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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1203/6/1/12

Victoria House,
Bloomsbury Place,
London WC1A 2EB

27th February 2013

Before:

VIVIEN ROSE
PETER FREEMAN CBE QC (Hon)
STEPHEN HARRISON
(Sitting as a Tribunal in England and Wales)

BETWEEN:

JOHN LEWIS PLC

Applicant

- and -

OFFICE OF FAIR TRADING

Respondent

- and -

DSG RETAIL LIMITED

intervener

Transcribed from Tape by Beverley F. Nunnery & Co.
Official Shorthand Writers and Audio Transcribers
Quality House, Quality Court, Chancery Lane, London WC2A 1HP
Tel: 020 7831 5627 Fax: 020 7831 7737
info@beverleynunnery.com

H E A R I N G

A P P E A R A N C E S

Mr. Aidan Robertson QC (instructed by Shepherd and Wedderburn LLP) appeared on behalf of the Applicant.

Miss Maya Lester (instructed by the General Counsel of the Office of Fair Trading) appeared on behalf of the Respondent.

Mr. Pushpinder Saini QC and Mr. Philip Woolfe (instructed by SJ Berwin LLP) appeared on behalf of the Intervener.

1 THE CHAIRMAN: I have a few preliminary remarks, Mr. Robertson, before we get going.

2 Thanks to everybody for your written submissions. We have a lot of material before us on
3 the detail of the website and the pros and cons of referring to bundled warranties and the
4 technical ease or difficulty of making the changes that John Lewis want to make to the
5 website. We have had rather less help with some of the preliminary steps that we regard as
6 important as forming the framework within which we have to decide this case.

7 I thought it might be helpful before we start to indicate where we want submission to focus
8 during the course of today. The first point, and this is probably more directed at the OFT, is
9 the time bar point. At the moment we are not clear whether that is just a point in relation to
10 Ground 2 and not a point that is taken in relation to Grounds 1 and 3 in the notice of
11 application.

12 Then, as far as the time bar is concerned on Ground 2, where the challenge seems to be to
13 the decision taken under s.154 of the Enterprise Act, we would appreciate a bit more help
14 from John Lewis as to whether they regard that duty as an ongoing duty, or whether it is
15 exercised once and for all, and if it is exercised once and for all then what is the specific
16 case in relation to Ground 2 on the time bar.

17 Perhaps these questions come to our minds because we are not entirely sure as to what the
18 decision is that is under attack in the three different grounds set out in the notice of
19 application, and whether actually the decision is slightly different in each of those three
20 grounds.

21 Another way of framing that question may be, when John Lewis and the OFT were in
22 discussion between June and November, what power did they think they were considering
23 that the OFT would or would not exercise to do what John Lewis wanted it to do. This
24 arises because the unusual feature in this case is that the undertakings in lieu are given by
25 the parties to the OFT, but in this case the OFT is, itself, very involved in the
26 implementation of UIL as a member of the steering group that is set up under the
27 undertakings and under clause 2.2 of the undertakings which requires the OFT, acting
28 reasonably, to approve the initial format of the website, whatever that means.

29 If the decision being challenged is, in fact, a decision taken by the OFT, or not taken by the
30 OFT, in fulfilling that role, its role as part of the implementation of the undertakings in lieu,
31 what is the legal nature of that decision, and is it agreed between the parties that that is a
32 decision within s.179 of the Enterprise Act and therefore something which is within the
33 jurisdiction of the Tribunal to consider on appeal?

1 Finally, as a preliminary point, on Ground 3, we are not at all clear what decision is said to
2 arise from the active participation of the OFT and the steering group, and at the moment we
3 are not convinced that this is the kind of case where Article 4(3) of the Treaty of the
4 European Union, in conjunction with the free movement provisions or Article 101, does
5 generate the duty that was discussed in the case law in the *INNO* case and the *Van Eycke*
6 case, to which John Lewis refer in their notice of application. This seems to be a point that
7 Dixons have raised, but not that the OFT have raised, as to whether, before you get to the
8 question of whether the undertakings in lieu, if implemented as currently envisaged, would
9 distort competition, whether that is something which is a breach of the Treaty in some way,
10 and also how that comes before the Tribunal, how the Tribunal has jurisdiction to deal with
11 the question of whether that is right or wrong.

12 So generally the message is that we do not really want a day of submissions arguing about
13 whether it is a good or a bad idea to have bundled extended warranties on the website. We
14 have read the submissions and we understand the points that there are about that, but we
15 would like some help with these more preliminary points about what the decision is that is
16 under challenge in relation to the three grounds, and how that fits in with the Tribunal's
17 jurisdiction, and what the powers that were exercised or not exercised by the OFT were;
18 and then what is the test also that the Tribunal ought to be applying when it comes to
19 consider the issues that have been raised by the notice of application?

20 I hope that is helpful rather than unhelpful, Mr. Robertson.

21 MR. ROBERTSON: That should certainly focus our submissions. Madam Chairman, if I can,
22 first of all, do the introductions in the time honoured way, I appear for the applicant, John
23 Lewis, my learned friend Miss Maya Lester appears for the respondent, Office of Fair
24 Trading; and my learned friends Mr. Pushpinder Saini, leading Mr. Philip Woolfe, appear
25 for the intervener, Dixons.

26 On housekeeping, can I just check that you do have the requisite five bundles, which are
27 three bundles of documents and two bundles of authorities.

28 THE CHAIRMAN: Yes.

29 MR. ROBERTSON: In relation to the third bundle of documents, they have been supplemented
30 with four further tabs earlier this morning. There are some documents there which I will
31 take you to in due course.

32 Given the Tribunal's indication to focus on those preliminary issues, that is what I am going
33 to do. I would like at the outset, just before I do that, to emphasise for those attending this
34 hearing that John Lewis does not object to the launch of the website in principle. Its

1 concern is to make it as comprehensive, and therefore informative, for consumers as
2 possible. Our concern at the moment, as you know from our extensive written submissions,
3 is that we think it will be misleading to consumers.

4 To focus on the points you raised by way of preliminary observation, the OFT's decision
5 making process is one which is governed by clause 2.2 of the undertakings in lieu. If we
6 can turn up the undertakings, which are in the third bundle of documents, tab 24, p.741,
7 clause 2.2 is set out there and, as you have already indicated, the OFT has two decisions to
8 make under clause 2.2: first of all, about half way down:

9 "The OFT, acting reasonably, shall approve in advance the initial format of the
10 [Extended Warranty] Price Comparison Website in writing."

11 Then the second is:

12 "Any further changes to the format of the [website] shall be agreed between the
13 Steering Group and the Website Manager and any changes, other than those
14 which are immaterial in the context of the undertakings, shall be approved by
15 the OFT in advance ..."

16 So that is the process that the OFT is currently engaged in.

17 Our visibility of it is that we did not see the proposed format of the website until 16th
18 November 2012, when it was emailed to us following the meeting of 15th November 2012.

19 We do not know what precise stage the OFT have got to under clause 2.2. We do not know
20 if they have approved in advance the initial format, we have not been told that they have.

21 Alternatively, the OFT are looking at further changes under clause 2.2. Because the website
22 has not been launched, we can say definitively that there has not been a final decision on its
23 format, and as a result of the ongoing discussions between us since the commencement of
24 this case you will have seen that the OFT have proposed further changes and we are
25 concerned that they still have the potential to mislead consumers because they do not
26 accurately set out which extended warranties come unbundled, because John Lewis
27 provides bundled extended warranties and separately charged for extended warranties. So
28 we fall into both categories, and at the moment the generic statement proposed by the OFT
29 in the most recent round of correspondence assumes that all John Lewis's extended
30 warranties are bundled. They are not.

31 THE CHAIRMAN: Presumably you have not yet applied to be a website participant as the
32 website is not launched yet, or can you apply to be a website participant before the website
33 is launched?

1 MR. ROBERTSON: We have not yet applied for the unbundled extended warranties, and they
2 have told us that for the bundle extended warranties we are not entitled to be on the website.
3 The problem we have got is that if we appear with our unbundled offerings on certain
4 electrical goods and then just do not appear at all with the bundled extended warranties
5 consumers will assume that we do not offer extended warranties at all for those products
6 where, in fact, they do come bundled.

7 The decision making process that we have referred to in our skeleton, it is the clause 2.2
8 decision making process that we are talking about.

9 MR. FREEMAN: Mr. Robertson, are you arguing that each of those approvals that you have
10 mentioned would be decisions under s.179?

11 MR. ROBERTSON: Yes, we are saying that they fall within s.179 and the OFT does not appear
12 to have taken any point on this.

13 MR. FREEMAN: But, you do not know whether decisions have been made or not and that is
14 what you are saying?

15 MR. ROBERTSON: We do not. And, sir, as soon as it became apparent to us how the website
16 was going to be formatted, that is the point at which we wrote our letter before claim to the
17 OFT and instigated these proceedings, because we wanted to get on with this as quickly as
18 we could (and I should say in parenthesis we are very grateful to the Tribunal for the speed
19 with which you have heard our application).

20 MR. FREEMAN: But you are arguing that at least one decision has been taken, and that is what
21 you are appealing against?

22 MR. ROBERTSON: Plainly, a decision has been taken that this is the way in which it is going to
23 be formatted, and it is going to exclude John Lewis. Whether it is the first decision under
24 clause 2.2 or the second decision under clause 2.2, and is it the initial decision, is the final
25 decision, we do not know.

26 THE CHAIRMAN: But, is this a correct characterisation of what has then happened, that — and
27 do say if it is not, because I am thinking aloud a little bit here — that you were asking the
28 OFT to exercise its powers under clause 2.2 to ensure that John Lewis was specifically
29 named. They said, “We can’t do that, because that scenario is precluded by the wording of
30 the UIL on their proper construction”, and so what you were arguing about has been, is that
31 right that the wording of the UIL effectively rules out the OFT, rules out the possibility that
32 the OFT will withhold its approval of the website unless John Lewis is mentioned in how it
33 wants to be mentioned, and they say, therefore, that they cannot insist on that under

1 clause 2.2 because that is a done deal on the basis of the wording of the UIL. Is that what
2 has been happening here?

3 MR. ROBERTSON: They have said that they interpret — well, we understood that they were
4 going to consider how to make reference to bundled warranties on the website, and that is
5 what we have been in discussion about since the end of June. We did not understand there
6 would be absolutely no reference to John Lewis until we were told in the meeting of
7 15th November that that would be the case, and followed up by the mock-up of the website
8 the following day. We only really understood the OFT's thinking as a result of a telephone
9 conference that took place between John Lewis and my instructing solicitors the day before
10 we submitted the notice of application on 20th December, when the OFT explained that their
11 interpretation of clause 2.3 was that it precluded anything going on the website other than
12 the statement set out there in clause 2.3. It was at that point that we thought, well, as we
13 said on our skeleton argument, why then was it that the OFT had proposed earlier that week
14 additional wording that went beyond clause 2.3? And the note of that telephone conference
15 shows my instructing solicitor having that debate with the OFT officials. They seem to
16 have conceded the principle that additional wording could go on, so clause 2.3 really
17 couldn't have that meaning. But, it was only on that date that we fully understood that the
18 OFT said clause 2.3 precludes anything else going on.

19 THE CHAIRMAN: As you understood it, that is what the OFT were saying, but we cannot
20 actually, in our role of approving the initial format or further changes to it, we cannot insist
21 on John Lewis being mentioned, by name or by logo, because that is ruled out by what is
22 said in clause 2.3 as being the maximum scope of what is referred to on the website about
23 bundled warranties.

24 MR. ROBERTSON: Yes. And that seemed odd to us given that the OFT, earlier that week, had
25 written with additional wording.

26 THE CHAIRMAN: Yes. I was trying to get in my mind what the parameters of the debate were.

27 MR. ROBERTSON: There is also — it seems to us that the content of the website generally is
28 not determined by the UIL. The UIL sets up a process under which the website can be set
29 up and designed to give information to consumers. So, when you look at the mock-up
30 provided by the OFT, even their mock-up has comparison by a range of factors for the
31 unbundled warranties which are not specifically provided for in the undertakings. The
32 undertakings are a framework under which the decision-making process takes place. But,
33 our case is that has got to be subject to the general duty under s.154 to come up with as

1 comprehensive a solution as is reasonable and practicable. So, that is, I think, how I can
2 assist you in answer to your —

3 THE CHAIRMAN: But, how does that then fit in with the three grounds of appeal in the notice
4 of application?

5 MR. ROBERTSON: The Office of Fair Trading is exercising a public law discretion. Its
6 discretion is constrained by s.154, and it is constrained by Article 4(3) TEU. So, those are
7 legal parameters within which its discretion must be exercised.

8 THE CHAIRMAN: Yes. But as far as Ground 1 is concerned, which focuses on the duty under
9 s.167 to monitor and review, that was what was confusing us as to what the context of the
10 discussions between June and November were. Were they discussions as to whether the
11 OFT should exercise its power to revise the undertakings or complain about a breach of the
12 undertakings, which is what seems to be pleaded, and then you plead: “We asked them to do
13 that and they said ‘no’ and that is what we are challenging”, whereas what you said this
14 morning is a rather different thing: “No, we were not asking them to exercise their
15 monitoring powers under s.167, what we were debating with them was what they were
16 going to do under clause 2.2 of the UIL”.

17 MR. ROBERTSON: Forgive me, madam, I was not addressing s.167 just now. Your question
18 asked me to address s.154, and I have also referred to EU law. The s.167 case ----

19 THE CHAIRMAN: Is a different ----

20 MR. ROBERTSON: Is a different case. They have made an error of law in interpreting the
21 undertakings.

22 THE CHAIRMAN: So are you then saying that decisions taken in fulfilment of the role under
23 clause 2.2 are still decisions in the exercise of the discretion under s.154, that it is ongoing
24 in some way?

25 MR. ROBERTSON: Yes. The same goes for the EU law argument as well.

26 THE CHAIRMAN: Right. So is this what you are saying, that in circumstances where the
27 undertakings, which are accepted involve an ongoing role for the OFT in implementing the
28 undertakings.

29 MR. ROBERTSON: Yes.

30 THE CHAIRMAN: Then that role somehow prolongs the operation of s.154, which is not then
31 brought to an end on the acceptance of the undertakings. I do not want to put words into
32 your mouth if they are not the right ones, but I am just trying ----

33 MR. ROBERTSON: That is basically it, because the undertakings set out a framework for a
34 decision then to be taken to launch the website in a way that is approved under clause 2.2.

1 It is essentially a two stage process. The framework of the undertakings, then a decision
2 taken under the undertakings to approve.

3 We say there is no reason to read the duty under s.154 to limit those to the first part of that
4 decision making process, when the undertakings themselves provide for a second stage of
5 the decision, which is the actual remedy itself, the launch of the website.

6 MR. FREEMAN: There is the point that the Chairman made that presumably the point that will
7 be made against you is that the undertakings in lieu as settled in June set a limit on what
8 could be agreed or implemented pursuant to the setting up of the website. Are you going to
9 deal with that and the correspondence around June at some point?

10 MR. ROBERTSON: We say that it sets up a framework, but the undertakings themselves do not
11 set out what the website is going to look like, it sets out a process under which that decision
12 will then be taken by the OFT as part of the steering group under clause 2.2.

13 MR. FREEMAN: You would say, would you, that as of the end of June, despite the fairly sort of
14 hostile reaction of the OFT at that time to a specific mention of John Lewis, there was still a
15 reasonable chance that you could persuade them in discussion to change their minds. Is that
16 your argument?

17 MR. ROBERTSON: We thought the decision was still open. As I say, it was not until December
18 that we understood them to say clause 2.3 precludes us saying anything else. If that was the
19 case, why did they invite us to have meetings and discussions and carry on repeating those
20 invitations?

21 MR. FREEMAN: I understand that, I seem to recall some internal correspondence, which again I
22 am sure you are going to deal with, saying: "We appear to have lost our point, not sure what
23 we do now" sort of thing?

24 MR. ROBERTSON: And then we contact the OFT and continue the dialogue with them, and they
25 do not say: "This is pointless", quite the opposite, they invite us to continue the dialogue.
26 We thought we were part of the decision making process, and what is the point of us being
27 part of that decision making process if the outcome can be something the OFT would know
28 is of no interest to John Lewis?

29 MR. FREEMAN: Thank you.

30 MR. ROBERTSON: I think that covers the first and second questions that you outlined in your
31 opening remarks.

32 The next point you asked us to deal with is, is this decision making process under clause 2.2
33 something which is within the Tribunal's jurisdiction to review under s.179? By way of
34 preliminary remark, the OFT has not taken a point against us that the Tribunal does not

1 have jurisdiction under s.179. When we first wrote our letter before claim, we said this may
2 have to be brought by way of a challenge before the Tribunal, and in the Administrative
3 Court by way of judicial review. The reason why we said that was that would then lead the
4 OFT to consider whether they were going to take a point about the jurisdiction of the
5 Tribunal, and they did not. They did not in their reply to the letter before claim. They have
6 not done so in their defence, nor at the case management conference. That is why we have
7 not put in a protective application to the Administrative Court.

8 THE CHAIRMAN: I can see that if your case is that decisions under clause 2.2 are, in effect, an
9 ongoing exercise of the discretion under s.154, then those would be in connection –
10 whatever the wording is ----

11 MR. ROBERTSON: Yes.

12 THE CHAIRMAN: -- with a reference, or possible reference. No, I do not want to set a hare
13 running that has not been set running by the parties, but it is something that we need to
14 make sure is not missed so far as our determination is concerned.

15 MR. ROBERTSON: The simple point is we did raise it, it has not been taken against us and our
16 submission on s.179 is there is no need to read that section restrictively, it is obvious that
17 matters like this ought to come to this Tribunal rather than going into the crowded lists of
18 the Administrative Court, at the moment there is no way it would have been heard as
19 quickly as this Tribunal has been able to hear it, and that is to everyone's benefit – whatever
20 the outcome.

21 The third question you raised, I think I have dealt with it and touched upon it, was Article
22 4(3), how is that engaged.

23 THE CHAIRMAN: If you were going to deal with that later in your submissions then that is fine,
24 I do not want to take you out of your order.

25 MR. ROBERTSON: Again, the short answer to it is that we have raised it, and the OFT have not
26 disputed they are under that duty. They have not taken a point against us. We have
27 explained that we are a substantial importer of particularly white goods from elsewhere in
28 the EU. A distortion of our ability to sell those white goods will be a distortion in trade in
29 the EU. The national authorities have a duty to promote EU objectives, which include a
30 system of undistorted trade and undistorted competition. It is a simple point and the OFT's
31 answer to is, "We are not distorting trade or competition".

32 Those were the three preliminary points. I think I should now just move on to updating our
33 skeleton in a couple of regards. That is at tab 5 of the first bundle. We refer there to the last
34 indication from the OFT being that it was likely to be launched in February, but on seven

1 days' notice to us. Since then the OFT stated to us on 19th February that the website will
2 not launch until this application is resolved, and that any launch would be on seven days'
3 notice. So that is the current position.

4 Then on negotiations we said at para.5 of our skeleton that we could not disclose the content
5 of the discussions that you directed at the case management conference because at the
6 OFT's request these took place on a without prejudice basis. Since then the OFT has made
7 an open offer, if that is the right word in this context. Can I take you to that
8 correspondence, which is bundle 3 of the documents. It starts at tab 49. This is the OFT's
9 letter of 20th February, proposing additional wording, pointing out that clause 2.3 is not
10 exhaustive, as the OFT argue that it is, but having additional wording:

11 *“These results do not include those extended warranties where there is a single*
12 *price which combines the price of the electrical good and the price of the*
13 *extended warranty, which may be available on certain electrical goods from*
14 *some retailers and manufacturers, For further information about these*
15 *providers click here.’*

16 The new page would be a static information page which lists providers of
17 Bundled [Extended Warranties], which would include [John Lewis] by name.
18 The contents of this page remain the same for all search results.”

