situation that now prevails as a matter of reality, whereas refusing to do so would in practice operate as an endorsement of an attempt by the OFT to salvage something from the wreckage of its investigation.

Finally, the third point, the fact that Somerfield did not appeal the Decision within two months, which the OFT I think relies, cannot be logically relevant to whether the circumstances on which Somerfield relies, are exceptional and justify an extension of time. Those circumstances arose over a year after the expiry of the initial time limit and could not possibly have been anticipated by any of the addressees of the Decision. It is obvious that none of the appeals that were brought related to the OFT's refined case restraints. The basis for Somerfield's application relates exclusively to exceptional and wholly unforeseeable circumstances arising after the original decision not to appeal. Somerfield did not know, and could not have known during the two months after adoption of the Decision that the OFT would abandon the theory of harm on the basis of which it had found an object infringement in the case and those unforeseen and unforeseeable circumstances obviously were not and could not have been taken into account by Somerfield at the time of its original decision not to appeal, and that point obviously applies equally to the ERA.

In overall conclusion we submit that the jurisdictional test for the exercise of the Tribunal's discretion is clearly met, and the balancing of relevant factors in this case comes down decisively in favour of granting an extension of time for an appeal to be brought.

It is unconscionable and fundamentally unjust for the OFT to hide behind a procedural obstacle to Somerfield now challenging a decision whose legal and economic reasoning the OFT has itself disavowed. In this respect, as I have said before, I note that the conduct of the OFT in this case stands in stark and unfavourable contrast to the approach that it envisaged on Day 26 itself in the Tobacco appeal, and that it adopted in the original *Mastercard* litigation, where the OFT directly recognised that it could not sustain the original Decision once it had decided that it wished to defend its challenge to the *Mastercard* scheme on a distinct economic basis. The two Judgments are at J26 and J36. I do not think it is necessary to go to them, but they set out the history and the approach that was adopted in that case.

The position initially adopted by the OFT on day 26 reflected a similarly realistic approach to the one adopted in *Mastercard*. By contrast,, the contrived attempt by the OFT to keep the Decision going on a new basis after it had been forced to concede that its central reasoning lacked any credible basis represented a new and unmeritorious departure from due process by the OFT that the Tribunal should not in any way condone.

Then finally, as the Tribunal, will be aware, the grounds for any appeal, if an extension of time is granted, would, in our submission, be straightforward. The legal and economic basis for the Decision has already been set aside as a result of the OFT's own concession. The OFT has never attempted to distinguish between the 20 individual agreements found to constitute an infringement by object in the Decision. There is no conceivable legal or factual basis on which a different result could be reached on an appeal by Somerfield, most obviously in relation to the Imperial/Somerfield agreement, but we would say equally in relation to the Gallaher/surcharges agreement, and in this respect we adopt the submission that appears somewhat modestly at footnote 16 to Gallaher's application that the previous proceedings in the CAT mean that the OFT should not contest any appeal if an extension of time is granted, and, in my submission, that is a factor that may be at the back of the Tribunal's mind in thinking whether it is right for this Decision to stay and be in force, given the extent to which the OFT itself has abandoned it.

Those are the submissions I wanted to make. I hope I have largely addressed the questions that were raised. Essentially I have made the point that when we made our decision as to

whether or not to appeal it was on what turned out to be a false factual basis that only emerged in November 2011.

THE CHAIRMAN: Yes, I quite understand the basis on which you have put your case, which is essentially the way in which matters transpired before the Tribunal, if that submission is accepted, and it seems to me that your third point that there is a good explanation for your failure to appeal follows automatically. The real question is whether I accept that.

MR. THOMPSON: Indeed, and I hope I have addressed that point.

THE CHAIRMAN: Absolutely, and I think you have.

MR. THOMPSON: So those are the submissions. I do not know whether the Tribunal wants to take a break or whether we will now turn to Mr. Turner.

THE CHAIRMAN: I think we will press on with Mr. Turner, if that is convenient.

MR. TURNER: Sir, I appear with Mr. Alistair Lindsey for Gallaher. I say at the outset that you are broadly right in your statement about the interplay between the cases of the two applicants on this occasion, and in particular you are right to say that if Gallaher succeeds on its main case that is neutral vis-à-vis Somerfield. Our main case is different from Somerfield's, because our position is different. We read the OFT's Decision as encompassing a case on infringement that we thought stood prospects of being upheld in the Tribunal. If I may explain it in a few preliminary remarks: this case centred on the issue that the retailers were being restricted in their ability to determine their retail prices for Gallaher's brands. The tobacco manufacturers though could compete using changes in their manufacture prices to influence and manipulate the retail prices.

In our dealings with the Office of Fair Trading before the Decision this was the consistent position put forward by Gallaher, and I will turn in a moment to the witness evidence. Moreover and pertinently, in the Early Resolution Agreement, the ERA, which we signed with the OFT in June 2008, that statement of the nature of the infringement case, namely a restriction on retailers' pricing freedom, was set out, and I want to show you that. There was no suggestion in the ERA that the nub of the case depended on some limiting of competition between manufacturers. That was not the gist of the infringement which the OFT wrote into the ERA, and which we were signing up to.

It is against that factual context that we received the Office of Fair Trading's Infringement Decision in April 2010, and our case is that it was reasonable for a party in Gallaher's position to understand the Decision document as encompassing the case that they saw to be arguable involving the restriction of competition between retailers.

The OFT itself, although 26 days into the appeal hearing, also submitted to the Tribunal that its Decision did encompass a retailer restriction only case. Prior to that, throughout the entire appeal leading up to day 26, the OFT explained, it defined, it defended its Decision as one solely containing a different case, one which was critically dependent on there being a limitation of competition between manufacturers.

Following 26 days of submissions, the Tribunal ruled that the Decision did solely contain a manufacturer focused case. That ruling showed that Gallaher had been mistaken in its reading of the Decision, but what it did not decide is whether Gallaher's mistake had been reasonable or unreasonable, and that is one of the key issues, in our submission, that arises today for you to decide.

Can I therefore draw those strands together. Gallaher's primary case is this: first, that the Office of Fair Trading's Infringement Decision was apt to confuse Gallaher as to its scope, because of the way it was drafted and in view of the surrounding circumstances. Gallaher was reasonably mistaken in thinking that the Decision encompassed the case that restrictions between tobacco retailers were the essential vice. That is the first point "reasonably mistaken".

Second, it is well established that the rights of defence require a competition authority to put its case with clarity in a decision. The reason is that this enables parties to take a properly informed decision about whether to appeal. Sir, you are aware that this particularly important in an area of the law where the infringement carries penalties that are considered to be criminal for the purpose of the European Convention.

The third point is that the circumstances of this case then are exceptional because the terms of the Decision itself and the conduct of the competition authority leading up to the Decision – up to the Decision – caused Gallaher to misunderstand the scope of the findings of infringement. The OFT was in breach of the duty to set out its essential case with clarity. In consequence, Gallaher did not make a properly informed decision about whether to appeal in the two month time limit. In those exceptional circumstances it ought to be given permission to appeal out of time. It as not able to make the properly informed decision it should have been able to make.

In a nutshell, that is the primary case. Our secondary case is similar to Somerfield's but with two qualifications that it is necessary to make. Mr. Thompson has eloquently developed the points, so I shall not, myself, descend to them in detail. The essential point is, as we see it, that the OFT presented a case on the appeal without proper factual evidence and in the teeth of consistent witness evidence from the industry.

I would say that there is one particularly striking element to this which also, in fact, supports Gallaher's primary case on having been misled. Can I ask you to turn up the Judgment of the Tribunal. In my copy it is bundle 4 at tab 15, p.1503 going to 1504, para.89. In para.89 the Tribunal refers to the fact that parties such as Gallaher had entered into these Early Resolution Agreements, and the co-operation that was required under those agreements, and says at the end of that paragraph:

> "Despite this we were not provided with any evidence from these parties confirming that they had entered into agreements of the kind defined as Infringing Agreements or that they had imposed or been subject to the paragraph 40 restraints."

A point feelingly made by the Tribunal that the OFT did not ask for any witness statement from a Gallaher witness. We say it can be inferred that at this stage in preparing its appeal, the OFT must have appreciated that Gallaher, supposedly admitting the very infringement in the Decision, did not support the manufacturer focused case that it was presenting in the appeal as constituting the sole basis of its Infringement Decision. It did not call Gallaher witnesses.

So the mismatch between Gallaher's apprehension of the OFT's case and the case which the OFT actually advanced in the Tribunal must, we say, have been known to the OFT.

The place where we part company from Somerfield is that we do not say that the OFT's belated attempts to register that the retailer only restrictions were part of its Decision were, in themselves, misconceived. Of course we do not, because we say that we were reasonable to apprehend that they were there within the Decision. At least from the vantage point of Gallaher that is so, and we say that is in line with the OFT's submissions.

A second point of difference, as I apprehend it, between us and Somerfield is a more nuanced point that Mr. Thompson at one stage suggested that a central reason why you have exceptional circumstances here is that the OFT publicly conceded the case rather than fighting it to an adverse conclusion. We, for our part, say that that is only one factor, and that the essential point which we come back is that the OFT presented this case without there being any real factual evidence to support it.

That is all I shall say about the secondary case. If I may, I will now develop my submissions on the primary case in the following way: the first is to look at the legal test, second, to turn to the factual circumstances concerning Gallaher and the misleading quality of the Decision, we say vis-à-vis Gallaher, and third, to grapple with the chief points of objection made by the Office of Fair Trading about whether there are exceptional

circumstances such as to justify extending time. At that point, if it is convenient, I will deal with the point that you, sir, have raised in relation to the ERA at the outset of the hearing. Let me start with the legal test. The issue under the rule is whether Gallaher can point to exceptional circumstances. These are ordinary English words. There are no closed categories of cases which will qualify. In our case, we rely on an unprecedented and exceptional factual situation which meant that Gallaher did not make an informed decision about appeal within the normal time limit. Gallaher made a mistake as to the scope of the Infringement Decision which was reasonable and which was contributed to by the competition authority. It was this mistake which undermined and which caused Gallaher not to exercise its right of appeal, and the OFT must bear some responsibility for that situation in view of its obligation to present a decision on infringement with clarity in order to facilitate the exercise of rights of appeal.

Our case on this is not, in fact, a point already covered by domestic authority. The OFT has cited *Carter*, and, sir, you were right, yourself, to identify *Carter* as being a case where a decision document was addressed to multiple parties. Pausing there, Mr. Thompson has made the point that it was by way of an umbrella decision with lots of separate infringements for individual parties, and that is why I say a "decision document". Secondly, there were points of principle common to all the addressees. Some appealed and others did not.

The appeal Judgment contained points of principle relevant to people who had not appealed. All that is so, and Mr. Thompson has rightly made observations about the impact of that for this case. I would make the following additional observation in relation to Gallaher: *Carter* was a case where the applicants made an informed decision not to appeal, and that is an important part of your ruling in *Carter*. It may be worth briefly taking up the authority, which is in the sixth bundle at tab 30. At p.2423 under the heading "Analysis", one finds the relevant part of the ruling. At para.20 in the opening part of the discussion, sir, you pointed out that the relevant facts (four lines in) were all known to <u>all</u> addressees of the Decision. Then, turning the page, at para.23 on p.2424, the nub of the ruling is this:

> "The truth of the matter, in the present case, is that the Applicants, having made an informed decision not to appeal, now regret that decision in the light of the outcomes of the appeals that were made by other addressees of the Decision, and now seek to re-visit that Decision."

Gallaher's primary case is to focus on that proposition as to whether in our situation there was an informed decision, and the point of distinction is that we say there was not, and that

the lack of information was contributed to by the competition authority. It is for that reason that we say on our primary case there is a distinction between this and the ruling in *Carter*. That is the domestic authority. There is some assistance on the legal test also to be derived from European law which I would like to highlight. The Office of Fair Trading referred to this authority, *Bayer*, in the Court of Justice in their response. Sir, you may recall that. They deployed the case in connection with their submission that the Tribunal's approach under the exceptional circumstances jurisdiction mirrors the EU case law. That is their expression in para.32 of the response, and they refer to *Bayer*. The Court of Justice ruling to which they refer is already in the bundle, bundle 5 at tab 12, page 1764. We have handed up the General Court judgment [T-12/90 – *Bayer v Commission*] because in order fully to understand the court's analysis you have to look at that first. Sir, if you have *Bayer* there at the General Court level. If you begin at para.1 I will take you briskly through the context, you will see that this case where a party sought permission to appeal late against the Commission Infringement Decision in a competition case. The party said that there had been confusion about the date of receipt of notice of the decision, and that had been contributed by the competition authority. You will see if you turn to para.8 in your copy Bayer is seeking a declaration that the Competition Commission decision was void. At para.9 the Commission is submitting an objection that the application was admissible because it was out of time. If you turn to para.15 on p.224, you will see that Bayer submitted three pleas in law about this objection. The second of the pleas was:

> "… on the existence of circumstances such as to render excusable its error as regards the starting point of the time allowed for initiating proceedings …"

and the last was on the existence of unforeseen circumstances or *force majeure.*
If you turn to para.22 on p.226 you find at the foot of the page the heading "Excusable error":

> "In the alternative, Bayer submits that, even if it is accepted that the period laid down by Article 173 of the Treaty started to run in December 1989 the application cannot be dismissed as inadmissible in the light of the case law of the Court of Justice holding that a failure to comply with time limits laid down in legislation does not prevent an action from being admissible where the applicant has been in excusable error as to the point from which time starts running."

Reference to the *Schertzer* case [Case 25/68 Schertzer v Parliament [1977] ECR 1729].

If you turn over the page to para.228 you have the General Court's discussion of the point. At para.28:

> "In the Court's view, it is first of all necessary to define more closely the scope of the concept of excusable error which may, in exceptional circumstances, have the effect of prolonging the period prescribed for initiating proceedings, as the Court of Justice held in its judgment in *Schertzer v Parliament*. That concept, which is distinct from those unforeseeable circumstances or *force majeure* explicitly provided for in Article 42 of the Protocol … arises directly out of a concern that respect of the principles of legal certainty and the protection of legitimate expectations should be upheld."

So it is a principle which arises from those more fundamental principles.

At para.29, the General Court states that:

"In the context of time-limits for initiating proceedings, which have consistently been held

> to be a matter of public policy and not subject to the discretion either of the court or of the parties, the concept of excusable error must be strictly construed and can concern only exceptional circumstances in which, in particular, the conduct of the institution concerned has been, either alone or to a decisive extent, such as to give rise to a pardonable confusion in the mind of a party acting in good faith and exercising all the diligence required of a normally experienced trader. In such an event, the administration may not rely on its own failure to observe the principles of legal certainty and the protection of legitimate expectations out of which the party's error arose."

That is a principle which we invoke in the present case.

Can I turn to the Court of Justice's Ruling, which the OFT has relied on, that is in bundle 5, tab J12. Would you go to p.1772, you will see that the General Court accepts the proposition but has ruled against Bayer on the facts of that case. Bayer therefore appeals up to the Court of Justice and at para.25 you have Bayer's point:

> "Bayer considers that the Court of First Instance should have declared its application admissible by recognizing the excusable nature of its error regarding the date from which the period of initiating proceedings began to run and should not have limited that concept only to those cases in which the conduct of the institution concerned had been such as to give rise to a pardonable confusion in the mind of a party acting in good faith."

You will see in para.26 that the court then goes on to say:

> "It should be pointed out in this connection that the Court of First Instance held, at paragraph 29, that the concept of excusable error could concern only exceptional circumstances in which, 'in particular', the conduct of the institution concerned had been, either alone or to a decisive extent, such as to give rise to a pardonable confusion in the mind of the party concerned. It follows from the use of the adverbial construction 'in particular' that, by not limiting the concept of excusable error, the Court of First Instance correctly applied the case-law cited."

So the Court of Justice similarly accepts the proposition and clarifies that it may not be limited to a case where the conduct of the administration has contributed to the pardonable confusion.

We do not say for our part that this principle governs you in the exercise of your jurisdiction under Rule 8(2). What we do say is that this is a useful illustration of the point that in Europe a proposition similar to the one of which we rely here for our main case has been accepted in principle. An excusable error, confusion, and one contributed to by what the administration has actually done.

With that introduction by way of setting the legal test, I turn to consider the factual circumstances here concerning Gallaher and the misleading quality of the Decision vis-à-vis Gallaher.

I said at the outset that in our dealings with the Office of Fair Trading at the administrative stage, Gallaher consistently made clear that any restrictions affected the competitive behaviour of the retailers, the restraints did not limit competition between the manufacturers themselves, and what we have called the lockstep theory or the para.40 restraints advanced by the OFT as the pith and substance of its defence of the decision in the appeal was not accepted.

If you take up the first bundle, I would ask you to turn to Mr. Bingham's statement of this application, which is at G, about half way through the bundle. Sir, I would ask you to look at para.9 on p.174. This is just to confirm, in the last part of that paragraph, the very last sentence, that Gallaher in its interaction with the Office of Fair Trading prior to the decision on a number of occasions explained to the Office of Fair Trading why what we have called the "lockstep theory" was not sustainable, and it is summarised in an annex to the draft notice of application, as it then was.

If you go forward in this bundle to tab 4, I will give you one example of this at p.282. You have there a formal response by Gallaher to a s.26 notice in January 2005, and if you look at para.1.1 and 1.2, you will see the statement:

> "It is a general objective of Gallaher's to ensure that its brands are priced competitively relative to their key competitor brands. Price positioning is key to any competitive strategy and tobacco is no exception.
>
> Gallaher has always sought to achieve this objective by monitoring retail prices and setting its wholesale prices at the appropriate level (using PCPs where necessary – see further below)."

