IN THE COMPETITION APPEAL TRIBUNAL

New Court
Carey Street
London WC2A 2JT **Tuesday 27 January 2004**

Before:

The President
SIR CHRISTOPHER BELLAMY
(Chairman)

PROFESSOR PAUL STONEMAN
MR DAVID SUMMERS

B E T W E E N:

PERNOD-RICARD SA

and

CAMPBELL DISTILLERS LTD **Applicants**

- and -

THE DIRECTOR GENERAL OF FAIR TRADING
Supported by
Bacardi-Martini Ltd.
Respondent

Mr Nicholas Green QC and Mr Aidan Robertson appeared for Pernod-Ricard and Campbell Distillers.

Mr James Flynn QC appeared for Bacardi-Martini.

Ms Kassie Smith appeared on behalf of The Director General of Fair Trading.

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THE CHAIRMAN: Good morning, Mr Green.

MR GREEN: President, Professor Stoneman, Mr Summers, good morning. I appear today with Mr Aidan Robertson for Pernod and Campbell Distillers, whom I shall refer to as "Pernod" for convenience. Ms Kassie Smith appears for the OFT and Mr Flynn appears for Bacardi-Martini.

The issues before the Tribunal today were directed to be heard by the Tribunal on 16th, and they are broadly three-fold. The first is whether there was an appealable decision; second, the procedure the OFT should have adopted in relation to the rule 14 notice and the assurances; and, third, what, if any, is the legal basis on which the OFT may accept assurances.

I should like to turn to the first issue, which is the jurisdictional issue of appealable decision. We submit that the essence of this case is that by a decision closing the file, the OFT also decided that on the basis of the assurances given by Bacardi, and accepted by the OFT, that Bacardi had changed its behaviour and that there was a material change of circumstances in the conduct of the case. Consequently the OFT was clear that provided Bacardi complied with the assurances, there would be no abuse of the dominant position, contrary to Chapter II of the Act; that this was a decision it took, and was to the effect that as of the date of the decision, Bacardi was not infringing the Chapter II prohibition. We submit that it plainly falls within section 46 of the Act as an appealable decision.

THE CHAIRMAN: But as at the date of the decision, was not infringing.

MR GREEN: There was no infringement, yes. We say this is confirmed by even a brief and cursory view of the main document, and I would like to take you to a small number of documents that we say confirm that position. First of all, the OFT's draft defence, starting at paragraph 70: "The reason the OFT closed its file was the acceptance of the assurances by Bacardi, which, for the reasons set out in paragraphs 104-108, the OFT considered appropriate."

If one goes to paragraph 104 and onwards, which is a few pages on, one sees the reasons for the closure of the file. In fact, it is necessary to look not just at that but also a couple of paragraphs beyond that; but starting at paragraph 104: "The reasons why the OFT accepted Bacardi's assurances were essentially three-fold. (1) The OFT still believed that reasonable grounds for suspecting an infringement existed, that the section 25 threshold was fulfilled; (2) However, the assurance evidenced a change in Bacardi's behaviour …" - so the assurances did constitute a material change in circumstances – "… which would deal with potentially abusive conduct in the future". The words "would deal with", mean, as is clear from other documents, addressed definitively and exhaustively.

Paragraph 106: "(3) Taking into account these issues and the amount of further work that would be involved in investigating the case, were the assurances not accepted, the OFT decided that it would not be appropriate to devote more resources to this particular case."

It is important at this point to note that they were referring to the further work that would be required if assurances were not accepted, not to the work that was required once the assurances were accepted.

At paragraph 107: "At the time that the assurances were accepted, it was the OFT's view that given the uncertainty as to the timing and nature of the future progress of the investigation, since further information would need to be sought, as well as to the outcome, there was greater advantage in the gains which would be brought about through the acceptance and subsequent publication of assurances, not in the least because resources that would necessarily continue to be deployed could be re-allocated to other important cases. If the assurances had not been accepted, the OFT would have continued its investigation." Again, that simply highlights the change in circumstances and the fact that the change of circumstances brought about a quite different legal

framework which affected the amount of work the OFT had to do in order to come to a decision.

Paragraph 108: "It is important to note that if Bacardi acts in accordance with the assurances, it will not act abusively in relation to the types of conduct covered by them." So the assurances nullify the abuses which were the subject of the investigation to date. "However, it could act abusively in other ways which are not covered by the assurances, in which case the OFT would not be precluded from investigating, pursuant to its powers under the 1998 Act."

Paragraph 109: "The OFT considered that in order to resolve" – and I emphasise "resolve" – it was resolving the problem, in other words accepting assurances which nullified the alleged abuses. "The OFT considered that in order to resolve the competition problem for the future, the assurances should focus on preventing agreements that, in the OFT's view, could impede other suppliers' access to the market." What the OFT is saying here is that the assurances addressed the legal and economic vice which it had previously alleged in agreements, namely foreclosure. That is, as it were, the conceptual or economic underpinning to the assurances.

Paragraph 110: "'Must stock' and 'preferred status' agreements were not included in the assurances. The OFT considered that those agreements, when considered against a background in which agreements that granted Bacardi some form of exclusivity were prohibited, which would be the case following the assurances, would not give rise to appreciable foreclosure effects on the market." The important word there is "prohibited". Although it is not correct to describe the assurances as prohibiting conduct, it nonetheless reflects the OFT's view that the assurances *de facto* brought to an end the alleged prior illegal conduct, which would thereafter be prohibited by adherence to the assurances.

THE CHAIRMAN: The implication of the "must stock" and "preferred status" agreements is that they are no longer necessary; you are suggesting that that is effectively a

decision that the “must stock” and “preferred status” agreements do not infringe the Chapter II provision.

MR GREEN: Yes.

THE CHAIRMAN: Given the acceptance of the assurances.

MR GREEN: That is right. They had been included in the rule 14, as appears elsewhere in the documents. The OFT’s view was that if they accepted these assurances, and the prohibition – if one can use that word – of exclusivity arrangements of a certain type in the assurances, then these other “must stock” and “preferred status” agreements would not be engaged in in the same economic environment or conduct; and therefore they were no longer appreciable restrictions.

The decision that then followed – it was on the basis of this material change in circumstance; so as at the date of decision which followed this, there was no infringement as a result of the assurances having been included. This is clear from the press release issued by the Office on 30 January 2002. It is five pages from the end of tab 5.

THE CHAIRMAN: We have also got it in the disclosure.

MR GREEN: Yes. It is in a number of places. This makes very much the same point. There are three significances that one can draw from the press release. “Bacardi has given the OFT assurances that it will not enter into or maintain certain types of agreement with on-trade retailers, licensed outlets selling drinks for consumption on the premises such as pubs and restaurants. The agreements covered are those which, according to the OFT, have the effect of excluding other makes of white rum from on-trade outlets in favour of Bacardi’s Carta Blanca; that these agreements have been the subject of an extensive investigation by the OFT under the Competition Act 1998, in the light of the assurances …” So the OFT’s closure was “in the light of”. “The OFT’s decision to close its investigation into the agreement was taken in the light of Bacardi’s change of behaviour and the OFT’s other casework principles. John Vickers, Director General of Fair Trading said: ‘The assurances removed

the competition problem that prompted the investigation and should widen competition opportunities in the market. It would not be appropriate in the circumstances of this case to devote more resources to it.'"

There are three points that flow from this. First, the decision to close the file was taken in the light of the assurances; in other words, as the result of a material change in circumstance; second, that the OFT believed the assurances removed the anti-competitive problems, i.e., nullified the abuse, i.e., there was no longer any abuse; and, third, that up to the date of the decision that the OFT had reasonable grounds for suspecting an infringement." This is evident from note 3 to the press release. "The OFT believes that there continues to be reasonable grounds for suspecting that there was an infringement from March 2000 and during the period of the investigation"; but it is implicit that what is being said is that that no longer existed as a ground for continuing investigation after the assurances.

The same position is confirmed in two OFT letters. The first is the letter of the Office to DLA of the same date, 30 January, which is tab 12 in the annexes to the application, which says pithily in the second paragraph: "We are writing to let you know that we have now obtained informal assurances from Bacardi that it will not enter into agreements with on-trade retailers …" The penultimate sentence reads: "The assurances remove the competition problem."

Tab 14 in the same bundle, paragraphs 7-10 of the section 47 letter, make precisely the same points and add one additional point. I will summarise the points. In paragraph 7 the Director explains that he took the view that for the purpose of the future the competitional problem had disappeared because of the assurances. In paragraph 8, in particular in the last sentence, the director says: "Moreover the Director considered that even if he had been able to proceed to an infringement decision, any directions imposed on Bacardi would have gone no further in scope than the assurances which were

being offered." That confirms that the Director believed there was nothing more to decide in relation to Bacardi's behaviour; in other words, this was the same in substance that he could have achieved through a decision which said "we impose the offered assurances by way of direction and find henceforth no infringement".