19 The problem with that, as we explained ----

20 THE CHAIRMAN: Just a minute, let us read the rest of that. (After a pause) Yes.

21 MR. ROBERTSON: We replied the following day, and that is at tab 50. We explained there
22 were two fundamental problems with what is proposed there. Firstly:

23 *“The Proposal is limited to a generic statement which appears irrespective of*
24 *whether or not the retailer in question actually provides a bundled extended*
25 *warranty for a particular product or product category.”*

26 As I have said, John Lewis provides bundled extended warranties on most of its goods, but
27 for some of them it is separate.

28 *“This would be misleading to consumers. What would be acceptable to JLP*
29 *would be a click-through to a non-generic form (i.e. a search against the*
30 *product categories and at least some of the criteria set out in the results page) so*
31 *separating paid for and multi-product warranties from bundled warranties but*
32 *otherwise treating them in an equivalent and neutral way.”*

1 We wanted to clarify and make it clear that some products come bundled with an extended
2 warranty, other products would go listed on the website along with other separate
3 standalone warranties.

4 THE CHAIRMAN: If you are a website participant.

5 MR. ROBERTSON: Yes, and the proposal is that we would be a website participant. This is
6 predicated on us becoming a website participant, because this is the OFT's offer to settle
7 these proceedings.

8 MR. FREEMAN: So your unbundled warranties would be listed with everybody else's
9 unbundled warranties, and so John Lewis would appear there, and this would only apply to
10 the bundled warranties?

11 MR. ROBERTSON: This is triggered by a statement that says, "These results do not include
12 those extended warranties where there is a single price".

13 MR. FREEMAN: So that appears under ----

14 MR. ROBERTSON: If one is looking, for example, at plasma TVs, you will not see John Lewis
15 there. You will just see this statement and a click through saying, "John Lewis offer
16 bundled warranties", but that statement is incorrect because for several products we do not
17 offer bundled warranties.

18 THE CHAIRMAN: If you are already on the plasma TV page?

19 MR. ROBERTSON: We would only be on the plasma TV page with a generic wording. In fact,
20 we would not be on the plasma TV page, we would just be ----

21 THE CHAIRMAN: What do you offer, remind me, on plasma TVs, a bundled or an unbundled?

22 MR. ROBERTSON: It is a bundled warranty.

23 THE CHAIRMAN: So what is the problem with then having you on the plasma, but clicking
24 through from the plasma TV page.

25 MR. ROBERTSON: We would not be on the plasma TV page. All we would have would be the
26 generic wording set out in the OFT's letter saying that these results do not include those
27 extended warranties where there is a single price. So there is no reference there to John
28 Lewis. This is the small print. You would click through and that would say, "The
29 following parties have informed the Retailers they provide extended warranties where there
30 is a single price which combines the price of the electrical good and the price of extended
31 warranty. These may be available on certain electrical goods from the parties listed below
32 as well as from other providers".

33 THE CHAIRMAN: That wording appears underneath the table that deals specifically with
34 plasma TVs, as I understand it.

1 MR. ROBERTSON: The first piece of wording appears below the table. The second piece of
2 wording, you have got to click on that to go through another page.

3 MR. FREEMAN: So you are complaining that you do not get a message that says, “John Lewis
4 provides a bundled warranty on plasma TVs”?

5 MR. ROBERTSON: Yes.

6 THE CHAIRMAN: The additional wording would be additional to the required wording.

7 MR. FREEMAN: We said we would not do this!

8 THE CHAIRMAN: Let us move on. You have not accepted this proposal.

9 MR. ROBERTSON: And the other problem with it is that it refers to John Lewis offering
10 bundled warranties that mislead the consumer, because, in fact, for certain products John
11 Lewis does not offer bundled warranties, it only offers standalone warranties.

12 THE CHAIRMAN: Where it offers a standalone warranty then you would be in the table that the
13 consumer is looking at. Give an example, and this is the last question I am going to ask, of
14 a product where you give a standalone warranty?

15 MR. ROBERTSON: I am told a speaker dock, audio speakers.

16 THE CHAIRMAN: So when the consumer has clicked through to a comparison table of a
17 speaker dock then you would be on that table, assuming that you are a website participant?

18 MR. ROBERTSON: Yes, assuming we are a website participant, we would be on that, but a
19 consumer who is researching has gone on to look at something where we offer bundled
20 warranties, they would be told here, “John Lewis offers bundled warranties”. It does not
21 say anything like, “By the way, John Lewis offers unbundled standalone warranties for
22 certain products”.

23 THE CHAIRMAN: Anyway, you declined that proposed wording.

24 MR. ROBERTSON: It seems odd to us when there is no problem at all, nobody has identified
25 any technical problem.

26 THE CHAIRMAN: No, there is no technical problem. The problem is whether the wording of
27 clause 2.3 means that the OFT considers that it cannot insist on anything beyond what
28 Dixons and Argos are prepared to agree. That is the issue.

29 MR. ROBERTSON: And our response to that is, what is being suggested as being acceptable to
30 Dixons is incorrect and there is no problem with it being correct. If you have got two
31 solutions, one is an incorrect solution and the other one is a correct solution, let us go for the
32 correct solution, because that gives full transparency and proper information to consumers.

1 To complete the picture on the correspondence, we replied on 21st February. Then at tab
2 51, three working days later, yesterday evening at 5.05, we get the OFT's reply, accusing us
3 in the last paragraph of shifting the goalposts by not accepting their offer.

4 We replied two hours later yesterday evening at tab 52 saying we are not shifting the
5 goalposts, we are not requiring a whole new part of a website, we just want statements to be
6 clear and not misleading.

7 The other point that we keep reiterating, and for some reason the OFT has a resistance to it,
8 is that these results should include a reference that makes it clear to the customer that they
9 should also look at the product price, the domestic electrical good price, to establish
10 whether they are receiving overall value for money. Obviously if you are buying an
11 extended warranty for a domestic electrical good and it has a five year warranty, if you are
12 buying that and you are being separately charged for the warranty, to work out that is good
13 value for money compared to other offerings you need to look at the overall cost. It seems
14 to us to be apple pie and motherhood but the OFT has a resistance to it.

15 I should also say that at tab 53 you have essentially acknowledgement of receipt by Dixons
16 but they have not contributed to the dispute.

17 While you are here in this bundle (this is not part of the correspondence, but just to explain
18 what tab.54 is doing here) we said in our skeleton — this is to correct a statement made in
19 footnote 5 of our skeleton, it is para.27, we said there:

20 "Some 40 per cent of [domestic electrical goods] purchases in the UK are now
21 made on-line".

22 We made reference to a document that is in the bundle, but, in fact that is the wrong
23 document. It should have been this document and the figure 40 per cent is not correct. That
24 40 per cent is a figure for John Lewis, it is not the industry figure. The industry figures are
25 set out in this document which is a report compiled by GfK Retail & Technology; and
26 essentially retailers subscribe to this information-gathering service. They get their own
27 figures and they get aggregate industry figures. About 60 per cent of retailers subscribe.
28 The figures are then extrapolated across the whole industry by GfK. The relevant page is
29 p.902 referring to the Rapid Rise in Internet Trade % Value Online Sales of total Market.
30 And then what you see here is domestic electrical goods generally broken down by, from
31 the left, "CE", consumer electronics, that is TVs, etc. "MDA" is major domestic
32 appliances, white goods. "SDA", small domestic appliances, kettles, toasters. "Photo",
33 self-explanatory. "IT" which is computing. And there you see the figures for Online Sales
34 for 2009, 2010 and 2011 and it is a rising trend in each of the categories overall in the broad

1 region of 20 per cent. And, of course, those are sales. That does not include the proportion
2 of consumers who do online searches and then go out and shop in store. So, the use made
3 of internet sites for that sort of research will inevitably be higher. I just wanted to make that
4 correction to our skeleton.

5 Now, as you have indicated, you have read the skeletons and detailed submissions that have
6 gone in, so what I propose to do is take you through our skeleton, but with a pretty light
7 touch, just emphasising the key points.

8 Firstly, factual background. This is in our skeleton beginning at para.9. Essentially, we
9 make three key points in response to the OFT. Firstly, in our skeleton at paras.10-14, we
10 explain that the Competition Commission's 2003 report does not justify this remedy treating
11 standalone and bundled extended warranties differently.

12 MR. FREEMAN: Can I just ask you, Mr. Robertson, at the risk of interrupting your flow —
13 I mean, the 2003 report, as I understand it, found that what were then called “free extended
14 warranties” fell outside the complex monopoly. Is that right?

15 MR. ROBERTSON: Yes. They found that they did constitute a part of the economic market.

16 MR. FREEMAN: Yes. But they found that there were not steps being taken by those in whose
17 favour the complex monopoly operated, and they were not part of the complex monopoly
18 finding.

19 MR. ROBERTSON: That is right. But for us, the point is that when they looked at the economic
20 market, they defined the market as being one for extended warranties generally, and they
21 did not exclude free.

22 MR. FREEMAN: Right.

23 MR. ROBERTSON: So, if you are starting at what the market conditions are, that is what we say
24 that is what the market is, plainly still the case.

25 We also, looking at the current remedy, and this is the point we make at para.12 of our
26 skeleton, the current remedy extends to non-point of sale insurance based extended
27 warranties. So, these are the ones provided by suppliers such as D&G (Domestic &
28 General), Warranty Direct, to pick out two of the leading names. They are provided for
29 under the undertakings, yet they too were not identified as being part of the complex
30 monopoly back in 2003. So, what we are looking at now is actually much broader than the
31 2003 report. The same thing goes for the 2005 order, as we have set out at paras.15-21 of
32 our skeleton. And in particular at para.21 of our skeleton we say under the 2005 order, the
33 definition of “supplier”, does not apply to third party suppliers of extended warranties

1 whereas the undertakings in lieu do. So, you cannot read down the scope of application of
2 the undertakings in lieu by reference to either the 2003 report or the 2005 order.

3 MR. FREEMAN: Sorry, can I just understand — you are saying that it may be the case that the
4 scope of the 2003 report and the 2005 order excludes bundled extended warranties, but that
5 does not stop the current round of measures extending more widely. Is that what you are
6 saying?

7 MR. ROBERTSON: Yes. That principle is accepted by the OFT when it comes to third party
8 suppliers of extended warranties, not at point of sale.

9 The third point we make on the factual background, and this really is the most important
10 point, is that when you come to consider the remedial action through the website, it would
11 be quite different to that under the 2005 order, and it will have a different impact on the
12 consumer harm identified by the Competition Commission and the OFT. This is paras.22-
13 29 of our skeleton. The big difference is that the website is principally aimed at
14 encouraging pre-point of sale shopping around, whereas the 2005 order was principally
15 concerned with addressing the point of sale advantage.

16 That is recognised by the OFT, the fact that there is this shopping around, it is recognised
17 by the OFT in the final decision in June 2012 because they say, and this is at bundle 3,
18 tab.23, p.722, which is the Assessment of the Undertakings In Lieu:

19 “Undertaking, establish and maintain the [price] comparison website”.

20 The:

21 “Situation it is attempting to address”,

22 Including:

23 “The limited incidence and effectiveness of shopping around”.

24 And then, the final column:

25 “The ... website is intended to provide an effective and accessible means for
26 consumers to compare [extended warranties] at [point of sale] to those offered
27 by alternative providers, including through conducting in-store comparisons on
28 internet-enabled mobile devices”.

29 “The OFT considers that this is likely to be of relevance to a wide range of
30 consumers, not simply those purchasing DEGs online, as some 80 per cent of
31 consumers shop around online for DEGs, who therefore may also consult the ...
32 Comparison website before making an EW purchase”.

33 Now, that shopping around for DEGs online does not take place at the point of sale. It is
34 the research you do in advance. It may also happen —

1 MR. FREEMAN: So, where it says “including”.

2 MR. ROBERTSON: Yes.

3 MR. FREEMAN: So, the idea is that you are in the store with a mobile device, and you access
4 the internet while you are looking at the washing machine?

5 MR. ROBERTSON: You can do that. But also, as it points out here:

6 “80 per cent of consumers shop around online for DEGs”.

7 Now, when you are doing shopping around, that is in advance of going to the point of sale.

8 That is working out which stores to visit.

9 THE CHAIRMAN: Well, is point of sale limited to in store? Or, is there a point of sale on-line
10 as well? Is it generally considered that point of sale is when you are actually there in a store
11 buying the goods rather than when you are clicking on the purchase?

12 MR. ROBERTSON: Point of sale is in store. That is the understanding that informed the 2003
13 CC report and the 2005 order.

14 MR. FREEMAN: Things have moved on since then.

15 THE CHAIRMAN: Yes.

16 MR. ROBERTSON: Well, they have, yes. I mean, it also includes on line. But what they were
17 principally concerned with — and I did say principally concerned with — is, at 2003 and
18 2005, is consumers being sold extended warranties when they were purchasing domestic
19 electrical goods in store.

20 THE CHAIRMAN: As a kind of a pressure selling thing.

21 MR. ROBERTSON: Yes. We can see that from the DTI guidance on the order, and that is to be
22 found in bundle 2, tab.6, p.315 sets out the background to the order:

23 “1.1 The report found that the selling of extended warranties at point of sale of
24 electrical goods creates a huge competitive advantage for retailers. This is
25 because of a lack of information available to consumers, a lack of competition at
26 point of sale and excessive prices.

27 1.2 The CC identified the following four overlapping characteristics of market
28 behaviour, which might distort or restrict competition:

29 Almost all extended warranties are bought on point of sale; very few consumers
30 consider the purchase of extended warranties before purchasing their electrical
31 goods and have little opportunity to consider alternatives”.

32 And then:

33 “1.3 The CC recommended a number of measures designed to open up the
34 extended warranties’ market to allow greater competition”

1 and the summary of the requirements is then set out on p.317 at 5.1. “If you are affected by
2 this Order”, you are a supplier of electric goods with extended warranties, “the main
3 requirements you will need to comply with are as follows:

- 4 “ * ensuring your product price displays include information (price and
5 duration) on at least one applicable extended warranty.
- 6 * providing “further relevant information” to your customers about extended
7 warranties.
- 8 * including in your published advertising materials information (price and
9 duration) on at least one applicable extended warranty: and
- 10 * providing sufficient termination and cancellation rights for your customers.

11 Then 5.2 if you are an in store retailer you will need to provide a written quotation for the
12 price and duration of the extended warranties which must remain valid for at least 30 days
13 from date of issue and ensure your customer has acknowledged receipt of the written
14 quotation in writing before the purchase of the extended warranty.

15 So that is why we say at para. 26 of our skeleton this order was principally aimed at
16 customers who had already gone into a store and bought an extended warranty, but under
17 the undertakings the website will serve quite a different purpose because the website is
18 aimed not only at point of sale – somebody being able to look up on their smartphone on to
19 the website to see: “Is this a good deal this assistant is trying to sell me?” but it is aimed at
20 encouraging consumers to shop around in advance of going into store.

21 This is a point that is made in the footnote, that I have already corrected for you, where we
22 see the OFT’s own survey evidence that the majority of consumers use price comparison
23 websites as a starting point for a wider or more detailed market search. That is from the
24 OFT’s report on price comparison websites, published in November last year. We know
25 that there is a trend to online shopping, LECG had reported upon that. We now know that
26 around 20 per cent of DG purchases in the UK are made online – that was the document that
27 I took you to, and the figure for John Lewis is actually much larger, i.e. 40 per cent.
28 LECG reported to the OFT, and I do not think we need to turn up the document itself, but
29 the relevant quote is set out there:

30 “A customer that uses the internet is likely to have access to a wider range of
31 information at the point-of-sale to make their extended warranty purchase decision.
32 They can more easily compare prices, check reviews, and perhaps even find data
33 on DEG reliability. Furthermore, the customer is not exposed to the risk of

1 pressure selling which may occur in the store. Therefore they may be less likely to
2 make poor purchasing decisions.”

3 So that is the context in which this website will be used. It is people doing their research in
4 advance and then deciding whether they are going to buy online, which they increasingly
5 do, or are they going to go into the store and actually have a look at it.

6 That is why we say at para. 28 of our skeleton that it is likely that consumers will rely upon
7 the website as providing comprehensive information about all extended warranties. It will
8 be endorsed by the OFT so people will think it is authoritative. The undertakings even
9 provide, at 4.4, for there to be money spent to ensure that the website will get on to the first
10 page of Google search results. I would like to remind the OFT that, of course, other search
11 providers are available but they have particularly focused on Google. They obviously want
12 it to be authoritative, but if there is no visibility for John Lewis and other suppliers of
13 bundle warranties, then it will not be and, as we have said in the skeleton, we cannot expect
14 consumers to appreciate that, in fact, this is just a subset of extended warranties, and it is
15 just addressing concerns going back to a 2003 report and a 2005 order. What we have
16 currently got is something which will just have small print on it, rely upon click-throughs
17 and generic statements when there is absolutely no technical problem with providing proper
18 information about bundled warranties.

19 As we make the point at para. 29, the potential for distortion to our mind is demonstrated by
20 Dixons’ presence here. They are obviously seeing it in their own interest to keep the
21 website in its current format.

22 We deal with Dixons’ submissions at paras. 30 through to 35 of our skeleton. The key point
23 to notice about Dixons is that they seek to emphasise that the OFT’s market study
24 specifically related to the market for extended warranties and not the market for domestic
25 electrical goods (para.31). In our submission that is not a reason to ignore the way in which
26 consumers purchase domestic electrical goods. That is relevant because it is the process
27 that then prompts purchasing decisions for extended warranties. Indeed, with Dixons, they
28 confirm in their skeleton that the only extended warranties they sell are ones for the goods
29 they sell. You cannot go into Dixons and buy a standalone extended warranty without
30 buying a domestic electrical good. The linkage is obvious. That is all I wanted to say by
31 way of factual background.

32 THE CHAIRMAN: I am just wondering about the time, Mr. Robertson.

33 MR. ROBERTSON: I think I will be pretty quick from now on. I told Miss Lester that I intended
34 to finish at midday and in fact your preliminary questions actually prompted quite a lot of

1 discussion of the Grounds, but I think I have actually covered quite a lot of the material and,
2 as I say, it is fully set out in the skeleton.

3 THE CHAIRMAN: Yes.

4 MR. ROBERTSON: In our skeleton we have re-ordered the Grounds to deal with the two public
5 law constraints on discretion grounds. First, s.154, which we have already discussed this
6 morning, It seems to us that the central paradox in the OFT's case is that, despite its duty
7 under s.154(3) to have regard to have regard to the need to achieve as comprehensive a
8 solution as is reasonable and practical, it is now arguing that the website should not carry
9 comprehensive information. We refer to the OFT's more recent review of price comparison
10 websites – a point I have already made – which refers to them as working well when they
11 enable consumers to compare products across the market and ultimately get better deals for
12 consumers. Here, this website will not enable consumers to compare products from right
13 across the market. It will only deal with standalone extended warranties and those which
14 are offered as part of multi-appliance warranties. The solution is not comprehensive, and the
15 solution that we have proposed is reasonable and practicable, and it is not being suggested
16 that it is not practicable.

17 We have set out our submissions on whether the view we take is appropriate, the OFT
18 argues it is inappropriate, at paras. 41 to 52 of our skeleton. We note in particular at para.
19 41 that the adverse effect on competition which the OFT identified in its findings in the
20 market study was, amongst others, that consumers still lack important information which
21 would allow them to take a more informed decision about which extended warranty to buy,
22 particularly information which would enable them effectively to evaluate value for money.
23 What we are proposing is the way to ensure that. We just do note that the suggestion that
24 came up in discussion with the OFT, that John Lewis would be allowed on to this website if
25 it were to charge a nominal fee of 1p for its extended warranties just demonstrates the
26 absurdity of where they have drawn the line.

27 At paras. 53 to 62, the OFT cites practical problems with what we proposed and, for
28 example, they say it would have been a disproportionate exercise to have compared the
29 features of a named bundled extended warranty along with standalone extended warranties
30 in an effective way. There is absolutely no evidence of that. You have a range of terms and
31 conditions that apply to bundled extended warranties as they applied to standalone extended
32 warranties, do you get new for old replacement, for example? They are entirely comparable
33 and, indeed, consumers, if they can compare them and do compare them so that they are
34 entirely comparable, we just do not see any evidence to suggest that this is disproportionate,

1 nor, indeed, as the OFT suggested, that it might be confusing for customers. Again, what
2 we are suggesting is as much transparency as possible. We just do not see what scope for
3 confusion there is.