I am not going to go into this in any greater detail, but this shows that what Gallaher was saying to the Office of Fair Trading consistently was, "At the manufacturer level there is competition although we are using influence over the retail pricing as our instrument of achieving this", which is therefore very different from the theory which then comes to be espoused as the basis for the defence of the appeal by the Office of Fair Trading.

If we can now turn back to Mr. Bingham at G, at paras 11 and 12 he records that he and the relevant Decision makers at Gallaher believed that the OFT's Decision did not only contain what we have called the "lockstep theory" which we repudiated, we considered it contained something resembling the refined case constraints, that is to say a case that it was competition between the retailers which was being inhibited because their freedom of behaviour was constrained by these restraints. Gallaher, in our submission, and on the evidence of Mr. Bingham decided not to appeal on the basis of that misunderstanding.

Paragraph 13 – Mr. Bingham first learns that the case was based on the lockstep theory alone when he had sight of the Tribunal's Ruling.

Paragraph 14 – he was confident that Gallaher would have appealed had Gallaher understood that the Decision was limited to the theory advanced in the appeal.

Paragraphs 15 – 17 are important because he also explains that it was the same misunderstanding which led Gallaher to enter the ERA after it had received the Statement of Objections. That is what he says about Gallaher's misunderstanding and I therefore return to the point which is that the question now for you, in my submission, is whether this misunderstanding on Gallaher's part was a reasonable one.

THE CHAIRMAN: I find it relevant, Mr. Turner, that at least to some extent the OFT appears to have shared the misunderstanding. What I mean is that OFT contended before the Tribunal that the Decision included not simply the para. 40 which it was abandoning but also the refined case and it argued that it could proceed on the basis the Decision did include this,

and lost on that argument. So to that extent the position of Gallaher, and the position of the OFT were ----

MR. TURNER: Aligned.

THE CHAIRMAN: Indeed.

MR. TURNER: Sir, I am very glad that you have raised that point because we say that it is relevant and important. We do not and cannot challenge the Ruling of the Tribunal ultimately that this was not a part of the Decision but what we do say is that the terms of the Decision were the basis for a reasonable misunderstanding on our part and we accept, sir, your point that if the OFT itself submitted that it was part of its own Decision, it was reasonable for us to have shared that view. So we do pray that in aid and rely on it as well. Now, in further investigation of this issue I will need to show you the Early Resolution Agreement itself, and certain parts of the Decision, including its operative part, the OFT's conclusions on what was the object infringement, and certain key passages. May I begin with the ERA. This is in the bundle ----

THE CHAIRMAN: I have a separate copy.

MR. TURNER: You now have a separate copy which is an unredacted copy because the one in the bundle contains lots of blanking out. I shall try to take care to avoid reading out anything in the red boxes.

THE CHAIRMAN: By "red boxes" you mean the ones that are in black in my version?

MR. TURNER: The boxes, in my copy they are red – in the boxes or the underlined text, which is confidential.

You will see that this is the agreement made in June 2008. The scope of the infringement is defined on the first page. You see just above the first box a reference to "agreements and/or concerted practices that restricted the Retailer's ability to determine its retail prices for the Manufacturer's …" single "…products and thereby had the object of preventing, restricting or distorting competition."

Then underneath the box:

> "You have indicated Gallaher's willingness to admit its involvement in relation to all of the infringements that are applicable to it. (see the appendix)."

It is very important, we now need to turn to the appendix to see what these infringements are which Gallaher is admitting to. That is on the sixth and last page of the hand-up: "APPENDIX: The infringements": Gallaher has infringed the Chapter 1 prohibition as set out in the Statement of Objections issued on 24th April 2008 by its involvement in "1. agreements and/or concerned practices with" the parties set out, "that restricted the

Retailer's ability to determine its retail prices for the manufacturer's" – singular – "products and thereby had the object of preventing, restricting or distorting competition."

So this appendix, consistently with the first page of the agreement sets out the gist, the pith of the infringement.

MR. BEARD: Sorry, it may just be … to get back to that if the Tribunal would read what is in the box in 2.

THE CHAIRMAN: I was about to ask Mr. Turner about that. If the first bullet is what we are coming to refer to as the "refined" case, would the second bullet fairly be described as a para.40 "restraint" case or not.

MR. TURNER: No, that is actually different, that is a part of the case which was dropped and not proceeded with in the Decision itself. You can therefore take the second part of it as completely irrelevant. The reason I think that my friend is jumping up is because he would like to say that there was an admission which went more broadly and included other matters.

THE CHAIRMAN: Yes, I see.

MR. TURNER: But they did not include the case that we are talking about, which was the principal case in the Decision.

THE CHAIRMAN: Right.

MR. THOMPSON: I think in reality it is not confidential, I think what it is is that bits were locked out of the actual agreement because the OFT no longer sought to pursue them but I obviously cannot see what is in Gallaher's box. I think that is the position.

THE CHAIRMAN: Just for the purposes of my note, I am proposing because I think labels are important here, to label the first bullet as the "refined case" but the second bullet as "not para.40 and not refined case"?

MR. TURNER: Yes, what Mr. Thompson says is correct.

MR. BEARD: That is accurate, there is no difficulty with that. The crucial words when you are coming to consider what the actual accusations are is actually going back to the starting point which is "Gallaher has infringed the Chapter 1 prohibition as set out in the Statement of Objections", and so you cannot read this document on its own, you have to go back to the Statement of Objections. But in relation to point 2, Mr. Turner rightly anticipates the point I am making in relation to this, that even in relation to the two bullets he is emphasising, and leaving aside the Statement of Objections, which is more broadly framed, you do have a wider acceptance here going beyond retailers, but it is also true that the restriction as described in 2 was not pursued in that form subsequently.

THE CHAIRMAN: That is very helpful, thank you. I am sure I will hear further on that, but I just wanted to be clear.

MR. TURNER: So the essential point again, if you return to that first page, under the box:

> "You have indicated Gallaher's willingness to admit its involvement in relation to all of the infringements that are applicable to it. (see the appendix)."

The definition of the vice by the OFT here is this: Gallaher is admitting to an infringement which is based on restriction of competition at the retail level relating to the prices for its brands. It is not an infringement with a different mechanism where the nub, the essence, the nature is limitation of competition between manufacturers. It is necessary in this application that this definition of the vice by the OFT , as well as the course of dealings with the OFT and Gallaher beforehand, should be taken into account by the Tribunal when assessing how Gallaher reasonably approached the infringement Decision itself; this is necessary factual context.

With that we turn to the Decision. The Decision I am going to begin with sprawls two bundles, 3 and 4. By way of preliminary if I may say, the OFT's rejoinder says that Gallaher has not pointed to any specific statement in the Decision which is said either to have been misleading, or which is said, in fact, to have misled us. That is para.20(b) of their rejoinder. Yet we did do so explicitly – it was para. 25 of our Notice of Application and Annex 13. What I would wish to do now is to take you briefly to the key parts of the decision, and I would preface this by saying I would not be picking out stray paragraphs. I am fully aware of the danger of that. What I will seek to do, sir, is to take you to the central passages so that you can see why Gallaher's belief was reasonable and, indeed, to pick up on your observation why the Office's convergent submissions on the scope of the Decision on Day 26 were also reasonable, even if the Tribunal ultimately ruled that they were incorrect.

If we take up first the fourth bundle and go within the first tab to p.1438 we have what you will know, sir, is a key paragraph in an infringement Decision. This is the operative part. "The OFT's Action" and "A. Decision: 8.2:

> "On the basis of the evidence set out above and for the reasons set out above, the OFT finds that the Infringing Agreements comprised in each case an agreement and/or concerted practice between each Manufacturer and each Retailer whereby the Manufacturer co-ordinated with the Retailer the setting of the Retailer's retail prices for tobacco products, in order to achieve the parity and differential requirements between competing linked brands that were set by the Manufacturer,

> in pursuit of the Manufacturer's retail pricing strategy. The infringing Agreements restricted the Retailer's ability to determine its retail prices for competing tobacco products and had the object of preventing, restricting or distorting competition …"

So one sees from this that this is at least compatible with being read so as to refer to the retailer's freedom being the nub of the problem. The Tribunal, we need not go to it in the interests of time, says at para.46 of the Ruling that one might construe: "para.8.2 of the Decision, read in isolation, as wide enough to cover the Refined Case Constraints." That is the operative part.

If you now go back to p.1410 [in bundle 3] you have another crucial paragraph. This is the section entitled "Legal Assessment". Within Legal Assessment if you go to 1417 you have the paragraph which is dedicated to the question of the anti-competitive object, that is para.7.32 at the foot of p.1417. You will see that the language is the same as in the operative part, broadly speaking. If you turn the page to 1418 you have the definition of the vice:

> "The Infringing Agreement between each Manufacturer and each Retailer restricted the Retailer's ability to determine its retail prices for competing linked brands."

Again, this crucial paragraph equally, and the Tribunal in my submission would have said the same about this as it had about 8.2, is setting out a case which, on its face is focused on the retailer restrictions of competition.

Now, if you would put that away and turn to bundle 3 where you have the prior parts of the Decision. At p.895 there is the summary of the infringements, that is the heading and you will see again a similar formulation at 1.4. I merely mention that because I then turn directly to the section which in the Ruling the Tribunal saw as containing the essence of the explanation of the manner in which these agreements restricted competition for the purposes of its Ruling. That was in the Judgment at paras 11 and 59. It begins at para.6.212 on p.1016. This is a section which the Tribunal digests in its reasoning at para. 59 in particular, the Tribunal there said:

> "The restraints condemned in the Decision were regarded as object infringements because of the effect they had on the *manufacturer's* incentives to decrease or increase prices at the wholesale level, see for example paras. 6.213 to 6.219 and 6.222 of the Decision."

So these are key parts from the point of view of the Tribunal's reasoning, and in that connection I would wish to draw your attention to para. 6.213, the first sentence, this being

a sentence which was not included in the quotation in the Tribunal's Judgment although it referred to the paragraph:

> "As stated in the SO [footnote reference to two paragraphs] a parity or fixed differential requirement restricts a retailer's ability to determine the retail prices of competing linked brands, because the relative prices of competing brands are fixed on the basis of the required parity or differential."

In other words, the retailer's hands are to that extent tied. I would wish to take you to that cross reference in the Statement of Objections at this point, which is at the second bundle at p.485. At p.485 there is a heading: "Consequences of the Infringing Agreements. Consequences of parity and differential requirements when considered on their own", and at paragraph 585 – I shall not read it at length, but you will see just above the italics at the end of that first section: "… it is clear that such requirements significantly restricted the Retailer's freedom to determine its retail prices in the following respects" which are then set out. At paragraph 586 there is this:

> "Therefore, the restriction in the Retailer's freedom independently to determine its selling prices, as caused by the price parity and differential requirements with the Manufacturer, resulted in a significant reduction in the Retailer's ability and incentive to reduce its retail prices, whether the parity and differential requirements were phrased as fixed or maxima."

Essentially the point that is being made by cross-reference, although not picked up by the Tribunal in its Ruling in that section, relates precisely to a theory of a problem relating to the retail level.

If you return to the third bundle, I will give you only a small number of further references. Page 965 there is a heading "(a) Elements of the Infringing Agreements", that is what this section discusses. On p.973 within that section, you have a subsection: "Contacts between a Manufacturer and a Retailer regarding retail prices", and on p.982 you have a discussion of the interaction between parity and differential requirements and retail price changes, and you will see this:

> "6.79 In practice, after the retail price of a competing brand had changed the Manufacturer decided whether to ask the Retailer to follow the price change in order to maintain its parity and differential requirements. That was assisted by an obligation in some written trading agreements for the Retailer to afford the Manufacturer the opportunity to respond to a retail price cut, or 'retail pricing' activity in relation to a competing linked brand.

6.80 On occasion, a Manufacturer expressly informed a Retailer that a parity and differential requirement was suspended …"

You see from all of this that it was not automatic, that the manufacturers are deciding on the influence that they will place on the retailers, the lockstep idea or the para.40 restraints is not what is being described here. At para.6.84 you will see manufacturer ITL informing a retailer that its parity and differential requirements were subject to change, that is in accordance with its own competitive policy. Finally, para. 6.92 because this was referred to by Mr. Thompson, and I will make a quick point about this. There it says:

"The OFT considers that although the Retailer may not have automatically changed the retail price of one Manufacturer's brand in response to a change in the price of the competing linked brand in every case, the parity and differential requirements created the expectation that …"

there was further action. I draw this to your attention because in fact there appears to have been a slight muddle in the OFT's note when it came to wish to change its case on Day 26 of the hearing, which is recorded in para. 39 of the Tribunal's Judgment, because there the OFT says differently from what was in the Decision and it gives this reference, they wish to argue a new case as they put it, or a different case that it was not automatic, but this very paragraph says in terms the OFT considers that the retailer may not have automatically engaged in this.

All of this, to summarise, shows that there were clear and consistent findings in the Decision to support the proposition that Gallaher's confusion in thinking that a retailer focused restriction as part of the Decision was reasonable - I do not challenge the Tribunal's finding - it was reasonable, and particularly in the context of the ERA which Gallaher signed, which you have seen, it was contributed to by the competition authority. That is the essence of the legal and factual primary case we are making.

If I may, in the remaining minutes of my address, try to deal with some of the objections that have been raised by the OFT and to address, sir, the point that you made about the ERA.

THE CHAIRMAN: That would be very helpful, Mr. Turner. Can I just ask you this: Why do you say this is outside the *Carter* decision, focusing now only on your primary case. I understand the point on the secondary case. The position as I see it is this: you regarded and the OFT regarded the Decision as comprising a case theory based upon para. 40 restraints which your client regarded as unarguable and did into take into account, and a

refined case which your client regarded as being part of the Decision and was the basis of entering into the ERA.

The case proceeds to the Tribunal and, for reasons we do not need to go into, the wheels come off the para.40 restraint case, that is the primary case which Mr. Thompson runs, and it is your secondary case, at that point the OFT pushes very hard its refined case and says: "No, the Decision embraces this, we can go forward on that basis", argues it and simply loses. Why are your clients not simply trying to take advantage of a subsequent ruling by the Tribunal which, in hindsight, makes the decision not to appeal a bad one?

MR. TURNER: I am glad that you have raised that. The reason is that the Decision itself as an instrument, properly construed, did not include that case. The Decision did not set out clearly and properly the case. Had we been properly informed and realised that it was about the para.40 restraints and it did not relate to the retailer focused case then, as Mr. Bingham says, we would have appealed. We were misled by this confusion in the terms of the Decision contributed to by all the prior behaviour and the terms of the ERA itself. It is therefore not that we were properly informed, we were not properly informed about the terms of the Decision.

THE CHAIRMAN: I see that. I suppose the point I am making is that the OFT made the same error, and what I am wondering is why is there a distinction between the OFT, to take *Carter*, making a mistake as to the imposition of the penalty which is overturned, and the OFT making a mistake as to the drafting and ambit of its Decision, which is then corrected by the Tribunal? In both cases the Tribunal tells the OFT it has got it wrong and you are, to put it a little tendentiously, trying to take advantage of that?

MR. TURNER: Yes, it is different. In the *Carter* case you have a question whether something that is clearly in the Decision was correct or not. Here the situation is different. We have a party deciding whether it should appeal having been misled about what that Decision contains.

THE CHAIRMAN: You say it is actually irrelevant in terms of your mistake what the OFT believed, although the OFT's belief is relevant as to he reasons for your mistake?

MR. TURNER: Yes, that is correct, precisely so.

Therefore if I turn to the main point as we apprehend them, made by the OFT, they fall within a fairly limited compass. Although they say that there are many there are common themes. The first point is the reliance on the *Wood Pulp* case, and they say that we are simply trying to take advantage of the successful appeals by other parties, and this falls foul of the *Wood Pulp* principle. The *Wood Pulp* principle is that the legal effects of an

infringement Decision on parties who do not appeal it are unchanged when other parties bring successful appeals. We accept that. We accept that a successful appeal has no legal effects on ourselves as a non-appellant and that is precisely why we are seeking permission to appeal out of time.

The relevance to the Tribunal's Ruling in this case was that that was the way in which we became aware that we had been misled as to the correct scope of the Decision.

The second point the OFT makes is close to the point you were canvassing with me a moment ago, that Gallaher is in the position of somebody who has just mis-predicted the way in which the Tribunal would have ruled if we had appealed on the grounds that there was inadequate reasoning in the Decision about retailer only restrictions. We say that is certainly not right. We were led to suppose under the terms of the ERA that the nub of the infringement in the Decision that we were admitting to concerned a retailer only restriction. There was nothing in the ERA which you have seen about limiting competition between manufacturers, especially when that is viewed against the context of the ERA. The terms of this Decision were misleading to us. It is wrong to say that we mis-predicted the outcome of a possible appeal based on lack of adequate reasoning. This is a case where the competition authority's behaviour and the way that this Decision was drafted, which you have seen, could reasonably lead a party to fail correctly to exercise its right of appeal.

The OFT disavowed the case based on retailer own restrictions until Day 26 of the hearing when it vigorously sought to argue that they were within the Decision after all.

The only point I would make about the Ruling, and I shall not go into a close analysis given the time, is that you see from the Tribunal's Ruling very clearly, para. 49: "We listened against the background to the way the proceedings unfolded up to that point."

The Tribunal in its Ruling interprets the Decision with the benefit of the 26 days of submissions and the way the case had been argued. When it discusses the scope of the Decision it does so by reference to documents in the appeal, including the skeletons, and the witness evidence. Its position we do not seek to question, but what we do seek to say is that that must therefore be distinguished from the case of a party in the position of Gallaher, *ex ante* at the outset, with the context behind it of the discussions with the OFT and the ERA and the terms of the Decision that you have seen.