Paragraph 9 simply confirms that the decision was a consequence of Bacardi's change of behaviour, and it was taken at a point in time when Bacardi had changed its behaviour, so the past exclusionary conduct no longer applied. Those really are the relevant points one draws from the letter. It confirms the position set out in the draft defence.

Bacardi's statement of intervention, with respect, also gives the game away. The only paragraph we need to go to is paragraph 54. This is the part of Bacardi's statement of intervention which deals with what is in effect the key question that has to be posed and answered. Here, Bacardi says: "Thus, at the time of accepting the assurances, the OFT's answer to the question, 'has Bacardi infringed the Chapter II prohibition?' would not have been 'no' or 'we cannot prove that they did'." Looking at that analysis, that is the question, and it is a question which is definitively answered by the OFT as in 'there is no longer any prohibition and we can no longer prove that they were engaging in any unlawful conduct for the future'. That is the question. The phrase as it is flies in the face of the way the OFT themselves see the points.

THE CHAIRMAN: What are we to do with the words "has been infringed"?

MR GREEN: As of the date of the decision, the OFT was concluding that there was no infringement. There had been in the past, but you have, as an antecedent fact, a change of circumstances. That is why the OFT kept emphasising there was a change of circumstances. Bacardi was complying with the assurances. They made it clear in their discussions with the OFT that they had changed their behaviour, and they had engaged in the lengthy and

protracted -----

THE CHAIRMAN: If the OFT comes to the view that as from a certain date there is no infringement, or alternatively that as from a certain date there will be no infringement as long as the assurances are preserved, how does one construe the words “has been infringed” in the Act, which seemed to be looking at the past?

MR GREEN: As of that date, they are entitled to say that, even if it is just for a matter of days, because we are talking about a situation where Bacardi has engaged in the compliance with the assurances.

THE CHAIRMAN: The following day they asked themselves the question.

MR GREEN: Yes. That is why the change of circumstances is so important. You do have a material change of circumstance, which the OFT itself recognises; and it relies upon that change of circumstance in order to justify the decision to close the file. As they have candidly said, had the assurances not been accepted; in other words, the conduct had not changed; they could not have taken the decision that they did to close the file; they would have had to have proceeded with the decision. So as of the date of the decision, there was a change of circumstance, and there was therefore a decision that the Chapter II prohibition had not been infringed – not only had not, but was not infringed as of the date of the decision, and would not be infringed provided the conduct in question remained extant; in other words compliant with the assurances. That is why I have emphasised the change in circumstances.

We would also submit that to take that view of the statutory language is an unnecessarily constrained view, and that it is perfectly possible to interpret section 46 in a more purposive sense, and ask oneself the question: could Parliament have intended that there would be no appealable distribution in circumstances where the OFT concludes that there is no abuse as a result of the change of circumstance; and the complainant says there is an abuse? The OFT have decided, we say quite

unequivocally, to say there is no abuse, upon the basis of this change of circumstance. We submit that if one asks whether Parliament intended there to be no appealable decision, the answer is that they did not; they intended there to be an appealable decision.

Our first submission is that the change of circumstance which the OFT itself records, which preceded the decision, means that at the date of decision it was quite able to decide that there was no ongoing infringement. There had not been in the past -----

THE CHAIRMAN: You say that the chronology is the investigation, a change of circumstances, and a subsequent, according to you, decision that in the light of the change of circumstances, since the change of circumstances -----

MR GREEN: We say that is what the OFT have said and that is what they have explained was their rationale for the decision to close the file. They actually refer to the change in behaviour justifying the closure of the file, and the converse; that had the behaviour not changed, they would not have closed the file and would have continued.

THE CHAIRMAN: The change of behaviour, according to you, antedates the decision.

MR GREEN: Yes, so far as the OFT's explanation of the chronology is concerned. That is why I emphasise the words "in the light of".

We would look at it two ways: (1) chronologically, according to the way the OFT have explained the facts; and (2) contextually, according to what we say the purpose of the construction of the Act is.

We can identify no discernible good reason for excluding this sort of decision from an appealable review. If the Office of Fair Trading had taken a formal decision, let us say a few weeks later, and had said "we impose these by way of direction, albeit we acknowledge they were offered to us and we are grateful for that", we would simply have a more formal version of what we have to piece together by way of a legal jigsaw; but it would

in substance be the same.

We submit that in those circumstances it cannot realistically be said there is no appealable decision.

Before turning to the second issue, I want to say one or two words about the irrelevance of the position prior to the decision. In the period prior to the taking of the decision, the OFT explains that it had and has at all material times reasonable grounds for believing there was dominance in either one of two markets, either the on-licensed market for white rum, or the on and the off-licensed market for white rum. It says that regardless of the criticisms of the distinction between the on and the off-licensed market, it was still of the view that there was dominance in that market; and that is clear from the draft defence paragraph 40.

It says at paragraph 39: "The OFT also says that it had reasonable grounds for suspecting an abuse." They say that further work had to be done before they could bring those reasonable grounds to a conclusion of a finding of breach. However, the assurances represented the material change of circumstances. So the analysis, as the OFT explains it, is a switch from one of breach to non breach, based on the existence of a reasonable ground, to one where there is no longer a reasonable ground for proceeding with the investigation.

It means that after the change in circumstances, the OFT did not need to conduct further work. Indeed, on the OFT's analysis, it would have had no jurisdiction to do so because it would no longer have had reasonable grounds for suspecting an infringement after the assurances were given.

A great deal is made by the OFT as to the amount of work which it had to do to bring the matter to a conclusion; but, with respect, that is misleading. If the OFT had not accepted the assurances, it would have had a great deal of work to do because it would have had to have gone through with its section 26 request; it would then have had to proceed to another rule 14, and so on, to a final decision. Once the OFT, however, accepted

that the assurances removed the competition law concern, it had really no further work to do. It would have been entitled to take the decision finding no infringement, but given its legal position that the reasonable grounds had evaporated, it could not have gone further down the line through further section 26s, rule 14s and so on.

In conclusion, we say that there was an appealable decision. It is quite clear from the OFT's own defence.

Can I turn to the second issue, which is whether the Office of Fair Trading should have disclosed the rule 14 notice and the assurances. What procedure should the OFT have adopted? The gist of our submission is that the Office of Fair Trading should have disclosed both the rule 14 notice and the draft assurances to Pernod.

We start with the proposition that under the Competition Act there is no duty to disclose those documents, but there is a power. However, in our submission, the power to disclose should be exercised in all cases, unless there is an exceptional reason for not so doing. We submit that there is no exceptional reason, or indeed any sensible reason in the present case for not disclosing either of those two documents. On the contrary, all the relevant principles which govern the exercise of the discretion go towards a conclusion that there should have been disclosure. There are five principal points I should like to make, addressing the question of how this discretion should have been exercised.

The first point is the relevance of EC law, both as a stand-alone body of jurisprudence and viewed through the optic of section 60. We acknowledge that the position in EC law is somewhat different to the position in UK law. EC law imposes a duty upon the European Commission to disclose a statement of objections, and it confers a power on the Commission to hear submissions and observations, oral and written, from third parties.

The three pieces of legislation that are relevant to this are summarised. The first is regulation 4282, and recitals 1, 2, 5 and 6 make the following points. They

say that the procedure which they have adopted has been revised in the view of long experience. They say the procedure which they are laying down in the regulation is designed to improve and facilitate good administration in recital 2; and in recitals 5 and 6 they implicitly accept that complainants have legal rights that justify protection.

In consequence complainants have a right to see a redactive version of the statement of objections and to comment upon it. Article 7 in this regard is mandatory; it imposes a duty on the Commission, not merely a power. In this, there is a distinction between United Kingdom procedure. However, the policy underlying the regulation is one which we submit is the same as does apply in the United Kingdom. We submit that the OFT should be very slow not to follow the European Commission's procedure. One can analyse this in a number of different ways. One could say that section 60 shows that the principle of consistency should be applied, and it would lead to the conclusion that the rule 14 notice should be disclosed in redacted form.

THE CHAIRMAN: The OFT submits that section 60 is about the substantive law, and it is not about procedure.

MR GREEN: You can read section 60 in almost any way you like. You could say that it applies to anything related to Article 81 or 82 which governs procedure, which ultimately can affect the outcome of the case, which would be to give it a wide and purposive construction. You can say it applies only to the pure analysis of Article 81 and 82 conduct. In our submission, it does not even matter for the purpose of this case whether you take a broad or a narrow view, because even if you take a narrow view, we say that the principles which underpin the EC regulations should apply here, because there is no sensible distinction to be drawn between the two.