4 As to price, all one needs to say is warranty included in the price of the product and, as a
5 consumer, if you are getting overall value for money, consider the combined price of the
6 product and the extended warranty. That is really what we say under s.154.

7 When it comes to our third Ground, which I have described in the skeleton as “issue 2”, the
8 EU Law Duties, I have already explained that the OFT has not disputed ----

9 THE CHAIRMAN: The s.154 arguments, you accept at the beginning of your skeleton, I think
10 that this is a judicial review principles case, so what you have to be saying is that the OFT’s
11 rejection of your proposal was not a decision that it could reasonably take for the reasons
12 that you set out. It is not for us to decide whether it is a good or a bad idea, it is for us to
13 decide whether rejecting that proposal was outside the scope of their discretion.

14 MR. ROBERTSON: On that they have taken account of irrelevant considerations, i.e. what was
15 ordered in the 2005 Order and identified as being a complex monopoly in the 2003 report.
16 They failed to have regard to the way in which online research and purchasing is now done
17 and the importance of it, and they have all the information on that from LECG, plus
18 everyone’s ordinary experience, and their research into price comparison websites
19 generally, published in November 2012.

20 Faced with two alternatives, where one is more comprehensive than the other and the
21 proposal we put forward is reasonable and not impracticable, then we say they cannot
22 rationally reject that, and we highlight the irrationality by referring to the discussion we
23 have had with them where they have confirmed that were we to charge a penny for our
24 extended warranties then they would be allowed on to the website.

25 THE CHAIRMAN: Yes.

26 MR. ROBERTSON: On our EU law ground, that is set out at paras.64 to 79 as regards the OFT’s
27 defence. We say the standard is not to distort trade and not to distort competition, those
28 being Treaty standards laid down in the TFEU and applicable to the OFT pursuant to
29 Article 4(3) of the TEU, when read in conjunction with Protocol 27 to the two Treaties. We
30 say that effectively this remedial action, which is going to distort against John Lewis, self-
31 evidently distorts trade because we are a major importer of, in particular, white goods, and it
32 distorts competition and introduces an unlevel element of the playing field. It is a very
33 simple argument.

1 The OFT's response is that it is not going to distort, and we have set out our case in full in
2 the skeleton and I am not going to detain us by reading that out. I just would emphasise at
3 para.78, we cannot quantify the scale of the distortion with any exactitude because the
4 website has yet to be launched, but it has plainly got the potential to distort, and the
5 potential effect on trade is sufficient to engage Articles 34 and 55 TFEU, free movement to
6 goods and services.

7 Finally, the point raised by Dixons says there is an Article 101 breach between the retailers,
8 make a complaint to the OFT, but the point is we are saying Article 4(3) imposes this duty
9 on the OFT, it is not a private law complaint against Dixons or Argos.

10 Our case on our first ground, which is s.167, is just effectively a short point of interpretation
11 on the meaning of clause 12.1 of the undertakings in lieu. If we are correct on that then our
12 bundled extended warranties in fact do qualify. So this is a question of interpretation, a
13 question of construction of the undertakings in lieu. The point is as simple and as short as
14 this: the definition of an extended warranty under clause 12.1, and we set this out at para.82
15 of our skeleton, is that the extended warranty means a contract for cover which is entered
16 into by a consumer for monetary consideration. The short point is that our bundled
17 extended warranties are provided as part of a contract for cover and they are provided for a
18 monetary consideration. It is a bundled consideration.

19 THE CHAIRMAN: Is this point a pre-emptive strike assuming that if you apply to be a website
20 participant for your bundled extended warranties you would be refused?

21 MR. ROBERTSON: We have been told we would be refused. The OFT advance a different
22 interpretation in their defence. We have set out fully in our skeleton our responses to the
23 OFT's defence at paras.87 through to 93. I do not think there is any point in me taking time
24 to read those out aloud, but that is what we have to say in response to the OFT's case.
25 In summary, we say it is a sensible interpretation that we were entitled to qualify by
26 charging 1p separately, and that should not make any difference to the price's bundle. It is
27 for monetary consideration.

28 Dealing with the OFT's time bar defence ----

29 THE CHAIRMAN: The Ground 1 is then moving away from your specific request about the
30 actual wording, dimension and the logo. It is saying, "You have told us that there is no
31 point applying to be a website participant as far as our bundled warranties are concerned,
32 but you are wrong to rule out us being a website participant on those, because they are
33 extended warranties within the meaning of the UIL".

34 MR. ROBERTSON: It is very much, if I can use the phrase, a standalone submission.

1 Dealing with the time bar defence, I think we have actually covered a lot of this in response
2 to your first and questions this morning. The point is, essentially, we say there has been a
3 continuing decision making process under the framework of the UIL, but we are dealing
4 with a decision that will be a decision taken under clause 2.2, and we are obviously in time
5 because the website has not launched yet to challenge that. If we are wrong on that, and we
6 should have brought the challenge at some earlier point and therefore we are outside the two
7 month limit, then our submissions at paras.106 to 113 are that this is a case in which the
8 Tribunal can exercise its power to extend the time limit.

9 As set out at para.106, the Tribunal has to do that if satisfied that the circumstances are
10 exceptional. We have set out fully what the then President of the Tribunal stated in *Hasbro*
11 at para.107, and summarised the points to be made about the Tribunal's discretion to
12 exercise this power at 108. Firstly, it is not limited, unlike the European position, to
13 unforeseen circumstances or *force majeure*. It includes any circumstances which may be
14 exceptional. Each case turns on its own facts. The Tribunal's discretion to grant a
15 derogation must, of course, have regard to the importance of strict time limits under the
16 Enterprise Act. The existence of the discretion to grant a derogation means that in an
17 appropriate case it should be exercised.

18 We say that when you look at the guidance as to when it should be exercised, you can take
19 guidance from the jurisprudence of the Administrative Court exercising equivalent
20 jurisdiction to extend time in which an application for judicial review may be brought now
21 under CPR 3.1(2)(a).

22 We have set out the authorities which show that the courts also apply what is, in effect, an
23 exceptional circumstances test to extending time. They do so if important issues of general
24 public importance are raised by the application. That is the position as summarised by
25 Clive Lewis QC in his Judicial Remedies textbook – we set out our position at para.110 –
26 and the linkage to exceptional circumstances can best be seen from the *Re S* case in the
27 Court of Appeal, where Lady Justice Butler Sloss emphasised:

28 “The general importance of the matter raised in the application to move may,
29 therefore, as a matter of public policy, constitute a good reason to extend time
30 even though in most cases the delay would be a complete bar to granting leave.
31 The issues raised must be genuinely of public importance and must be such that
32 they can best be ventilated in the public law context. Such cases are likely to be
33 exceptional.”

34 So the linkage with your jurisdiction.

1 MR. FREEMAN: And how would you phrase the issue of general public importance in this case?

2 MR. ROBERTSON: We say there are two, and that is at paras.112 and 113. We say at 112 that it
3 would be contrary to the public interest, in particular the consumer interest, if the website
4 were permitted to be launched where, if the application had been made within the two
5 month time limit, the Tribunal would have upheld John Lewis's case that the website is
6 liable to mislead consumers. So it is the ongoing capacity of the website to mislead. Of
7 course, this only arises if you think that we have made out a good case on the merits.

8 THE CHAIRMAN: So you are saying that this should be, effectively, a rolled up hearing that if
9 we think that you have got good grounds then we would grant permission out of time, if we
10 decide you are time barred; but if we are against you then we can say they are exceptional
11 circumstances if we think you are time barred. It is like a sort of rolled up permission and
12 substantive hearing.

13 MR. ROBERTSON: It is like that, except that you do not have the two stage permission, but you
14 are dealing with all the issues together, including the time issue. We say that this is not a
15 case just about John Lewis's private interests, we are not the only supplier of bundled
16 warranties for a start. This is a case about, if you have got a remedy which is liable to
17 mislead consumers and that is permitted to go ahead, then that is an ongoing public interest
18 in not having an official OFT endorsed website misleading consumers. That is not a terribly
19 elegant way of putting it, but it is the consumer interest that places this as raising an issue of
20 public interest, and that comes within the exceptional circumstances power that the Tribunal
21 has.

22 The second public interest that we referred to at para.113 is, we have taken in a constructive
23 engagement with the OFT at every step since the adoption of the undertakings. On the
24 OFT's case we should not have attempted to resolve the issue of negotiation and
25 constructively engaging with them, but should have immediately resorted to litigation. We
26 say that is contrary to the public interest in promoting resolution of disputes without taking
27 up the time of courts and tribunals. That is the second consideration that we would rely
28 upon.

29 That takes us to relief, and this is an issue that was not directly addressed in the OFT's
30 defence, but is now addressed in the OFT's skeleton, so I should take another five to ten
31 minutes to deal with this point. The OFT argues in the skeleton at para.19, which is bundle
32 1, tab 6, p.74.46:

33 "Even if [John Lewis] could show that the OFT acted irrationally, it is not
34 entitled to the remedy it seeks from this Tribunal. Neither the OFT nor the

1 Tribunal has power to require the Retailers to amend the UIL, which were
2 offered voluntarily (even if JLP were not too late to make this argument). After
3 careful analysis, the OFT accepted the UIL in lieu of a reference to the CC, and
4 the OFT cannot now refer the matter to the CC for a year from their acceptance
5 (until 27 June 2013 at the earliest).”

6 Our submission in response to that is no good reason why the Tribunal should be hamstrung
7 in this way when it comes to relief. We are not challenging the undertaking, we are
8 challenging the subsequent decision by the OFT as to the format of the website. The
9 tribunal’s powers as to relief are set out in s.179(5) which is at, in the first authorities
10 bundle, tab.20 on p.475:

11 “The Competition Appeal Tribunal may —

- 12 (a) dismiss the application or quash the whole or part of the decision to
13 which it relates; and
14 (b) where it quashes the whole or part of that decision, refer the matter
15 back to the original decision maker with a direction to reconsider and
16 make a new decision in accordance with the ruling of the Competition
17 Appeal Tribunal”.

18 As to sub-section (a) there is no reason why the tribunal should not quash the decision that
19 was communicated to us on 15th November 2012 and confirmed by the supply of the
20 website mock-up the following day.

21 As to sub-section (b) there is no reason why the Tribunal cannot refer this matter back to the
22 OFT with a direction to reconsider and make a new decision in accordance with the
23 tribunal’s ruling. The OFT’s case appears to be that it cannot make a new decision in
24 relation to the website because it is precluded from doing so by the undertakings. We
25 submit that is not the case. Nothing in the undertakings precludes the website showing a
26 full comparison of all extended warranties. The OFT has the initial right of approval for the
27 format of the website under clause 2.2, and it has also got the final power of approval under
28 clause 2.2. The whole purpose of the OFT being a member of the steering group is, and we
29 do not need to turn this up, but as explained in the consultation on the undertakings
30 published in May, just for the record it is document bundle 3, tab.19, p.637, para.4.2. The
31 OFT is a member of the steering group to ensure that the website “will be run in a fair and
32 reasonable manner and that no party is unreasonably disadvantaged”.

33 THE CHAIRMAN: Sorry, where did that come from, again?

1 MR. ROBERTSON: That comes from the OFT's May consultation, May 2012 consultation on
2 the undertakings, document bundle 3, tab.19, p.637, para.4.2. So, even if the OFT's
3 interpretation of clause 2.3 of the undertakings were accepted, and any further changes to
4 the wording of the website were required to have the blessing of the steering group (which
5 is effectively Dixons, since Comet's demise), then the position is simply that the OFT
6 should make a new decision to require a full comparison of all extended warranties,
7 continuing the extension of the original deadline of 27th October 2012 under clause 2.1 until
8 that is done.

9 Of course, the OFT cannot force Dixons to agree, but then if it does not, it logically follows
10 the OFT will have no option but to refer to the Competition Commission in June in exercise
11 of its power to do so under s.156(1) and to consider releasing the undertakings in
12 accordance with clause 11.2.

13 MR. FREEMAN: So, the OFT would go on refusing to authorise —

14 MR. ROBERTSON: Yes.

15 MR. FREEMAN: — the format of the website until they “met your demands”, as it were?

16 MR. ROBERTSON: And that would concentrate Dixons' mind, though it would not be meeting
17 our demands, it would be meeting the Tribunal's direction to reconsider and reach a new
18 decision.

19 MR. FREEMAN: Yes. But, actually if —

20 THE CHAIRMAN: And also, yes, quite, so what is —

21 MR. FREEMAN: No, that is not quite right, is it? Because, I mean, on your argument we would
22 make a direction which would then have to be implemented, and we would be back to the
23 situation we are in now, in that you would be saying, “That's not good enough”. “That's
24 not good enough”. “That's not good enough”, until the OFT stopped withholding its
25 approval?

26 MR. ROBERTSON: Well, we have been at the situation where we would not have a misleading
27 website being launched.

28 MR. FREEMAN: But, the Tribunal would not be sitting over this saying, “No, that's not right”.
29 “That's not right”. “That's not right”?

30 THE CHAIRMAN: Yes.

31 MR. FREEMAN: So, I mean —

32 THE CHAIRMAN: So, would we be directing the OFT not to approve the website unless it
33 contains what John Lewis wants? Or are we just asking the OFT to reconsider the matter.

1 MR. ROBERTSON: It is to reconsider in accordance with your decision, and your decision on
2 this bit would be that the website should also contain bundled extended warranties.

3 MR. FREEMAN: I thought you were asking us to come to a view that the OFT's current
4 decision, whatever it is, is irrational because it does not consider the appropriate evidence?

5 THE CHAIRMAN: Yes.

6 MR. FREEMAN: Now, I am not sure you were going to the next stage, to say that we should say
7 what it should contain?

8 MR. ROBERTSON: You would be in the same position as the Administrative Court on a judicial
9 review, where the Administrative Court does not direct the decision maker as to the content
10 of the final new decision. It quashes the decision and leaves it to the decision maker to
11 reconsider and reach a new decision in a way which is consistent with the judgment that has
12 been handed down quashing the decision. And that is standard before the Administrative
13 Court, and —

14 MR. FREEMAN: Do you think that works in practice? That is enough, is it?

15 MR. ROBERTSON: Well, it does, that is the basis on which the Administrative Court goes, and
16 there have been cases where you have attempted to go further and say the court should spell
17 out what the new decision should be. I attempted to do this in a case for judicial review
18 brought by Speciality Produce Limited against DEFRA, a judgment of June 2009, a
19 decision of the Deputy Judge of the High Court, and the judgment concludes with the
20 Deputy Judge saying:

21 "Mr. Robertson invited me to spell out the final decision that DEFRA should go
22 away and make again, but we do not do that in public law".

23 THE CHAIRMAN: So, is this how it would run, then, if we were with you, that we would quash
24 the decision. We would make it very clear from what we say in our judgments that we
25 think that there should be, that the website should contain what John Lewis says it should
26 contain. The OFT then goes away and, having regard to that, says effectively to Dixons,
27 "All right, well, we have these powers under clause 2.2 and as members of the steering
28 group, and we are not going to give our permission for this website to be launched until
29 you, Dixons, agree that it contains this information". If Dixons then dig in their heels, the
30 website is never launched, and the OFT says, "Well, these undertakings have then failed",
31 and we then exercise our statutory powers to revoke them and everything is back in the
32 melting pot. Is that —

33 MR. ROBERTSON: Yes, the OFT said to us that if the undertaking, if the website does not
34 launch and they cannot implement their undertakings, then their only option is to refer to the

1 Competition Commission. They have said that to us. They said that in the November
2 meeting.

3 MR. FREEMAN: One is tempted to observe that is not a terribly good outcome for consumers
4 either, is it?

5 MR. ROBERTSON: Well, it means that it is then for probably the new authority then to — I do
6 not know what the transitional provisions are — but let us assume it is the CC, it is for the
7 CC then to deal with how do you deal with this consumer harm. If the website cannot deal
8 with it because it misleads consumers, then there has got to be another way to addressing
9 the consumer harm. The OFT thought that their undertakings, that was the only way in
10 which they could envisage addressing this without making a reference to the CC, but this
11 shows that a misleading website does not remedy the consumer harm under the Enterprise
12 Act. It follows, as night follows day, that it goes to the CC which has got much broader
13 decision making powers, order making powers.

14 As I say, we are not entranced by the option of a CC reference, and I doubt Dixons is either.

15 MR. FREEMAN: Mr. Robertson, how could you say that!

16 MR. ROBERTSON: Well, it is a submission I made at the outset, we would like to see the
17 website provide full information, and we would like to see it launched as soon as possible,
18 and we do not see any practical reason why that should not happen.

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

20 THE CHAIRMAN: Thank you very much. Yes, Miss Lester.

21 MISS LESTER: Members of the Tribunal, I would like to start with the timing point, but I will
22 deal briefly first with some of the preliminary points raised by the tribunal. The timing
23 point will, I am afraid, involve going through some of the documents and the
24 correspondence, so, please bear with me. But, what we say is that it is clear from June 2012
25 that what had been decided by the OFT was as follows: First of all, that there would be a
26 price comparison website for extended warranties as part of the undertakings in lieu of a
27 reference. Secondly, that that price comparison website would not include results from
28 bundled extended warranties. Thirdly, again, it was clear by June that John Lewis would
29 not be named expressly by name on the website; and Fourthly, that bundled extended
30 warranties had been considered by the OFT, had been consulted on, and that the OFT had
31 reached a decision about how bundled warranties would be dealt with. And that was made
32 completely clear, the way in which bundled warranties would be dealt with, in the
33 undertakings which were accepted in June.

1 The undertakings which were voluntarily offered by the retailers were, in the OFT's view, a
2 reasonable and practicable way of remedying or mitigating the adverse effects on
3 competition that it had identified. And we do say that the timing point is an answer to all
4 three of the grounds of review because it was clear in June that the undertakings in lieu did
5 not include bundled extended warranties, and I will show you in the documents that it is
6 simply wrong to say that the OFT took a subsequent decision and only made it clear in
7 November that that was the case. It is perfectly clear from the UILs themselves in June.
8 Secondly, on ground 2, the exercise of the OFT's discretion under s.154 to accept
9 undertakings was a discretion that it exercised in June. Again, there is simply no decision in
10 November, and I will show you that this is so when we go through the documents, of the
11 kind that John Lewis has represented to the Tribunal.

12 Thirdly, any unfairness or discrimination or misleading effect or distortion, or however John
13 Lewis puts its ground 3, flows from the undertakings themselves decided by the OFT to be
14 accepted in June, and not from any decision in November. And on that basis we say that the
15 timing point is a reason for the Tribunal to reject all three grounds.

16 On the jurisdiction point, we, of course, were responding to the case that was made in the
17 notice of appeal, and not the case that has been made today about the decision that was
18 under review, and that is why we did not take a jurisdiction point. The case that has been
19 put in the notice is that it was a breach of the OFT's discretion under s.154 not to include
20 John Lewis's bundled extended warranties in the website. Now, if that is right, then of
21 course a decision of the OFT to accept undertakings, an exercise of discretion under s.154,
22 is plainly a decision that this tribunal has jurisdiction to hear; and our case is that in fact the
23 exercise of the OFT's discretion took place in June and not in November, and therefore the
24 point was not a jurisdictional one but an out of time one. The case, again, under ground 1
25 was a case that the OFT had not correctly exercised its powers or should be required to
26 exercise its powers to enforce the undertakings in lieu.