THE CHAIRMAN: So what you would say is we would have to consider the decision not to appeal based upon the material available to Gallaher at that time?

MR. TURNER: Yes. The third point which I think touches on something Mr. Beard was anticipating in his intervention is that the Office says there are not exceptional

circumstances which justify an appeal because Gallaher has admitted an infringement and you have to take that into account.

The logic of that assertion is, in my respectful submission, somewhat confused because Mr. Bingham's evidence makes quite clear that Gallaher's decision to enter the ERA was driven by the belief that the Office's case encompassed retailer only restrictions. We now know that it did not, so it cannot be an objection to allowing an appeal out of time against this Decision to say that Gallaher was prepared to contemplate that something else ruled to be outside the Decision was arguable. This was an application to bring an appeal against the Decision, which the Tribunal has ruled does not contain the retailer only restrictions.

The fourth point: the Office asserts that the principle of legal certainty militates against giving us permission to appeal out of time. In fact, we say that the point made by the European Court in *Bayer* applies here, and it is worth briefly revisiting if you have the hand-up and the General Court's statement at para. 29, which was repeated when it came to the Court of Justice. You will remember there that the administration may not rely on its own failure to observe the principles of legal certainty and the protection of legitimate expectations out of which the parties' error arose. In fact, the Office's conduct in this case is what is contrary to legal certainty for that reason.

If one drafts a decision in circumstances where a party, an addressee is reasonably misled on an essential point, that undermines legal certainty.

A similar principle was articulated by the Tribunal domestically, and it is quoted in the Judgment itself. Mr. Thompson briefly referred to that – in the interests of time I cannot go to the case – but I will show you the quotation in the ruling of the Tribunal at para.44, if you have it on your screen. You will see the quotation from *Mastercard* and the Tribunal in *Mastercard* had said:

> "… 'it is particularly important to be able to identify clearly what findings are made by the Decision by he OFT, upon what basis those findings are made, and whether those findings are maintained. Moreover, from the point of view of the parties it is important that, when appealing, they are in a position to identify precisely ' …"

and here is the *Carter* point –

> "… 'the findings that are in issue, and the basis for those findings.' …"

That is the point which we lock on to, sir, in relation to *Carter* because that is the point of distinction.

Gallaher invokes the rights of defence, essentially, and our entitlement to have been faced with a decision which was adequately clear and unequivocal. The Office in the overall context and in its drafting was in breach of that obligation. The remedy so far as we are concerned is to permit an appeal out of time, and it would have two policy consequences because they say that the policy is against us. It creates a proper incentive on the OFT to draft decisions in a way which does make clear to addressees why they are alleged to have infringed and it removes an incentive, frankly, for parties to bring appeals to this Tribunal on a precautionary basis in a way that would be contrary to a principle of procedural economy, if one had to appeal on a precautionary basis, because you will never know what the nature of the infringement that would be said to have been contained in the decision would be.

Finally, sir, if I may briefly address the point that you made at the outset in relation to the ERA. My note says that you said that the ERA brought proceedings to a contingent close, so it could be said that by not appealing within the two month time limit Somerfield and Gallaher traded a discounted penalty for the prospect of a successful appeal. There are two answers in relation to that. The first is that the contingency in the ERA did not fall away at the end of the two month period. You will have in mind, and we can go back to it, that clause 7 refers to the right of the party to continue to bring an appeal.

The legal position was not settled when Gallaher did not appeal within the two month period. The Rules of this Tribunal allow for appeals out of time in exceptional circumstances. Therefore, the contingency has not been closed.

The second point is a substantive point that converges with what I have already said. The premise is that Gallaher did make a fully informed decision in the ERA, knowing what it was admitting and comprising when the Decision came along. You have seen the terms of the ERA, you have seen the appendix. The ERA was, in fact, a cause of our mistake, and it was a reason for us not being fully informed.

Put differently, the essential vice referred to in the Decision was not referred to in the ERA. Sir, unless there are any further points, those are my submissions.

THE CHAIRMAN: No, that was very helpful, Mr. Turner. I do have two related questions for you. The first one is this: bitter experience shows that the decisions of regulators are never short. They are long and they are complicated documents and that is probably unavoidable. In a sense, it might be thought to be quite common that one would be able to mount an argument that a decision was unclear in hindsight, when one sees how proceedings pan out

on an appeal to the Tribunal. So part 1(a) of my question is: is there a floodgates danger were the Tribunal to accede to your submissions here?

The second part of my question is this: it is testing whether a non-appealing addressee of a decision has in fact relied upon the misleading nature of a decision. I am very grateful for Mr. Bingham's evidence, but the one thing that is clear from Mr. Bingham's evidence is that there is no waiver of privilege. There is a general assertion that this is what we did, and I make no criticism of that. Obviously privilege is a very important matter which should not be invaded. In a sense, given that the essence of your argument is that we, Gallaher, were misled and reasonably so, the fact that there is almost always going to be a question of legal advice here rather inhibits an ability to investigate. So part 1(b) of my question really is: to what extent ought that to affect our approach in whether or not to find that time should be extended?

MR. TURNER: Yes. On the first point in relation to floodgates, certainly not. The circumstances in this case are exceptional, and I accept that if, in many cases, you could say a decision is unclear, there will be argument about its content. The distinctive feature of this case is that we were faced with signing up to an ERA which put the case in no particular way and an admission based on that, and a Decision which, for the reasons which I have outlined, appeared to encompass that case. That is a reason why we were misled. That is an exceptional state of affairs, because certainly to my knowledge, and I will be corrected, there are no other cases where a party has said, "I have been misled because the scope of the decision was not what I reasonably took it to be".

THE CHAIRMAN: The mistake would have to be as the scope of the decision, would you say, or would you say that is simply a very important characteristic in this case?

MR. TURNER: The mistake here which makes it exceptional is certainly that it goes to the essential infringements which were the basis of the infringement finding. For the reasons given in *Mastercard* the competition authority must state its case clearly so that a party has an ability to appeal on the properly informed basis.

Then two circumstances may arise. If the decision is unclear in terms of something such as the reasoning by which a finding of infringement is made, then of course one can appeal by saying "insufficient reasoning, so I do not understand what is there". This is not that sort of case. This is a case where the text of the Decision appears from the point of view of Gallaher to include a finding of infringement, and therefore we do not exercise our right of appeal. That must be taken to be an extremely rare occurrence.

Mr. Lindsey points out that in relation to the second part of your question, which concerns Mr. Bingham's evidence, it is quite true that one cannot go into his motivations, and so forth. Nonetheless, I am relying not only on his motivations or what Gallaher understood, I am showing you the reasonable basis for them on an objective basis by reference to these documents. That, coupled with his subjectivity, on which, by the way, there has of course been no application to cross-examine him or anything of that kind, creates the basis for the application. In other words, we are not saying Gallaher says to you that it was misled, you must take that at face value as the basis for granting permission – certainly not. It is only when coupled with the additional point that there was a reasonable basis for it which I have sought to develop that we have our case that we were reasonably misled. As, sir, you pointed out, the fact that OFT itself converged in saying that this was a part of its Decision at a very late stage in the day, it gives some support to the reasonableness of that belief.

THE CHAIRMAN: For the purposes of my question 1(b), I am quite happy for you to assume that the error was a reasonable one. The question, I suppose, is more the subjective side, was there an error? There it does seem to me that one is drawn immediately into an examination of facts where, by definition, given the way these decisions are made, one is not ever going to hear the whole story. You may be right, it may be that one has to simply say, if there was a set of facts which make a mistake reasonable, and someone asserts, "Yes, we did make that mistake", you draw the inference.

MR. TURNER: Yes, put differently, if we are right in the proposition that you can have exceptional circumstances, to use the tag in the *Bayer* case, where there has been a pardonable confusion, perhaps one contributed to by the administration, then one needs to be able to decide in your position whether there has been such a confusion and whether it is pardonable and reasonable. We have done the best we can with putting forward this evidence which is not subject to challenge. Had it been subject to challenge, Mr. Bingham could have given evidence and could have been more closely questioned.

THE CHAIRMAN: That is a fair point, thank you very much.

MR. TURNER: I am obliged.

THE CHAIRMAN: Yes, Mr. Beard.

MR. BEARD: Sir, I will try and break it down into four parts. Just to pre-empt what I am going to say later about the Gallaher case, to be absolutely clear a "reasonable" misreading of a decision just is not an exceptional circumstance. There is no way that could possibly be an exceptional circumstance giving rise to a basis for an appeal, so in those circumstances for Mr. Turner to say, "Yes, well, there were different ways of reading a decision" just does not

take him any further. Obviously, he has clutched on to the doctrine of "excusable error" in European law, and I will come on to that.

What I will do, if I may, I will go through things in four parts. I will look at the nature of the test of exceptional circumstances. Then I will briefly look at the nature of the decision and something to do with *Wood Pulp*, not least given Mr. Thompson's emphasis about how *Mastercard* showed the path of truth and righteousness for an authority, because effectively in *Wood Pulp* what was going on was a kind of *Mastercard* application to the Commission. Then the last two parts, I will deal with the specifics of the two cases, which I hope will drop out a little bit from the preceding material.

So just dealing with the nature of the test, we obviously know from Rule 8(1) that appeals have got to be brought within two months of the disputed Decision, a matter I will come back to. It is not suggested that no one knew when the disputed Decision was provided. No one was unclear about that.

Rule 8(2) then talks about the Tribunal not extending time provided under para.1 unless it is satisfied that the circumstances are exceptional. It is just worth noting in passing there, this Rule is made pursuant to s.15 of the Enterprise Act, which is a provision that requires to be made by way of statutory instrument by way of a negative procedure before Parliament. In those circumstances, it is notable that Parliament in the statutory instrument plainly set out a high threshold before there should be any extension of time. Of course, that has been reflected in the previous case law of this Tribunal, and is carried through into the relevant guidelines.

Yesterday we provided a brief note to the Tribunal in relation to guidelines.

THE CHAIRMAN: I have read that, thank you, Mr. Beard.

MR. BEARD: It does not change anything as to the actual force of it. It is a question of the relevant reference to the statute in the Court of Justice which we think was changed actually by the Treaty of Nice back in 2001. So, in fact, a qualification in the judgment of *Hasbro* might have been appropriate as well, but we will leave that for the moment.

The guidelines say under Rule 8(2) that the Tribunal may not extend the two month time limit for appealing unless satisfied the circumstances are exceptional. The possibilities of obtaining an extension of the time limit for appealing are thus "extremely limited".

Just pausing there, "extremely limited" is already suggesting that in these circumstances where you are talking about the nature of the decision and the consequences of parallel appeals in relation to the decision document, those are not the sorts of circumstances that are going to be relevant.

Interestingly, the guidelines go on and say:

> "(The comparable rules in the Rules of Procedure of the CFI, which is to be found in Article 42 of the Statute of the Court of Justice [now 45], requires the party concerned to prove the existence of unforeseen circumstances or of *force majeure).*"

That was the phrase that was put forward in *Hasbro*, and was approved in *Hasbro*, and it has therefore percolated back into the guidance by way of reference.

It was for that reason that *Bayer*, the ECJ case of *Bayer*, was included in the bundle, just to emphasise what it was that had been the approach of the European courts in dealing with that unforeseen circumstances or *force majeure* test. It is worth perhaps just turning *Bayer* and dealing with this point briefly, given that Mr. Turner's emphasis on this reasonable excusable error doctrine has somewhat expanded today. Notwithstanding the fact, of course, that we have had umpteen submissions in relation to these matters, the doctrine of excusable error has never been referred to before.

If we turn up tab 12, in bundle 5, which is the ECJ case, I will just take the Tribunal to the bit it was actually included in the bundle for. The bit it was included for and was cited in the Office of Fair Trading's response to the application is actually para.30, p.1773:

> "According to Bayer, the Court of First Instance infringed the second paragraph of Article 42 of the Statute of the Court of Justice of the EEC, according to which no right may be prejudiced in consequence of the expiry of a time limit if the party concerned proves the existence of unforeseeable circumstances or of *force majeure*. Those two concepts, Bayer claims, are distinct and refer to impediments which, in the one case, have no connection and, in the other, do have a connection with the party concerned. In the present case, the fault committed by the mail office …"

this is the mail office of Bayer, and we will go back to it in the CFI judgment, but what was concerned was that the relevant decision had not percolated up to the relevant personnel from the post office within Bayer, and so they did not realise what the date was that time was running from for any appeal. This is their plea:

> "The Court of First Instance should therefore not have based its decision on judgments of the Court of Justice relating to *force majeure*.
>
> It must be pointed out in this regard that the Court of First Instance, in giving its reasons for rejecting the plea based on the second paragraph of Article 42 of the

> Statute of the Court of Justice of the EEC, first reviewed the conditions which must be satisfied … As the Court of Justice had consistently held, there must be abnormal difficulties, independent of the will of the person concerned and apparently inevitable, even if all due care is taken. The Court of First Instance went on to hold that since the circumstances relied on by Bayer did not constitute an excusable error, they could not, *a fortiori*, be regarded as satisfying those conditions.
>
> It follows from the foregoing that the concepts of *force majeure* and unforeseeable circumstances contain an objective element relating to abnormal circumstances unconnected with the trader in question and a subjective element involving the obligation, on his part, to guard against the consequences of the abnormal event by taking appropriate steps without making unreasonable sacrifices. In particular, the trader must pay close attention to the course of the procedure set in motion and, in particular, demonstrate diligence in order to comply with the prescribed time limits."

So that was the fourth plea, very emphatic, very high threshold, and then 33 sets out why it was that the particular points that had been raised did not take them further.

Mr. Turner, in relation to *Bayer*, now refers to what is said in relation to the third plea in law in this appeal, which can be found at paras.25 through to 28, and this is what is referred to as the "excusable error". Paragraph 25 starts:

> "Bayer considers that the Court of First Instance should have declared its application admissible by recognizing the excusable nature of its error regarding the date from which the period for initiating proceedings began to run and should not have limited that concept only to those cases in which the conduct of the institution concerned had been such as to give rise to a pardonable confusion in the mind of a party acting in good faith."

It is important to work out what is actually being talked about here. The excusable error doctrine in European law which is not contained in Article 42, as it then was, Article 45 as it now is, that relates to an error regarding the date from which the period for initiating proceedings began to run. That is, therefore, perfectly understandable because otherwise you end up with a bizarre situation which, if you have an excusable error doctrine that is broadly framed, it effectively cuts across the very tightly circumscribed terms of the unforeseeable circumstances and *force majeure* requirement that is spelled out in the statute.

So this is not some vast gateway being opened in European law where you can go round agonising about the terms of decisions and judgments that are made subsequently, it is very clearly focused. You can actually see that, in addition, if you turn back to *Bayer* CFI, itself. If one goes to the paragraph to which Mr. Turner referred you, which is para.22:

> "Excusable error
>
> In the alternative, Bayer submits that even if it is accepted that the period laid down by the third paragraph of Article 173 of the EC Treaty started to run on 28 December 1989 …"

so focusing on the starting date –

> "… the application cannot be dismissed as inadmissible in the light of the case law of the Court of Justice holding that a failure to comply with time limits laid down in legislation does not prevent an action from being admissible where the applicant has been in excusable error as to the point from which time started running."

That is the doctrine that is being talked about. You can see this from the subsequent paragraphs, 23, 24, 25 and 26, and I will not go through them, that they are all to do with what had the Commission been doing in terms of its communications with Bayer, what had Bayer been doing in the light of the Commission steps, and whether or not that meant that the way in which Bayer had dealt with the receipt of the decision was, itself, as to constitute an excusable error given rise by the conduct of the Commission. That is why in para.28, when the court comes to its view which is obviously later approved by the ECJ:

> "In the Court's view, it is first of all necessary to define more closely the scope of the concept of excusable error which may, in exceptional circumstances, have the effect of prolonging the period prescribed fro initiating proceedings, as the Court of Justice held in its judgment in *Schertzer v Parliament*. That concept, which is distinct from those of unforeseeable circumstances or *force majeure* explicitly provided for in Article 42 …"

That is just making out the point I was emphasising that the arrangements for the excusable error doctrine are such as to be separate from the statute restrictions. Those are very narrow, there is no possibility that this excusable error doctrine should be more widely drawn.

I did not know where Mr. Turner was going to go with this because, as I say, it had never been raised, but I thought it might be helpful to look at the case that is actually cited here in para.28 as the very basis and essence, so perhaps I could pass up a copy, it is the *Schertzer*

case. (Same handed) This is actually a staff case, but it obviously raises the same sort of issue. Someone had brought a challenge to their termination of contract of employment and the argument was being run by the European Parliament, which had been the employer, that actually it had been brought out of time. If one turns to para.10, what you will see is:

> "By letter dated 12 March 1968 signed by the chairman and by a member of the European democratic union group the applicant was informed that the group had decided to terminate the employment which he had had entered into pursuant to a contract of employment dated 29 January 1965.
>
> That letter gave three months' notice …
>
> On 10 June 1968 the applicant forwarded a complaint through official channels under Article 46 of the conditions of employment … and Article 90 of the staff Regulations …"

Article 90 is the vehicle you use when you are complaining about something that has been done to you as a European staff member.

> "… to The President of the European Parliament against the communication of 12 March 1968.
>
> By letter dated 24 July 1968 the president informed the applicant that his complaint was wrongly addressed since the bureau of the European Parliament had by Decision dated 12 December 1962 entrusted each political group [with contracts of employment]."