You can say that section 60 binds, in which case one should follow the principles underlying the regulation. One can say that section 60 on its own language makes allowances for due differences between UK law and EC law

because of the words “having regard to any relevant differences”. Therefore, the fact that one is mandatory and the other is discretionary is simply a matter that you can have regard to, but when you look at the underlying principles it does not lead to any different conclusion; or you can say that section 60 does not apply, but the principles which underlie the regulation itself should equally be applied, because it simply makes good practice so to do and is common sense.

THE CHAIRMAN: Is good practice a legal principle?

MR GREEN: When you are considering the exercise of discretion and a tribunal which is supervising the exercise of discretion to decide whether it is rational, sensible, in accordance with the principle of good administration, English administrative law is not materially different to EC law administrative law. That is why the principles set out in the recitals to the regulation can be read across into English law.

THE CHAIRMAN: Have we got a principle of good administration in English administrative law?

MR GREEN: The principle of good administration is a catch-all; it is a broad-brush principle, which for example encompasses the duty to give reasons, which we have in English law. It encompasses the duty to act fairly as between different parties, which we certainly have in English law. One thinks back to the *Camelot* case and the way in which television franchises are granted. I remember Richards J. used a principle that is not dissimilar to good administration. If you break it down into its constituent parts, we find an analogy for probably almost every way in which it has been used in Community law.

The second regulation that is relevant is of course Regulation 17, Article 19, which establishes and indeed shows that it had been long-established, that third parties should be heard on the issues arising. Under Article 19, third parties appear at oral hearings, when the European Commission’s statement of objection is debated. This is to ensure that they can make known

their views on the statement of objection, albeit that it has been served on them in redacted form.

THE CHAIRMAN: If there is no statutory equivalent to Article 19 in the English system, can we imply it?

MR GREEN: All one says, if there is no statutory duty, is that there is a power. If there is no compulsion, it does not mean to say they cannot do it. We know from other cases that they do in fact serve redacted rule 14s. They did it in the BSkyB case, and they did it in the *Freeserve* case, or Oftel served effectively a draft document to both Freeserve and BT, after having discussed the matter with the tribunal. I can show you the references later. It is part of their practice to serve -----

THE CHAIRMAN: The Oftel example was a bit special, was it not, because it was subject to some discussion with the Tribunal as to what procedure they should follow?

MR GREEN: It was. I will show you that discussion and indeed the Tribunal's ruling, which has some resonance for today's case.

I will come back to those cases as a discrete issue, but it has certainly been part of the OFT's -----

THE CHAIRMAN: They have done it from time to time.

MR GREEN: Yes. They clearly have a power to do it, and our submission concerns the exercise of that power, whether it is a proper exercise to refuse to do it in the present case.

Our first point is the guidance from EC law, and refer to regulation 2842. Regulation 17 is the second, and the third is regulation 1/2003, which in Article 27 expresses the principles, "the complainant should be 'closely associated' with the procedure." That is not something which has been dreamt up for the purpose of the 2003 regulation; it is a reflection of some thirty years plus of past practice.

THE CHAIRMAN: I have the impression that one of the Commission's draft notices presupposes that the pre-existing regime regarding complainants will continue after May 2004.

MR GREEN: Yes. I think in large measure regulation 1/2003, so far as third parties are concerned, codifies existing practice. As far as I can see, it does not amend or alter regulation 2842 of 1998. That is not one of the regulations that is amended or repealed by the 2003 regulations.

Point one concerns the precedent or guidance value of EC law. Point two concerns a submission that disclosure is needed to protect the legitimate interests of complainants. There are two aspects to this. The first is that the complainants have rights under the Act, which cannot be exercised if they are denied access to the key documents which arise in the course of an evolving administrative procedure.

The second aspect of this point about protecting the legitimate interests of complainants, is that the complainant's right of appeal may be prejudiced if access is denied. Those are two quite different rights, one concerning participation during the administrative procedure, and one concerning rights of appeal subsequent to it.

So far as the first is concerned, the fact that third parties have a legitimate interest is recognised by the old section 47. That, in its own right, is a statutory reflection of the fact that third parties have rights. Third parties were plainly contemplated as having appeal rights. Indeed, one almost does need authority for the proposition, and the Office of Fair Trading have long taken the view, and publicised it on all occasions, that they wish to encourage complaints because most cases that they pursue, or a high percentage at the very least, are engendered initially be a complaint. So complainants play an important role in the administrative procedure.

In this case there was more than one complainant, which is explained in the footnote to the OFT draft defence. If complainants are not given access to the key documents as they arise during the course of the procedure, then their ability to participate in a

rational, informed way, will plainly be prejudiced. The more a case progresses, the more a third party who is kept at arm's length becomes divorced from the real issues that the OFT is debating with the defendant.

THE CHAIRMAN: Do they have a right to participate?

MR GREEN: If the Office of Fair Trading has a power to permit a third party to participate, then the power should be exercised according to principle. We submit that the OFT in exercising that discretion must take account of the fact that third parties have rights. If the right is to be exercised, it has to be exercised in a way that is reasonable. There is no point in having a right if the procedure adopted by the OFT *de facto* prevents you from making sensible use of that right.

In the present case, one can give some broad illustrations. The rule 14 was issued by the OFT, and as a result of the reply to the rule 14 a number of key issues arose as question marks in the OFT's mind, for example the correctness of LECG's econometric methodology, the correctness of the submissions of Charles River Associates and Professor Sir George Yarrow on substitutability between the on and the off market, and between rum and vodka and other products; the correctness of the OFT's *volte face* on "must stock" agreements and "preferred status" agreements. All of these were issues arising at the time of the rule 14, in which, plainly, the defendants made headway, and the OFT acknowledged that the response to the rule 14 forced them to re-think some of the issues; that the third party would wish to make detailed submissions about some of these matters, in so far as it were able, protecting confidential rights of course. Everything we say obviously needs to bear that in mind.

But there were matters on which not just my client but the other complainant or complainants might have been able to provide illumination – matters on acts, evidence, submissions, experience of methodologies and so on, on which third parties could have been of assistance. The OFT does not have to accept those submissions. But if a

third party has rights and the OFT finds itself at a crucial point in its inquiry in a position of serious doubt, that is precisely the point in time at which a third party would wish to exercise its rights in order to contribute.

These were key developments in the evolution of this case, the response to the rule 14. Third parties were kept at arm's length. They may be asked straight questions about bits and bobs and respond, but unless they are engaged in a sensible way, they cannot make sensible and detailed responses.

The second aspect of protection of the legitimate interests of a third party -----

THE CHAIRMAN: Those responses that raised the doubts in the OFT's mind were in Bacardi's answer to the rule 14 notice.

MR GREEN: Apparently so. They are summarised in paragraph 29 onwards of the draft defence, and in paragraphs 32 and onwards. The OFT explains which points came out of Bacardi's response to the rule 14 that gave them real cause for concern. It focused primarily on dominance and the definition of the relevant product market in concluding whether it was the on-market only or the on and off market, and whether it was white rum or white rum plus vodka and/or other products. They also made serious headway into the econometric analysis of LECG and into their analysis of certain abuses.

THE CHAIRMAN: Can you correct me if I am wrong, but my recollection is that if we were following EC procedure, which we are not in this case, but if we were, the normal sequence of events would be that the complainant would get a redacted copy of the statement of objection.

MR GREEN: Yes.

THE CHAIRMAN: They would at some stage also get a redacted copy of the reply. Then they would put in some written observations on the reply.

MR GREEN: That is right. There is usually a barney about whether the redactions to the defendant's reply are sufficient.

THE CHAIRMAN: Yes, "I cannot answer this because it is all redacted".

MR GREEN: Yes, absolutely. "I cannot make sensible observations at the oral hearing because …"

THE CHAIRMAN: If there was an oral hearing, the complainant has a subsidiary.

MR GREEN: Is present. You generally have your say after the main parties, before the Member States.

In broad terms, one needs to recognise (a) that third parties have a legitimate interest in participating in an administrative procedure. That fact is recognised by the Act. The second point is simply that they must be able to do it on a reasonable and sensible basis, protecting confidentiality and other legitimate interests of the defendant. Community law would of course teach that the defendants' rights are greater than those of the third parties; but that does not mean to say that the third parties' rights are non-existent.

THE CHAIRMAN: Yes.

MR GREEN: The second aspect of this concerns the right of appeal, and that is the second way that we say disclosure affects legitimate rights in relation to an appeal.