27 The case that has been put today is astonishingly different. Now we are facing a new case
28 pleaded on my learned friend's feet which is, first of all, that the OFT's decision was a
29 decision on format taken under clause 2.2 of the undertakings. Secondly, that the decision
30 under review was not a decision under clause 2.2, or I think now under s.154, but rather a
31 failure to accept the offer put by John Lewis to the OFT. I have to say I am not clear which
32 of the offers put by John Lewis is actually said to be the failure to accept which is said to be
33 the decision now under review, but Mr. Robertson's case is that the failure of the OFT to
34 accept what John Lewis was offering is vitiated by: First of all, an irrelevant consideration

1 having been taken into account, namely application of the 2005 order. I will deal with that
2 point, but we have simply never heard this before. Secondly, that the OFT fails to have
3 regard to a relevant consideration, namely, I think statistics relating to consumer on-line
4 searches. Again, it is the first time I have heard this. Thirdly, it is vitiated by the fact that
5 the OFT failed to (I suppose this is a proportionality point) failed to implement instead the
6 more comprehensive alternative solution, and that this Tribunal should now require the OFT
7 somehow to take a new decision trying to require the retailers who have voluntarily given
8 undertakings which the OFT has assessed and agreed, trying to require entirely different
9 undertakings, and it was striking at the end of Mr. Robertson's submissions that what he
10 really wants is an order requiring the website now to include bundled extended warranties.
11 When we go back through the documents you will see that this is entirely inconsistent with
12 – forget whether it is permitted by – it is wholly inconsistent with the undertakings that
13 were accepted in June by the Office.

14 If I can start going through the question of what was decided and when, and what was clear
15 to John Lewis at what time, could I start in February 2012 at tab 13 of bundle 3. I think all
16 the documents are in bundle 3. Tab 13 is the OFT's market study, and notice of the OFT's
17 intention to accept undertakings, and the reason I showed you this document is because this
18 is the first indication from the Office that it is considering accepting undertakings, and it is
19 consulting on what people think about that. The only page I wish to show you is p. 595 of
20 the bundle and that tells you that there are at that point proposed undertakings which then
21 follow and become modified, subsequently as a result of consultation which we will see.
22 Then annex C begins on p.614, and at p.615 is the first mock-up of the website, the
23 proposed price comparison website that the OFT has published.

24 I show you this document because you see what was proposed at that stage by the OFT, of
25 course, this is before the decision to accept undertakings. You will see a list of providers
26 down the left hand side, which do not include John Lewis. You will see on the right that the
27 cost of extended warranties is envisaged to be placed in columns next to the providers, and
28 you will see at the top, if you have not looked at this before, that the way this price
29 comparison works is that the consumer puts in an envisaged purchase price of a product at
30 the top, and once you put in the purchase price you then get your list of providers and
31 extended warranties.

32 The point I want to make about this is it is immediately clear at this stage that there is no
33 indication at all from the first version of the mock-up that is sent, that is published, that
34 John Lewis would be named, that it was intended that John Lewis would either be named at

1 all or that it would be specifically named or included in this comparison list. At that point
2 there is no letter from John Lewis saying: “Hang on a second, we have seen this, but it
3 seems to us to be crucial ----”

4 THE CHAIRMAN: Are these providers, Best Buy and Littlewoods, are they actually people who
5 do provide an extended warranty for this model of LCD TV, or are these just random
6 names ----

7 MISS LESTER: It is an illustration of what the website would look like, so whether in respect of
8 an LX150 Samsung it is correct, but yes, in practice that is how it would work. You put in,
9 and we can see it from the later mock-ups, you put in that you are buying a plasma
10 television.

11 THE CHAIRMAN: What I am wondering is what you could glean from the non-inclusion of ----

12 MISS LESTER: Not very much at this stage. The only point I am making, which is a very
13 limited one is there is nothing to indicate to John Lewis that it would be included at this
14 point, and that is the first time that it has been sent a mock-up.

15 MR. FREEMAN: If your illustration had been an audio box then that would have included John
16 Lewis?

17 MISS LESTER: An audio box?

18 MR. FREEMAN: Well, what we heard earlier this morning about ----

19 THE CHAIRMAN: A speaker dock.

20 MR. FREEMAN: A speaker dock, or whatever. The product on which John Lewis did offer ----

21 MISS LESTER: Yes, that is right. The Office writes to John Lewis at tab 14 of the bundle on
22 10th February and says that it would be interested in John Lewis’ views on two issues. First,
23 the likely effectiveness of the undertakings and whether John Lewis, in principle, would be
24 interested in participating.

25 John Lewis’ response is you have internal documents from John Lewis discussing its
26 response, one of which is at tab 17. Tab 17, forgive me, is the version that was sent to the
27 OFT, and so this is John Lewis’ response to the OFT with its reaction and what it says is
28 that at the bottom of that email, the thrust is that John Lewis would wish to participate and,
29 again, this is on the basis of the mock-up it has seen, but that it is concerned about the way
30 in which it is represented on the website.

31 Then the consultation document in May, which is behind tab 19 at p.636, is where the OFT
32 explains for the first time, before the decision to accept undertakings, how it proposes to
33 deal with bundled warranties, and what it says on p.636 at para.4.2, at the second bullet
34 point is:

1 “The availability of EW products whose price is combined with the price of the
2 DEG will be explained to consumers using the EW Comparison website, alongside
3 the search results, so that consumers are aware of these options when considering
4 their EW purchase.”

5 What is being proposed there is that bundle warranties, the existence of them will be
6 explained alongside the search results, not that they will be included in the search results,
7 but what is proposed is that they will appear on the side.

8 Then, in the same document at p.638 there is an explanation of clause 2.3, which we will
9 come to, but the explanation for that clause – from the right hand side of the page – is to
10 ensure consumers are aware of the full range of EWs available to them, so that they are able
11 to choose the EW products which best suits their needs. So the OFT is saying that we
12 propose to deal with bundled EWs by alerting consumers to their existence so they know
13 about them.

14 Then p.647 we see clause 2.3 – if I could ask the Tribunal just to read clause 2.3.

15 THE CHAIRMAN: (After a pause) So this was being highlighted in the May consultation as a
16 change to the draft that had been published with the February consultation.

17 MISS LESTER: Exactly, the changes are highlighted in red. You will remember this is in
18 response to John Lewis, this happens after John Lewis has said to the OFT “We’re worried
19 about how we’ll appear”, and the words I want to highlight on the search comparison
20 website: “These results do not include those extended warranties where there is a single
21 price.” Nothing could be clearer to consumers that what is being said here is: “Here is a
22 price comparison website for extended warranties, what is not included in this price
23 comparison is bundled EWs.” These results do not include bundled EWs.

24 John Lewis commented on that version because it was clear at that point that what was
25 proposed was not to include John Lewis in the search results – that is May.

26 John Lewis commented at tab 21, 31st May, and this is an email from Amy Holt of John
27 Lewis, and what she says at the bottom of the page, she comments on clause 2.3 in that
28 table, and she says:

29 “We are pleased that our previous specific feedback on this point has been taken
30 into account. However, it’s not clear exactly how this is communicated and we
31 think it is crucial that this is done in an appropriate way. We would strongly
32 suggest – and expect – that the comparison site would specifically list John Lewis
33 and make clear in the ‘cost’ column that the EW is included in the price of the
34 product. It should be absolutely explicit that customers buying products from

1 [John Lewis] benefit from the EW being provided at no extra cost as opposed to a
2 generic statement.”

3 Then we get the OFT’s final decision in June at tab 23 and if I could ask you to look at
4 p.716 of the bundle and to read, please, paras. 3.7 and 3.8 on that page.

5 THE CHAIRMAN: (After a pause) Yes.

6 MISS LESTER: The point I want to make there is that it had already been made clear that what
7 was going to happen was John Lewis’ bundled products would not be in the search results.
8 John Lewis then says: “It is very important that we are named expressly”. The OFT takes
9 that into account and expressly explains why it is rejecting what John Lewis would like in
10 those paragraphs. I think it is agreed, that John Lewis is the party making the submissions
11 here, and the second sentence of para. 3.7:

12 “However, the same party said that the EW Comparison website should be more
13 explicit in naming the EW providers who supply an EW whose price is included.”

14 In other words, “we do not just want clause 2.3, we would like it to say John Lewis is one of
15 those providers.” The OFT explains that first of all that would require a modification to the
16 UIL. In other words, the UIL do not permit that and it is not necessary in the OFT’s view to
17 modify the UIL, and that it does not have to have all EW products represented as long as
18 consumers are aware of their existence, that the website is open to a range of providers and
19 the consumers might be misled, and remember of course that the Advertising Standards
20 Authority has already told John Lewis that it is misleading to try and describe its bundled
21 extended warranties as being free, so the OFT makes the point that it could be misleading in
22 this context too.

23 MR. FREEMAN: You are not asking us to take a view on whether this was a right or a sensible
24 decision?

25 MISS LESTER: No.

26 MR. FREEMAN: Your point is that this is what the OFT said and John Lewis knew about it?

27 MISS LESTER: That is exactly right. The submission I was about to make is that this may or
28 may not be a right decision. We submit strongly that this is a right decision for reasons I
29 will come on to. John Lewis is expressly asking you not to quash this decision. It is not
30 challenging the undertakings in lieu of reference, and it is clearly out of time to do so. The
31 point I am making at the moment is, what was clear to John Lewis by June was that, first of
32 all, it would not be named in the price comparisons on the website; secondly, that it was not
33 envisaged that it would be named anywhere on the website at all.

1 THE CHAIRMAN: Thirdly, that the OFT's view was that to change that would require a
2 modification to the UIL.

3 MR. FREEMAN: Can you just explain that a little more, because this is the document that
4 embodies the decision to accept the UIL – is that right?

5 MISS LESTER: Yes, it is.

6 MR. FREEMAN: It is not a question of modifying the UIL, it is modifying the consulted on draft
7 of the UIL – is that right?

8 MISS LESTER: It is, yes. You will remember that from May there have been different versions
9 of the UIL with amendments made. What they were saying here is that we looked into what
10 you said about why we should change them, and we decided that we would not make that
11 change.

12 MR. FREEMAN: I am not for a moment saying you should have done this, but it would have
13 been open to the OFT to have phrased 3.7 and 3.8 differently, and have published
14 undertakings in lieu which reflected that change of view. There is nothing to stop them
15 doing that?

16 MISS LESTER: No. Then there is a letter at tab 25 from Dan Moore of the OFT which again
17 explains to John Lewis that it has taken into account its representations in its email of
18 31st May, but the OFT appreciates the concerns about the way in which John Lewis has
19 bundled EWs will be put on the website, in particular the end of para.2, the Office noted
20 John Lewis's suggestion of specifically listing John Lewis under price comparison, they
21 have carefully considered it and the OFT considers the effectiveness of the comparison is
22 not dependent on having all the types of EWs specifically represented. I will not read it all,
23 but over the page, the OFT makes it clear that it will keep the issues that John Lewis has
24 raised under review as part of its statutory duties to monitor undertakings, and that the OFT
25 would welcome engagement from John Lewis as the undertaking are implemented to inform
26 the OFT's position on the Steering Group.

27 THE CHAIRMAN: It is this next bit, "I would be very happy to have a discussion, or arrange a
28 meeting to discuss this further" that they rely on to say that the door did not seem to be
29 entirely closed.

30 MISS LESTER: They do. I am coming on to that now. Just before I do, I would like to point to
31 two bits in John Lewis's evidence on what was decided and what was clear to it by 29th
32 June, and that is in bundle 1, first of all, in Mr. Ambler's witness statement, which is tab 2,
33 para.23, p.31. Mr. Ambler is referring there to a conversation between Amy Holt of John

1 Lewis and Dan Moore of the OFT on 29th June “to discuss our continuing concerns”, and he
2 remarks:

3 “This conversation failed to alleviate these concerns. Amy Holt informed me in
4 an email on the same day that the Website will not include EWs which are
5 included in the price of the product and that these will instead be described in a
6 separate part of the website.”

7 So what is clear, even on Mr. Ambler’s evidence, is that by 29th June it was clear to John
8 Lewis that the price comparisons would not include John Lewis in them.

9 MR. FREEMAN: The nature of the description is still open?

10 MISS LESTER: It is. Then in Amy Holt’s witness statement at para.9, which is behind the next
11 tab, the same point is made. She says:

12 “On 29th June ... Dan Moore informed the Website will not include EWs which
13 are included in the price of the product. These will instead be described in a
14 separate part of the website.”

15 The reason I am stressing this point, that it was clear by that point – in fact it had been clear
16 since May, certainly by June – that they would not be in the price comparison first. That is
17 the first part of the remedy John Lewis seeks. So John Lewis has said, first of all, “Please
18 will you require the retailers to include John Lewis in the price comparisons itself”, and in
19 the alternative they say that they should be named. Of course, it is relevant to the timing
20 point that by June it was already clear that they would not be in the price comparisons; and
21 secondly, that they would not be named elsewhere, and that is the point I am coming on to.
22 Then tab 26 is the email of 29th June, this is the internal John Lewis email that was being
23 referred to that was reported by both witnesses, and the first paragraph I think reflects what
24 is said in their witness statements, that the price comparison will not include bundled
25 warranties. You will see from the first sentence of the email that this is as a result of a
26 telephone call with the OFT. What is said in the last but one paragraph is:

27 “So, all paid for warranty products will be included in this price comparison
28 table – I wondered if it would be worth at least giving some to whether [John
29 Lewis] would like to be included in this table and if so, how to do this ...

30 I do not agree with the OFT’s approach to this but I’m afraid it seems to be a
31 done deal.”

32 Of course, the reason she is saying that is because it was a done deal because the final
33 decision had been published already in June in which the position was made clear. Of
34 course it was also clear to them at that point that they would not, in fact, be named at all,

1 because I have already shown you the response to consultation and what clause 2.3 looked
2 at. You will remember the OFT saying, “We have looked at whether John Lewis should be
3 named and we have decided for the following reasons that it should not be”.

4 Then at tab 27, another internal John Lewis email updating John Lewis on the undertakings.
5 The paragraph that starts at the bottom of the page:

6 “The draft proposal referred to the price comparison website explaining the
7 availability of EWs where the price of the EW is combined with the price of the
8 product ...”

9 that is bundled EWs –

10 “The draft proposal appeared to suggest that this would be done by way of a
11 simple statement elsewhere on the site, as opposed to being clearly set out in the
12 comparison table – which would be where consumers would be most likely to
13 seek information. We suggested in our feedback that this would not be an
14 appropriate way of communicating the information – it should be absolutely
15 explicit that customers buying products from JL benefit from the EW being
16 provided at no extra cost, as opposed to a generic statement. The comparison
17 site should specifically list JL and make clear in the ‘cost’ column that EW is
18 included in the price of the product. Indeed, this site has been established with
19 the sole aim of providing clear and accurate information ...”

20 Then down to the bottom of the email:

21 “Unfortunately it has been presented to us a fait accompli but if anyone has any
22 thoughts on how we may try to tackle this, I would be grateful if you would get
23 in touch.”

24 THE CHAIRMAN: What about the bullet:

25 “Unfortunately, the OFT have not adopted our comments into the final proposal
26 and JL’s offering will be listed elsewhere on the site, as opposed to the price
27 comparison table.”

28 MISS LESTER: There is a confusion here. This email suggests that John Lewis’s offering will
29 be listed elsewhere on the site. I have already shown you the document showing that the
30 OFT considered specifically naming John Lewis, but that it had rejected the idea of
31 specifically naming them, but this is John Lewis’s internal email ----

32 THE CHAIRMAN: Yes, but if we are looking at what you say, you preface this by saying, “We
33 are looking at what was clear to John Lewis”.

1 MISS LESTER: Two things: first of all, what the OFT had decided and by when, which is the
2 relevant question, of course, for the timing point. Then we can come on to the question of
3 whether it was reasonable for John Lewis to wait. In terms of what had been decided, you
4 have seen the document which says why the OFT had decided not to name John Lewis.

5 MR. FREEMAN: Sorry to interrupt, this is December 7th, is it not?

6 MISS LESTER: No, it is 16th July. It is half way down the page.

7 MR. FREEMAN: So what you are quoting from is from July?

8 MISS LESTER: Yes.

9 MR. FREEMAN: Is there any possibility that John Lewis were confused as to whether they
10 would be listed?

11 MISS LESTER: I think there is a possibility because their evidence says exactly what this email
12 says, that they understood that their offering would be described somewhere else on the
13 website. Quite what that means, but that is consistent of course with clause 2.3, but we will
14 come on to the specific naming of John Lewis.

15 MR. FREEMAN: Is it possible that the entire discussion was at cross-purposes then?

16 MISS LESTER: Well, it is possible, if the John Lewis did not read the final decision, that the
17 discussion was at cross-purposes. The issue for the Tribunal on timing is: when is the
18 decision that John Lewis is reviewing?

19 MR. FREEMAN: We are still on timing?

20 MISS LESTER: We are still on timing, I am afraid.

21 THE CHAIRMAN: Timing includes what is the decision that is actually being challenged.

22 MISS LESTER: Yes, exactly.

23 Then at tab 28, 31st July, this is John Lewis checking with the OFT whether the undertaking
24 had formally been accepted and whether an intervention notice under the Enterprise Act had
25 been served – that is the bottom of p.761, and the OFT confirms that the undertaking had
26 been accepted. That is at tab 29, 1st August. They were accepted and published on 27th
27 June. You will see below para.2 in that email at tab 29 that the OFT says:

28 “The format of the comparison website has not yet been agreed and will be
29 subject to OFT approve. However, an initial draft of the website which
30 provides an illustrative example of how may be look can be found at ...”

31 So what they are saying here is that the undertakings have already been agreed in the form
32 of the UILs in the bundle with clause 2.3 that you have seen, but that the format has not yet
33 been dealt with. We will have to come on to what that means.

34 The text following says:

1 “It is important to note that this illustrative example does not reflect certain
2 amendments made following the initial consultation on the draft proposed
3 undertakings, for example in relation to the statement ... [at clause 2.3].”

4 So the red text that you saw that was modified:

5 “... and the placement/prominence of this statement on the website is something
6 which will need to be approved by the OFT.”

7 So when the OFT is talking about format that has not yet been agreed, there is an indication
8 that the placement and prominence of the statement is something that will need to be
9 approved.

10 When Mr. Robertson is talking today he says that he not challenging the undertakings, he is
11 challenging the format, and it is quite clear from the undertakings and from the final
12 decision that the substantive decision about how bundled extended warranties will be dealt
13 with on the website is determined in the undertakings. What is not determined is format –
14 in other words, as you would expect from the word ‘format’ - placement, prominence, font
15 size, how big, where, that sort of issue has not yet been determined. You will see, now we
16 are past June, that the ongoing discussions between the OFT and John Lewis consist of the
17 OFT saying, “Yes, format is still open for discussion”, and indeed they have several
18 discussions with John Lewis in an attempt to be helpful about the format, about how, you
19 know, they agree with John Lewis that consumers ought to be aware that bundled extended
20 warranties are available in the market, and indeed that is what they said in their final
21 decision, and that is their way of dealing with bundled extended warranties. So, there has
22 been flexibility on where on the website it will appear, how big, whether it goes at the
23 bottom or the top, of course, subject to agreement in the steering group with Dixons — that
24 kind of issue. But, that is entirely different from what John Lewis has come asking the
25 Tribunal to do, which is now to direct after the undertakings have been accepted that they
26 should, in effect, be entirely re-written; so, instead of having clause 2.3 saying, “There are
27 these bundled warranties but they will not be in the website themselves”, they want an
28 entirely different set-up which they suggested to the OFT at the time when it was relevant,
29 namely, during the consultation. The OFT explained why it took that into account but
30 decided against it. And that is not a decision that is now open to challenge.

31 THE CHAIRMAN: So, it was as a consequence of that, you are saying, that the powers that the
32 OFT has under clause 2.2 of the undertakings do not extend to insisting on John Lewis
33 being expressly mentioned in the website.