So he is essentially saying, "No, you have written to the wrong person, you should be writing to the heads of group". Then:

> "At the same time the European democratic union group asked the secretary-general of the European Parliament to postpone the expiry of the notice terminating the applicant's contract of employment until 16 September 1968 …"

because of the fact he had not yet been able to take all of his leave. So it was counting holiday as work time.

> "By letter dated 10 June 1968 sent to the Parliamentary Secretary … the secretary-general of the European Parliament stated that he had noted the new date on which the contract of employment was to expire and that he would have regard to it in spite of certain reservations which he had as to whether the extension was in accordance with the applicable provisions of the staff Regulations.

> As a result the director-general of administration of the European Parliament forwarded to the applicant by letter dated 19 September 1968 the account of the severance grant due upon termination of the contract of employment on 16 September 1968.
>
> The applicant has brought his action mainly against the letter from the director-general of administration dated 19 September 1968, and alternatively against the … rejection of the complaint lodged on 10 June 1968 …
>
> The European Parliament, taking the view that the decisive measure is the letter of termination dated 12 March 1968, has contested the admissibility of the action on grounds of delay."

Then what is said is the important paragraph:

> "Although it is true that the letter of termination dated 12 March 1968 from the European democratic union group must be regarded as having alone given rise to the claim in the action, the effect of the delay in instituting proceedings should not be strictly applied to the applicant in view of the difficulty which he experienced in identifying the authority competent to receive his complaint and the uncertainty with regard to the period of notice which resulted from the extension requested on his behalf by the European democratic union group and granted by the secretary-general of the Parliament."

So this is just a case where, strictly speaking, in law the relevant decision was in March, the strict approach would be two months plus X for a challenge to be brought, but because the parties in this matter, the relevant responsible people, had said, "Oh, no, it is not for us, it is for somebody else", and then turned round and said, "Actually we will terminate your contract at the end of September", the court is saying, "Actually, because of what was done to you by those organisations you did not know when time started". That was the excusable error, that is the extent of the doctrine in the European law. There are umpteen cases where excusable error has been dealt with by the European courts in relation to these matters. None of them are concerned with anything remotely like that which Mr. Turner now seeks to rely upon, or indeed if Mr. Thompson was to do the same. It is a very narrow doctrine. I am conscious of the time. That may be an appropriate moment. I am going to move back to some of the domestic authorities. The point I am going to make is simply that the domestic authority, *R G Carter , Hasbro*, strictly construes these matters, European law does, the guidelines were right to. None of what has been said today moves us any further

forward. This is in fact a very straightforward point. There may be big numbers associated with it, but that does not actually change the nature of the application at all.

THE CHAIRMAN: That is very helpful, Mr. Beard. I know that we have indicated that we can run to five o'clock today, but, in fact, I will have to rise promptly at a quarter to five. Just to make sure that there is not a problem I suggest that we resume at 1.45.

MR. BEARD: Sir, I am perfectly content to do that. In fact, timings have been worked out between the parties to finish at 4.15.

THE CHAIRMAN: That is excellent.

MR. BEARD: That includes a whole hour for a lunch break.

THE CHAIRMAN: I am very content to sit earlier if that assists. I know one thing the parties cannot do is budget for Tribunal interventions. I am in the parties' hands.

MR. THOMPSON: There was a dispute about timing, but to my mind Mr. Beard got early and has been given two hours, of which he has used a chunk already, so I would anticipate we have plenty of time on any view, and I would not think it is necessary to blow a whistle for people to stop given the way the hearing has gone to date and the scope of the issues. I would have thought we would have ample between two and 4.30 to conclude the matter, but I am very happy to come back at 1.45 if that would suit the Tribunal.

THE CHAIRMAN: Let us compromise and say 1.55, and I will see you then.

(Adjourned for a short time)

THE CHAIRMAN: Yes, Mr. Beard.

MR. BEARD: Before the short adjournment I was talking about some of the European law authorities, if I might just track back to one or two domestic authorities on the test. Volume 5, tab 21 is *Hasbro.* I am not going to go through the particular circumstances of the case but just highlight one or two comments of the then President of the Tribunal at p.2005. On that page at line 7 there is an initial emphasis on the nature of the Rule, which was then Rule 6(3), a citation of the Tribunal's Guide to Proceedings, and emphasis on the comparison with European law, and then at line 20:

> "In my judgment, the general intention behind the Tribunal's Rules is that the initial time limit for lodging an appeal is intended to be strict. Cases that do not involve *force Majeure* in the strict sense will, in my Judgment only rarely give rise to 'exceptional circumstances'.
>
> As far as the Tribunal is concerned, respect for the deadline in commencing proceedings is, in many ways, the keystone of the whole procedure. In my judgment, therefore, derogations can be granted only exceptionally under Rule

6(3). That principle is important as it is under the Competition Act, is likely to be even more important when the Tribunal assumes its various new jurisdictions under the Enterprise Act later this year."

So that is emphasising the position in relation to appeals which is, of course, what we are talking about here, the subsequent Enterprise Act changes were pertaining to damages claims.

MR. THOMPSON: Can you read lines 7 to 10?

MR. BEARD: Certainly.

"First, the Tribunal is not permitted to extend the time limit for lodging an appeal 'unless satisfied that the circumstances are exceptional'. See Rule 6(3)…"

- now 8(2), the words have not changed -

"It is probably impossible to produce any indicative, let alone comprehensive, definition of what is meant by the 'the circumstances are exceptional' in Rule 6(3). Each case must turn on its own facts."

There is no dispute about that. It is not a closed category. The point that is made by the Office is not "It is a closed category" but that in circumstances where the intention of the wording is to constrain the circumstances in which extensions of time should be granted, where the authorities clearly have drawn a comparison with the EU law under Articles 42, 45 in relation to unforeseeable circumstances or *force majeure*. The basis on which the events subsequent to a Decision, and in particular an appeal in relation to parts of that Decision could ever amount to exceptional circumstances are difficult to envisage at all. We never, ever say "never" but here we absolutely say "no".

If we move on then to *RG Carter*, which was the other authority and which, I am obviously conscious, that you, Mr. Chairman, will be familiar with. It is in bundle 6 tab 30. I will pick it up at para.4 if I may. There is a summary of the various Tribunal Panels' findings, because in construction, as you will recall, there were actual parallel Tribunals sitting and overlapping in the two courts here. So a series of Judgments came out, many of which dealt with markedly similar issues that had been raised in a multitude of appeals. Paragraph 4 is summarising some of the key conclusions that RG Carter then wanted to rely upon. Paragraph 4(a):

"The final penalties imposed on the Appellants were excessive given the nature of the infringements found by the OFT to have been committed".

It is just worth recalling the context of this. In all of the cases that were identified in the Decision there were effectively two types of infringement, there were the straight cover

pricing infringements, and there was the cover pricing plus compensation infringements and, of course, what had happened was that the starting point for those categories of case had been set in precisely the same way across all infringement findings for the relevant category. So although obviously different companies were involved, slightly different factual situations were involved. That finding made by the OFT was identical, effectively, in relation to each type of case.

> "(b) That the OFT's interpretation of its guidance, contained in a document published in December 2004 entitled *Guidance as to the appropriate amount of a penalty* as meaning that 'relevant turnover' was measured in the undertaking's last business year prior to the Decision was incorrect.
>
> (c) The Minimum Deterrent Threshold used by the OFT at Step 3 of the Guidance, was by its nature and application such as to give rise to penalties which were excessive and disproportionate."

What is worth noting about those two is, of course, that they are straight legal challenges that were upheld in the appeals. So (b) the OFT got its own Guidance wrong, it misinterpreted its own guidance, and (c) the MDT was disproportionate and therefore unlawful, and it had of course been applied across the board in relation to all of the cases.

If we then move on to the analysis section, which is on 2423, starting at para. 19. First of all there is simply an exposition of Rule 8(1) and 8(2). At para. 20 there is an emphasis on the length of the Decision. Of course, one of the matters raised by Somerfield at one point about suggesting this was an exceptional case was the length and complexity of the Decision. Unfortunately, as you adverted to earlier, Mr. Chairman, there are frequently cases where there are long, complex documents. Here it was addressed to 103 undertakings, there were fewer in the Tobacco Decision.

The facts set out in the Decision were known to all of the addressees, so what the terms of the Decision were in respect of each undertaking was known to each of them, and they knew there was a Decision and therefore they knew that time ran, and that is what is concluded at the bottom of para.20. By definition these are facts and matters that will be known at the time the Decision in question is published.

Paragraph 21:

> "Decisions which penalise breaches of the Chapter 1 prohibition will often, by their nature, tend to involve consideration of the activities of multiple undertakings over the course of many years. Multiple addressees of such decisions are the rule, and not the exception. Whilst some addressees may seek to appeal such decisions,

> others, for whatever reason, may not. The Decision in this case is no different, save in terms of scale, which I do not regard as a relevant factor."

I adverted to the OFT's position in relation to that matter, and we say again here, the scale of the penalties that have been imposed do not change the position in relation to the appropriate approach, the application of Rule 8(2) in these cases.

Paragraph 22:

> "In paragraph 4 of the Application, the Applicants stated that they based their decision not to appeal on legal advice to the effect that the OFT should be presumed to have interpreted properly its own Guidance."

Here obviously there is a degree of parallel with the case certainly put by Gallaher, which is effectively saying the OFT should have been presumed to have interpreted its own Decision correctly.

> "In the event, the Tribunal found that the OFT had misinterpreted and misapplied its Guidance in a number of respects. Such an outcome, however, could scarcely have been regarded as unforeseeable when the Applicants were considering whether or not to appeal the Decision between September and November 2009. The fact that a decision is successfully challenged on an appeal can scarcely be described as 'exceptional'. The whole point of the appeal process is to enable decisions to be challenged. A number of other addressees of the Decision decided to appeal the Decision albeit one was out of time."

That was *Fish*. Paragraph 23:

> "The truth of the matter, in the present case, is that the Applicants, having made an informed decision not to appeal now regret that decision in the light of the outcomes of the appeals that were made by other addressees of the Decision and now seek to revisit that decision."

Mr. Turner has sought to place reliance on this saying that it is the informed nature of the decision that you are taking that is crucial here, and we were not informed because we misunderstood what the Decision was about. I will come on to that in a moment, but what is clear is that both Somerfield and Gallaher had the Decision. Obviously they have had exchanges with the OFT before, obviously they had entered into early resolution agreements on the basis of the SO, but they had had the Decision, they could parse the Decision, they could pour over the Decision, they could work out how they interpreted that Decision. They could then make an informed and fully advised decision whether or not to appeal.

That does not mean that all of the terms of the Decision in question were certain and unambiguous, that there could not be arguments both as to the legal basis on which the decision was taken, nor in relation to the factual findings. Plainly, all of those matters were at issue if you wanted to appeal against any of them.

> The exceptional circumstances relied upon by the Applicants amount to nothing more than the normal decision process that any addressee of a decision goes through when deciding whether or not to appeal. It is simply that in this case, with the benefit of hindsight, the Applicants wish to change their decision not to appeal."

Those, with respect, are sentences that could be transposed precisely to this case. This is exactly what is going on here. Somerfield and Gallaher entered into early resolution agreements. When they got the Decisions they were well advised by very capable legal advisers. They had lots of people concentrating on this, working out what they thought the Decision might mean. They will have weighed up perfectly sensibly a whole range of issues, some of which may be legal, some of which may pertain to the Decision, some of them may just be commercial – it could be a whole range of issues. I do not want to presume, but the idea that they were not in a position to consider properly whether to appeal - nothing there. The idea there was an excusable error for Gallaher not appealing in these circumstances does not make any sense, they knew the Decision, they knew they had two months and they decided against it. Other parties did not, including parties that had entered into early resolution agreements and decided in fact, having seen the Decision, they thought its reasoning, its basis, was flawed. Another point I will pick up in relation to Gallaher is that Mr. Turner has said that they were unclear about the reasoning, they were unsure about the reasoning. That in itself is a ground of appeal. If the "Decision does not stack up" - as the language was used once in *Interbrew* – then you can take the Decision on. That would in fact be a basis for appealing the Decision in and of itself.

THE CHAIRMAN: Just to be clear, I do not think either Somerfield or Gallaher are actually challenging *RG Carter* as it stands. They are saying the mere fact that a Decision is reversed, perhaps extensively on appeal, is not enough, they each point to additional factors. I think Mr. Turner's point is that both Gallaher and the OFT consider that there were two theories of harm in the Decision as regards one the OFT conceded during the course of the hearing it could not run, and as regards the second, which I think Mr. Turner majored on as his case, it was that both the OFT and Gallaher were under the same misapprehension which was corrected by the Tribunal, but you are saying that makes no difference?

MR. BEARD: It makes no difference at all. If you want to draw a parallel with *RG Carter* the non-appellants who would, if the guidance on penalty had been applied properly, have got lower penalties, such as RG Carter itself, were working on the basis that the OFT had got its interpretation of the guidance right and they were following it. Both RG Carter and the OFT, in terms of the proper legal interpretation of that guidance, got it wrong. There is an exact parallel with that position here. There is no good basis for distinguishing RG Carter from Mr. Turner's position in relation to Gallaher; it makes no difference.

Just moving on to para. 24:

> "I agree with the OFT that a circumstance that applies equally to the 76 other addressees to the Decision who chose not to appeal cannot be considered exceptional. No injustice is caused to the Applicants by my refusal to extend time. They enjoyed precisely the same opportunity as every other addressee of the Decision to lodge an appeal at Tribunal but they chose not to do so."

That is precisely the same in relation to all of the undertakings affected by the findings of infringement in the Tobacco Decision, they were all sat there with this lengthy Decision. They were all pouring over it, some decided to appeal, some decided not to, no doubt there were a myriad of different interpretations of different parts of that Decision. The fact that there may have been different interpretations is simply irrelevant to this exercise, there is no realistic possibility that that could ever be an exceptional circumstance, and that is why – although never say "never – we say "absolutely not" here.

It is just worth moving on down, I will not go through paras. 25 and 26 but 27:

> "What is important – and what underlies the existence of a strict limit for the time for making an appeal – is the need for certainty and finality of process. In that regard, I share the views expressed by the President in *Fish Holdings v OFT* at para.21:
>
> > '… Where no challenge to a decision is lodged with the Tribunal within the time allowed for doing so, the OFT and everyone else is entitled to assume that the decision in question is definitive. Where, exceptionally, time is extended that assumption is undermined . It seems to me that there is some inevitable prejudice to legal certainty in that regard, as well as in the effort and expense entailed in defending the decision and in processing the appeal …'."

Then it talks about how long has elapsed and so on. Undoubtedly, the public interest in legal certainty is being embodied in Rule 8(2). It is not by coincidence that Parliament

approved such a strict interpretation. It is not by coincidence that the President in *Hasbro* focused on the parallel, very tight interpretation of Article 42 of the Statute of Court of Justice and said: "That was the relevant benchmark". It is because the principle of legal certainty is of such significance in this context.

Of course, that is why Mr. Turner has attempted to develop this notion of an excusable error, because what he wants to be able to do is to say that actually what the President was saying in relation to *Hasbro* does not really cover the way that EU law works. He is not saying EU law is binding on this Tribunal. What he is saying is that the approach of EU law should be mirrored by the Tribunal and EU law allows this more expansive definition of what is a circumstance that should permit an extension of time because there is this excusable error doctrine, and the sort of excusable errors that are covered by it include ones where we are not kind of sure where the Decision is going because it would be quite difficult to understand and therefore we decided not to. The point I was making before the short adjournment is that is a fundamentally wrong interpretation of that doctrine.

What we have is a situation where domestic law quite properly mirrors the way in which EU law works, both of them are extraordinarily strict.

As I say, it is vanishingly hard to see how post-Decision events, particularly relating to parallel appeals could, in those circumstances ever constitute exceptional circumstances. Just to be absolutely clear, the category may not be closed, but it is very closely circumscribed. Otherwise, the effect is that the certainty of an unappealed decision is effectively undermined, and that would be quite wrong. There is a real legal issue as to certainty and linked to it a form of floodgates argument, because if one allows appeals out of time on the basis of the outturn of what is said here to be related appeals, that in those circumstances you will find that people will want to grab on to appeals that come up later.

Of course, Mr. Thompson and Mr. Turner stress repeatedly that these situations are special, this case is different. Tobacco is different from construction, from CRF, from Kits, from toys, from any other case. But the creativity of legal minds to identify what is a distinguishing factor, and how one then distils out that distinguishing factor, particularly taking Mr. Turner's approach of reading the Decision was actually rather hard and, in the circumstances, "We did not understand it in the way that the OFT did, or the Regulator did, or we understood it in line with them but not the way that the outturn appeal was, and in those circumstances that really affected our consideration of the appeal." That way there may be inordinate benefits to lawyers but in terms of the public interest and the public policy goal of engendering legal certainty there would be very significant damage.

Mr. Thompson laughingly said in *Eden Brown*, which is a very different case, people could not come along and say: "*Eden Brown*, there is a legal issue that has been decided, and you cannot then pick it up as a basis for an appeal in an unrelated case, in other words a case not related to construction recruitment fora.

I do not think we should just work on that basis. I do not see on what basis that if it is being said that a legal finding in relation to a particular statutory provision or guidance, or indeed a treaty provision is being found in relation to a case on different subject matter, effectively to undermine the basis on which people considered their appellate decision making in relation to related matters, the idea that this Tribunal will not face applications in relation to those sorts of situations seems to me to be incorrect because there will be very, very significant incentives to actually undermine those decisions on the basis of other appeals in due course, but for the moment one only needs to focus upon this situation in these proceedings. That deals with the domestic authorities, and the European authorities on the relevant test and, as I say, I have not troubled the Tribunal with what we have dug out overnight in relation to the excusable error jurisdiction because there are numerous cases and we can assist with those if that is of interest.