The starting-point is that the tribunal in Freeserve began to develop a principle that an appeal is at least in some respects affected by the scope of the original complaint. That is not a principle that the tribunal has as yet developed at any length, but assuming it is a principle the tribunal intends to adhere to, what it means is that if the original complaint, which in this case was served in 2000, becomes a defining characteristic of an appeal, then in any investigation where matters progress substantially, the complaint will become increasingly irrelevant. If it then has a lingering legal relevance, it is going to deny the complainant the ability to exercise his rights on appeal, because it will be said by the OFT and the Intervener "look what it said in its complaint; it did not say (a), (b) or (c); it ran a very broad-brush case", which is often what happens right at the outset when you are

putting in a complaint; you may have limited information.

If the principle holds true that the complainant's participation in the administrative procedure in some way affects the scope of the complainant's appeal. We submit it must also be the case that the complainant's continuing participation will affect the appeal because the complainant may put in three or four substantial documents over the course of two or three years. It may put in the document in response to the rule 14 and the defendant's reply which completely subsumes and overtakes its original complaint. In the present case, given a material change of circumstances, a complainant may put in a document in response to the assurances which makes all of its prior documents largely an irrelevance.

We submit that that, in its own right, indicates that a complainant should be able to participate fully; otherwise the principle that it is tied to its complaint becomes a ball and chain, and an unfair ball and chain.

In this case, one can see illustrations of that because both the OFT and Bacardi seem to make plain that what was said or not said in the original complaint, for example from the OFT's draft defence at paragraphs 113 and 134, in 113 the OFT says: "Moreover, Campbell Distilleries's original complaint stated that 'the most common and damaging of Bacardi's practices has been the seeking of exclusive supply agreements. Many of these practices are targeted expressly at the exclusion of Havana Club. This is the very conduct, amongst other things, which is prohibited by the assurances.'"

We object to the fact that certain types of agreement are no longer prohibited. Part of the justification for the OFT's position seems to be, "we identified the main agreements as being the exclusivity". That is plainly right, but it does not mean to say that other agreements are irrelevant, or that that can be taken as justification for what we might or might not have said in response to the draft assurances. The same point flows out of paragraph 134. It takes the original complaint out of context. The OFT repeat the same point.

Bacardi's statement of intervention is more stark in this regard. I draw attention to paragraphs 101-012 under "Complainants' rights" which starts at paragraph 99. They actually made complaint in paragraph 101 that the original complaint was not supported with useful information or evidence on key issues. It did not provide market research or other helpful evidence in support of its claimed market definition. They made a number of vague and unsubstantiated assertions.

Then, in relation to white rum, paragraph 102, the white rum issue can be seen in documents contained in annexes 1-8 of the application. The complaint is submitted in the name of Campbell Distilleries. A few lines down: "But it never submitted the results of this test or indeed any evidence to support its implication that any such sniff test had every been carried out."

These are just illustrations of the sorts of sniping that is made at an original complaint; but in circumstances where Bacardi had a specific opportunity to say, by way of illustration, comment on the methodology used by LECG as an econometric technique, it might have said something entirely different. There may have been many things which Bacardi, as its understanding evolved of the real issues in the case, would have said. To take what was said in 2000 and measure it against events which occurred two or three years later is an irrelevance.

That is the second point; how are the complainants' legitimate interests to be protected.

The third point is that there is no administrative inconvenience or harm to the defendant in a disclosure obligation being met. Quite simply, the rule 14 can be redacted to protect confidential material so there is no prejudice there. The assurances themselves do not contain any confidential information; indeed, it is said in paragraph 140 of the OFT draft defence: "The publicity given by the OFT to the conclusion of the assurances of Bacardi, will also act as a significant disincentive to Bacardi to breach the terms of the assurances. Customers and/or competitors will be aware

of the assurances and will be free to complain to the OFT if Bacardi does not comply with them." So the assurances were intended to be public documents. They were intended to be documents which the retailers and wholesalers could read and could then, if they found that Bacardi was not behaving in conformance with the assurances, use as the basis of a complaint to the OFT, or indeed use in negotiations with Bacardi. So it cannot be suggested that disclosure of the draft assurances could in any sensible way have prejudiced Bacardi or the Office of Fair Trading, given the purpose that they were seeking to achieve.

The fourth point concerns the consistency of the OFT's practice. We pointed out in our skeleton at paragraph 12 that at the moment the OFT's practice appears to be arbitrary. For example in the BSkyB case, the OFT disclosed the rule 14 to the competing retailers, who were companies alleging that they had been foreclosed and excluded. The other case in which there was some disclosure is the *Freeserve* case. Perhaps I can hand up the decision of the tribunal, plus the paragraph that shows this is what Oftel did in practice. They could sensibly be placed in tab 5 of the authorities bundle, which is where the other Freeserve material is contained.

The context of this was that subsequent to the decision remitting the matter to Oftel, there was a debate between the parties as to the procedure that should be adopted. In relation to disclosure, the issue arose as to whether Oftel could, in a practical sense, keep an open mind in its assessment of the merits a second time around.

What the tribunal said on pages 4-6 was as follows, starting at line 28 of page 4 of the ruling of 16 April of last year. "Such a reconsideration by the Director should, in our view, in principle be recommenced with an open mind. Despite the mental gymnastics that may possibly be involved, the Director should not, in our view, approach his reconsideration with a closed mind with a view to inevitably reaching the same conclusion."

Then the tribunal identified what it described as safeguards on that point specifically. "It seems to us, in the light of the further development of the argument that has taken place since the original decision, the parties involved, Freeserve and BT, should have an opportunity to put before the Director any material they wish before the Director reaches a concluded view. If, on a reconsideration, the Director were to come to the provisional view that after all there may have been an infringement of the Chapter II prohibition, then at least in normal circumstances the Director would follow the procedure provided under the Act, in accordance with section 26, namely the procedure that applies in the case of possible infringements. If, on the other hand, the Director should reach the provisional view that there is no infringement, the suggestion has been helpfully and responsibly made on behalf of the Director that before coming to a final conclusion he should put before Freeserve and BT the draft conclusions to which he was provisionally minded to come, and give those parties the opportunity to submit any observations that they may have. We think that this is a sensible suggestion. It is in fact quite close to the procedure customarily followed by the European Commission when rejecting complaints under Article 6 of EC regulation 99. If the matter reaches that stage, the Director will then put his draft conclusions to Freeserve and BT, and they will be able to put their arguments to the Director, drawing his attention to any matters they may think of relevance, including the usefulness or otherwise of the Director taking into account in his decision on the original facts of the case any subsequent developments which may throw light on the original circumstances. It will of course be for the Director to decide what is relevant and what is not. It will also be for the Director to take into account the relevance or otherwise of the forthcoming regime to be shortly introduced by European directives, and the relationship, if any, between those directives and the issue that the Director may be considering in

reaching his new decision. The fact that, in our view, Freeserve and BT should have the opportunity to comment on any provisional conclusions the Director proposes to reach in possibly rejecting the complaint does not of course preclude either Freeserve or BT from putting any matters to the Director that they think fit before he reaches his provisional conclusions. That is entirely a matter for them. We see no basis upon which they could be prevented from putting such observations to the Director if they wished to do so." They then say that if it adds to time, that should not be a problem.

Plainly, the tribunal was dealing with what may be viewed as a *sui generic* situation, but it was to address a particular problem whereby the tribunal was anxious that the decision-maker should keep an open mind. To keep an open mind is to do no more than saying that the decision-maker should, since he is in the unfortunate position of being piggy-in-the-middle, hear all parties and come to an objective decision. That is precisely the situation that one is in, in the present case, where the Director is listening to all parties, the complainant and Bacardi, and should come to an objective decision.

We submit that the principle reads across from the concerns the tribunal had in that case to the present case.

In the present case, if there was a presumption in favour of disclosure, a strong presumption as we submit should be the case, this would remove the element of caprice which governs present practice. At the moment, the principle seems to be that he prevails who shouts loudest. In the present case, Bacardi threatened judicial review of the Office of Fair Trading on two occasions, first in relation to an extension of time for the rule 14 reply to be served, and then second, during the course of the negotiation of the assurances in relation to the issuance of a section 26 notice. If you look at the bundle of correspondence prepared by Simmons & Simmons at tab 3, there is a letter from Simmons & Simmons to Dr Mason at the OFT in relation to the

negotiations. The letter is from Mr Freeman. "Thank you for your letter of 13 December confirming the suspension of the section 26 notice dated 10 December for the period during which informal discussions with Bacardi are in progress. In turn, we confirm that Bacardi is suspending its steps to commence judicial review of the notice …"

THE CHAIRMAN: Yes.