1 MISS LESTER: Absolutely. The undertakings are undertakings offered as a suggestion to the
2 OFT as a way of avoiding a reference to the Competition Commission. The OFT looks at
3 them, they have many discussions, they change them, and when they are in a form that they
4 think will remedy the problem, they accept them. They come into effect. They have been
5 signed. You have seen the confirmation to —

6 THE CHAIRMAN: Yes, but as was said right at the outset, the oddity here is the OFT's ongoing
7 role in the implementation of these undertakings as somebody approving "certain aspects",
8 if I can express it neutrally, of the website, and that was really what I was exploring with
9 Mr. Robertson and now exploring with you, is what was thought to be the extending of that
10 role of the OFT in the implementation of the undertakings, and if — which I know you do
11 not accept — that role did enable them to refuse consent unless the reference to bundled
12 EWs named John Lewis, if they then declined to refuse consent, what kind of decision is
13 that that it has taken up?

14 MISS LESTER: It would have been open, of course to the OFT to say, "We are not accepting
15 these undertakings in this form" up to the point when they accepted them. But, having
16 exercised their discretion and accepted them in the form that they were being at that point
17 offered, the OFT just does not have power at that stage to say, "We require an amendment".
18 The OFT does, you are right, have a continuing role, and it might be useful to look at that,
19 I mean, you have looked at it already the undertakings —

20 THE CHAIRMAN: Yes. Maybe this is a different way to — suppose that Dixons wanted to
21 challenge a decision of the OFT as to the format, the prominence of something, suppose
22 Dixons proposed a format which had Dixons products in a much much bigger type font than
23 everybody else's and the OFT would say, "No, no, no. That's not the idea of the website.
24 Everybody's font has got to be the same size and the same colour, and so we're not going to
25 approve the website", and Dixons wanted to challenge that decision.

26 MISS LESTER: Yes.

27 THE CHAIRMAN: Now, under what power is the OFT taking that decision, and is it under a
28 power which can then come to us on appeal?

29 MISS LESTER: Well, what the OFT can do is enforce the undertakings and make sure that they
30 are in force, so if what is done by Dixons or by anyone is not implement the website or
31 acted in some way inconsistently with the undertakings, then of course the OFT has powers
32 to do something about that. And if I can steal this section from Dixons' skeleton argument
33 at para.6, they have summarised the OFT's continuing role, if you like, and powers in a

1 helpful way. Their argument is at tab.7 of the first bundle. I think the one we were on was
2 the second one, enforcement. If they are not being complied with —

3 THE CHAIRMAN: But it is not really complying with the UIL because the size of the font is not
4 something that is set in the UIL.

5 MISS LESTER: Well, there are two answers. One is that the OFT can review whether the — it is
6 set out at para.61. whether by change of circumstance the undertakings are no longer
7 appropriate, but if what you are addressing is a formatting issue, then that is dealt with as
8 specifically being part of the OFT's role under the undertakings.

9 THE CHAIRMAN: Yes.

10 MISS LESTER: Which takes us back to clause 2.2 of the undertakings, which say that the format
11 is to be agreed between the steering group and the website manager, and that is the process
12 that you have said is an oddity. But, after the undertakings in lieu were agreed, the OFT
13 then says, "I don't think there is anything remarkable about this". They have said, "Right,
14 we have now agreed what the retailers have agreed to do, but we have not agreed details
15 like prominence and font size, and that is something that the UIL specifically envisaged the
16 OFT having a role in. But, the fact that it has a role in deciding with the retailers on how
17 the website will look and, for example, ensuring that it can be viewed on a hand held
18 device, on a Blackberry or whatever, and where exactly the statements are, those are
19 formatting issues, and that is what is reflected in the discussions with John Lewis.

20 THE CHAIRMAN: Yes, well, that is a different point. But – it may not arise, but I still —

21 MISS LESTER: The answer to the question if Dixons wanted to argue that the OFT was
22 unreasonably withholding its approval because of a formatting problem —

23 THE CHAIRMAN: Administrative court. You would say that would go then for a review.

24 MISS LESTER: Yes, and you can see on the, the undertakings themselves say that the OFT's
25 approval shall not be unreasonably withheld or delayed. Now, of course, if the OFT were to
26 do something unreasonable in a public law sense in relation to one of the decisions it is
27 required to take under the undertakings, for example, to do with format, it just had some
28 crazy format decision, then that would be a normal judicial review. But, that cannot
29 possibly be a decision in connection with the OFT section 154. That is not a decision
30 whether to accept undertakings rather than make a reference to the Competition
31 Commission.

32 THE CHAIRMAN: That is not the test under 179. The test is very broad, and what I am trying to
33 explore is whether you say, which I think Mr. Robertson says, that it is, or whether you

1 agree that it is broad enough to cover decisions that are taken by the OFT in performance of
2 its functions under clause 2.2 of the UIL.

3 MISS LESTER: No. We would not accept, that is why I say that Mr. Robertson's changed case
4 would have been a very different one on the pleadings. If he had said that this is an
5 unreasonable exercise of your, this is an unreasonably withheld OFT consent under
6 clause 2.2, that is entirely different.

7 MR. FREEMAN: So, those complaints, you say, should go to the administrative court?

8 MISS LESTER: Yes.

9 MR. FREEMAN: And you are saying they are not, they are decisions, but they are not decisions
10 in connection with a reference. Is that what you are saying?

11 MISS LESTER: Well, let us just look at s.179.

12 MR. FREEMAN: Dare I ask why not?

13 MISS LESTER: It has got to be a decision in connection with a reference or a possible reference.
14 So, the decision has already been taken that there will not be a reference because the
15 undertakings satisfy the OFT. Now, if John Lewis had launched a challenge to some part of
16 the undertakings and had done so after June, within the time limit, then it would have been
17 challenging the decision to accept undertakings instead of referring.

18 MR. FREEMAN: I understand that point. But, I think the point that is confusing us is that, well,
19 puzzling us, is that these undertakings depend for part of their effect on the fulfilment of a
20 condition. The condition is the establishment of the website, and the OFT, as the chairman
21 has said, is involved in the establishment of the website in that it has to approve in advance
22 what the website is going to look like. And, I mean, you are arguing, I think, that all John
23 Lewis's complaints are not about format, they are about content; and because it is format it
24 does not really go to the essence of the undertaking, and you are saying we should go off to
25 the administrative court if there is a dispute about format?

26 MISS LESTER: No, I am not. What I am doing, first of all, is responding to the suggestion that
27 we did not take a point on jurisdiction, and that is, we say, because the decision has been
28 put on an entirely different basis. So, if it had been put on the basis that this was a breach of
29 clause 2.2, then we would say that it is not the decision in connection with a reference, but
30 the principal point I am making is not that what John Lewis is complaining about is format
31 and not substance: what I am saying is that John Lewis is complaining about decisions that
32 were clearly made in June and were dealt with all in the undertakings which have been
33 agreed. So, they are not format decisions. It is just not right to say that what they are
34 complaining about is a matter of format. What they are complaining about is the way in

1 which the OFT decided to display or treat or represent to consumers bundled extended
2 warranties in the website; and how it chose to treat bundled extended warranties is not
3 something that is now open to challenge. But, it was dealt with clearly in the undertakings
4 in June, and we will see after lunch that it also was not dealt with afresh in November,
5 which was — and I think still is — John Lewis’s pleaded case.

6 THE CHAIRMAN: Right. Well, we will come back at two o’clock. Thank you very much.

7 (Adjourned for a short time)

8 MISS LESTER: Can I take you to the decision that John Lewis says it is asking you to review
9 from its notice of appeal, please, which is bundle 1, tab1. First of all para. 1, fourth bullet
10 point refers to:

11 “a subsequent decision by the OFT communicated at a meeting on 15th November
12 not to allow certain JLP Extended Warranties to be listed on the EW Price
13 Comparison Website comparing EW prices ...”

14 in a neutral manner. So it is a decision communicated at a meeting on 15th November and
15 then at the end of that paragraph “confirmed by a letter on 14th December”. So that is where
16 the decision under review is. In case there is any doubt about this, paragraph 7 of the notice
17 of appeal says: “As to the timing of this application, the OFT’s Website Decision” and that
18 is always how it is referred to, “was communicated in a meeting on 15th November,
19 followed by an email on 16th November”. Then at para. 45, p.12, at the bottom of the page
20 – this is referring to the meeting on 15th November, John Lewis’ case there is:

21 “Importantly, JLP was informed for the first time in this meeting that the Website
22 would be going live on 10th December 2012 and that the ‘degree of prominence’
23 would not include JLP or other bundled EW providers being identified by name or
24 logo.”

25 So that does not include JLP or other bundled EW providers being identified by name or
26 logo. So the case we are meeting is there was a meeting on 15th November confirmed
27 subsequently at which for the first time a decision of the OFT was conveyed to John Lewis
28 of the kind outlined in the Notice.

29 THE CHAIRMAN: When it says “degree of prominence” in quotes, what is that a quote from?

30 MISS LESTER: That is quoting from correspondence which we are about to look at.

31 THE CHAIRMAN: Right.

32 MISS LESTER: I have already shown the Tribunal that nothing in the undertakings suggests that
33 John Lewis will be named, and that the undertakings are very clear that the way bundled
34 EWs will be dealt with is clause 2.3. Also, and crucially, I would ask the Tribunal to read

1 again paras. 3.7 and 3.8 of the final decision in June, because those paragraphs expressly
2 reject the idea not only that John Lewis will be included in the comparisons but that John
3 Lewis will be named.

4 THE CHAIRMAN: And you say that we can have regard to those paragraphs in construing the
5 texts of the undertakings?

6 MISS LESTER: No, I am saying that a decision on both those points was taken in June. So in
7 terms of what decision did the OFT take, it took a decision that it told John Lewis about in
8 the final decision document which was in June.

9 THE CHAIRMAN: Oh, I see.

10 MISS LESTER: And that document is called “Final Decision on the Undertakings.

11 THE CHAIRMAN: Right.

12 MISS LESTER: And it is the document in which the OFT explains the undertakings it is
13 accepting and why. Can I now show you a letter of 8th August, which is at tab 30 of
14 document bundle 3. There are not too many more documents to take you to. This goes to
15 the point that the Tribunal noted that John Lewis says it was under the impression, you will
16 recall, that it will be referred to somewhere on the website, even if it was not going to be
17 named in the price comparison, so this is a letter from John Lewis to the OFT at tab 30.
18 You will note that at this point in time, namely, August, John Lewis is already saying to the
19 OFT: “We think the decision that you have taken is unlawful, the undertakings are
20 unlawful”. If you flick through the letter and read it at some point you will see that all of
21 the grounds which are now familiar from the Notice of Appeal are set out in this letter,
22 including the free movement argument. What is said here is that the website is unlawful,
23 which confirms the fact that John Lewis already had grounds, and this is only August, for
24 challenging decisions of the OFT.

25 But, what is said in John Lewis’ letter is that at p .770, the first full paragraph of that page,
26 you will see again John Lewis saying that:

27 “According to your proposals, where extended warranties are included in the price
28 of a product, these prices will not be displayed in the comparison table but will be
29 referenced elsewhere on the site.”

30 You will then see the OFT’s response to that at the next tab, tab 31, and the response to that
31 point is on p.774, and I just ask you to read the whole of that first bullet paragraph.

32 THE CHAIRMAN: (After a pause) Yes.

1 MISS LESTER: So the OFT is saying: “The message will be elsewhere on the site”. The UIL
2 specifically require that the message is placed on the same page where the comparison
3 results will be displayed so that consumers are specifically made aware of the options.

4 THE CHAIRMAN: So does that mean that the sentence will be on each of the pages?

5 MISS LESTER: We will look at the mock-ups in a second, but on the same page as the price
6 comparison, the text saying there are also these ----

7 THE CHAIRMAN: There are lots of different pages of price comparison, potentially, depending
8 on what ----

9 MISS LESTER: There are different pages in the sense that there are different products being
10 compared.

11 THE CHAIRMAN: Yes.

12 MISS LESTER: And the text remains constant on the top of each page.

13 THE CHAIRMAN: I see.

14 MISS LESTER: The other point to note in this letter is over the page, having clarified what was
15 decided about the website already the OFT goes on to clarify what is still under
16 consideration, and the OFT says there, at the top of p.775, that “The OFT has now accepted
17 the UIL”. “The final UIL include the definition of EWs” which we will come on to.
18 “However, in addition to the Website explicitly highlighting the availability of
19 combined EWs, the OFT is considering further steps to help facilitate consumer
20 awareness of this option.”

21 Then:

22 “To this end, the OFT is currently considering the following issues:

23 * The precise prominence of the message regarding EWs where the price is
24 combined ... Although this will be on the page where the comparison results
25 are displayed, the precise prominence on that page has yet to be agreed, and is
26 something which is subject to OFT agreement.

27 * Publicity for key messages in the market study”

28 And the OFT says at the end of that letter, on the next page:

29 “We would welcome the opportunity to meet with you to discuss the further work
30 which the OFT is considering ...”

31 Namely those points which you have just seen:

32 “... particularly any suggestions which John Lewis has on the above next steps, as
33 well as to provide any further explanation of this letter. If you are available please
34 contact.”

1 That is the background to the meeting that then takes place on 15th November. You will
2 note on 15th October (tab 32) John Lewis responds to that letter and says that they are also
3 keen to keep the dialogue going. They still have concerns about the legality of the website
4 and they attach their responses to the points that the OFT has made in its letter of 24th
5 August, and I just ask you to note the first one on p.780, which is John Lewis' comment
6 that:

7 "Unless providers of EWs included in the price of the product are displayed in
8 exactly the same way as those providers who charge separately for EWs then we
9 feel this is clearly discrimination."

10 So JLP has already set out its grounds for review. The undertakings are clearly unlawful,
11 because the way that they deal with bundled EWs in John Lewis' view is discriminatory,
12 because John Lewis' case here is only if you deal with them in exactly the same way would
13 the undertakings be lawful. Of course, you have seen from the undertakings that that is not
14 what the OFT decided. It decided to deal with them by way of clause 2.3. So then, looking
15 at the meeting, and you will recall John Lewis' case is that at this meeting a decision, which
16 is the decision that this Tribunal must review, was conveyed at the meeting on 15th
17 November. There is a note of that meeting behind tab 35. So the first document behind that
18 tab is John Lewis handwritten notes of that meeting, and there is a typed up version which
19 follows, starting at p.818. I would ask the Tribunal to read this obviously, because this is
20 the decision meeting, but perhaps without detaining you to read it in full now I just point out
21 some main points.

22 First, at the beginning: "Dan Moore gave an update on progress with the comparison
23 website". The first bullet says they are working on a number of design issues.

24 "One of the main issues is how to give the inclusive EWs a sufficient degree of
25 prominence To that end this will be the first message on the actual
26 comparison page, but will not be included within the comparison table itself."

27 Mobile versions and so on, and then the next heading to the bullets is: "All participated in a
28 discussion on the points below:" and you can run your eyes down them. The OFT offered
29 to let John Lewis see a final version of the website prior to general release. Over the page –
30 John Lewis is in an invidious position because it cannot describe its product as free. The
31 penultimate point:

32 "John Lewis concluded by restating that it would need to consider its options and
33 that it had legal advice that it was confident that it could lead to it challenging the
34 legality of the website."

1 What I would suggest the Tribunal will not find anywhere in that meeting note is a decision
2 of any kind where anyone, still less a decision by the OFT that their whole case rests on that
3 this is the meeting at which the OFT is said to have told John Lewis for the first time that its
4 bundled warranties would not be included in (a) the comparison table, and (b) named
5 separately on the website. It is simply not consistent with the note of the meeting.

6 MR. FREEMAN: Is this an agreed note?

7 MISS LESTER: It is a John Lewis note.

8 MR. FREEMAN: Is there an OFT note?

9 MR. ROBERTSON: If I could assist the Tribunal. There is not an OFT note. We thought there
10 was an OFT notetaker at the meeting but no note seems to have been taken by the OFT.
11 This was exhibited by Mr. Ambler to his witness statement and it is introduced by para. 40
12 of his witness statement. To give you the reference it is bundle 1, tab 2, p.34. The relevant
13 statement is:

14 “We were also advised at the meeting, contrary to our understanding of the OFT’s
15 objectives in conducting the market study and the objects of the [undertakings],
16 that the website was not there to provide a view of the whole market and inclusive
17 EWs would not appear.”

18 And that is picking up on the bullet point on the second page of the note, the first full bullet
19 point

20 “JL raised that it felt in an invidious position. The OFT acknowledged this point
21 but again reiterated that it was not trying to provide a view of the whole market.”

22 That is what Mr. Ambler is referring to in his witness statement.

23 MR. FREEMAN: I think what I am getting at is not to say whether the OFT should or should not
24 be taking notes, it is whether this is seriously queried as an accurate record of what was
25 discussed at the meeting.

26 MISS LESTER: It is not seriously queried, no. You will see the OFT has not put in evidence
27 challenging what John Lewis has said about it.

28 THE CHAIRMAN: What Mr. Ambler seems to be saying is that he was actually told something
29 that does not seem to have made its way into their own note of the meeting.

30 MR. ROBERTSON: It is in that bullet point. It is the final part of that bullet point, and that is
31 what Mr. Ambler refers to in para. 40 of his witness statement.

32 THE CHAIRMAN: I see.

33 MR. ROBERTSON: Mr. Ambler, of course, is not a lawyer, he is not taking an attendance note,
34 he is a commercial man.

1 MISS LESTER: What the Tribunal will also notice is that after that meeting if, indeed, that had
2 been the crucial meeting at which significant decisions were conveyed for the first time by
3 the OFT that John Lewis was unaware of before, we do not suddenly get letters saying:
4 “This is an outrage, if you proceed in this way it is unlawful.” In fact, what you have
5 already seen is that John Lewis had already set out its grounds of challenge before that,
6 because the reality is, as I have said, it was challenging decisions that had been taken in
7 June, and this was simply a meeting at which, as it is plain from the note, formatting issues
8 were discussed, which were still open for discussion but grounds of challenge have already
9 been set out by John Lewis.

10 What then happens in the next tab, tab 36, is that the OFT tells John Lewis, after the
11 meeting:

12 “Thank you for a very constructive meeting yesterday. We much appreciated
13 your time.

14 We agreed to send you the data integration guide ... and the final versions of
15 the Website mock-ups ...”

16 which they then attach.

17 “I have also attached a mock-up of the mobile version of the Website ...”

18 You then immediately have JLP’s letter before claim at tab 37.

19 THE CHAIRMAN: Just looking at 839, that is the mock-up.

20 MISS LESTER: That is the mock-up.

21 THE CHAIRMAN: It seems to be largely in Latin for some reason.

22 MISS LESTER: I think that is what happens with a prototype website. What you can see,
23 although it is microscopic, on the second page, p.840, is the famous clause 2.3 words under
24 “Compare plasma television extended warranties”. Can I, since we are on that point, just
25 show you, bearing in mind that John Lewis’s case is that that is very confusing to
26 consumers because of the reasons John Lewis gives, their own version. What they would
27 like is attached to their skeleton, and that is in the first bundle behind tab 5. It is the end of
28 their skeleton, pp.74.29. This is their first mock-up alternative, this is what they would like
29 their option 1 to say. Of course, their case is that this is not inconsistent with the practice by
30 the undertakings. You can see clause 2.3 under the heading, so it still says, “These results
31 do not include those extended warranties where there is a single price”, because of course
32 that is what is in the undertakings. You then see, completely contrary to that, that it does, in
33 fact, include a bundled warranty, because John Lewis has added its own product in a black
34 box near the bottom of the page, where it says, “Included in the price of the product”. It has

1 then added its additional box underneath that saying, “To assist with your assessment as to
2 whether the extended warranty is value for money you will need to consider and compare
3 the price of the underlying product”. In my submission, this is doubly confusing because,
4 first of all, the consumer having been told expressly that this page does not include bundled
5 extended warranties, then sees that it does include bundled extended warranties, because
6 there is one, and is next told that in order to assess whether the extended warranty is value
7 for money you have to consider the price of the underlying product, which of course is
8 wrong, because in order to assess whether the extended warranty is value for money you
9 need to know the price of the extended warranty. John Lewis’s point is that in order to
10 compare the value of the bundle of the domestic electrical good and the warranty, you need
11 to compare the whole. That is really John Lewis’s case in these proceedings, that what this
12 should all have been about is a website which compares the domestic electrical good and
13 the extended warranty because that is the way it sells its product, as a bundle. What the
14 OFT has been trying to say is that the object of the exercise it was performing was to try to
15 reduce the point of sale advantage, the unfair advantage that retailers have, by providing just
16 about extended warranties, the idea being that when you go into a shop you have already
17 made your decision about a domestic electrical good, or you have not already made your
18 decision, but you have sufficient information about DEGs, and indeed the OFT has found,
19 as did the CC, that there was price competition, sufficient competition in the market for
20 DEGs. What there was not was sufficient information about just extended warranties. This
21 is the version that the OFT asks you to direct would be not misleading to consumers, unlike
22 a version ----

23 MR. FREEMAN: Just one moment, before we leave the examples of the website, the very small
24 legend on the JLP option one, which you have drawn our attention to, it says, “Please note
25 this website does not contain details of all extended warranty providers or products”. It
26 does not mention the word “bundled”.