Instead, what I would like to move on to is just the nature of Decision and although Mr. Thompson and Mr. Turner have stressed that they are not challenging *Wood Pulp2*, it is important to understand how their approach to what can constitute exceptional circumstances would effectively circumvent the way in which *Wood Pulp 2* operates. To that end if we could turn up the *Wood Pulp 2* decision which is in bundle 5 at tab 15. This is *Wood Pulp 2*, *Wood Pulp 1*, just for your notes is in bundle 5 at tab 9, that was the primary challenge by a number of members of the *Wood Pulp* cartel against the infringement Decision.

If I could start briefly at para. 3, which is on p.1805:

> "By the Wood pulp decision, the Commission found that some of the 43 addressees of that decision had infringed Article 85(1) [now 101] of the EEC Treaty in particular by concerting on prices for bleached sulphate and wood pulp."

Over the page:

> "Article 1 of the Wood pulp decision listed the infringements of Article 85 found by the Commission, the addressees concerned and the relevant periods."

Just focus on para.5 for a moment:

> "In Article 1(1) of the decision, the Commission stated that the Swedish addressees, with the exception of Billerud-Uddeholm and Uddeholm AB, and other

> Finnish, American, Canadian and Norwegian producers had concerted 'on prices for bleached sulphate wood pulp announced for deliveries to the EEC during the whole or part of the period from 1975 to 1981. According to Article 1(2), all the Swedish addressees had infringed Article 85 of the Treaty by concerting on actual transaction prices charged in the Community, at least to customers in Belgium, France, the Federal Republic of Germany, the Netherlands …"

What we were looking at here was a wide-ranging cartel involving all of these various players.

Then para.6, significant fines imposed. "Fines were imposed on nine of the Swedish addressees." Paragraph 7:

> "Those latter undertakings decided not to lodge applications for the annulment of the Wood pulp decision and paid the fines which had been imposed upon them."

However, 26 of the original 44 addressees did bring applications and that is what was heard in Wood pulp 1. The important thing just to bear in mind here is this is a single cartel arrangement with different dimensions, 26 people appeal saying: "There is nothing to see here in relation to Articles 1(1) and 1(2), a bunch of them do not including the Swedish addressees, and it is these people who then pursue matters.

Paragraph 8:

> "By the Wood pulp judgment, the Court of Justice annulled Article 1(1) and (2) OF THE Wood pulp decision."

So entirely quashed those cartel findings.

If we then move on to para. 10:

> "By letter of 24 November 1993 AsiDomän Kraft Products and the other respondents in these proceedings, which had not brought proceedings for the annulment of the Wood pulp decision, asked the Commission to reconsider their legal positioning the light of the Wood pulp judgment, even though they were not addressees of that judgment, and to refund to each of them the fines which they had paid. They contended in particular that they were in the same position as the other producers in relation to paragraphs 1 and 2 of the operative part of the *Wood Pulp* judgment and that the annulment by the Court of Justice of the Commission's finding that addressees of the Wood pulp decision had concerted on prices for bleached sulphate wood pulp and on transaction prices in the Community should also have been applied to them."

So this is effectively what Mr. Thompson referred to as the *Mastercard* solution. It is these people going to the Commission and saying: "Commission, you lost Articles 1(1) and 1(2), those cartel arrangements did not exist, there is no infringement finding. There were findings in relation to us in relation to those matters, you must quash those, get rid of them, do away with them. Be a responsible authority and pay us our money back."

The Commission responds in para.11 saying: "No, we are not going to do that, and then if you turn over the page, para.13:

> "The respondents raised a single plea alleging that, by its decision of 4 October 1995 …"

This is the refusal to accede to the request to remove the Decision:

> "… the Commission disregarded the legal consequences of the *Wood Pulp* judgment."

In other words, that you should effectively say that the Commission was obliged to apply the findings of the Decision in relation to the non-appellants.

What we then see, if we turn on to para.49 on 1817 is the court setting out the essence of the appeal.

> "Essentially, the appeal raises the question whether, where several similar individual decisions imposing fines have been adopted pursuant to a common procedure and only some addressees have taken legal action and obtained annulment, the institution which adopted them must, at the request of other addresses, re-examine the legality of the unchallenged decisions in the light of the grounds of the annulling judgment and determine whether, following such a re-examination, the fines paid must be refunded."

Then para. 52 notes that effectively the Community Judicature cannot rule on matters not before it. They say that it would be ruling outside the realm of the petitioners, the *ultra petita* principle that is articulated there.

Paragraph 53:

> "Consequently, if an addressee of a decision decides to bring an action for annulment, the matter to be tried by the Community judicature relates only to those aspects of the decision which concern that addressee. Unchallenged aspects concerning other addressees, on the other hand, do not form part of the matter to be tried by the Community judicature."

Paragraph 54:

> "Furthermore, although the authority *erga omnes* exerted by an annulling judgment of a court of the Community judicature … attaches to both the operative part and the *ratio decidendi* of the judgment, it cannot entail annulment of an act not challenged before the Community judicature but alleged to be vitiated by the same illegality."

Effectively it is saying appeals are *in personam* they are not *in rem.* Then we go on to para. 57:

> "It is settled case-law that a decision which has not been challenged by the addressee within the time-limit … becomes definitive …"

Then para. 61:

> "Such a rule is based in particular on the consideration that the purpose of having time-limits for bringing legal proceedings is to ensure legal certainty by preventing Community measures which produce legal effects from being called in question indefinitely as well as on the requirements of good administration of justice and procedural economy."

So that is setting out and recognising that you do get these situations, in particular in this case where it was a single infringement involving all these cartelists, but you do only quash certain decisions, and yet they remain valid against other parties. Here it is saying specifically that the Commission does not have to do anything about it. Indeed, if the Commission were to start doing something about it, that would be contrary to that fundamental principle of public policy.

Then just to conclude, at 63:

> "Where a number of similar individual decisions imposing fines have been adopted pursuant to a common procedure and only some addressees have taken legal action against the decisions concerning them and obtained their annulment, the principle of legal certainty underlying the explanation set forth in paragraphs 57 to 62 above therefore precludes any necessity for the institution which adopted the decisions to re-examine, at the request of other addressees, in the light of the grounds of the annulling judgment, the legality of the unchallenged decisions and to determine, on the basis of that examination, whether the fines must be refunded."

In his submissions towards the end Mr. Thompson referred to the consequences in relation to, for instance, follow on claims of the position that he says his client is left in if he is not allowed to have an extension of time to appeal. It is not to do with the terms of the

extension of time to appeal, it is the nature of appeals being *in personam* that leave any such anomaly. That is not a relevant consideration here.

Deutsche Bahn does not assist Mr. Thompson or Mr. Turner at all in relation to those matters. *Deutsche Bahn* is talking about something entirely different. It is talking about the timing for bringing damages claim. Specifically that case proceeded on the basis that there was not any suggestion that *Wood Pulp (2)* was somehow being overturned by a side wind or further considered. Indeed, in submissions made which we referred to in the rejoinder, it was made clear by the claimants in that case that they were not seeking to do that.

The significance, of course, of all of this is that where you can get the potential for, as Mr. Thompson puts it, some sort of subsequent anomaly, that is a function of the public policy interest in legal certainty obtaining in relation to the structure of appeals. That cannot and should not be prayed in aid as a way of extending time for appeal and effectively circumventing that policy, particularly, I have emphasised, where the criteria for extension of time has been set down strictly with regard to that public policy interest.

Indeed, it is just worth noting that the judgment in *ITL*, of course, itself, even in para.2 of the judgment says:

> "For the reasons we set out below our unanimous decision is that these appeals should be allowed and the decision quashed so far as it concerns these appellants."

I turn then to the particular points that have been raised by Somerfield and Gallaher in relation to these matters. Somerfield's case, it seems from the submissions today, essentially boils down to two points, whether cumulatively or alternatively giving rising rise to the exceptional circumstances. The first appears to be that the OFT conceded its case before the Tribunal, and the second is that the OFT sought to sustain its decision against, it is said, Somerfield on the basis of the refined case. I will deal with those two points in reverse order, if I may.

The idea that the OFT has sought to sustain its decision against Somerfield on the basis of the refined case is just not right. Of course, the OFT argued in the course of the appeals that the refined case was part of a decision, and the Tribunal said, "No, in relation to these appeals you are not entitled to sustain the decision against the appellants on the basis of that refined case". So it could not be the basis against those appellants. That is not the same thing as saying that the refined case is being maintained against Somerfield. Somerfield was faced with the decision as it was. It had an infringement finding made against it in that decision, and that decision is valid against it. The fact that subsequently there was a characterisation of parts of the decision by the OFT as amounting to the refined case

restrictions, that I will come on to, it does not mean that the OFT is somehow *ex post* maintaining those sorts of positions against Somerfield. The decision against Somerfield is as it was at the time. Trying to get into some kind of refined taxonomy about how you re-interpret it is not productive in these circumstances. Indeed, the way that Somerfield puts its case leads to really quite odd questions arising. If Somerfield is saying, "Well, the decision to seek to sustain the position on the appeals by reference to the refined case is itself an exceptional circumstance", that would seem to suggest that if the OFT had not tried to run the refined case there would be no exceptional circumstance in relation to Somerfield. That seems a very odd position to end up in, but if the OFT tries to maintain its position in an appeal it ends up worse off vis-à-vis an extension of time application from Somerfield than if it had not tried to do so.

Of course, in relation to Somerfield, the case against it has been set out in the Decision. It understood that case and accepted it. It could have appealed, just as Asda did in those circumstances. Of course, as with Asda, Somerfield was in a position where it had entered into an Early Resolution Agreement and there was no suggestion that there was any confusion on the part of Somerfield about what it was entering into, or indeed what the scope of the Decision was.

The second point they raise about seeking to sustain the Decision against Somerfield on the basis of the refined case, that only arises if Somerfield is right that the Decision somehow otherwise falls, but that is to presume that actually the Decision against it has fallen. The whole predicate of the OFT's position is: if you do not appeal it the Decision stands against you.

Going back to the first point on a concession, it says, "This is different because the OFT conceded its case". I will go on to whether or not there was actually a concession, as Somerfield put it, and indeed pick up some of the points that Gallaher makes about the characterisation of the case in a moment. Let us just assume that Somerfield are right, and that the OFT had conceded some or all of the appeals. For the purposes of an "exceptional circumstances" application, the natural question is, so what? Conceding cases is not unknown. It can be due to legal issues, it can be due to factual issues, it can be due to a combination of things. The fact that the case is conceded, and therefore a judgment entered against you, does not make any substantive difference to this exercise, as compared to a situation where wilfully and blindly the OFT would have careered ever onwards and ended up with a decision against it. How can that possibly be an exceptional circumstance? It is perverse to suggest so. The more that a party presses on in the face of clear concerns being

articulated by a tribunal, the more that other parties are adversely affected. It makes no sense at all. The idea that a regulator who is more pragmatic in the face of communications coming from a tribunal, or reading the evidence that is being provided, taking into account what is being said orally, recognising that its cross-examination is not succeeding as it might have hoped, and saying, "Okay, we are not going to press on for another six weeks, this is a waste of everybody's time, we recognise there is a problem here"; or if, in the course of litigation, because things do come out in the course of litigation, it has realised that a legal point which previously had not been thought to really bite on some way in which the OFT approached matters, it actually seems to the way that a decision is put together, and the OFT says, "Hang on a minute, we just had not realised quite the significance of that point, and now it is articulated, now we hear it, we are going to concede the matter". That should justify other people coming along and saying, "It is an exceptional circumstance which allows us out of time to appeal pursuant to, for instance, that legal point", whereas if you had rolled through to a full hearing and it had just been decided against you, there is not an exceptional circumstance. Perhaps they are saying, "If you do go through to a full hearing that will be an exceptional circumstance too", but if that is the case "exceptional" just is utterly debased as a term, because that is the meat and drink of appeals, as this Tribunal recognised in *Carter*.

Indeed, *Carter* just draws out certain of the circumstances that illustrate why it is that the way in which proceedings unfold, the vicissitudes of litigation play out, means that those are not going to be exceptional circumstances. We never say never, but it is very, very hard to see how they could be, and certainly the points put forward, the idea that running a refined case in the course of the appeal, but conceding anything in the course of the appeal could amount to exceptional circumstances is plainly wrong.

Just to back that up, I have proceeded on the basis that there was some sort of grand concession here, but it just is not like that in these proceedings. What the OFT's lengthy Decision was about was the operation of the parity and differentials clauses. As explained in the Decision, the example of a parity requirement is a requirement by manufacturer A for a retailer to price manufacturer A's brand X at the same price as competing manufacturer's brand Y. So a parity requirement involves both manufacturers and retailers. So does a differential requirement. The example of a fixed differential is a requirement to price manufacturer A's brand X at Z pence less than the competing brand Y. Again, it involves both manufacturers and retailers.

The Decision went on to explain, as indeed the statement of objections had done before it, that parity or fixed differential requirements restricts a retailer's ability to determine retail prices. Undoubtedly that is true, it did affect retailers.

If a parity or a fixed differential requirement is implemented, an increase or reduction in the retail price of one brand leads to the corresponding increase or reduction in the retail price of another brand. That also impacts on the way in which manufacturers compete against one another. So it is not right to try and isolate restrictions and restraints that were characterised in the Decision as simply being retailer only or manufacturer only. These are dangerous characterisations that can mislead as to what was being dealt with.

The way that this is perhaps most easily seen is by reference to the judgment. Could we just go to bundle 4, tab 15, the judgment starts at p.1469. If one turns on to p.3 of the internal number of, 1474, what you see in para.8 is a summary of how the Tribunal perceived that the Decision had found that the terms of the agreements between the manufacturers and the retailers could be derived from a number of sources and factual elements, and I will not go through those, but there was a whole range of factual matters at issue. "The Decision then dealt with each of the bilateral relationships separately, but used broadly the same wording to describe the infringement of each case" - (para.9).

Then what one sees in paras.10 and 11 are references to particular parts of the Decision where there was a description of how it was envisaged that the infringing agreements restricted competition that the Tribunal has particularly identified, in trying to crystallise some of its considerations in this judgment, but recognising that it is dealing with an extensive and lengthy Decision.

Then we find in para.14 the description of the infringement that Mr. Turner has referred to at para.8.2 of the Decision. Then there is a description of the appeals, and in particular the volume and extent of the evidence and material that was then provided. Then could we go to para.28. As part of the course of exchange of pleadings and submissions, in para.40 of the OFT's skeleton, which was drawing on submissions that had been put forward by Imperial in its skeleton, so they were actually Imperial's summary of what was in the Decision, we have what have been referred in the remainder of the Judgment as the "Paragraph 40 restraints".

> "Assuming that ITL has a P&B agreement with a Retailer of the kind identified by the OFT:
>
> (a) if the retail price of Gallaher's brand increases, then the retail price of ITL's rival brand must also increase;

(b) if the retail price of ITL's brand increases, then the retail price of Gallaher's rival brand must also increase …"

So the thing to bear in mind here is that we are talking about agreements with retailers but they are talking here about restraints which have effect on the relevant competing prices of the manufacturers. So to try and identify, even in relation to the para.40 restrictions, and say, "These are to do with retailers, they are not to do with manufacturers", is just not right. That is picking up something Mr. Turner says when he talks about what he thought or Gallaher thought was the essence of the Decision. He starts distinguishing between retailer focused restraints in the Decision, and then manufacturer focused restraints in the refined case. When we look at the summary here, the para.40 restrictions, it is not delineating retailers and manufacturers in the way that Mr. Turner is suggesting. It is the interaction between them that is important, and when you have two manufacturers in the market the way in which their relative prices are being set is clearly of significance.

Then (c) and (d) are to do with price decreases.

Then para.29:

"Those four restraints were referred to frequently during the course of the main as the paragraph 40 restraints', and we refer to them as such …"

Then we move on to the hearing and the growing uncertainty about the OFT's case that the Tribunal then describes, and how they have been many days of witness evidence. The witness evidence had borne out what had been put in witness statements previously, and the cross-examination by the OFT had not made, I think it is fair to say, in roads into that evidence.

Of course, what is said later on in the judgment is, "You knew about that evidence, OFT, because you had had witness statements previously", and that is fixed on by these applicants to say, "This really was not to do with vicissitudes of litigation as to what happened". That is simply to gloss over the situation where, as a Regulator faced with a great deal of evidence against you, you still decide that you have enough factual material on the documents, in the circumstances you are willing to pursue your decision in the face of appeals against it. Obviously, however, you are going to be sensitive to the way in which the oral evidence has an impression upon the Tribunal, the extent to which your cross-examination does or does not make headway in relation to the relevant case.

THE CHAIRMAN: Mr. Beard, it is probably also a point for Somerfield, but obviously I did not have the pleasure of being present during *Tobacco*. To what extent should I simply be taking as read and accepting the Tribunal's narrative of events before it in its Judgment that

you are taking me through? One can see a number of points which either side might draw up. For instance, against you, if you look at para.31, there is reference to the fact that it appeared that the OFT's counsel was not putting very clearly whether the para.40 restraints had been imposed or not, and it was left to counsel for the appellants to make those points. Later, when we come to the nature of the concessions being made by the OFT, again one sees some fairly clear statements by the Tribunal as to what was and was not conceded. That, presumably, I can just take as read?