MR GREEN: You have seen it. We all know that Mr Flynn here is a gentle, cerebral and diplomatic man (I hope he will not take insult at that! He does!) Bacardi had at their disposal the redoubtable skills of Mr Freeman and Mr David Vaughan, QC, so at least one of those would have viewed disclosure of the rule 14 as perverse, monstrous and unlawful. A strong presumption that there should be disclosure would insulate the OFT from such pressures. The OFT will simply say, "We are piggy-in-the-middle; it is a fact of our lives; we have a presumption that we should disclose; the fact that you may threaten and bluster is neither here nor there. If you can come up with an exceptional reason why we should not disclose, we will listen to it and possibly accede to it."

We would submit that a rule which is a presumption in favour of disclosure will serve a positive benefit in immunising the OFT from the sorts of pressures which inevitably arise in the course of this adversarial procedure. Most rule 14 procedures are adversarial, with the OFT betwixt and between the complainant and the defendant. The OFT's position is an uncomfortable one, necessarily and inevitably; and this would assist the OFT, we submit.

The fifth point, which is that disclosure would improve decision-making generally, is, we would submit, an important one. This is the final point I want to make and after that I want to deal very briefly with the third preliminary issue, and then that is me done.

This case concerns foreclosure. The people who know about foreclosure are those who are at risk of being foreclosed, that is the third parties. In this case, with respect to the OFT, at the time the assurances were

negotiated, they were quite plainly at sixes and sevens. They needed help. Bacardi launched a series of well-placed, well-directed missiles at the rule 14 notice in its reply, which the OFT acknowledges had caused some considerable damage. The OFT does not accept, however, that it was fatally holed below the water line. As at the end of 2002, the OFT's confidence was shaken, and the plausible and wily Mr Freeman, we say quite properly – there is no hint of a suggestion of criticism – suggested to Mrs Bloom the opening of truce talks. But at this juncture the OFT were quite plainly uncertain as to the relevant definition of the product market, whether it was the unlicensed market or included the off-licensed market. They were uncertain as to substitutability between white rum and vodka, and white rum, vodka and other products; and they were uncertain as to whether "must stock" and "preferred status" agreements were abusive, assuming they were correct on methodology. They were uncertain as to their methodology in relation to the snip test, and the approach generally engaged in by LECG as to statistical analysis. This was all set out in the OFT's draft decisions, paragraphs 36-39.

So the OFT embarked on discussions at a point in time when it recognised that its own knowledge about the facts was inadequate, and proof of that fact is shown by the section 26 notice, which was issued on 10 December, which is in the blue file at tab 1. I do not need to read it to you, but if you look at the letter sent by the OFT of 10 December, there are 14 categories of questions and documents which the OFT were seeking at that point in time. The questions which were being posed and the documents which were being sought were of a fundamental nature. There is no criticism of the OFT; they had properly taken on board the reply to the rule 14, and they were progressing investigation. Bacardi was threatening judicial review.

So far as Bacardi was concerned, they must have felt that they had the OFT well and truly over the proverbial rum barrel.

At this point in time, we submit that the complainant's comments on the draft assurances would have been of material assistance to the OFT, and they should have taken that assistance. Paragraph 140 of the OFT's draft defence says, "these assurances are for public consumption; they are there to be read and understood by retailers and wholesalers and the world at large". Those persons must be able simply to look at the assurances and understand what Bacardi can and cannot do, so one should be able to look at these and conduct an objective analysis of the language and understand the parameters of the permitted behaviour.

We submit that the assurances are riddled with ambiguities and holes, and I should like to identify a few of these, which simply serves only to highlight the sorts of observations and comments which a third party could have made at the time, had they been given an opportunity so to do.

If you could turn to the assurances themselves, they are at the back of the OFT's press release. I will start by picking up a few points arising out of definitions. First of all, in the definition of a promotional support arrangement, which is the key definition in the assurances, the first point to note is that the definition of a PSA incorporates some nexus or association between the provision of assistance by the brand owner, and promotion of the brand-owner's product in the retailer's premises. It is providing assistance in promotion. So there must be this connection between the assistance and the promotion. The definition would therefore not seemingly, on its face, include a case where Bacardi offered a very low price, let us say simply a big discount – clause 5 of some agreement, and in clause 12 there was an exclusivity arrangement. You would not see the nexus; you would simply see a price, which, if you knew what other people were being charged, turns out to be low; and you would see an exclusivity requirement; but there would be no connection or nexus between the assistance and the promotion.

It is also clear from the definition that it does not appear to cover a system which is unrelated to promotion, for example £1,000 for cellaring or stocking certain quantities. That comes out of the limited notion of the word "promotion". It would appear that the assurances do not cover agreements to provide assistance to wholesalers, where that assistance may be conditional upon the wholesaler imposing resale restrictions on the retailer, because these are limited to agreements with retailers.

One turns now to the individual assurances themselves, first de-listing. On its language, it only concerns PSAs which contain terms that require a specified white rum product to be excluded; so there must be a requirement in the contract, but it excludes PSAs where the retailer, for example, has an option or an incentive. In other words, if you exclude a rival's rum, you will get £1,000; they are not required to do so but they are incentivised to do so. It also seems to be limited to 100 per cent exclusion. It refers to specified white rum products excluded from the retailer's premises. I think the retailer or wholesaler reading that would think that it did not cover a 75 per cent requirement or an 80 per cent requirement because that is not exclusion.

It would appear on its face also to limit PSAs to those in relation to products of competitors, suggesting that if the competitor is not identified in some way, that may not be – the language of paragraph 1 is loose. The definitions appear to be wide and open circumvention. A retailer who wished to hold Bacardi to these assurances could well be led to believe that they did not prevent Bacardi from preventing all sorts of financial and other advantages in return for some degree of loyalty.

In relation to clause 2 solus, one has the same problems with the definition of PSA, the notion of "require". Then one has in the second sentence the odd sentence: "Should Bacardi be asked to or wish to compete for relevant business on terms provided for solus status,

it will wish to discuss the issue with the Office with a view to seeing whether that is justified in the particular circumstances." There is nothing there which apparently imposes an obligation on Bacardi to seek the views of the OFT. It simply says it is a statement of Bacardi's present wishes or intent. It does not say what criteria the OFT would use in approving or disapproving of an arrangement, and it seems to draw a distinction between prohibited solus arrangements and those where Bacardi is asked for one by the retailer, or one where Bacardi is subject to some form of tendering process. The implication is that those are allowed, or at least not prohibited, or outwith the scope of the assurances. This caveat is vague and uncertain. There is no obligation to consult in the circumstances defined.

Clause 3 solus pouring, says: "Subject to the exceptions set out in paragraph 6 below, Bacardi will not conclude a PSA with retailers which contain terms which require the retailer to grant solus pouring status to Bacardi." A solus pouring agreement is defined on the previous page as one where the retailer agrees that the producer's branded product will be the only brand that is served to customers who do not specify a brand. So if the customer simply says, "I want a rum" then it is Bacardi's rum that is going to be dispensed. You have the same limitations inherent in the definition about terms that require, the definition of PSA, but it is unclear whether this applies to cocktails where rum is an ingredient. If you ask for a cocktail, is it the case the retailer must always stock Bacardi's, or can they choose?

Similar criticisms may be made of the assurances in relation to solus optic in clause 4 – there is the word "require" and there is the definition of a PSA. It would appear that this does not prevent a retailer from removing Pernod out of sight, because a solus optic agreement does not include that circumstance. A solus optic agreement or arrangement is one where the retailer agrees that a producer's branded product will be the only

brand within the relevant product time displayed on optic. Pernod could be shoved to the back of the shelf. It does not concern the situation where there are display cabinets, like the classic ice-cream freezer cabinets, where only Bacardi is served.

Clause 5 is even more obscure. If I were a retailer looking at this, I would be baffled by clause 5. It says: "Any contractual commitment covered by paragraphs 3 and 4 above will normally not exceed one year in duration, or provide for termination after one year or less. No promotional support arrangement will be made for a term exceeding two years."

The commitments covered by paragraphs 3 and 4 are all prohibited arrangements; so it is difficult to see how they could have any duration at all. If they are covered by paragraphs 3 and 4, they necessarily fall into the scope of arrangements which Bacardi cannot enter into in the first place.

What is meant by clause 5 is not obscure. It is not stated whether we are talking about some category of permitted agreements or something else. Clause 6, the exception, says: "Subject to the limitations on duration set out in paragraph 5 above, Bacardi may conclude PSA with retailers, including solus pouring or solus optic status for its white rum products, where a retailer includes an express requirement for suppliers to offer PSA, including solus pouring or solus optic status, in the context of a tender process involving other spirits suppliers; and Bacardi would, on a reasonable and objective assessment risk having its white rum products excluded from the retail premises in question if it felt it complied with the retailer's requirements."