27 MISS LESTER: I am sorry, where is that?

28 THE CHAIRMAN: It is right at the top just under “Compare plasma television extended
29 warranties”.

30 MR. FREEMAN: I see, so it is the one at the top ----

31 THE CHAIRMAN: It has been put in a different place.

32 MISS LESTER: Do you remember that the OFT said that that message would appear at the top of
33 the page.

34 MR. FREEMAN: That is very helpful, thank you.

1 MR. HARRISON: When you showed us the previous one, the initial mark up had the price of the
2 actual electrical goods on it. Is this new website therefore not giving the price of the
3 electrical goods?

4 MISS LESTER: If you look down the left under “Compare extended warranties”, there is a sort
5 of click menu where you get the product, and plasma televisions is the one highlighted
6 there, and you then get “Product purchase price”, and it says £400. As I understand it, you
7 click on a price range. You might say, “Is this right, £400 to £600 as a range”. You click
8 on the price and then it then tells you that if you are buying a television that costs £400 ----

9 MR. HARRISON: It would not be a range, it would be a specific price. So if there was a 42 inch
10 plasma whatever, that would be the price of a Samsung. In the previous example it was a
11 Samsung price. It would be a price for that specific product.

12 MISS LESTER: It is a price for the class of product. You are looking at plasma televisions in the
13 case of this version rather than a specific model.

14 MR. HARRISON: So you click through to a range, not to a specific product?

15 MISS LESTER: Yes.

16 MR. HARRISON: Whereas in the previous website, the initial version you showed us, it was for
17 a specific product, a Samsung television?

18 MISS LESTER: Yes.

19 MR. HARRISON: This website no longer is adopting that approach.

20 MISS LESTER: I am told it was seen as being too complicated that way.

21 MR. HARRISON: I see, it just says “Plasma TVs between £200 and £800”, that is how it works?

22 MISS LESTER: Yes.

23 MR. HARRISON: Thank you.

24 THE CHAIRMAN: Yes, because it is the price of the warranty, and the price of the warranty
25 may be affected by the price of the underlying product, but may not be pro rata with the
26 price of the underlying product.

27 MISS LESTER: What it is not doing is saying anything about the price of the product, it is just
28 comparing warranties, and if you look at the terms of the final decision in June it is very
29 clear that what this does is compare the price of extended warranties. What is also striking
30 about the John Lewis’s case on this is, if I can show you their skeleton argument in the
31 same bundle at tab 5, para.14, p.74.4: the point that is being addressed here is that the OFT
32 have said at para.13 that it might have been confusing for consumers to have included
33 bundled EWs precisely because they do not know the element of that that is attributable to

1 extended warranties because John Lewis does not attribute a specific element. John Lewis's
2 response is to say:

3 "It is clearly not confusing to the consumers simply to list the price as 'included
4 in the price of product' or words to that effect and there is no evidence to the
5 contrary. A consumer would then be able to compare like with like in every
6 respect except for price."

7 Exactly the same words are used at para.61 of the skeleton, "in every respect except for
8 price", and if you look back at the OFT's decision to accept undertakings and the problem it
9 was considering, "This is specifically a price comparison website". The whole object of the
10 website is to compare the prices of extended warranties, and there are other features. John
11 Lewis's case is that its version is fine because you can do everything except exactly what
12 the website is supposed to be doing, which is comparing the prices of extended warranties.
13 Those submissions go to a number of the points, but the first point they go to is the timing
14 point which I have already made several times, that the relevant decisions were made by the
15 OFT in June and not in November.

16 John Lewis's case in its skeleton argument is that it asks the Tribunal to extend time. This
17 is a very difficult argument to understand because they are expressly not challenging the
18 undertakings in lieu of reference. They say it several times, and they have said it again
19 today, they are not challenging those undertakings. One has to ask, what is the point of
20 asking the Tribunal to extend time? Extend time for what? In order to make that case they
21 would have to identify exceptional circumstances, and I will come on to that, which allow
22 them to challenge the decision taken in June now. That only makes sense if they have
23 actually set out grounds upon which the June decision was unlawful. They have not only
24 not done so, but they have specifically and repeatedly said there is nothing wrong with the
25 undertakings, the undertakings are fine. That is the first point.

26 The second point is ----

27 THE CHAIRMAN: They say the undertakings are fine because they, I think, do not accept that
28 on their proper construction the undertakings preclude the specific mention of John Lewis
29 on the website. I think what they say is, if you are right, OFT, that the undertakings do
30 preclude the mention of John Lewis by name, then they did not realise that until November,
31 and if that is the case then it may be that they accept that the decision was taken in June,
32 but, because they did not appreciate that, time should be extended. Is that roughly how it
33 runs, Mr. Robertson? Mr. Robertson is nodding.

1 MISS LESTER: There are a number of difficulties if that is the submission that is now made. I
2 will come on to Ground 1 very briefly which is, is it really right to say that the undertakings
3 do include their bundled warranties, but the idea that they appreciated that at the time is
4 completely inconsistent with the evidence, because the first time the argument ever appears
5 that the undertakings in fact bundled warranties is 15th November 2012.

6 THE CHAIRMAN: They inclusion of the bundled warranties is a slightly different point. I think
7 we are still talking at the moment about the point whether ----

8 MISS LESTER: The construction point?

9 THE CHAIRMAN: Yes, whether clause 2.3 is properly construed as the maximum that can
10 possibly be included about bundled extended warranties.

11 MISS LESTER: The way that John Lewis has put its case in writing until Mr. Robertson just
12 nodded has never been that it is only on that limited basis that they are not challenging the
13 undertakings in lieu of reference. They have said, first of all, at para.2(a) of their Notice of
14 Appeal, "This application is brought for an order to quash the OFT's website decision, not
15 for the avoidance the UIL", no qualification. At para.95 of their skeleton argument they
16 say:

17 "This misrepresents the decision which JLP seeks to challenge. JLP is not
18 seeking to challenge the UIL."

19 I think there are several other references to that. At no point is it said, "Well, we might be,
20 if we are wrong on some of our arguments". I assume that is because they realised they are
21 plainly out of time to bring this case, so they have to say that.

22 The idea that they have made out a case for exceptional circumstances is not, with respect,
23 one we invite the Tribunal to accept. The only exceptional circumstances put forward by
24 John Lewis, even today, are, first of all, that they have a good case. If that is a reason for
25 the Tribunal to extend time then that would be certainly rewriting the rules on time limits.
26 Secondly, their only other reason is that they talked to the OFT after June. The OFT enter
27 in a dialogue with them which you have now seen was about format of the website, but, in
28 any event, of course speaking to the Regulator about a decision is not a reason to extend
29 time.

30 I could take you to the Tribunal's guide to proceedings and the case law on the kinds of
31 exceptional circumstances, I will not take your time on that case, but I would simply invite
32 you to look at them because, first of all, of course the importance of certainty of time limits
33 is completely crucial both for this Tribunal and the office and all of the private parties; but,

1 secondly, the exceptional circumstances are truly exceptional if you look at the guide and
2 the case law that we have referred to.

3 I would just make some very brief comments about the grounds, because I have effectively
4 dealt with them in the course of my submissions on timing. On ground 1, we do not say
5 that it is arguable, even arguable, that the undertakings permit or include John Lewis's
6 bundled products. And, strikingly, one has not seen anywhere in the correspondence an
7 application by John Lewis (and the Tribunal remarked on this) to be included in the website.
8 If they had thought, "This is fine, the website includes us", they would be happy with the
9 situation and would be asking for their bundled products simply to be listed, but the reason
10 that they have not done so is because it is completely clear from the terms of the
11 undertakings that they do not include bundled EWs, in fact that is the whole point of the
12 discussion about clause 2.3 and the consultation is the OFT were deciding "How do we deal
13 with them?" We decided not to include them in the price comparisons or to name John
14 Lewis, but to have this very clear message to consumers, "This website does not include
15 bundled EWs". And, of course, ground 1 only gets off the ground if the UIL do cover
16 bundled EWs and that excluding them would be a breach of the OFT's statutory duties
17 under s.162 for not taking enforcement action. And we say that that is not arguable.
18 Clause 2.1 of the undertakings make clear that this is an EW price comparison website.
19 Clause 2.3 we have already seen. John Lewis's case on this ground rests on the definition
20 in clause 12.1. I cannot remember, I am afraid, whether Mr. Robertson showed it to you.
21 Do you want to see the definition?

22 THE CHAIRMAN: Yes, why not?

23 MISS LESTER: It is in the UILs which are in bundle 3 at tab.24. So, this is the construction
24 point. Page 750 of the bundle. You will see the definition of Extended Warranties, and you
25 will see how the argument arises.

26 THE CHAIRMAN: Yes.

27 MISS LESTER: Because the definition there is:

28 "... a contract (or contracts) for cover ... for monetary consideration",
29 and the OFT's case is that that does not include bundled extended warranties because that is
30 not an extended warranty for monetary consideration. Indeed, John Lewis's preference is to
31 describe it as being "free" and therefore not —

32 THE CHAIRMAN: But, it is not free, is it?

33 MISS LESTER: No, well, we do not know what the price is, and John Lewis has not told us.

1 MR. FREEMAN: But is this an argument on literal construction, or are you praying in aid
2 previous versions of this?

3 MISS LESTER: We are praying in aid a number of things. So, John Lewis's case is that, first of
4 all, well, the OFT's case is that this would make no sense, first of all, in the light of
5 clause 2.3 because —

6 THE CHAIRMAN: Well, yes, I can see — I would not have thought that you needed to try and
7 exclude bundled warranties from the definition of extended warranties in 12.1 because the
8 point really is whether that necessarily means that EW providers including providers of
9 bundled warranties can insist on having those included in the search results.

10 MISS LESTER: Well, John Lewis's case, as I understand it, is "We come within the definition,
11 and therefore it is a breach of the UIL not to allow us on to the website".

12 MR. FREEMAN: They say they have not applied yet because they think you will turn them
13 down.

14 MISS LESTER: Well, they have said because they know we will turn them down because we
15 made a decision in November and told them that for the first time.

16 MR. FREEMAN: Right. But, you cannot draw anything terribly much from their not having
17 made an application?

18 MISS LESTER: No. I simply made the point that if that really were a point that they had thought
19 was correct, one would at least expect to see them writing a letter saying, "We're in", rather
20 than a whole host of letters saying, "We're not in. This is terrible. Please can you amend so
21 that we are in". That is the only point I make about that. But, what we do pray in aid is the,
22 if you like, the history of this clause, because this clause was amended from a previous
23 version of the UILs which appears attached to the February market report, which had a
24 slightly different definition; and the definition was changed in order to make it consistent
25 with the 2005 order which was, you will recall, enacted after the Competition
26 Commission's report, and that definition is identical. In the case of that definition the
27 Department of Trade & Industry's guidance which is at —

28 THE CHAIRMAN: Well, was it explained anywhere in the May consultation why the
29 definition —

30 MISS LESTER: Yes, it says that it was changed in order to make it consistent with the 2005
31 order.

32 THE CHAIRMAN: Right.

1 MISS LESTER: Bundle 2, tab.6, which John Lewis says is inaccurate, I think because that is the
2 only way it is able to deal with what the DTI says about the meaning of that clause. It is
3 tab.6, p.316 of the guidance at para.2.3 says:

4 “The Order is not intended to apply to businesses who ...
5 supply extended warranties for free e.g. where the extended warranty is included
6 in the published price ...”.

7 And at para.3.2 under the heading “Types of warranties covered by the Order”:

8 “The Order is therefore intended to apply where a consumer enters into a
9 contract for a warranty which costs extra and is offered for purchase at the same
10 time as the electrical good”,

11 and of course this makes sense in the light of the CC’s conclusions that bundled EWs were
12 not part of the complex monopoly situation as was pointed out earlier. It also makes sense
13 because of the requirements of the order, because what the order does, and its requirements
14 are summarised on p.317 of the DTI guidance, is essentially, “Ensure that the product
15 displays information including the price and duration of an extended warranty”. Now, that
16 requirement would not make sense in the case of bundled EWs because, a bit like under
17 price comparison, by definition you cannot unbundle the price of a bundled EW.

18 Now, John Lewis’s case on this is, I think, slightly unclear, because it has said that in fact
19 the reason that it does not come within the definition for the purposes of the 2005 order as
20 well as the DTI being wrong about the scope of the order is because its warranties are less
21 than £20 in price. We do not know whether that is right or wrong, but that is what they
22 have said, and therefore they do not come within a part of the order, and I think we do just
23 have to turn up the order itself, briefly, to see this point which is in the second authorities
24 bundle at tab.23, p.509.

25 THE CHAIRMAN: It is actually in our first bundle.

26 MISS LESTER: Is it? Right.

27 THE CHAIRMAN: Yes.

28 MISS LESTER: I do not want to spend too long on this because it is a slightly technical point,
29 but the scope of the order starts at p.508, which is clause 2 if you are on a different bundle.
30 And then the obligations start at s.3 of the order, and you will see at s.3.1(c) that one of the
31 requirements is:

32 “... provide a written quotation for an extended warranty”,

1 and that requirement pursuant to s.3(3) does not apply where the price of an extended
2 warranty is £20, which John Lewis says is its situation in the case of its bundled EWs. And
3 likewise under s.8 of the order, one of the provisions, namely, the requirement that:

4 “The supplier [should give] notice in writing to a consumer ... at least 20 days
5 before the end of the period referred to in para.(1)(a) [that the consumer can
6 cancel]”.

7 That obligation to give notice in writing also is disapplied where the price of the extended
8 warranty is £20 or less; and we get that from s.8(3) and the point John Lewis is seeking to
9 make is that the reason it does not come within the terms of the order is that its extended
10 warranties in a bundle are less than £20 — the answer to which is, first of all, even if that is
11 right, and we have no way of knowing how much its bundled EWs cost, it only exempts it
12 from those very specific provisions of the order; and it is still not clear to me whether John
13 Lewis accepts or does not accept that it otherwise comes within the terms of the 2005 order.
14 Secondly, in our submission it would not make sense for this order to apply to John Lewis’s
15 bundle of EWs. Quite apart from the point about the definition we have already seen that
16 they are not for monetary considerations, because the thrust of the order is imposing a
17 requirement that they should state the price of the extended warranty, which is the point
18 I have already made, which would make no sense in the case of bundled —

19 THE CHAIRMAN: Why can you not say, even though you are not providing it separately,
20 why cannot they say how much of the total price is the washing machine, and how much is
21 the —

22 MISS LESTER: Maybe they could. Maybe they could. I mean, I do not know what their case is
23 on that. They do not. They have tried to say it is free and been told they cannot. They have
24 now said it is less than £20.

25 MR. FREEMAN: I am very puzzled by this because, surely it would be ultra vires to make an
26 order against people who are not party to the complex monopoly? I am afraid my
27 monopoly law is very out of date, but I seem to remember that was the basis on which
28 measures could be taken.

29 MISS LESTER: That sounds like another extremely good reason why that is the case.

30 MR. FREEMAN: Well, add that to your list.

31 MISS LESTER: But, in any event, the point here, which is rather circuitous, is that the definition
32 of EWs in the UILs was amended to make it comply with this. This, on our case and the
33 DTI’s, does not apply; nor does the definition that you have seen in clause 12.1.

1 MR. FREEMAN: But, to be fair — and I may have misunderstood what John Lewis was saying,
2 and you have obviously gone into it very closely, but I had the impression they were saying,
3 “Well, that’s the issue in 2003-2005. Now things have moved on and the website as set up
4 pursuant to these undertakings will operate in a slightly different market environment where
5 purchasing decisions are made, not in store but maybe ahead of the visit to the store. and
6 therefore you have to look at the effects of the undertakings in lieu in the broad market in
7 the broad range of competitive conditions, and you can find support for that in the 2003
8 report where the Competition Commission, although it did not find anything against the free
9 extended warranties, it nonetheless said they were part of the relevant market and their
10 effect had to be taken into account. I think that is the argument against you?

11 MISS LESTER: To which we say that, as we have in our defence at length, is that what the OFT
12 was concerned with when it accepted the undertakings, was exactly the same problem that
13 the Competition Commission found; and, yes, things have moved on, but the same essential
14 problem remained, which was the relevant problem being a lack of information, a lack of
15 shopping around at the point of sale for extended warranties.

16 MR. FREEMAN: Yes, but it is possible that a measure taken to address one mischief can have
17 unintended effects, and I thought that is what John Lewis are raising as a concern, that this
18 measure which is intended to, as you say, state the comparison of unbundled extended
19 warranties, can nonetheless be confusing or distorting in a different way?

20 MISS LESTER: Yes, that is, but I think that is a slightly different point. So, I think the first point
21 they make is that what the OFT were trying to do now is different from what the
22 Competition Commission were trying to do when the order was enacted, and therefore the
23 order is irrelevant and you cannot look at the mischief that was trying to be remedied in
24 2003.

25 MR. FREEMAN: That is what I rather inadequately described to you, yes.

26 MISS LESTER: But I think they also make another point, as I understand it, which is even if our
27 website were perfect for addressing the mischief that we were concerned about it may have
28 unintended consequences like being very unfair and discriminatory on John Lewis.

29 MR. FREEMAN: In assessing those you would take the undertakings’ construction as it is
30 written, and you can look at clause 12.1, the definition, afresh if you like?

31 MISS LESTER: Yes, but the point we make in our defence, and I will not go back through it but
32 I would ask you to have another look at it, is simply that when you are looking at what the
33 OFT assessed as being the competitive harm it was trying to address with undertakings in
34 June 2012, the problem it identified was a very specific problem about a lack of information

1 for consumers, either once they have already decided to purchase their DEG or not once
2 they have already decided to purchase it, but the lack of information is not about the DEG
3 or the price of the DEG, it is that they do not realise sufficiently that they can shop around
4 for standalone extended warranties, and we were simply trying to set in context the problem
5 that the OFT identified. The OFT itself, in the final decision, refers to the Competition
6 Commission's findings and says that things have moved on to some extent, but the same
7 essential problem remained. So all we are saying about this, the construction point is a
8 slightly separate one but we are simply saying that this has been a long standing problem.
9 The Competition Commission tried to address it with the 2005 order. The OFT then looked
10 at matters again, decided that there is still a problem, and it is still the same problem, and
11 instead of referring back to the Competition Commission we will try undertakings in lieu.

12 MR. FREEMAN: I understand that.

13 MISS LESTER: Did I answer your question?

14 MR. FREEMAN: I think you may have done. I will let you know.

15 MISS LESTER: In our submission, and this is apparent from looking at Mr. Ambler's witness
16 statement, John Lewis' real case is that the undertakings are not in the terms they would like
17 them to have been in because their concern is with consumers who want to buy DEGs and,
18 as we know, and the Competition Commission made this point, John Lewis, as a sales'
19 pitch, includes extended warranties, precisely so the consumers will buy the underlying
20 DEG from John Lewis, but that is not what the undertakings in lieu are about or require, and
21 they are, of course, not about providing commercial or advertising opportunities for parties,
22 but it is very clear from reading what Mr. Ambler has to say that they would have preferred
23 a different solution and they, indeed, made submissions to the OFT about the solution that
24 they would have preferred, and they would have liked the website to have been about
25 comparing the bundle of a DEG and an EWs price. The OFT took that into account and
26 decided that that was not the proportionate solution to the problem, and that is not the
27 decision that is either open to challenge or under challenge. This is, of course, a decision
28 that the OFT has a great margin of discretion in making, and I have made my submission on
29 that.