MR. BEARD: It is difficult to see how the applicants can say that there are exceptional circumstances here because of what the Tribunal has said, but somehow you should ignore other parts of the Tribunal's decision. I see that as difficult. For the OFT's part, it looks at the decision, it does not look at all of it with great warmth. I am sure there are those behind me that disagree quite fundamentally with some parts of what the Tribunal has said in relation to the way in which the OFT presented its case. There are no doubt people not here who consider that the criticisms of the way in which they presented the case are not fair. Those matters, to some extent, have to be left to one side here. The point I make is a broader one, that the way in which litigation pans out and the way it is then expressed in a Decision do not in and of themselves give rise to any exceptional circumstance at all.

THE CHAIRMAN: I quite see that, and I see the force of that. I suppose the point I am really getting at is that it would be unattractive, I think, for this Tribunal to get involved in a trial within a trial as to precisely why it was that *Tobacco (1)* came to the end it did. It does seem to me that you are right, one has to take what the Tribunal said in this Judgment, good or bad, take it as a whole, and see where one ends up, whether it meets an exceptional circumstances or not. You are not disagreeing with that.

MR. BEARD: I am not disagreeing with that. I place the proper caveat, which I am sure those behind me would want placed in relation to it, but for the purposes of these proceedings it has to be on that basis. And of course, in particular Mr. Howard, who was counsel for Imperial, made great play of the fact that the way in which the OFT was presenting its case and cross-examining witnesses gave cause for concern and that effectively this was undermining the position that the OFT had in relation to these issues, that it was pursuing what had been referred to as the "paragraph 40 restraints".

Of course, these matters did come to a head, as is described in the Judgment. In particular, there were concerns expressed, as articulated in para.32, on day 16. There was further concern expressed on day 19. On day 23, the Tribunal asked the OFT to clarify two matters by close of proceedings on Wednesday, 2nd November. The first matter was whether the

OFT still maintained that each of the agreements which were the subject of the appeals operated in the same way; and the second was to answer certain questions about how the OFT now asserted the agreements operated, such as whether the OFT still maintained that the para.40 restraints operated independently of any changes in the wholesale price set for the brand by the manufacturer for that retailer.

Then it is in response to that that we have what is referred to as the "Day 26 statement" that was then produced. That is referred to at para.35.

Mr. Thompson says, "Mr. Lasok said these matters may or may not be established to the appropriate legal standards, and that is effectively him folding, him conceding". That is plainly not what was going on. What he was saying clearly in relation to the day 26 statement was that the OFT was pressing on. Whether or not it would or would not be found in the end that the matter was made out is a separate issue entirely, but certainly it would be wrong to treat that as amounting to a concession in relation to the entirety of the case, and that is absolutely clear from the way in which the OFT continued with the litigation. It pressed on, and it did say that, although there were clearly issues arising in relation to the para.40 restraints, nonetheless it was going to continue to press for the Decision to be maintained.

I think it is important to just step back a moment here, because the essence of this is: is the OFT continuing to maintain the Decision. The precise arguments that are deployed in order to maintain the Decision are not of the essence of what the OFT was doing. What we do not have here is a concession by the OFT that the Decision should be given up. It clearly recognised in relation to the evidence that had been heard and the proceedings to that date that parts of its case in relation to what are referred to as the para.40 restraints were undoubtedly significantly weakened by what had happened. Indeed, concern had been plainly expressed as to the extent to which it could continue to pursue all of the matters as it did.

The statement that has been put forward then is considered by the Tribunal, in particular in para.39, where we come on to the refined case, what we see very clearly is that the OFT is not conceding the Decision in relation to the appeals. It is contesting the appeals in relation to each of the infringing agreements, and doing so on the basis that those agreements were object infringements, and it put forward what has now come to be referred to as the OFT's 'refined case'. The refined case restraints are effectively those set out in 2(a) and 2(b) of the quote:

"The OFT considers that the evidence before the Tribunal supports the conclusion that each of the appellants has committed an infringement of the Chapter I prohibition comprising the Agreement on concentration of:

(a) specific retail prices in the context of the maintenance of the manufacturer's P&D strategy regarding the retail prices of its own brands relative prices of linked competing brands."

Just pause there, Mr. Turner is saying this is all now about manufacturers, it was previously about retailers. No, with respect, just as the para.40 restraints talked about retailers and manufacturers, so does 2(a) in particular. Then 2(b):

"a requirement or expectation that retailers would adhere to the manufacturer's P&D strategy in the absence of manufacturer wholesale price change or alternative manufacturer instructions."

I will come on to how that is to be dealt with.

THE CHAIRMAN: I do not want to take you out of order, and please take this when you wish, but obviously these are statements that can be read perhaps in many ways.

MR. BEARD: Undoubtedly.

THE CHAIRMAN: In a sense though, I would be inclined to attach some importance to the way the Tribunal in this judgment articulates what concessions have been made, and at some point I would be grateful if you could help me on paras.51 and 52 of the Judgment where there does seem to be a fairly clear conclusion by the Tribunal as to what it considered the OFT was making by way of concession. As I say, do not let me take you out of order. Do take your own time, but I would be very grateful if you could help me with that.

MR. BEARD: I am perfectly content to move on to that. Before I do, if I may, it may just be worth looking at the 17th and 18th November speaking note, which is in this tab back at 1468AZ [B4/Tab 15]. In this tab, of course, we have the submissions made on 7th November by the OFT [1468R], which are clearly saying that it wants to press on. Then we have the 17th November speaking note, and if one goes through this to para.32, there is a point being made here about the extent to which relevant restrictions are within the terms of the Decision. What is said at 33:

"In the light of the evidence, the OFT considers that the manufacturers' P&D pricing strategies were implemented by the retailers playing a more passive or compliant role - that is to say, it was agreed or concerted that they would enable the manufacturers to implement the P&D strategies in their stores, as set out above.

> In any event, both the Decision and the refined case are concerned with an agreement or concerted practice the purpose of which is to enable the manufacturer to implement its P&D strategy which, by its nature, is concerned with the pricing of linked competing brand. ITL's argument that the refined case differs from the case set out in the Decision in that regard is incorrect."

So the OFT is saying there, "We think the refined case is a way of justifying the Decision as against ITL in relation to the agreements".

If you turn back to para.31, one can see that there is talk here about how there is a damping of competition, and that damping of competition does relate to manufacturers damping competition between themselves through the manner in which retailers are operating the P&D restrictions, but it is clearly in that section talking about the way in which retailers are constrained in the way in which they proceed.

I think the other paragraph I would refer you to in that note is also, if one goes on 1468BM, para.48, this speaking note is clearly spelling out how the OFT understood that the refined case in para.48 of the OFT's skeleton argument fitted together:

"In these appeals there has been significant debate about the four scenarios contemplated in para.40 of the OFT's skeleton argument. Although that paragraph is not the basis for the refined case, it is important for the Tribunal to understand how the refined case relates to the position as previously explained. Then it goes on to talk about that, and talks about the footnote references. If one turns on to 51:

> "Under the refined case two of the factual permutations set out in para.40 fall within the factual scope of the restrictions set out in 10(a). On the refined case, as in the Decision, the factual scenario involved the re-aligning of P&D's by the giving of instructions by the manufacturer to the retailer, the difference between the case made out in the Decision and the refined case lies in a different understanding of what was agreed or concerted between the manufacturer and retailer."

So the OFT was there clearly trying to say that para.40 restraints that we have been characterising as the best way of articulating our arguments to defend the Decision are still being maintained even through these refined case articulations of the basis for the Decision. But, overall - central point - we are still seeking to defend the Decision. Then we come back to the paragraphs that you are referring to, Mr. Chairman, in the Judgment itself, paras. 50 through to 52, it talks about:

"50. The Day 26 Statement was, we assumed, made on instruction in response to the request made three days earlier by the Tribunal seeking clarification of the OFT's case on precisely those issues. The Tribunal and the parties were entitled to treat it as the OFT's considered view. We are satisfied that the OFT did concede that if the case it wished to put forward at that stage went outside the paragraph 40 restraints, that would require the Decision to be set aside. In that event, the only question for the Tribunal would be whether to keep the appeals going in order to exercise its powers under paragraph 3(2)(e) to make a new decision."

That is saying that if you are not pursuing the para. 40 restraints in your refined case then you would actually need a new Decision because the refined case, if it does not encompass the para.40 restraints, or any of them, is effectively going further. What is clear is that the OFT did not consider that that was the case. It thought that it could pursue the refined case, albeit that it would not be pursuing all of the previously characterised para. 40 restraints.

"51. It was therefore striking that the Refined Case, served a few days later, alleged two restraints which were clearly not the same as any of the paragraph 40 restraints and yet the OFT still maintained that the Refined Case "reflected a part but not the whole of the infringement found in the Decision". The Refined Case made no reference to the concession that had been made on Day 26, either to ask the Tribunal's permission to withdraw that concession or to explain how the Refined Case fitted with the Day 26 Statement or with the paragraph 40 restraints.

52. We see considerable force in Imperial's submission that the OFT should not be permitted now to argue that the Refined Case Restraints are within the Decision. However, it would be unsatisfactory for all the parties for these appeals to be brought to an end purely on the basis of the Day 26 Statement. We do not propose therefore to end our consideration there since, regardless of the OFT's concession on Day 26, it is clear in our judgement that the Refined Case Restraints are not part of the Infringing Agreements as defined in the Decision.

So never mind what had been said or what could be read into the Day 26 statement the Tribunal then carried out an analysis whether or not the restraints had been put forward.

THE CHAIRMAN: Indeed, that part I understand, but it seems pretty clear from these two paragraphs, 51 and 52, that the Tribunal did think and, indeed, held, that a concession had been made that actually would entitle it to bring the case to an end at that point and what the Tribunal was saying was that it is unsatisfactory to decide it on that basis and therefore we will go on and just check to see whether, in fact, the Decision does contain the refined case,

and of course it held that it did not. The Tribunal might have been in a slightly awkward position if it had found that the Decision did contain the refined case but the concession was different but, as it happened, the two findings, or holdings dovetailed.

MR. BEARD: Yes.

THE CHAIRMAN: It does seem to me that these two paragraphs are essentially recording a concession by the OFT that the case could not go on.

MR. BEARD: Certainly, in terms of their interpretation in paras.50, 51 and 52 that appears to be what is read into the Day 26 statement which, as I say, is clearly also not the way that the OFT was approaching matters, because that is not consistent with what it is then saying in the speaking note in relation to these matters. It was not reading what it had said previously in that way at all. It was clearly thinking that actually, albeit that the restrictions and restraints that had been pursued previously had been substantially weakened and that it should re-characterise matters in the refined case, that was not saying that it was giving up on the Decision, because if it was really saying that it was giving up on the Decision, even putting in a speaking note itself does not make any sense at all.

The OFT has put forward that position, the Tribunal has said: "We see it as being a concession in those circumstances as per the terms of paras. 51 and 52, but this simply goes to show how, in the course of these sorts of exchanges during litigation, you can end up with the Tribunal saying :"You have conceded something". The OFT is not thinking that it has conceded something and is continuing to pursue matters, albeit on a refined case modified basis, and the Tribunal is rightly saying: "We are going to have a look at how these things fit together, because if, in fact, the refined case does not cover the argument put forward before us, we are not satisfied that you should be able to proceed. What is important, perhaps, is just to focus on where it says at para. 50:

> "We are satisfied that the OFT did concede that if the case it wished to put forward at that stage went outside the paragraph 40 restraints, that would require the Decision to be set aside."

The difficulty that one has with paras. 51 and 52 is that that concession, insofar as it is properly articulated and properly recognised, does not carry with it the correlative effect that there was a general concession of the entire case, of the Decision in relation to the appeals. Although one can read paras. 51 and 52 as suggesting that that is the Tribunal's finding in relation to it, the OFT plainly had not conceded at that point that the refined case went outside the terms of the Decision as it had been set out in its lengthy document and as

summarised in the para.40 restraints because, of course, it needs to be stressed that the refined case, of course, came afterwards.

THE CHAIRMAN: No, you see the difficulty is what I articulated earlier. How far are you inviting me to go down the road of effectively re-construing the speaking note and the statements made by the OFT as opposed to simply looking at the Judgment, no matter how regrettable all of the parties may regard it and simply taking that as the gospel statement of what happened?

MR. BEARD: As I say, the difficulty one has here is that as I have made clear you have the Judgment here, this was what the Tribunal concluded. We say in fact paras. 51 and 52 of the Tribunal's Judgment are ambiguous because they are recognising an OFT concession in para.50, which is not contested, and extrapolating from that something broader, which is not consistent with what it then says in relation to the refined case. Therefore, this is an ambiguity of interpretation of this Judgment. This is not an invitation to go back further, but I am simply explaining why it is there is an ambiguity here. No matter how conscientiously drafted and prepared Judicial Tribunal Judgments are it is not unknown that they themselves contain ambiguities, and this must be one of them in this regard. I should stress that we are taking this in two stages. I hope I have explained very clearly that even if there were said to be a concession that does not matter here.

THE CHAIRMAN: I have that point.

MR. BEARD: If there was a concession it clearly was not what the OFT contended, and the reason I took you to the speaking note is just to be clear that the concession made in para. 50, which you were asking about: "what is the scope of the concession?" That is accepted. What is not accepted was that the concession then effectively was just the OFT folding its hand in relation to the entirety of the case. However, that does appear from the language of paras. 51 and 52 to be the way that the Tribunal was thinking about it. However, it did not decide the matter on the basis of the concession because it carefully goes on and says: "We are not doing that", because of course no matter what was said in the Day 26 statement we are actually going to look at the refined case.

Taking it in stages, concession does not matter, we say this part of the Judgment is ambiguous and is extending the scope of the concession in a way that it really properly could not be, and that those paragraphs should be read accordingly. But, in any event, this Judgment does not proceed on the basis of the concession. This Judgment proceeds on the basis that you look at the refined case provisions, and that is what is then done in para. 56 through to para.59. What is then said is: "Forget all about what the OFT did or did not do,

forget about whether or not Mr. Lasok threw in too many subjunctives or negatives, or whatever else he did in the course of his submissions, let us actually look at whether the refined case is different from what has been set out previously as the summary of the basis for the Decision or not. If it is different and does not encompass any of those elements then in those circumstances we are not going to let this go on because the OFT does not have a basis for its case and we are going to find that this Decision should be quashed in relation to the appellants", and that is effectively what they do in this part of the Decision, because in para. 56 it is saying that the refined case 2(a) restraint is not contrary to what the OFT had been submitting covering the para.40 restraints. In other words, the OFT's case, if it is trying to defend the Decision on the basis of the refined case it cannot do so, but I go back to the point that it is about the Decision that matters here. The Tribunal is saying that if you are running this refined case you do not have the basis for supporting the Decision because really the Decision is based on what is summarised as the para. 40 restraints, and I am not trying to revisit any of that - that would be hugely entertaining, no doubt, for all concerned but something that is not appropriate for this hearing. What is appropriate is to focus on what the Tribunal was doing; it was looking at whether or not the OFT's case really could be maintained.

In many ways it is rather like a self-initiated half-time submission in proceedings. In other words, albeit after factual evidence has been heard but before expert evidence, the Tribunal sits and thinks to itself: Is there a basis for this case to continue to proceed? Again, the situation of a half-time submission is far from unusual. It is of the essence in many jurisdictions that half-time submissions are commonly made; they are much rarer in this jurisdiction but in a way that is what we are seeing here. That does not make it outlandish or unusual, or an exceptional circumstance in any way. It is saying: "You have not got the basis to proceed with matters as you are now saying you are able to do so". The fact that the OFT, recognising what has gone on, recognising weaknesses in its case, recognising the way the Tribunal has thought about these things, has tried to reconfigure its arguments and is trying to say: "These are the bases on which the Decision should proceed", it is plainly no exceptional circumstance at all. As I reiterate the submission I made previously that to reach any other conclusion would end up in a perverse situation where the OFT would be better off either blithely continuing with the para.40 restraints, not trying to reconfigure things, just being blindly insensitive to what was going on and not trying to actually accommodate anything but certainly not conceding, because if it concedes then according to Mr. Thompson this is a salient warning which means that people should be flocking into

this Tribunal effectively taking advantage of the decision that the Tribunal then takes overturning the findings of infringement in relation to the appellants' agreements.

In relation to the position of Somerfield, we have a situation where the use of the refined case, is not in and of itself, to defend a decision, in any way a basis on which it amounts to an exceptional circumstance vis-à-vis Somerfield. The fact that there was on Somerfield's account a concession albeit that that is not the way that the Tribunal decided the matter again does not amount to an exceptional circumstance. Those were two key components of Somerfield's case. It really does not matter the basis upon which someone else's appeal succeeds whether it is a concession, a powerful Judgment, a damning Judgment, or merely a balanced, careful and more refined Judgment in a particular case. None of those factors matter and that must be seen against the backdrop of the threshold test which, as I say, has to be seen as extremely high indeed.

I will then, if I may, move briefly on to the Gallaher case unless there are particular issues. I am going to focus on Gallaher's primary case, because obviously Gallaher's secondary case is Somerfield in a different dress. I know that, of course, claims can be run in the alternative, although quite how one runs the two cases in this circumstance is an interesting one given that one case is predicated on the idea that you could not understand the Decision and the other that it is entirely comprehensible, but the flexibility of the legal mind is a marvellous thing.

THE CHAIRMAN: It is like the schoolboy in the school window, is it not?

MR. BEARD: Yes.

THE CHAIRMAN: But just to be clear, you would accept that if we were to accept Somerfield's submission that would then read across to Gallaher?

MR. BEARD: In relation to their second case?

THE CHAIRMAN: Were I to reject Mr. Turner's primary case but to accede to Mr. Thompson's case, then ----

MR. BEARD: It is a matter for the Tribunal but Mr. Turner has undoubtedly put a secondary case which is along the same lines, and so if one were to accede to the Somerfield case one could see the consistency of approach there.