What is taken with one hand is given back by another in clause 6. The circumstances where Bacardi can enter exclusive PSAs are now vague and uncertain. It only applies where there is a so-called express requirement; but there is no definition of what is meant by an express requirement, and plenty of drafting devices exist to avoid or create, as the case may be, such express

requirements. It makes the right to alter a PSA subject to “a reasonable and objective assessment”. It does not say by who. Apparently, it must be Bacardi, but nobody is going to know what that reasonable and objective assessment was, or what the conclusion of it was. Certainly Pernod or other complainants will not know, but it makes the right to conclude a PSA triggered by a risk that Bacardi’s white rum product would be excluded. “Risk” is a term that is undefined. Who determines risk? It is Bacardi, presumably. The concept of risk is almost impossible to define, measure, monitor or regulate. It is not justiciable, but it does allow Bacardi to manipulate the situation by encouraging retailers to ask for a tender or create some risk.

These are the sorts of matter - and whether they are good points or bad points really does not matter for today’s purposes – drafting points, factual points, evidential points, which third parties would have wished to have been consulted on. It might have led to the same substantive result but with different and tighter wording; it may have led to different substantive results.

The conclusion is therefore, coming back to my fifth point, that the third parties should have a right to comment on a document such as an assurance, particularly a document which is intended to have a public legal effect to retailers and wholesalers. The people who are affected by this are third parties who are foreclosed. They are the people with the best knowledge to make sensible suggestions about drafting, especially in circumstances where the OFT, on its own admission, is in a state of quite legitimate uncertainty.

The last point on point 5 is just an illustration to show that in practice, giving the third party a right to comment on assurances can alter the decision-makers conclusion.

I should like to turn to the ice-cream case. The authorities bundle at tab 7 sets out the European Commission’s decision. Paragraph 7: “On the basis of

these proposals, and in the light of HB's express expectations regarding their effects in the market, on 5 August 1995 the Commission announced its intention to take a favourable view towards HB's distribution arrangements as notified. The changes did not however achieve the expected results in terms of open outlets. In view of this, and of the situation as it currently stands in the market, the Commission has revised its expressed intention. Accordingly, on 22 January 1997, the Commission sent a new statement of objections to HB. HB submitted its written response on 24 April 1997 and put forward arguments at an oral hearing." Footnote 8 says that in relation to the publication of the new revised HB distribution arrangements, only Mars, the principal third party and complainant, responded. If you jump to 69-73, you will see the nature of the suggested changes to the freezer cabinet policy for distribution of Mars ice cream. You see the conclusion of the Commission in paragraph 247, which is that the freezer cabinet agreements do not qualify for exemption. Then they set out that the changes in the arrangements did not in the event amount to a satisfactory conclusion, and that was because of the Mars intervention and submissions. One can see confirmation of this in the second bundle at tabs 24 and 25. Tab 24 is the European Commission's notice in the official journal. It summarises the facts, the change of circumstance and the Commission's statement in the very last page of that, and that it intends to take a favourable position. This was at the stage of the notification to the world at large. Then at tab 25, the first paragraph, the Commissioner states that their change of position was in the light of the undertakings given by the defendant.

THE CHAIRMAN: It does not actually say it is in the light of the comments made by Mars.

MR GREEN: It does not say that. The only person who submitted observations in response to the 93 notice was Mars. The decision, when one goes through it, sets out the HB position and then the Mars position; and, at the

very least, it is a pretty strong inference that the reason the Commission changed its mind was because of evidence submitted to it by Mars. It is merely an illustration and no more, of how a decision-maker can change its mind.

Pulling all the various threads together, for these five principal reasons we submit that the OFT had a power to disclose both the rule 14 and the draft assurances.

THE CHAIRMAN: You have not really raised the rule 14 in your notice of appeal, have you?

MR GREEN: I will come back to that in one moment, if I may. We say the power should, save in exceptional circumstances, be exercised in favour of disclosure; that there are no exceptional circumstances here; that all of the policy and the evidential considerations lead to the conclusion there should be disclosure; and, as such, the OFT adopted an erroneous and unlawful procedure.

So far as the failure to raise the point is concerned, the time for raising such an objection was when the tribunal ordered the preliminary issue of the 16th. No such objection was made at that point. The point about the rule 14, as the tribunal will recollect, was one raised by the tribunal itself at the very first CMC. We have acknowledged that it is not explicitly set out in the notice of application. If there had been a serious objection to it, it should have been raised when the preliminary issue was heard. Had there been a serious issue, we would have said two things: if needs be, we will apply to amend to simply raise the point; and there can be no possible prejudice by either the OFT or Bacardi, because the amount of time taken to argue the point and incrementally to argue the other points is miniscule. The fact that it has to be argued *per se* cannot be counted as prejudice, but we do submit it is simply too late. The time to take the point was on the 16th; it is not now.

Finally, I make a point of clarification on the third preliminary issue: is there a right to accept assurances at all? We accept that there is. The legal

basis for that is that we say there is a power so to do. It is inherent in the Act. It does not alter matters that subsequently the law is codifying what had been previous practice, given that there is no prohibition in the Act from the taking of assurances at the moment. We say it is innate and inherent because we accept, and it is accepted in law, that the OFT has what is loosely described as an *Automec* type of discretion not to proceed in a particular case. The decision not to proceed further because a defendant changes its conduct, is simply another reason why the OFT would not proceed in a given case, and would proceed to close a file. If, say, the OFT could close a file because the issue is simply not important enough to warrant resources being devoted to it, then equally we would submit that the OFT can close a file because the matter is important, but the defendant changes its position.

All of this is without prejudice to our submissions as to admissibility, but we have no objection to the point in principle – we think that would be an argument too far.

MS SMITH: I will turn first to the issue of admissibility and whether there is an appealable decision under section 46(3((b) of the 1998 Act.

The decision in the present case to close the investigation following the giving of formal assurances by Bacardi is, in the OFT's view, significantly different from the types of decisions with which the tribunal has dealt in the past. In the light of that, the OFT seeks guidance from the Tribunal as to whether it is an appealable decision under section 46(3)(b) or whether, as the OFT believes, the decision involved an exercise of administrative discretion and is therefore a decision that the applicants can challenge, but by way of judicial review in the administrative court, rather than by way of an appeal to this Tribunal.

The applicants have characterised in their pleadings the OFT's decision to close its investigation into Bacardi as, in effect, two decisions, first a decision as

to whether there was an infringement before 29 January 2003, and secondly as to whether there was an infringement after the date of the decision on 29 January 2003.

The OFT's case is that it is artificial to seek to divide the decision in this way, for the reasons set out in paragraph 6 of our skeleton argument. However, we do in that skeleton argument, and will today, address those two submissions. The applicant now puts more emphasis on the second, which is basically as to whether there was an infringement after 29 January 2003, but I would like to address both the first and second characterisations of the decision.

THE CHAIRMAN: I am not sure at the moment that you need to address the first possibility in any detail.

MR GREEN: I do not think we would be suggesting there was an appealable decision prior to the change in circumstances.

MS SMITH: I am very grateful for that indication. Can I nevertheless just start, to put my submissions in context, take the Tribunal to some of the cases that have dealt with the question of appealable decision. I remind you and your colleagues of the test set out in paragraph 122 of *Claymore*, which is set out and reproduced in paragraph 54 of the draft defence.

The position is summarised in *Claymore*. The first question to be asked is whether the OFT has made an appealable decision, which is a question of fact. Did it determine the particular circumstances of each case? It is a question to be determined objectively, and it is a question as to whether the OFT has in fact reached a decision as to whether the Chapter II prohibition has been infringed. To put it the other way round, has it genuinely abstained from expressing a final view as to whether there has been an infringement.

THE CHAIRMAN: the word "final" does not quite figure in the way you put it there.

MS SMITH: Sir, I am jumping the gun. The OFT's submission will be that on the basis of the Tribunal's

jurisprudence, for there to be an appealable decision, the OFT must have reached a final and definitive position on whether the Chapter II prohibition has been infringed. If I could make that decision good by reference to some of the other tribunal cases, I will not take the Tribunal to the judgments, but if you and your colleagues wish me to do so, I will.

THE CHAIRMAN: We will re-read them, of course; but if you could tell us any particular passages you want us to bear in mind, that would be helpful.

MS SMITH: Starting with the case of *Bettercare*, this makes it clear that there does not have to have been a full investigation under the Act for there to be an appealable decision, but in that case it was clear that there was a final position reached by the OFT on a conclusive question of law; that is whether Bacardi was or was not an undertaking for the purposes of competition law. A determination of that question was determinative of the question as to whether or not there had been an infringement, because if it was not an undertaking the competition law was not even engaged.

In paragraphs 66 and 69 of that judgment, the tribunal described the OFT's decision letter as containing a carefully-considered and, to all appearances, final view on that question.