30 I could address the Tribunal on Ground 2, which is the reasonableness of the decision, but I
31 took it from your intervention ----

32 THE CHAIRMAN: I think we have probably had enough submissions about that, yes.

33 MISS LESTER: Turning then finally, and very briefly, to the third Ground. The third Ground,
34 the discrimination argument and the distortion of competition argument is premised on the

1 idea that the website is misleading to consumers and that it is confusing for consumers
2 because consumers will think that the website is a full range of extended warranties, and
3 will think that John Lewis is not within the market.

4 We say that the premise of this argument is simply wrong and I have shown you why, in our
5 submission, John Lewis' version of the website is far more confusing to consumers, and that
6 in our submission the solution that the OFT reached in discussion with the retailers is
7 extremely clear to consumers, namely it compares the prices of extended warranties, and
8 makes clear that there are other products which are bundled extended warranties, which are
9 expressly not compared.

10 We also say, and have said this in our pleaded case, that the idea that, first, the UILs do not
11 distinguish between extended warranties originating in the UK or in other Member States,
12 and simply a pleaded case of a different in treatment has not been made out, nor has any
13 evidential case about the likely impact on John Lewis, and everything John Lewis has said
14 about the likely impact on it is entirely speculative.

15 MR. FREEMAN: You do not have to have difference in treatment, do you?

16 MISS LESTER: No.

17 MR. FREEMAN: You can have the same treatment that has different effects.

18 MISS LESTER: Yes. But we really say that Ground 3 stands or falls with Ground 2, because if
19 there is some kind of unfairness to John Lewis, then we say it arises out of the undertakings,
20 the timing point and, secondly, in our submission Ground 2 and Ground 3 are much the
21 same point, which is the effect of what you have done in the undertakings in the way you
22 have treated bundled EWs is to have an unfair impact on John Lewis, and you can either
23 see that as irrational or they have said it will have an unfair impact, but they simply have
24 not made out a case that this will have any impact on cross border goods between Member
25 States.

26 I would finally make one point about the recent flurry of correspondence on offer letters.

27 THE CHAIRMAN: Just staying with Ground 3 for the moment, I raised in my opening remarks a
28 query about whether this broad ranging duty not to adopt measures which distort
29 competition is actually what is created by Article 4(3) in conjunction with Article 101,
30 looking at the *INNO* case and the *Van Eycke* case, and Mr. Robertson fairly made the point
31 that that is not a point that the OFT have made, and I think you are agreeing with that in
32 saying that you have chosen to tackle this by saying they simply have not made out on the
33 facts a discrimination of the kind that would cause concern, even if there were such a duty.
34 Is that a fair description of where we are?

1 MISS LESTER: It is not a point that we have taken in the pleading, and we have, of course,
2 talked about it. We do not think it would be fair for us now to start amending our pleading
3 orally to make it.

4 THE CHAIRMAN: No, no, I am certainly not encouraging you to do that, I am just establishing
5 where we are on the various points.

6 MISS LESTER: We have made the point that if the UILs really amount to a distortive agreement,
7 an anti-competitive agreement, then the correct recourse is not a s.179 appeal to this
8 Tribunal.

9 One final point about the offer that we made, which is that you will recall – perhaps I will
10 just show you - that JLP have said several times in their skeleton argument and in their
11 Notice of Appeal that what they require is a very simple addition to the website, a simple
12 statement, naming JLP. The references to that are paras. 3 and 116 of JLP’s skeleton, and
13 paras. 14 and 22 of their Notice of Appeal and para. 63 of John Lewis’ skeleton says that it
14 is so blindingly simple and obvious that the OFT could simply add what they describe as
15 being the second option at para. 107(b) of the Notice of Appeal and I will just show that to
16 you. John Lewis Notice of Appeal, tab 1, bundle 1, para. 107(b). This is one of several
17 references to what John Lewis have told us it would like the website to say, which is to refer
18 on the website to the provision of such extended warranties by John Lewis and other named
19 providers. You will recall that throughout their pleaded case they are complaining first of
20 all that they are not in the price comparisons, and they also say: “We are not named
21 anywhere, and we would like to be named somewhere”, which is why we offered, we made
22 them an open offer having, of course, discussed and got the agreement of the retailers that
23 we would agree in order to settle these proceedings, that we would name them.

24 There are a number of references in the bundle of correspondence to occasions on which
25 John Lewis said to the OFT: “What is wrong with just naming us”, and they made the point
26 that Mr. Robertson keeps making, that: “There is no technical difficulty with it, so why not
27 just name us?”

28 We wrote, and our open offer letter is at tab 49 and you have seen it. The point I would
29 simply make is it is very striking that when we offer to do exactly what John Lewis came to
30 this Tribunal asking you to do as one of its alternative solutions, it said “No”, and the reason
31 it said “No” is the reason we call it ‘changing goalposts’ and we, of course, do not say that
32 lightly, but their letter back at para.50 said that it is unacceptable, and what they would want
33 is a click through to a non-generic form, which is a search form which, as we understand it,
34 means that what they would like is a separate tab on their website, which you can see from

1 their second mock-up which I did not show you, their second example of what they would
2 like is a separate tab on the website which includes their bundled EWs.

3 THE CHAIRMAN: A separate tag on this website ----

4 MISS LESTER: Yes.

5 THE CHAIRMAN: -- or on John Lewis' website?

6 MISS LESTER: No, on this website. So it is their skeleton, bundle 1, tab 5, p.74.31. Again this
7 is in the context in which they are saying it is really simple, it is just a little statement. What
8 they have said, they rejected being named now. I am not entirely clear what they mean by a
9 "click through to a non-generic form i.e. a search against the product categories and at least
10 some of the criteria set out in the results page." But when we wrote back saying: "This is
11 not what you asked for in your application to the Tribunal" that, of course is right. They
12 asked for what we offered them, but I think they may mean JLP option 2. You have got the
13 "Compare plasma television extended warranties" heading. You have then got clause 2.3,
14 and you then have three tabs: "Single Product Cover," "Multi-Product Cover" and John
15 Lewis has now added a third called "Inclusive Product Cover". So I am not sure whether
16 technically this is a new web page or it is a new tab in the web page. The idea is you would
17 click on this, and this would then list bundled warranties, including John Lewis, and you
18 can see they have added other providers.

19 MR. ROBERTSON: If I could just interrupt to explain the point about tabs. The OFT's mock-
20 up, which is two pages on, 74.33 has two tabs at the top "Single Product Cover", "Multi-
21 Product Cover" and so what we propose is putting in a third tab which must be the same
22 way they have put in a second tab, "Multi-Product Cover", and just have a third tab
23 "Inclusive Product Cover".

24 THE CHAIRMAN: But would you then take out the sentence that is on p.74.33: "These results
25 do not include extended warranties where there is a single price"?

26 MR. ROBERTSON: You would have to take it out for this tab because it will be directly
27 contradicted.

28 THE CHAIRMAN: Yes, of course you would take it out for this tab, but would you take it out
29 for the Single Product Cover, and the Multi-Product Cover?

30 MR. ROBERTSON: No, because that would still be correct, and if you wanted inclusive product
31 cover then click on that tab, and maybe you could add those words.

32 MR. FREEMAN: It is still quite confusing, is it not?

1 THE CHAIRMAN: On your tab “Inclusive Product Cover” you do not then have, “These results
2 do not include those extended warranties where there is a separate price for the extended
3 warranty”.

4 MR. ROBERTSON: There is no objection to putting that wording in. There is nothing in the
5 undertakings to prevent you from doing that because you can add additional wording. If
6 you look at all these criteria here, none of these are referred to in the undertakings. This is
7 all the implementation of the website.

8 MR. HARRISON: Sorry, that would apply for each category of product again. What you are
9 saying is that it would not be that some of the plasma TVs, for example, provided by John
10 Lewis would fall into extended warranties and others would be in a bundled form. All
11 plasma TVs are bundled, are they? Is that how it works?

12 MR. ROBERTSON: Yes, I am told that is correct.

13 THE CHAIRMAN: I see, you are saying what they want now is goalposts in a different place
14 which you say is this new tab of inclusive product cover.

15 MISS LESTER: Yes, and it is contrary to their case.

16 MR. FREEMAN: Are you saying they have dropped option 1 and only want option 2?

17 MISS LESTER: It might be the other way round. They seem to have, and no doubt I will be
18 corrected by Mr. Robertson, what they were initially saying was, “We would either like to
19 be in the comparisons or, at the very least named”, and you will remember all the
20 correspondence on that.

21 MR. FREEMAN: What I mean is, are they asking for something they originally asked for, or are
22 they asking for something different? They may have dropped something they were
23 originally asking for?

24 MISS LESTER: I am not sure about that. I think they are still asking for ----

25 MR. FREEMAN: We will ask Mr. Robertson in due course.

26 MISS LESTER: As I understand it, they expressly ask the Tribunal to direct that we require the
27 retailers to include them in the price comparisons themselves, which is, I think, option 1.
28 They seem not to be happy with option 2, which is to be named, because that is what we
29 offered them, and I think that this new mock-up that you have seen may be a third option,
30 but I will be corrected if that was ----

31 MR. FREEMAN: It says option 2 on it.

32 MR. ROBERTSON: It is intended to be option 1. Option 1 and option 2 are the alternative forms
33 of relief that we seek in the notice of application. These are intended to be mock-ups of
34 them.

1 MR. FREEMAN: Thank you.

2 MISS LESTER: Those are my submissions, unless there are any further questions.

3 MR. FREEMAN: I have a point of information really. I have gleaned from what you were
4 saying that the OFT's position is that during the discussions with John Lewis over the
5 summer of last year there was never any mention of appealing the undertakings in lieu
6 within the two months from 27th June – is that right? There was this letter in August about
7 legality. The actual date, the two months' expiry date from the undertakings was not
8 figuring in the conversations?

9 MISS LESTER: There is the letter that we looked at in August.

10 MR. FREEMAN: I am aware of the August letter. That is it, is it?

11 MISS LESTER: That is it as far as far as I am aware.

12 THE CHAIRMAN: Mr. Saini?

13 MR. SAINI: I am not going to repeat Miss Lester's submissions, and we adopt what the OFT
14 says subject to one point, where we may not be in agreement with the OFT, and that is in
15 relation to s.179. There may be a difference between us.

16 I am going to divide my submissions into two parts. First of all, I am going to go straight to
17 the undertakings and the construction issue, and, in our submission, construction of the
18 undertakings is at the core of this case. Secondly, I am going to go through the three
19 grounds, but by reference to the legislation which you have not been taken to yet. It is quite
20 important to see why a lot of the references in Mr. Robertson's grounds and in his skeleton
21 argument refer to breaches of particular provisions.

22 First of all, the undertakings, you may have them open, but I have got them in tab 3 at
23 p.741, and I want to go straight to the core submission, and that, in a nutshell, is as follows:
24 the position of bundled providers was the subject of a bespoke provision, which is clause
25 2.3. That bespoke provision did not suddenly spring out of nowhere, it was the subject of
26 detailed consultation, including consultation with John Lewis. 2.3 was the start and the end
27 of the treatment of bundled EW providers. The entirety of Mr. Robertson's argument is
28 based upon a line in 2.2. If you have 2.2 open and if one goes six lines from the bottom of
29 p.741:

30 "The OFT, acting reasonably, shall approve in advance the initial format of the
31 EW Price Comparison Website in writing."

32 It is Mr. Robertson's case that there is a discretion of some form given to the OFT there
33 because we are at the initial format stage. In exercising that discretion the OFT can
34 effectively require a rewriting of the undertakings and he is saying that the discretion that

1 one sees in that line can be exercised, and indeed must be exercised by the OFT in a way
2 which we say results in a complete rewriting of 2.3. That, in our submission, is the start and
3 the end of this case, that this claimed discretion which he says is in those lines cannot be
4 used to rewrite the undertaking. That is why we are here. We are here because we have
5 agreed undertakings, perhaps under protest. It is very important that the language of those
6 undertakings be adhered to.

7 It is a remarkable proposition that a statutory undertaking, and we will look at the
8 legislation in a moment, can be rewritten effectively in the course of the exercise of some
9 form of limited discretion which the OFT have under 2.2. We say that in the context of
10 what is going on in 2.2 and in the wording that I have read the OFT have the ability to
11 dictate, through their approval power, format, but that is not so wide as to require a
12 rewriting of the website in a way which conflicts with other parts of the undertakings.

13 In so far as the OFT dealt with John Lewis in a way which might have suggested that there
14 was some wider power that the OFT had – and we do not accept that the record
15 demonstrates that, the record that Miss Lester has taken you through – that is not a problem
16 for us, and it is not a concern for the Tribunal. The start and the end of the process, as far as
17 this Tribunal is concerned, is the terms of the undertakings. So whatever bilateral
18 discussions there may have been between the OFT and John Lewis, that cannot change the
19 meaning of the undertakings. These are public law instruments which have to be construed.
20 They can only have one meaning. Even if the OFT has led John Lewis to believe that there
21 may be some other meaning, and it has not done that, it cannot affect the meaning of the
22 undertakings.

23 Therefore, what Mr. Robertson has to do, and he only came close to accepting this at the
24 end of his skeleton argument, and I am not even sure if he accepts it now, is mount a direct
25 attack upon 2.3, an attack which he accepts is way out of time, because 2.3, as we say, is the
26 bespoke provision.

27 It is also just worth looking at 2.5 as well, which I do not think the Tribunal has focused on
28 yet. It says:

29 “Admission to the EW Price Comparison Website shall be as follows:

- 30 (i) EW providers other than the Retailers will be permitted to publish and
31 maintain the information in accordance with 2.2 to 2.4 ...”

32 which will include 2.3.

1 So if and in so far as John Lewis have unbundled warranties they can apply to join, and they
2 may well do, but in so far as they have bundled warranties, 2.5(i) makes it clear they are
3 going to be dealt with in accordance with 2.2 to 2.4, including 2.3.

4 It is also worth bearing in mind, and this has not been contradicted in the evidence, that 2.3
5 was the subject of specific negotiation between those that were the subject of the
6 investigation and the OFT. As Miss Grantham says – and I will not take you to the
7 statement, it is the end of bundle 1, a statement from my clients, Dixons – ultimately, and
8 with some reluctance no doubt, we accepted 2.3. It would be a startling proposition if,
9 having accepted the statutory undertakings, that through the exercise of this limited
10 discretion under 2.2 we end up with a very, very different result.

11 We do not need, in making this submission, to go into the meaning of “Extended
12 Warranties” on p.750. Miss Lester has made the submission, which we would adopt, that
13 the intention of the OFT here was to adopt the definition in the order.

14 It is also important to bear in mind – I will hand this up, but I will not take you to it given
15 the time – this is the Statement of Remedies issued by the Competition Commission
16 following the 2003 work and prior to the 2005 order. Unfortunately this document is not
17 numbered. At para.17, which was effectively the 2005 order – para.17, the last line, the
18 Competition Commission there said:

19 “We do not propose that remedies would apply to the provision of free EWs.”
20 There was never any intention, as far as the 2005 order is concerned, and there was no
21 recommendation, that the 2005 order should apply those who provide free EWs, but, in a
22 sense, this Tribunal does not need to get into this issue of construing the meaning of
23 “Extended Warranties” on p.750, because of the prior submission that there is a bespoke
24 provision dealing with the situation, namely clause 2.3.

25 If one looked at it in terms of normal contractual interpretation, you would say that in so far
26 as there is a general provision in 2.2 appearing to give the OFT a discretion to exercise the
27 approval power reasonably, that must be read subject to a more specific provision in other
28 parts of the contract, namely 2.3.

29 It is quite important - and I am going to now turn to the issue of the grounds and the
30 legislation – to bear in mind that Mr. Robertson, although he is really attacking, and must be
31 attacking, the undertakings has not made any formal application to amend his grounds. He,
32 realistically, accepts, given the record of the correspondence that Miss Lester has shown
33 you, that it would be quite difficult, given the exchanges between the parties, particularly
34 the letters from John Lewis in August threatening all kinds of challenges based on EU law

1 grounds, for him to say that, despite correspondence, there were somehow exceptional
2 circumstances allowing an application to be made out of time.

3 I would warn this Tribunal, with respect, not to get drawn into any examination of whether
4 or not the undertakings were rightly given, whether or not the language in the undertakings
5 is appropriate, whether or not they meet competition law requirements, because there is no
6 such challenge before you.

7 That having been said, we need to look at the pleaded case – and I emphasise “pleaded
8 case” – which one finds in bundle 1. At p.5 we see each of the three Grounds. It would be
9 useful if the Tribunal could have that open and at the same time have open the authorities
10 bundle 1, and one sees the Enterprise Act at tab 20. Very helpfully Mr. Robertson has
11 summarised each of his three Grounds in paras.11, 12 and 13. It is worthwhile, first of all,
12 looking at ss.162 and 167 because those are the provisions which are said to have been
13 breached. They appear at p.471 of tab 20. The first argument appears to be that somehow
14 the OFT has breached s.162 in not requiring the form of reference to bundled EWs that John
15 Lewis would like to see on the website.

16 It is quite difficult, with respect to Mr. Robertson, to see how there can be any breach of
17 162 — 162 is a straightforward provision requiring the OFT to keep under review
18 undertakings. What failure of review is there here? That provision does not apply. That is
19 the first section he relies upon.

20 The second section he relies upon in para.11 of his grounds is s.167(6) and if one sees that,
21 it says that:

22 “Compliance with an enforcement undertaking or an enforcement order shall
23 also be enforced by civil proceedings brought by the OFT for an injunction”,
24 and the tribunal can read the rest of it. It is difficult to see, again, how this arises. Is it the
25 case that, is it being said that my clients, or the other parties, the other retailers, are in
26 breach of the undertakings and the OFT have failed to take enforcement action? Again, that
27 does not meet the facts. So, it is quite difficult to see how the first ground arises by
28 reference to sections 162 and 167(6). What may be being said — and this was perhaps
29 made clearer this morning — is that ground 1 is essentially a construction argument.
30 Perhaps that is what ground 1 is.

31 THE CHAIRMAN: Well, I understood ground 1 as not relating to the mention of the bundled
32 EWs, but relating to the fact that they know, and therefore anticipate, that any application to
33 become a website participant in respect of the bundled extended warranties will be rejected
34 by the steering group because the steering group maintain that bundled warranties are not to

1 be listed on the search results. That depends on the steering group's interpretation of
2 clause 12.1 of the UIL, that the interpretation is wrong, and hence their anticipated rejection
3 of the not yet made application to become a website participant is also wrong, and the
4 refusal to do anything about it would then be a breach of s.162 or 167(6). That is my
5 understanding of where we are.

6 MR. ROBERTSON: That is a pretty accurate summary of my notice of application, paras.65-70.

7 MR. SAINI: That may be, but then it is a construction argument —

8 THE CHAIRMAN: Yes.

9 MR. SAINI: — which is that the steering group and the OFT have misconstrued the
10 undertakings, and because the OFT are not going to do anything about it the OFT are in
11 breach of these sections, that may be it. But then it is no more than a construction
12 argument. And if my learned friend is wrong on construction and we are right on the
13 bespoke provision argument, ground 1 falls away as I understand. I do not think there is
14 anything else there. What I was seeking to tease out is whether or not there was some other
15 argument underlying the reference to sections 162 and 167(6), but Mr. Robertson has
16 helpfully confirmed there is not anything else there, because the start and the end of it is it is
17 a construction argument.