I will deal therefore with the primary case. With respect to Mr. Turner this case really does not get out of the gate. Issues pertaining to the terms and interpretation of a Decision are simply not exceptional circumstances. When one looks at the relevant test for unforeseeable circumstances and *force majeure* in particular in European law one is looking at those external factors that come to affect the way in which you deal with a particular case

and in particular why it is that your case is not lodged on time. Whilst those matters of course apply in relation to Somerfield's primary case and Gallaher's secondary case, because we say to try to draw in the appellate procedures is effectively trying to take into account matters you should have dealt with when you were considering whether or not to appeal in the first instance. Here, talking about the interpretation of the Decision itself is *a fortiori* a matter concerned with what you do when you weigh up the risks and decide whether or not to appeal. It is no good basis for extending the time for you to appeal. When you weigh up the risks, when you carry out your interpretation you have a whole range of risks that you are weighing up: have I read the Decision correctly? What are the possible weaknesses in it? What sort of evidence could we deploy? How would it affect us if we were able to pursue our appeal? What could we lose if we pursued an appeal - that is obviously going to be pertinent to an early resolution applicant signatory? There can also be reputational issues and commercial issues of all sorts that are considered and concerned in such an assessment. Of course, in this context it is important to recognise that the OFT does not have the final word in relation to the interpretation of its own decisions, you can tell that from the Judgment.

The way in which the OFT operates as a statutory body is to put its Decision out there, and then it is for anyone that is an interested party and objects to it, to look at it, assess it, and decide whether or not it warrants an appeal if they are affected by it. That really is the be all and end all of the case. That can never, we say, amount to an exceptional circumstance. We say "never" in this case, we just do not see how that could ever, ever, be a matter that could justify an extension of time. It is so different from those cases of excusable error to which I have already referred where you have a situation where you did not know when the time limit was, you did not know when the Decision was delivered, you did not know what you were talking about in relation to the Decision because the authority had told you the Decision was actually at one date and it should have been treated as being given at an earlier date. Those are just wholly different situations.

Of course, what we have here is Gallaher coming along and saying: "We looked at the Decision, we made an assessment. We decided that in the Decision there was some reference to the refined case. We therefore thought we are not going to appeal because we think the refined case has force". That is the story they are telling, that is the approach that Mr. Bingham puts forward in his evidence.

I think they accept the para.40 type restraints were in the Decision, although having said he was not going to pick and choose amongst the Decision and Statement of Objection, that is

absolutely what Mr. Turner did, and I am not going to try and go back and pick out bits and pieces. One has to read the Decision and, indeed, the Statement of Objections as a whole, and it is plain that those documents are focused upon what later came to be considered to be the para.40 restraints for the purposes of the hearing.

When one comes to the Judgment where Gallaher now finds itself is in a place where it says: "We got that wrong". It did, on its view now, think that it got things wrong. In other words it thinks that if it had taken an appeal it might have done better than it initially assessed it would have done had it taken an appeal. That is not an exceptional circumstance in any way. The fact that Gallaher thought it could see within the Decision a reasoning that might have supported the refined case and, indeed, when it came to it in the context of the appeals the OFT were saying a similar thing does not make any difference. It does not make it in a different position from, say, the non-appellants in *RG Carter* who read the guidance and thought the OFT gets its own guidance right - does it not? Well, they were wrong. Gallaher was wrong. If it was, so be it.

If you start permitting parties to come along and say: "The interpretation is quite difficult, there are long decisions; they are quite complicated issues. We will not appeal, but if an appeal pans out we might be in a position later to say that we did not really understand what was going on here so we decided not to appeal but on refection, now having seen a Judgment in relation to a related matter, we think there was really something there for us and because we have misread that other people might have misread it too, but we have misread that, that justifies us coming out of time".

The idea that the public policy in favour of legal certainty has any existence thereafter is just impossible to maintain. It will have gone. The basis on which the approach in *Wood Pulp* is articulated, the basis on which the jurisprudence of this court has developed in relation to extensions of time would entirely fall away. It would undermine the intention of Parliament in setting Rule 8(2) as it has done.

It is just worth remembering the Judgment itself is not actually making any findings about Gallaher, this is a question of reading things across. There is a wonderful irony here, trying to understand what the real counterfactual would have been if Gallaher had decided that the reasoning in the Decision, on its account of what the refined case was, was so weak that it might have appealed and come forward and said that actually this case is about the refined case rather than the para. 40 case effectively telling an entirely different story from Imperial in the course of the hearing; that is perhaps something to conjure with in these circumstances. It is not, however, something that has any real impact on this Tribunal's

decision making. The fact that they feel some remorse as a matter of their internal decision making again does not amount to an exceptional circumstance. If you could reopen a Decision when you realised that actually your legal and factual prospects of challenge had been mis-appraised the world of uncertainty would have opened up.

Part of the assessment that will have been carried out will, of course, have been whether the reasoning in the Decision was sufficient. In relation to what Gallaher relies upon, the refined case account in relation to which it has tried to highlight one or two paragraphs in the Decision, then if it thought in relation to those matters that the reasoning which it considered perhaps gave rise to a strong case against it were not that good, then that in and of itself is a basis to bring the appeal.

One of the factors you are taking into account is not only do we think the case that we do not consider amounts to much (the para. 40 type restraints case) we could take that on, we are a bit more worried about the 2(a), 2(b) case against us, but when we look at the reasoning it does not amount to very much; we could take that on. In those circumstances if you have uncertainties about the reasoning that in itself is a basis for appeal. It is not a basis for saying: "We will wait to see what happens. Actually, they are not spelled out and they are not given the basis that we thought they were going to be in that Tribunal Decision put forward in relation to other appeals. In those circumstances we will bring the claim. We should be entitled to; it would be terribly unfair if we were not able to."

Mr. Turner has actually said the reasoning was jolly clear and this was a different case. If that is so then the reality is they just did not want to take the risk in relation to challenging these matters because their appraisal was that the Decision was sound, but I do not have to re-emphasise again that people can get things wrong and decide not to appeal, such is the way of things. Other appellants take those risks, sometimes they inure to their detriment and they end up with painful and heavy cost bills, and those that kept their powder dry sit back quietly and do not articulate any of their thinking. It would not have mattered whether they just happened to flip a coin in those circumstances, they would not complain about it. But in circumstances where instead they see that there is an advantage to try to do these things, in effect what they want to do is circumvent that separation of the outcome of appeals that has been so carefully spelled out in relation to wood pulp and in the subsequent domestic authorities.

A couple of final remarks in relation to Gallaher: if you allow the idea that a mis-appreciation of a Decision can itself, following a subsequent Judgment amount to an exceptional circumstance, you do get into precisely those practical problems that you were

identifying, Mr. Chairman, in relation, for example, to waiver of privilege. But more practically all of those issues that pertain to what information and what thinking was going on internally. How on earth can it possibly be right under Rule 8(2) on that sort of inquiry? That cannot be the way that this exercise should be conducted.

Of course, it would be important in order to carry out that exercise properly not just to pick and choose in relation to particular paragraphs as Mr. Turner did, but to think about the entirety of the Decision. Picking on odd paragraphs and saying these are sort of focused on retailers when actually you read on four paragraphs and it is all about manufacturers and the way in which competition between them is reduced, and then say: "Actually we were misled because we did not realise it was all about manufacturers as well as retailers" is something that simply cannot be sustained, one has to read the Decision as a whole. I am very happy to take the Tribunal to further passages in the Decision to counteract those put by Mr. Turner, but that, in the OFT's respectful submission is simply the wrong exercise to be engaged in in relation to this sort of application.

In relation to the ERA, again it does not assist Mr. Turner. Again he picked and chose bits and pieces of the SO. The ERA was in relation to the infringements as set out in the SO. The SO talked about retailers and manufacturers, it did not talk about one or the other. His categorisation, his dichotomy is not right. Of course, that is actually illustrated in those boxes that I asked Mr. Turner to refer to - the second box - where specifically it was talking about things that went beyond what he referred to as retailer related matters. Obviously, I do not know to what extent that remains confidential. One can see there that the acceptance as part of the ERA was recognition of the fact that matters went beyond those, that Mr. Turner now says were the core of what constituted the relevant decision.

Underlying all of this and the reason why we have the strict thresholds, the reason why there must be a proper reluctance to have these strict thresholds and have them properly applied, and the reason why it may be that certainly people may think that the outturn of the likes of *Wood Pulp* does feel as if it creates anomalies. Underlying that is the principle of legal certainty and the need to avoid the floodgates opening. As I say, every case is special. Some are more special than others. It depends how much time one spends focusing on the special nature of a case, often as to how they can be represented as different from everything else, as really only a minor increment, nothing to worry about here, you are not really changing the fundamental basis on which to proceed.

So in the circumstances, the truth is that both the Gallaher appeal and the Somerfield appeal are really seeking to circumvent that very fundamental fact. Their appeals are *in personam*

and if you do not appeal you are stuck with the Decision and you can end up with situations that people might discuss as being unusual. They might discuss the situation in *Shannon* as being somewhat unusual.

We have set out in our rejoinder at p.8, footnote 24 [B1/Tab F/169], precisely why it is that *Shannon* is not of assistance to the applicants in this case. It is worth noting that here some may say the position is almost *a fortiori* that of *Wood Pulp*. The charges against both Shannon and Tracey arose from the set of facts. Shannon pleaded guilty whilst Tracey successfully contested the charges before the court, that contestation being the analogy for appellant's successful to the Tribunal. The analogy goes further, because as noted in Somerfield's reply, following Tracey's acquittal on two substantive charges the prosecution offered no evidence against Tracey in relation to the conspiracy charge. Even the prosecution's abandonment of the conspiracy charge against Tracey did not result in the alleged co-conspirator, Shannon, being relieved of liability following his guilty plea.

It may be something for moral philosophers and ethicists to discuss as to whether or not the outturn of those sorts of arrangements is what overall legal policy should pursue, but it is absolutely clear that the rules that we have here under the Tribunal Rules set out by Parliament have made a decision as to how those anomalies are to be dealt, and extending time, flexing those conditions, relying on such matters as the form of argument deployed by the OFT in the course of submissions, whether or not it pressed on madly or conceded would simply circumvent that fundamental legal policy, and it would be wholly wrong for this Tribunal to do so.

Unless I can assist the Tribunal further, those are the submissions of the Office of Fair Trading.

THE CHAIRMAN: Thank you very much, Mr. Beard. Mr. Thompson?

MR. THOMPSON: Yes, sir, inevitably on these occasions one has to try and produce some order out of chaos, and I will try and do that. I thought I would start with a point of clarification because it is a point that has popped up from time to time. It is just to clarify the position on ERA, which is bundle 3, in the Decision, p.919 and 921. If you start at 921, what happened was that after the SO the case narrowed and the three bullet points were excluded from the scope of the ultimate decision and in particular the information sharing case and the case against Tesco and the effects case were all dropped. If one then goes back to paragraph 2.115 of the Decision you see that what happened was that the OFT lopped bits out of the ERAs to reflect the narrowing of its case. One might wonder why it did not lop everything out of the ERA after the Judgment, but they did not choose to take that course.

The next point I wanted to address was simply the one that the Tribunal raised with Mr. Beard about the status of the Judgment, and certainly for my purposes the Judgment is a helpful and very carefully drafted summary of the facts on which I rely, although the exceptional circumstances on which I rely are the actual facts of the OFT's conduct, and that is why, for my purposes, I looked at some of the primary facts as they appear in the transcript on the public record, although I emphasise that I am not in any way disputing the findings in the judgment. It is simply for the purposes of clarification that I have brought certain primary facts to the Tribunal's attention.

The next point, I think it will help to look at the Judgment because to some extent I felt myself transported back to November 2011 when some mysterious submissions were made by Mr. Lasok, but if I could just clarify what actually happened, I think that may assist the Tribunal in understanding the issues before it. I think it is helpful to start, first of all, at para.13 on p.1476, and this bears on some of the submissions that both Mr. Beard and Mr. Turner made. The Tribunal clearly found that the description that is set out from the Decision at para.11:

> "… constitutes the OFT's 'theory of harm', that is its explanation as to why the agreements it has found to exist have the object of preventing, restricting or distorting competition within the meaning of the Chapter 1 prohibition."

So that was a clear and emphatic finding. I think, if there is any difference between myself and Mr. Turner it is that he appears to take bits and pieces out of the Decision and say that looks a bit like retailers, whereas by the time we got before the Tribunal the case was focused on what the theory was, and the theory of harm was that set out at 6.213 to 217. Although Mr. Beard made some rather confused submissions about it all being much the same, in fact it is not much the same. The point was that the manufacturer had an agreement with the retailer, on the OFT's case, whereby if it put up its own wholesale price and if, as a result, that led to a retail price increase for its own brand, that would also lead to a retail price increase for the competing brand, and that led to a lot of economic theorising about whether or not that altered manufacturers' incentives in relation to actually making those wholesale price increases. That was the whole core of the OFT's case, we would say both in the Decision and certainly on the appeal in the expert evidence that was put before the Tribunal. That was what the case was about until day 26.

The next point that I think may help to understand what was going on is para.42, p.1488, where the Tribunal notes that the consequence of the OFT's conduct had led to a completely

confused procedural situation whereby nobody really knew what was being proposed, although it is said at para.(c):

> "The OFT appeared to treat the hearing as an application by it to the Tribunal to reset the timetable for the hearing with a view to continuing the appeals on the basis of the Refined Case …"

. The Tribunal says:

> "In the end we have treated this as an application by all the appellant for the Tribunal to exercise its powers under paragraphs 3(1) and (2) of Schedule 8 to determine these appeals by simply allowing the appeals now and setting aside the Decision so far as it relates to the appellants."

Certainly the tone of that paragraph is that the position was somewhat irregular, and that it had resulted from the strange way that the OFT had behaved since day 26.

It is against that background that one reads paras.50 to 52, and, as I understand it, what the Tribunal says – and I do not think there is any mystery, no doubt the OFT did not like it, but I think it was pretty clear what was being said – was that they were saying that, strictly speaking, as I think I said this morning, the OFT's case had already failed by concession, but as a matter of caution, giving that it was running this refined case, it was appropriate for the Tribunal to see, first of all, whether the refined case was within the Decision, although the OFT seemed to have already conceded that it was not, and they did that then carefully from 51 to 61, and reached the firm conclusion that it was not.

Then the second part of the judgment, which Mr. Beard did not look at all, but which is really what the OFT was driving at from day 26 onwards, and one sees in the note, was that they were trying to persuade the Tribunal that even though the case did not fall within the Decision, it would be rather a good thing if the Tribunal, instead of being an appeal tribunal, would be a court and would hear the evidence and find in its favour because they had thought of this rather good case that they would now like to run, and it was that that met with complete disdain and outrage from the appellants and ultimately led to the Judgment in the form that it did. Mr. Beard's account is really quite misleading and not acceptable, and, in my submission, it merely reflects the improper conduct that we have criticised already this morning.

In terms of the half time submission, again, in my submission, that is quite an outrage for a public authority that has imposed hundreds of millions of pounds of fines on the basis of its Decision, to say, "Oh, no, we can listen to the evidence and then we can come up with another case, and that is all right because that is half time", and there was some discussion

of that type of issue before the Tribunal. Again, in my submission, that is a quite improper way for the OFT to exercise the jurisdiction it has to take decisions under this particular legislation.

I now go slightly more in order, and I will go back to Mr. Turner's points of distinction with the Somerfield case. First of all, he said that he did not necessarily agree that the OFT had been misconceived to run the refined case. I am not sure I used the word "misconceived". I said that it was exceptional, unprecedented and, if necessary, I went so far as to say that it was improper for the OFT to seek to defend the Decision on the basis of a theory of harm that was not in the Decision itself. I think the only point I would take issue with is that, in my submission, the OFT did not, in fact, misapprehend the scope of its own Decision, it knew that its theory of harm was the one that I have already referred you and that that was the central plank of its case, and that is certainly what it said to the Tribunal.

So far as the position of retailers is concerned, it is obvious, as a matter of fact, that the nature of the restriction here, a P&D restriction, if it has any effect at all, which was not necessarily conceded, was to restrict retail price movements because that is what it was about.

Likewise, there were some individual facts in the case that might have supported an RPM case, and I think the Tribunal chair mentioned that as a possibility in some of the passages I showed you this morning. That was not what the case was about. The OFT recognised, both in its Decision and in its appeal, that its theory of harm was based on the incentives of manufacturers resulting from the obligation of retailers to move the prices of competing brands. There are repeated references to competing paired brands, and that was what was brought to the attention of the Tribunal repeatedly during the hearing.

Given that the OFT had clearly committed itself to the manufacturers' incentives point, our point is that it is quite unreasonable for it then to have sought to defend the Decision on a different basis by reference to retailers and possibly retail price maintenance, a basis that had not been pursued in the Decision itself.

The position of Gallaher – I am not here to fall out with Gallaher at all – Gallaher identified these two additional theories of harm and it appears to have been concerned about them, and it appears to have thought that they were in the Decision. That is a matter for Gallaher, but as far as we are concerned that was not the position and we did not address the case on the basis of retail incentives and we, as it turned out – and I am talking here about the Co-Op, but it was equally obviously as legal adviser to Somerfield – did not the case to have been advanced against us on the basis of the theory of harms that underlay the refined case.

The other point that Mr. Turner made was that he did not necessarily say that the public concession was decisive, as against, for example, where a case had simply succeeded on appeal. Just to clarify, we do not say it is decisive either. We say it is a factor, and we also say that the *Mastercard* analogy is a close one and shows what should have happened once one had got to the day 26 position.