Again, in paragraph 89 the tribunal commented that the Director General considered himself sufficiently informed to have taken the decision on the question of whether or not North & West was acting as an undertaking. As I have said, a decision on that question was determinative of the question as to whether there was an infringement.

In the *Freeserve* case, on the facts of that case, the tribunal held that Oftel's decision to close the file following preliminary investigation would essentially be a finding of "no case to answer". Those are the words used in paragraph 93 of the judgment. It was held that Oftel had made the decision that the complaint did not warrant any further investigation, and was described in

paragraph 93 as “a definite view and conclusion”, a conclusion reached by Oftel.

As regards the *Claymore* case, I would refer you, sir, to paragraphs 56-60 of the OFT’s draft defence. There, we set out extracts from the tribunal’s judgment in *Claymore,* which, again, we say, show that what is important here is a question of whether there was a final and determinative position reached by the OFT. References are made to a “full investigation”, final conclusion and a firm decision that the evidence was insufficient to establish an infringement.

In *Aquavitae* one case where the tribunal has found there was not an appealable distribution, the issue was considered at paragraphs 206-209. The question that the tribunal asked in that case was what was the reason for closing the file, for making a decision not to continue with the investigation. Was it because the regulator had concluded that an infringement had not been established, as in previous cases such as *Claymore*, or was it, as in *Aquavitae* because there was an independent reason for closing the file; in other words, the introduction of new legislation?

Sir, in this case we say there is no conclusion on the part of the OFT that an infringement had not been established at the time it made its decision. The OFT’s mind was still open on that. The reason for closing the file was the giving of assurances by Bacardi and the decision that in the light of those assurances, resources could be better employed on other cases.

THE CHAIRMAN: It was the view expressed that that would resolve the competition problem.

MS SMITH: Sir, yes. I will come back to the various documents to which Mr Green made reference this morning.

Focusing on the question as to whether there was an appealable decision as regards the position after January 29, that is that there was no infringement after this date, one must not lose sight of the fact that the decision that is being challenged here is the decision of 29 January 2003. In our submission, the position

crystallised on that date. One cannot start saying, "possibly if we made a decision a month later we could characterise it as a section 46(3) decision". The question for the Tribunal in this case is not whether the OFT could at a later date have taken an appealable decision; in our submission, it is whether the OFT did in fact, in the particular circumstances of this case, take an appealable decision by way of the decision of 29 January.

In that regard, our submission is simple. Even if, by deciding to accept the assurances and close the file on that date, the OFT was implicitly deciding that Bacardi's compliance with the terms of the assurances means it will not infringe the Chapter II prohibition in that regard, that is not a decision that is within the ambit of section 46(3)(b). It is a decision as to the future. It is not a decision as to whether the Chapter II provision has been infringed; it is a decision as to whether the Chapter II provision will be infringed. The wording of section 46(3)(b) is plain and clear, in our submission. The OFT can only make appealable decisions as to whether the Chapter II prohibition has been infringed. That, we say, is consistent with the wording used throughout the Act, set out in annex 1 to my skeleton argument to my original observations to the Tribunal, and other sections of the Act where the same wording is used.

THE CHAIRMAN: How do we get round the negative clearance situation, where a party says, "I do not want to implement this agreement until I have got a clearance from you, so can I have a clearance please?" You then say: "Okay, I will give it clearance; your agreement does not infringe" as in the second … decision. Is it implicit in the logic of your argument that that is not an appealable decision?

MS SMITH: The position is that a party cannot notify a prospective decision. They cannot say "we will be entering into an agreement".

THE CHAIRMAN: They notify the agreement but say it will not

take effect until they have got clearance.

MS SMITH: That is dealt with specifically under section 14 of the Act. There is a process in the Act dealing specifically with notification for, in shorthand, negative clearance.

THE CHAIRMAN: Section 14(2) again uses the words “has been infringed”.

MS SMITH: Sir, yes, and it is the OFT’s position set out under OFT guidance note 400 on the main provisions of the Act, that an agreement must be in existence and have been in existence for the OFT to consider it under section 14 and to grant negative clearance.

THE CHAIRMAN: The case I am struggling with at the moment is that the agreement is in existence but they have not implemented it.

MS SMITH: Sir, I think I would have to take instructions on exactly what the OFT would do in such a situation, but my understanding is that the agreement -----

THE CHAIRMAN: I am trying to see the various landscapes, as it were. Let us assume it is an agreement where there is not an object problem. The parties are saying to themselves, “we have not yet implemented this agreement and there it is; if you say it does not infringe the Chapter I prohibition, we will go on with it; if you say it does, then we will abandon it”.

MS SMITH: Sir, my understanding is that the Director would have to look at the decision, the agreement. Under section 14 it must be in existence, and the Director must make a decision as to whether the Chapter 1 prohibition has been infringed on all the circumstances and the facts and the economic situation that has in the past obtained. The Director cannot say under section 14, “in the future this agreement is allowed”; the Director can make a decision under section 14(2) that the Chapter I prohibition has not been infringed, and give the reasons why it has not been infringed; but cannot bind itself as to what might happen in the future if the facts and economic circumstances change. The parties can then take that decision, and decide as a matter of assessing the

commercial risk, that they will continue with the agreement in its present form and on the basis of the facts as obtaining when the Director looked at the decision; but the Director is not making a decision under that section as to the future.

THE CHAIRMAN: Yes. You can deal with the future. Section 21, as Professor Stoneham points out, gives guidance as far as the future is concerned.

MS SMITH: That is a notification for guidance, yes.

THE CHAIRMAN: You mentioned OFT 400, which I had not looked at until this moment.

MS SMITH: Sir, with regard to section 21 I would draw your attention to the fact that when we are talking about a decision rather than guidance, the decision under section 22 again is a decision as to whether Chapter II prohibition has been infringed.

THE CHAIRMAN: Yes. It is interesting that paragraph 7.4 of OFT guideline 400, which we have in our Butterworth's Handbook, 9th edition – 7.4, 3007 – slips into using the present tense. It may be that it is outside the relevant prohibition or that it is prohibited or that it is examined. I do not think a great deal turns on that, but it shows that one can, in a communication of this sort at least, use the present rather than the past.

MS SMITH: Sir, that is as may be. We say that in the present case -----

THE CHAIRMAN: We have to go by the Act.

MS SMITH: Yes, but also the applicants are not asking you and your colleagues to interpret section 46 as being in the present tense; they are asking you to interpret as being in the future – whether the Chapter II prohibition will be infringed as of the date of the decision of 29 January.

THE CHAIRMAN: Does it not have a present as well as a future connotation?

MS SMITH: Sir, it may for a split second be both future and present, yes, but it is getting a little *Alice in Wonderland*. The whole point of the assurances was, "this is what we will do" and the OFT says, "good; you have

told us what you will do; we are happy to recognise that in the form of these assurances and to publicise it; and therefore we will close the investigation."

Perhaps I could take you to the documents which I say support what we are talking about. They all talk about the future. Tab 12, the annexes to the notice of appeal: "I am writing to let you know that we have now obtained informal assurances from Bacardi and Martini that it will not enter into agreements with on-trade retailers, which have the effect of excluding other makes of white rum, and these remove the competition problem that gave rise to the alleged breach." But it is quite clear, in my submission, that removing the competition problem relates to the future situation that they will not enter into these agreements. That is made clear, sir, at tab 14, the letter of 15 May, and the longer letter in response to the applicants' section 47 application.

My learned friend Mr Green took you to paragraph 7, and I invite you to look back at it because it makes the position, in my submission, clear. "At that point, however, it became apparent that Bacardi was willing to give the assurances in question. The Director took the view that only for the purposes of the future these removed the competition problem that had prompted the investigation." So they are making it clear that that is what the OFT's view of its decision was. We say that is what the decision was, on any objective view of the facts.

THE CHAIRMAN: It is not only for the future; it is at the time, is it not? It is as soon as – at the latest as soon as the assurances are entered into.

MS SMITH: Sir, the decision that is being challenged is the decision to close the file, which happened at the same time as the decision to accept the assurances, or the decision where the assurances were given and finalised. Everything happened at the same time; so, as I said, there may have been a split second when it was both present tense and future tense. What we are talking

about is a decision -----

THE CHAIRMAN: A situation that is looking to the future.

MS SMITH: That is looking into the future. Sir, we say that to interpret section 46(3)(b) so as to encompass this sort of decision as to whether the Chapter II prohibition will be infringed is to do violence to the language of the statute. We say that is illustrated by the attempt that is contained in paragraph 10 of the applicants' skeleton for today's hearing, where they attempt to shoehorn that decision into the language of section 46(3)(b). They say, "the OFT made a decision that, as to the future, there was no infringement". As a matter of grammar and as a matter of common sense, that makes no sense.