18 The second ground requires one again to look at the legislation, because (this is para.12) if
19 you would kindly look at s.154 it is said that there has been an unlawful exercise of
20 discretion under sub-sections 154(2) and 154(3) and if the Tribunal will kindly look at s.154
21 which is at the start of tab.20, p.465, and sub-section (2) merely refers to accepting
22 undertakings, which has happened back in June 2012. And sub-section (3) says that when
23 they are going to accept an undertaking, in other words in proceeding under sub-section (2)
24 there are particular factors that the OFT has to have regard to. But, we respectfully say that
25 in so far as any discretion was exercised under 154(2) and 154(3) it was exercised in June.
26 So, those sections are spent, for want of a better word. And it is difficult, then, to see
27 looking back at ground 2 at para.12 how the OFT had any discretion which it then exercised
28 in November which violated the sub-sections, because these sub-sections can only apply at
29 the time of and prior to accepting undertakings. So, we say that, again, there is no error of
30 law there because these two sub-sections simply cannot apply. They could have applied
31 had there been a challenge which Mr. Robertson has not made to the acceptance of the
32 undertakings back in June, but they cannot apply to any decision in November.

33 MR. FREEMAN: What is said against you is that the discretion requirement remains operative
34 until the website is finalised.

1 MR. SAINI: Well, there may be other factors constraining the exercise of the discretion by the
2 OFT under that clause, but we say it is certainly not the pleaded sections, because those
3 pleaded sections apply at the time when an undertaking is being considered and is accepted.
4 But, specifically by what is being pleaded, it may be that Mr. Robertson's argument under
5 this head is best put under ground 3, which is the catch-all. Now, the catch-all is, "If I can't
6 get into ground 1 and ground 2, I will chuck everything into ground 3 and say it's a general
7 breach of EU law duty is not to distort trade and competition". Now, there are two
8 fundamental problems. The first is a timing problem. If we are correct on construction, the
9 relevant decision which gave rise to these evil effects was taken in June, and under the
10 relevant rules, the relevant CAT rules which we will be familiar with, there is a strict time
11 limit.

12 Now, the second point is, if we are wrong, the tribunal will be very familiar with rule 8,
13 which says that the notice of appeal must be received within two months of the date upon
14 which the appellant was notified of the disputed decision. We say that the relevant effects,
15 which we do not accept, which I am going to come on to in a moment, the relevant anti-
16 competitive effects, or the distortion, flows from that decision.

17 Secondly, there is the evidential point. What is the evidence that this Tribunal has that there
18 will be —

19 THE CHAIRMAN: So, your first point, that if there is a distortion it arose in June, that is really
20 the same construction point, because that depends on whether it is true that it was a done
21 deal in June that bundled EWs would not be included in the search results as on a par with
22 standalone ones, and also that a mention of bundled EWs would be limited to that phrase in
23 clause 2.3.

24 MR. SAINI: That is right. What I was trying to deal with was a suggestion that somehow time is
25 at large and does not start running because there might be some continuing effect. And that
26 does not work within the regime of the tribunal rules, because there has to be a clear date
27 from which time starts to run. Now, let us assume I am wrong on construction, and that
28 somehow there was this wider discretion on the part of the OFT that the exercise under the
29 clause 2.2 wording or that they had to exercise under clause 2.2. wording in a way which
30 was consistent with the OFT's EU law duties, we do not say (I need to make this clear) and
31 in common with the OFT, we do not say that in principle Article 4(3) duties will not be
32 engaged. That is not our case. Our case is a different one, which is that John Lewis has not
33 evidenced or even pleaded any reason why, although the provisions are indistinctly
34 applicable, the undertakings will lead to a difference of treatment in fact or will in any way

1 present a barrier to undertakings established in other member states. We say that John
2 Lewis would, consistently with *Keck*, have to evidence that the website would lead to
3 British and European goods being treated differently. They have not done that.
4 There is also actually a more important point here, which is that if the Tribunal had any
5 concerns that there might be some form of anti-competitive result flowing from the way that
6 the undertakings are phrased and what they require, then the appropriate remedy is within
7 the legislation itself which is under s.162 which is that the OFT has an ongoing duty to
8 monitor the undertakings. And if it turns out, once the website is launched, that there is a
9 major problem, then no doubt the OFT will take action. But, instead, you have, with respect
10 to Mr. Robertson, a half-baked case of a potential breach of competition law when in fact
11 there is a remedy for dealing with exactly this issue within the legislation, which is the
12 ongoing duty of the OFT to monitor the undertakings. That is the right avenue. That is the
13 right place to go if there is an anti-competitive result.

14 I just want to deal with one point here while we have the legislation open. I am not sure if
15 we do ultimately disagree with Miss Lester on this, but if the Tribunal would please open
16 s.179, this related to some question just before the short adjournment, p.475, and I believe
17 the Tribunal raised the issue as to whether or not when the OFT makes a decision under,
18 I am using the shorthand, the clause 2.2 wording, the approval wording, would that be a
19 decision which is capable of review within s.179? And in our submission it would be. The
20 wording of s.179(1) is very wide, and we submit that such a decision would be a decision
21 arrived at in connection with a reference or possible reference. It would make little sense
22 for that to have to go off to judicial review in an ordinary court.

23 MR. FREEMAN: Things happen, even if they make little sense.

24 MR. SAINI: Can I also, just while I am on this —

25 MR. FREEMAN: Could I just ask you a follow up question on that? I mean, you moved us from
26 ground 2 on to ground 3 fairly rapidly, I think. If the OFT were to take decisions under
27 clause 2.2, prohibiting things appearing on the website, so, not approving in advance, what
28 duty do you think it would be under? Under the terms of clause 2.2 it has to act reasonably,
29 but I think what you are asking us to accept is that whatever discretion arises from s.154
30 would no longer be applicable. Is that right?

31 MR. SAINI: Indeed.

32 MR. FREEMAN: So, it would be a general duty to act reasonably?

33 MR. SAINI: A general duty to act reasonably consistently with the expressed wording of the
34 undertaking.

1 MR. FREEMAN: So, it is really a sort of contractual term, “derived duty” as opposed to
2 something at large?

3 MR. SAINI: Indeed. It is also important to bear this point in mind, sir, which is — let us imagine
4 that the OFT decides it has made a mistake in accepting 2.3, and it is stuck with 2.3, and
5 that there is some overriding competition law concern which has arisen from the way the
6 website is working.

7 MR. FREEMAN: Like distortion of trade or —

8 MR. SAINI: Absolutely. The answer is, as I have shown the tribunal with the interpretation
9 itself. The OFT should say, “These undertakings which we have accepted are no longer fit
10 for purpose because there is, actually, the way they are working is, having distortion of
11 competition, we need to change them.

12 MR. FREEMAN: And you are saying John Lewis cannot rely on s.162 yet because the
13 undertakings have not “taken effect” in this respect?

14 MR. SAINI: Absolutely, the website would have to be launched, and the OFT itself – John Lewis
15 does not have to knock on the OFT’s door, the OFT has an active duty to keep ----

16 MR. FREEMAN: The undertakings under review, indeed, yes.

17 THE CHAIRMAN: But then they say: “We will have lost lots of money by that time, so if we
18 can see now that the way it is going to be operated, according to how the OFT interprets it is
19 distortive, why should we have to wait a year and lose all those sales before we can
20 challenge the matter?”

21 MR. SAINI: It goes back to the question of the time limits, because if we are right on
22 construction – this is assuming we are correct on construction – they should have
23 challenged the undertakings back in June. Nothing has happened between June and now in
24 any relevant sense. In fact, the story of this case is that the OFT are victims of their own
25 reasonableness. One could have imagined the OFT in another light saying to John Lewis,
26 rather than being so reasonable with them, saying: “Actually, obviously we will happily
27 have a dialogue with you, but you know, and you have known since at least June what is
28 going to be said about bundled warranties.”

29 Just in relation to the clause 2.2 wording ----

30 MR. HARRISON: What you are saying though is that the fact that it enters dialogue and is being
31 reasonable suggested that they were open to change their mind. What you are saying is they
32 could not change their mind anyway because of the undertakings?

33 MR. SAINI: As a matter of law the OFT could not have changed their minds, but the reality is
34 that the OFT, however Mr. Robertson may portray it, were not actually saying at any point

1 that there was this flexibility which John Lewis assumes that there is there. The OFT
2 actually made their position very, very clear. But if, and insofar as this Tribunal considers
3 the OFT had not made the position clear, the undertakings are public law instruments, they
4 mean what they say, nothing the OFT could have said or done can change the meaning of
5 those undertakings.

6 THE CHAIRMAN: But those discussions would then be a relevant factor in the exercise of a
7 discretion whether to extend time.

8 MR. SAINI: That would depend upon Mr. Robertson persuading you that the grounds which he
9 is now relying upon were not available to him at some point in the summer. In fact, the
10 evidence that Miss Lester was showing you shows you that the very same judicial review
11 challenge had been threatened in August.

12 THE CHAIRMAN: The highest they could put it, I imagine, is that they would say: "If we had
13 issued proceedings then we expect we would have been met by the OFT saying: "Why are
14 you taking that step? We have told you we are happy to meet with you and continue
15 discussing this." That would have to be what they thought the dynamic going on was, but
16 you say there is nothing in the correspondence that indicates that that was a reasonable fear
17 on their part?

18 MR. SAINI: It is also worth bearing in mind that one of the reasons that has been underlined both
19 in the Community courts and the domestic courts, the importance of the time limits, is the
20 reliance that third parties place upon decisions and the fact that they have not been
21 challenged. So whatever the OFT may have done, my client not being a party to this to-ing
22 and fro-ing that is going on, my clients are entitled to assume after June, having reluctantly
23 agreed these undertakings, that they were not going to be tinkered with or, in fact,
24 substantially redrafted as JLP would want. So time limits are very important for that
25 reason as well. It is not just the OFT it is in my clients' interest in certainty and finality.
26 It is worth bearing in mind as well, and this appears in the record but I will tell the Tribunal
27 anyway rather than taking you to documents, that in the formatting discretion, if one looks
28 at 2.2, my clients did not want the 2.3 wording to appear at the top of the results page, but
29 the OFT said, and we could not disagree with this because it was within clause 2.2, 2.3.
30 They said "We insist it goes right at the top. It is the first thing that the customer will see."
31 So that is an example of the exercise of the clause 2.2 power or discretion in a way which is
32 faithful to the undertakings, but does not contradict the undertakings. The relief which John
33 Lewis seeks contradicts the undertakings.

1 Two final points, just for your note, there was a seven week gap between the OFT's letter of
2 24th August indicating the OFT's position, and John Lewis' response on 15th October.

3 Finally, Mr. Robertson was saying that under clause 2.2 there was a failure to take into
4 account some relevant considerations in exercising the clause 2.2 discretion, but what he
5 omitted to mention is that the most relevant consideration when exercising the clause 2.2
6 discretion is looking at what is in the rest of the undertaking. So one cannot exercise the
7 clause 2.2 discretion without looking at what is in clause 2.2 and following.

8 MR. FREEMAN: What are we to make of the Office of Fair Trading's open offer?

9 MR. SAINI: I would submit that, happily for the Tribunal, the Tribunal is not mediating this
10 case. The Tribunal has to decide applying judicial review standards, whether the OFT's
11 claimed website decision was lawful or not. I respectfully invite the Tribunal not to be
12 sucked into this issue of where the wording may go, should there be a separate page? That is
13 not really a matter for the Tribunal.

14 MR. FREEMAN: We do not have to decide then, in your submission, whether the open offer was
15 outwith the possibility of 2.2, 2.3 and 2.4? We can leave that question then, can we?

16 MR. SAINI: Absolutely, because the reality is that in an attempt to compromise these
17 proceedings both parties have given way, there has been a compromise. The Tribunal
18 should not get drawn into that. The Tribunal has enough to deal with. The Tribunal should
19 simply assess whether ----

20 MR. FREEMAN: But on your submission a party not so far involved in these proceedings would
21 have grounds for contesting that?

22 MR. SAINI: Absolutely.

23 MR. FREEMAN: That is your submission?

24 MR. SAINI: Indeed. Can I just take instructions? (After a pause) Unless the Tribunal has any
25 questions, those are our submissions.

26 THE CHAIRMAN: Thank you very much. Anything in reply, Mr. Robertson?

27 MR. ROBERTSON: I think I have about half a dozen short points in reply. First, the question of:
28 does this Tribunal have jurisdiction under s.179? Miss Lester accepts that when we are
29 looking at decisions under clause 2.2 they are decisions, it is just that they are reviewable in
30 the Administrative Court and not here, and we say there is no reason to read s.179 in such a
31 limited form. It is undesirable for exercise of discretion by a competition authority sitting
32 under this part of the Enterprise Act, to be shunted off into the overcrowded lists of the
33 Administrative Court. Section 179 is expressed in broad terms. We have looked at
34 subsection (1). Subsection (2) refers to decisions, including a failure to take a decision

1 permitted or acquired by this part in connection with a reference or possible reference. Here
2 we are talking about a possible reference to the Competition Commission if these
3 undertakings do not come into effect with the website. So those words are broad enough to
4 include this challenge.

5 I have already taken you to option 2, the two alternative forms of relief, and with our
6 skeleton, which we served, we annexed mock-ups of both options, so I am not going to
7 address you on those again, but just point out that when we had the flurry of correspondence
8 at the end of last week, and over the last day, the OFT were in possession of option 2, they
9 knew that is what we understood by option 2, so it should have been absolutely clear to
10 them that what they were offering by way of open offer was not what we construed option 2
11 to be.

12 THE CHAIRMAN: It is slightly confusing me, I think, option 2 is actually the first alternative in
13 para. 107(b).

14 MR. ROBERTSON: It is not intended to be. It is intended to be the second of those options
15 because it is ----

16 THE CHAIRMAN: Is it the one with the extra tab? Is that not the Ground 1 point about how the
17 website would appear if extended warranties in clause 2.5 included bundled extended
18 warranties, and so they were treated in all respects like standalone warranties.

19 MR. ROBERTSON: I think the answer is it is capable of falling under both rubrics.

20 THE CHAIRMAN: Because it also has the little sentence?

21 MR. ROBERTSON: The first of the options that we annexed to our skeleton just includes John
22 Lewis bundled warranties in the same price comparison table. The second option puts them
23 into a second tab, not in the price comparison table for standalone warranties.

24 THE CHAIRMAN: Oh, yes, yes, yes. I understand.

25 MR. ROBERTSON: What I did want to take you to was the original mock-up published by the
26 OFT in June which is also annexed to our skeleton at bundle 1, tab 5, p.74.35. This is the
27 one when Dan Moore emailed in July or the beginning of August and said "Don't rely on
28 this because it doesn't reflect modifications that we have made to the undertakings."
29 Just a couple of points to make about that: it does confusingly refer to the purchase price of
30 the DEG quite specifically, when we are told that this is for comparison of extended
31 warranties, it has nothing to do with comparing prices of DEGs, that is one of the oddities
32 of this. Another oddity is in the list of providers you noticed when you looked at this earlier
33 that it refers to Tesco. I am instructed by those sitting behind me that Tesco, some of their
34 products are bundled warranties. That is not in evidence, but that is what I am told on

1 instruction. So it is plain that this was no more than a very preliminary version, and it bears
2 no relation at all to the version that we were supplied with on 16th November, which is a
3 couple of pages earlier in our skeleton.

4 MR. HARRISON: Just on that point, the £299, the product price, has now been removed, there is
5 no doubt about that, that has now been removed.

6 MR. ROBERTSON: That is my understanding, obviously we have only been supplied with
7 mock-ups, we have not had a Beta version of the website to play around with.

8 MR. FREEMAN: This is in answer to timing, that you ought to have known from this annexed
9 mock-up what was likely to be in it?

10 MR. ROBERTSON: Yes. The third point is it has been said that we have not applied to the
11 website yet, although we know what the current response would be, just to make it clear, the
12 application process, it is in the undertakings, documents bundle 3, tab 24, and it is clause
13 2.5 on p.742. 2.5: “Admission to the price comparison website should be as follows”,
14 subparagraph (2):

15 “EW providers which meet the requirements shall be permitted to become website
16 participants as soon as reasonably practicable following application.”

17 There is nothing that has been published so far about what you do about making application
18 - who do you apply to for a start? It is just left hanging there.

19 I think those are the three points arising from Miss Lester that we have not already
20 thoroughly covered in our skeleton.

21 With my learned friend Mr. Saini’s submissions there were three points arising from those.
22 First, the extent of s.154 is it, as he put it, spent? That is in the authorities’ bundle, tab 20.
23 We say, again, that is a very restrictive interpretation. If you look at subsection (1):

24 “Subsection (2) applies if the OFT considers that it has the power to make a
25 reference under s. 131 ...”

26 Section 131 is the power of the OFT to make references “... and otherwise intends to make
27 such a reference.” There is no reason to say that the OFT has ceased to intend to make a
28 reference. They have always said if they cannot get the website up and running
29 satisfactorily their only option is to make a reference. That continues to be the backdrop to
30 all of this.

31 THE CHAIRMAN: But is that not always the backdrop and would there not then be an overlap
32 between s.154 and the monitoring duty under s.162? There is always lurking in the
33 background the threat of making a reference if the undertakings do not do what they are
34 supposed to do.

1 MR. ROBERTSON: I think the problem is here the undertakings are, as I described this morning,
2 effectively a two stage process. There is accepting the undertakings, and then there is
3 implementing them under the framework of the undertakings through the website.

4 MR. FREEMAN: So the argument would be that the steering group keeps putting up
5 inappropriate website proposals which the OFT is not prepared to authorise and then goes
6 on and so then you start to fall within s.162 which has not been complied with if the
7 undertaking has not been complied with in some way?

8 MR. ROBERTSON: The OFT's response to that is, or should be, that proposal is inapposite to
9 address the consumer harm we have identified. It is not a solution which is as
10 comprehensive as is reasonable and practical to the adverse effect on competition
11 concerned. It is not meeting the requirements under s.154(3). If you do not have s.154(3)
12 still in play at that point, by what standards does the OFT say that is an unreasonable,
13 impracticable solution.

14 MR. FREEMAN: Mr. Saini said it was a duty at large to be reasonable.

15 MR. ROBERTSON: And ended up as some form of contract which it self-evidently is not a
16 contract.

17 MR. FREEMAN: I think I may have said that.

18 MR. ROBERTSON: It is not a duty at large it is a duty under the Act. There is no reason to read
19 s.154(3) ----

20 MR. FREEMAN: So it is not really the discretion we are talking about, it is the factors that have
21 to be taken into account ----

22 MR. ROBERTSON: Yes.

23 MR. FREEMAN: -- in exercising the discretion?

24 MR. ROBERTSON: The relevant considerations. In relation to the EU law ground argument,
25 Mr. Saini submitted that that was something that had to be pursued only under the OFT's
26 duty under s.162. That is essentially a nuclear option that can only be invoked at some
27 point further down the line when the damage is being done. Again, we said there is no
28 reason to say that is not a public law consideration this Tribunal cannot take into account at
29 this stage. The OFT continues to be under duties under Article 4(3), read with the other
30 Treaty Articles that were referred to this morning. Why put those on hold until some point
31 in the future? It seems to be contrary to the effectiveness of EU law if you accept that
32 submission.

33 The third point is Dixons' argument about the importance of time limits. This is a case in
34 which they are engaged with the OFT in designing the website, and we did not get the first

1 mock-up until November, so it is not as if they have been completely out of the loop, frozen
2 out in the cold, they are part of the implementation process of the undertakings. We would
3 say this is not a case where they are suffering prejudice by the time it has taken to sort this
4 out. Apart from anything else we have been told that they were against this sort of remedy
5 in the first place, so it is not as if they were enthusiastically seeking to embrace it; that
6 certainly was not their initial response. We have been engaged in constructive dialogue
7 with the OFT and it has taken some time for us to see the mock-up in November. But as
8 soon as we saw that and the position became clear then we really did get our skates on and,
9 thanks to the Tribunal, we are here today.

10 Unless I can assist you further, those are my submissions in reply.

11 THE CHAIRMAN: Thank you very much, Mr. Robertson. Thank you everybody. That has been
12 very helpful in dealing with the points that we raised at the outset and has certainly clarified
13 our thinking on the structure of this case, so thank you all very much for that. We will let
14 you know through the usual channels when we have arrived at a decision.

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