We say that there are three factors that we have set out at para.2 of our core submissions, and it is those cumulatively that represent the exceptional circumstances in all the circumstances of this case.

I think it is worth just looking at *Mastercard*, which is at bundle 6, tab 26. First of all, I would note just in passing at 2347 that the appellants in that case were Mastercard UK, Mastercard International and the Royal Bank of Scotland Group. So there were three appellants. If you turn into the Decision it appears that the Decision related to the licensees of the Mastercard scheme generally. If you look at para.6 you will see that:

> "The Royal Bank of Scotland (which is the largest issuer of Mastercard credit cards in the United Kingdom has lodged its own appeal, while also support MMF's appeal) …"

it appears that the banks were also the addressees of this decision, so for example Lloyds or HSBC presumably were also addressees of this decision.

When one comes to what happened in this case, para.37, p.2360, what had happened was that the OFT had changed its defence, and then at 33 it had stated its intention to withdraw the Decision, and then towards the end of 37 you find:

> "However, it seems to the Tribunal that in cases such as the present there is a need for legal clarity and certainty. The legal effect of a 'withdrawal' is not in our view entirely clear, even if the OFT has power to 'withdraw', nor would third parties necessarily know the circumstances in which the 'withdrawal' had taken place. In our view, an Order of the Tribunal setting aside the Decision under Schedule 8, paragraph 3(2) of the 1998 Act is a clear and definite judicial act which avoids uncertainty and which at the same time gives the appellants the essence of the relief that they seek in these appeals."

I do not know what Mr. Beard would say about this *Mastercard* Decision. I do not know whether he says it is still, strictly speaking, in force against Lloyds and HSBC because they were not appellants, but, in my submission, the logical position taken in *Mastercard* was to get rid of this Decision because it was no longer supported, and if the OFT wanted to pursue the case again it could do so. That is, in fact, what it has done in the *Mastercard* case.

Turning to the authorities that Mr. Beard relied on, I do not think it is necessary to go to them. In relation to *Hasbro*, I do not think there is any dispute either that the test is strict, or that it all turns on the facts which are basically the two points that were made in that case. So far as *R G Carter* is concerned, Mr. Beard's forensic tactic was perhaps a rather naïve one, which was to set up a series of Aunt Sallies and then knock them down. Just to be clear, my case is not that the Decision was a long one, I do not take that to be exceptional, nor that the fines were high, which was the next point that Mr. Beard took, nor that there were several parties, nor that we took legal advice at the time of the Decision, nor that the appeal succeeded, nor indeed that we were not informed. It is not because of the benefit of hindsight, it is not because of a legal finding. I would also say, as far as I can there was no misunderstanding of the Decision in *R G Carter*, and, just to clarify, it is not the case that we appeal whenever a case succeeds in law or fact, or we say that that is an exceptional circumstance.

Our case is that we are in a state of considerable outrage that the OFT is upholding the Decision on a basis that it no longer supports and by reference to a case that it is not prepared to pursue against us, and we say that that is exceptional and something which the court, the Tribunal, should not condone.

If one looks at *R G Carter*, whereas Mr. Turner referred to the passage about whether or not they were informed at the time, that is not the passage I rely on. I rely on the passage at 27, and indeed the quotation from *Fish Holdings:*

> "… 'where no challenge to a decision is lodged with the Tribunal within the time allowed for doing so, the OFT and everyone else is entitled to assume that the decision in question is definitive …'"

I can see that normally that is the case, but our point is that that is precisely not the case here. The OFT itself has disowned the reasoning in the Decision, and so the whole position is entirely obscure. Likewise, at the end, the Tribunal says this:

> "It is only right and proper that anyone considering the Decision should now be able to assume that, absent truly exceptional circumstances, the Decision can be considered to be immutable against those undertakings that chose not to appeal …"

Precisely. We say that here the circumstances are truly exceptional, and that is the basis upon which we seek permission out of time. So we say that there is nothing inconsistent with *R G Carter* that we are effectively the case that proves the rule in para.27.

Turning to *Wood Pulp*, I do not think there is really anything in *Wood Pulp* that I need to trouble the Tribunal with. We do not dispute the status of an unappealed decision, we do

not dispute the general statements at 61 and 63 in relation to legal certainty. Mr. Beard appeared to think that this was a case of the *Mastercard* solution. Quite obviously it is not anything like the *Mastercard* solution. The *Mastercard* solution, if he puts it that way, is similar to this one where the OFT concedes that the case it now wants to run does not support the case in the Decision. The difference was in that case it quite properly saw that the game was up and the Decision had to be removed and withdrawn. Here, somewhat disingenuously, it battled on until the Tribunal put the case out of its misery.

I do not think I need to say much about the case that was made against Somerfield specifically. I think the point that was made was that the case that the OFT relies on against Somerfield remains as stated in the Decision. The response to that is that that is quite a bizarre state of affairs, given that the OFT, itself, has publicly abandoned any defence of that state of affairs, particularly in relation to the Imperial/Somerfield agreement itself, but, in my submission, the reasoning is equally good or bad, clear or unclear, in relation to the Gallaher/Somerfield case.

Finally, if the OFT had not tried to run the refined case, had battled on and had lost, that would have been a different situation. That would have been a situation where the Tribunal would have heard a case and would have decided it on the facts, on the merits, and the OFT might even have won, however unlikely that may seem now. As it was, the OFT, as a public body, conceded that it could not defend the Decision as it stood, but instead of, at that point, withdrawing the appeal, or allowing the Tribunal to annul it, as was the case in *Mastercard*, and realistically applied against all the addressees of the Decision, the OFT chose instead to run a different case outside the scope of the Decision. When the Tribunal would not run it for it, instead of pursuing that case, it simply closed the file, and, in my submission, that is an exceptional situation which leaves the case in an unresolved and unfair state, and in those circumstances my clients should, exceptionally, be given permission to appeal, so that the legal position can be regularised and everyone knows where they stand.

I think those points I want to make. Can I just ask if anyone wants me to say anything else. I think I have already made the points about *Shannon* that we have and I do not think I need to say any more response to what Mr. Beard said just now.

THE CHAIRMAN: Thank you very much, Mr. Thompson. Mr. Turner?

MR. TURNER: Sir, if it pleases the Tribunal, I will address reply submissions under four topics. The first is that I will look at the legal test points; second, a question raised by you and canvassed with me in discussion and pursued by Mr. Beard, is it exceptional to argue that a

Decision is unclear; third, I will look at the characterisation of the Decision in this case; and fourth, the questions of Gallaher's decision not to appeal – was it misled, was it reasonably misled?

To begin with the issue on the legal test, I would like to revisit briefly *Hasbro*, *Bayer* and *Carter*. On *Hasbro*, a very short point: whereas prior to the short adjournment I apprehended that Mr. Beard was saying that that case was effectively authority for the proposition that you need unforeseeable circumstances or *force majeure*, effectively, in order to get over the hurdle, to some extent he retracted from that after the short adjournment. Without going back to *Hasbro*, the correct position is that while it refers to those points in the European jurisprudence, it accepts that exceptional circumstances may exist outside those categories, albeit only rarely. We do not depart from that proposition.

Turning to *Bayer*, I make the following four points. The first, very briefly, to make clear that there was no surprise about *Bayer*, *Bayer* is one of Mr. Beard's authorities. We told Mr. Beard prior to the hearing about the particular parts of it that we intended to refer to, and happily that allowed him to make detailed and cogent submissions about it. The importance of *Bayer* is that it fits with the case that was fully and already articulated in our notice of application and submissions. The principle in *Bayer* refers on its face to exceptional circumstances allowing a late appeal.

If I may invite the Tribunal to take up again the General Court judgment, the key paragraphs are 28 and 29 on p.228. The point is that the *force majeure* and unforeseeable circumstances doctrines flow from a separate source of power under the Statute of the course of justice. This is a doctrine based on principle and, as you see from para.28, although *Schertzer* along with certain other authorities to which you have not been taken, is an example of the application of that principle, the last two lines of para.28, which were not read aloud link into para.29 and explain that there is a wider principle at work. It arises directly out of a concern that respect of the principles of legal certainty and the protection of legitimate expectations should be upheld.

Then in para. 29 the application of those principles in the context of time limits for initiating proceedings is explained, and it is explained there that it can concern only exceptional circumstances in which, in particular, the conduct of the institution concerned has been alone or to a decisive extent such as to give rise as to the pardonable confusion.

The point therefore is that this principle cannot be narrowly limited to the facts of the earlier *Schertzer* case, or other staff cases. It is a principle which, as stated here, runs more widely

than that. It defines a set of circumstances where this Tribunal may find exceptional circumstances to exist. That is all I wish to say about *Bayer*.

Turning to *Carter*, you will recall the point from para. 22 of the Ruling, there the applicant's position was that in deciding to appeal they supposed that the OFT would be presumed to have interpreted it guidance on penalties correctly. That was the issue there. It was a mis-prediction. The proposition is that that is the same as in the present case so far as Gallaher is concerned. That is not so. Here there was no appreciation of a doubtful point made clearly in the Decision and a mis-prediction as to the prospects of succeeding in a challenge to it on appeal.

Here, one has a situation where, when taken together with the surrounding factual context the operative document, the Decision itself, misleads the party as to its scope. It creates a reasonable mistake about the operative legal document; it is not a mis-prediction case. So much for the legal authorities: *Hasbro, Bayer* and *Carter.*

I turn then to the question of whether it is exceptional to believe and to argue that a decision in this area of the law is unclear. The misleading aspect of this decision concerned the essential nature and the description of the infringement itself. We are not therefore saying that any ambiguity in a part of a long decision would be picked up and would be treated by the Tribunal as justifying an appeal out of time because of exceptional circumstances.

It is not possible to have a more central problem than the one that has arisen in this case, and it is unprecedented, there has never been a case such as this. Secondly, this is a case where the confusion concerning the scope of the Decision was contributed to by the statement of the essential restriction as it was framed in the agreement, the Early Resolution Agreement.

May I ask you, sir, to pick up again the Early Resolution Agreement. You will recall that it begins on the first page under the box by referring to "Gallaher's willingness to admit its involvement in relation to all the infringements applicable to: see the appendix". The appendix does mirror the two bullet points, but it is perhaps better to work from the appendix therefore. When one reads at para.1 one sees nothing about a restriction by object because of the limitation of competition between manufacturers at all, and reading it carefully it refers to "Agreements or concerted practice that restricted the retailer's ability to determine its retail prices" and I said before and I say again for the manufacturer's [singular], Gallaher's, products, "and thereby had the object of preventing, restricting or distorting competition.

I will show you in a moment how that departs from the case that was advanced by the OFT in defence of the appeal against its Decision. The document also refers back to the Statement of Objections and I have taken you to the key paragraphs in that document which show that the theory which Gallaher believed the Decision continued to contain is referred to in quite unambiguous terms in paras. 585 and 586.

Finally, Mr. Thompson referred you very helpfully to the paragraphs in the Decision explaining how these Decisions were adapted when the Decision came to be made. What happened was that parts of it that had, as it were, become redundant were redacted, as it were, effectively dropped by the wayside, but what does not happen is that that first paragraph is changed to reflect the fact that the Decision, if it be the case, is a different Decision focusing on the manufacturer limitations of competition arising from the restrictions. So what one observes is an irrelevant part of the case from the SO being put to one side, we see at the time of the Decision implicitly this being confirmed by the steps taken to leave this in place, and those are relevant surrounding circumstances.

The third topic I wished to address is the characterisation of the Decision. As Mr. Thompson foreshadowed, Mr. Beard had - as I heard it too - suggested that the restraints, which were the subject of this Decision, inevitably ran together competition between manufacturers and retailers, and so it was wrong to say that there could be a serious confusion or misleading quality in the Decision.

As to that, if you will open the Judgment, I say simply that that must be wrong. At para. 59 the Tribunal stated:

> "The restraints condemned in the Decision were regarded as object infringements because of the effect they had on the manufacturers' incentives to decrease or increase prices at the wholesale level…"

And then it refers to these various paragraphs.

> "A restraint which is limited to preventing price moves instigated by the retailer (rather than following on from a change in the wholesale price) is not one of the paragraph 40 restraints.

The last sentence there is important:

> "To put it another way, there was no finding in the Decision that an agreement which (i) left the retailer free to move its prices out of line with the specified parity and differential requirements in response to changes in wholesale prices but (ii) constrained it from departing from those requirements on its own initiative would be an object infringement of the Chapter 1 prohibition."

So the Tribunal itself clearly draws the distinction which we are urging on the Tribunal as well. The point is that the so-called para. 40 restraints were objectionable because of the effect on the manufacturers, and I wish the Tribunal please to compare the terms of contract which we have just looked at and my reference to "determine the objectionable quality" because they determine the retail prices of the manufacturer's brand [singular] with what is said in para. 57 of the Judgment.

MR. BEARD: I think if you are going to go to 57 it is necessary to start at 56.

MR. TURNER: Well, I am going to start at 57.

THE CHAIRMAN: Why do you not read 56 first, Mr. Turner?

MR. TURNER: We can read it first.

> "So far as the paragraph 2(a) restraint is concerned, the OFT's case is now that the price instruction given to the retailer by the manufacturer required the retailer only to move that manufacturer's price."

"… *that* manufacturer's price", and so you can see why we see this as being something that is consistent with what we want to say.

> "These price instructions were given 'in the context of' the maintenance of the manufacturer's parity and differential strategy. In formulating this restraint, the OFT accepts now that there was no requirement on the retailer to move the price of the competing brand. Nonetheless, the OFT wishes to argue, the choice of price by the manufacturer reflected its own strategy as to which competing brands its products should be priced against."

Very similar to what we are saying, in fact.

> "By complying with the manufacturer's instruction, it is therefore alleged that the retailer enabled the manufacturer to implement its parity and differential strategy."

Then we turn over to para. 57:

> "The OFT submits that the object of such an agreement in economic terms is the same as the anti-competitive object of the Infringing Agreements described in the Decision. The appellants strongly contest this. Whether the outcome on the market of such an agreement would be the same, this is in our judgement a very different case from the reasoning set out in the Decision and the OFT's Skeleton. The nature …"

and here is the part that I was going to take the Tribunal to:

> "The nature of the infringement which was condemned in the Decision and to which the OFT's theory of harm related was the requirement that the retailer alter

the prices not only of that manufacturer's [singular] brand but also of the linked competing brand. The key element of that reasoning has now gone. "

I would ask you, sir, to compare that with the statement in the Early Resolution Agreement about the nature of the restriction and you will see from that that the Early Resolution Agreement refers to the restriction relating to the control of that manufacturer's [singular] brand. Happily this neatly describes the difference and the misleading quality of the Decision upon which we rely.

Our case is that it was reasonable for Gallaher to have been misled by the Decision into considering that it encompassed a finding about restriction of competition between retailers. We have taken you to the key parts of the Decision. It is important that Mr. Beard in his very full answer has not responded. He asserts that we were selective, however, the paragraphs which I took the Tribunal to were not the only the operative part and the only section in s.7 on the object of the agreement, but the precise sections referred to by the Tribunal in the Judgment. There is no question of it being selective, and great pains have been taken to avoid that being the case. Had there been any different complexion to be put on the Decision one would have expected the Office of Fair Trading to draw it to the Tribunal's attention; that was their opportunity.

Mr. Thompson, by the way, said that the case was about the para.40 restraints and wished there to be no doubt about that, and suggested that we might have had a different take on that question. We do not. We accept and, indeed, we urge on this Tribunal that the OFT's case, as it was presented in the appeal, was framed solely and exclusively by reference to a limitation on competition between manufacturers arising from what we have called a 'lockstep' theory, the para. 40 restraints, and those involve not just an obligation to move the price of one manufacturer's brand as per the early resolution agreement but the other. That is different from the agreement which we made in 2008, and which we believed the Decision reasonably continued to encompass.

My last topic is the issue of Gallaher's decision not to appeal, was it misled and was it reasonably misled? As to whether Gallaher was misled Mr. Beard came perilously close on occasions to saying that Mr. Bingham's evidence was untruthful or inaccurate, because he has given specific evidence as to the basis on which the Decision was taken not to appeal. Sir, you canvassed with me, prior to the short adjournment, whether there was any further support for that that could be given. There was one point drawn to my attention by Mr. Lindsey and by those instructing me which is that, of course, Mr. Bingham's witness evidence was consistent with and exhibited a large number of submissions to the OFT all to

the same effect. Those submissions, which you will find in the bundle, all refer to our understanding of the restraints and what we understood the operation of the mechanism of these agreements to be. The lockstep theory in particular was consistently repudiated.

As to whether we were reasonably misled, I emphasise that it is not just the terms of the Decision on which we rely. It is important for the Tribunal to appreciate that it is the terms of the Decision in conjunction with the surrounding circumstances, which include in particular the agreement which we had made with the OFT, its specific terms and how that agreement was treated. It is that combination which is exceptional and important.

In conclusion, although Mr. Beard urged on the Tribunal that the stakes in this case should not alter the analysis, in my submission some attention should be paid to the fact that Gallaher in particular has paid a fine of over £50 million to the OFT under the authority of this Decision. Because the stakes are high particularly anxious scrutiny should be given to a case of this kind. There is a major and justified sense of grievance on Gallaher's part that it was misled - reasonably misled - into not appealing. These do constitute exceptional circumstances, the application should be allowed.

Sir, those are my submissions.

THE CHAIRMAN: Thank you very much, Mr. Turner. I see, Mr. Thompson, you are absolutely right on the timing, I am very impressed. Obviously we will be reserving Judgment which will be handed down as soon as practically possible. Thank you all very much.

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