THE CHAIRMAN: It is "back to the future"!

MS SMITH: Sir, yes. The OFT makes in its skeleton two secondary arguments on this point, which really are related to and arise from the same point, that this is a future looking decision.

Our second point is that as the tribunal recognised in *Aquavitae*, for there to be a decision under section 46(3)(b) as to whether the Chapter II prohibition has been infringed, you must be able to identify the first person in respect of whose conduct the OFT has made a decision; and, secondly, the conduct to which the decision relates. In the present case, Bacardi agreed not to engage in certain conduct. We say that a decision by the OFT as to whether the Chapter II prohibition has been infringed requires identification of the conduct in question that has happened, and a decision whether or not by engaging in that conduct the undertaking has been in breach or was in breach of the Chapter II prohibition. It may that they were not because they were not an undertaking. It may be that they were not because it was not abusive; it may be that they were not because they were not in a dominant position. But you cannot apply to the future non-conduct that obtains in the present case.

A third and related point is that, in line with the submissions I made in opening to you and your colleagues,

sir, an appealable decision in a file closure case we say necessarily involves the OFT in reaching a final and definitive position on whether or not there was an infringement. Again, that may be reaching a final and definitive position on whether there was dominance, whether there was abuse, whether the person was an undertaking for the purposes of competition law.

We say that the OFT cannot reach such a final and determinative position on future non-conduct. It cannot undertake an investigation into the future. The factual and economic circumstances will necessarily change and cannot be predicted.

The decision by the OFT to accept Bacardi's assurances not to engage in certain conduct in the future is not equivalent to it having reached a final and definitive position on the conduct that is the subject of the decision.

THE CHAIRMAN: Does the non-conduct point take us back into the vexed question of the so-called "without prejudice" correspondence, which we have parked for the moment? One has the impression, reading that, that the OFT specified certain conduct that was, in the OFT's view, infringing, and Bacardi said effectively "we will give you assurances that will deal with that". Probably, we would find in correspondence details of the conduct one is -----

MS SMITH: Sir, you are correct: one can see from the assurances themselves, as published, that Bacardi do agree not to do certain things.

THE CHAIRMAN: That is solus optics, solus pouring, promotion support arrangements.

MS SMITH: Yes.

THE CHAIRMAN: That do not comply with the assurances. Solus optic, support arrangements and so on that do comply with assurances but do not infringe, according to the OFT.

MS SMITH: Sir, we say that when one looks at the assurances they effectively say is that Bacardi says "we will not do certain things; we will not enter into solus agreements and we will not enter into de-listing agreements".

What we say that cannot be equated with is a

decision by the OFT that certain conduct had been engaged in by Bacardi, and the OFT considered that conduct and decided whether or not it was an infringement of the Chapter I and Chapter II prohibitions. It is a statement by a party that is subject to an investigation, “we will not do certain things” which cannot be equated -----

THE CHAIRMAN: A statement for example – you can say, looking at the undertakings, that according to the Director, if you are asked to enter into a promotional support arrangement, that gives you exclusivity; and that is in response to a tendering request from a customer, and there is upon some objective basis a risk that if you did not offer those promotional support arrangements, you would not get the business, then in the Director’s view that conduct does not infringe the Chapter II provision.

MS SMITH: Sir, yes. I think it is really just the mirror image of what we were saying, which is that it was defining the parameters of what Bacardi was agreeing not to do. The assurances leave a whole area on which the OFT has expressed no view. In the future, Bacardi could engage in quite different conduct, and there is no implied assessment of that by the OFT in the assurances.

Sir, it all comes back to the point that we are not talking about whether or not there has been, we are talking about whether or not there will be.

THE CHAIRMAN: We are circling around the whole time -----

MS SMITH: The whole question. We say there must be a certain latitude to interpreting legislation, but we say that here, imposing the words “will be” on the words ”has been” are going beyond that latitude. Bear in mind also that we are not saying, by taking that interpretation – the Tribunal is not excluding the applicants from challenging the decision; they are simply saying, “we do not believe that we can interpret the legislation to the effect that the decision is to be challenged in this specialist tribunal.” But it does not stop the applicants making a challenge by way of judicial review.

Anything I say further will only be circling around the fundamental issues.

THE CHAIRMAN: You have set it out very fully and helpfully. That does cover the point.

MS SMITH: Sir, if I may move on to the issues of procedure, these submissions are of course made without prejudice to our submissions on admissibility, but necessarily we have to make them on the basis that once the Tribunal gets to consider these issues, it will have held that the distribution is an appealable decision; and although we disagree with that, we have to make these submissions on that basis.

We submit that the decision is to be judged by the procedural requirements obtaining at the time it was made on 29 January.

THE CHAIRMAN: I think that will be common ground.

MS SMITH: The modernisation proposals we say are not relevant, but we have ensured that they are in the agreed bundle.

Second, we say that the question the Tribunal should be considering is that identified at the hearing of 16 January; whether there were procedures that should have been followed in regard to the decision but were not, and therefore that affect the legality of the decision.

We say that in that regard, therefore, the approach of the Tribunal should be as follows. First of all, to determine whether or not there were any procedural requirements imposed on the OFT by the relevant legislation, but with which the OFT did not comply in reaching its decision, I understand from my learned friend's submission this morning that the applicants have pretty much stepped back from saying there are any requirements at all on the OFT.

THE CHAIRMAN: They have not run the section 31(2) point.

MS SMITH: They have not. We say that if there are no procedural requirements, and the procedure is a matter of discretion, we then move more into the realm of public law considerations and administrative law considerations of procedural fairness. The question for the Tribunal, in my submission, is whether or not the OFT exercised its

discretion reasonably and rationally. That, we say, is a question that can only be answered on the facts of this particular case.

Sir, the third point is that if the OFT failed to respect either procedural requirements or failed to exercise its discretion rationally, what was the effect of that failure? Did it undermine the safety of the decision to such an extent that it affected the legality of that decision? The test essentially, we say, is to ask whether a different procedure would have made any difference on the facts of this case.

The last of my preliminary points is that we do adopt Bacardi's submission that the Tribunal can only determine its appeal by reference to the grounds of appeal in the notice of appeal; and although it can issue guidance on procedure – and we will make submissions with that in mind – we make the point that the only procedural ground contained in the notice of appeal was the section 31(2) point and the failure of the OFT to consult the applicant before accepting Bacardi's assurances. We say that only that ground could be a basis for setting aside the decision.

THE CHAIRMAN: And not the rule 14 point.

MS SMITH: Sir, yes. I then turn anyway to make submissions on those two particular procedural issues.

THE CHAIRMAN: I suppose you could perhaps say that there might be a certain logic in that anyway because the rule 14 procedure does not really go anywhere in the event.

MS SMITH: Sir, that is correct. I will also take you to some documents that show the applicants had been shown the rule 14 notice in this case. They had a full opportunity to make submissions on issues that were central to that rule 14 notice.

Looking at the rule 14 notice, was there a procedural requirement on the OFT to disclose the rule 14 notice to the applicants? We accept that section 31 was engaged because at that stage the OFT was proposing to make an infringement decision; but we say the applicants were not required to be consulted under section 31(2).

We say that those to whom notice should be given under section 31(2) are correctly identified in rule 14 of the Director's rules. That contains a proper interpretation of section 31(2) for the reasons we have set out in paragraph 39 of my skeleton argument.

THE CHAIRMAN: It raises the question on what basis, if any, the Director discloses the rule 14 notice if he chooses to do so, as he apparently has done in at least one previous case.

MS SMITH: Yes, sir, and I will come to that, on what basis he exercises his discretion.

Sir, if I could refer you and your colleagues to paragraph 39, the OFT makes the submission there that rule 14 is the proper interpretation of the requirements of section 41, on the grounds therein set out. Paragraph 39A; it is a natural, reasonable reading of section 31 to identify the persons likely to be affected by the proposed decision as being those who will be the subject of it, and that that is in line with what we say is the purpose of section 31(2) as set out at (b).

In (c) we say that one cannot read the phrase "likely to be affected" in the broadest sense so as to encompass all those who might be interested in the decision, because that would be administratively unworkable.

We say in (d) that there is nothing to suggest that section 31 should be read so as to require disclosure to some interim group of people, between that small group identified in group 14, and all those who might be interested in the proposed decision, because there are real practical difficulties in defining such a group. We set those out in (d).

However, we do say that there is a possible administratively workable option, that if the Tribunal takes the view that section 31(2) should be interpreted wider than rule 14, there is a two-fold test for disclosure of the rule 14 notice. The first is the complainant or third party writes to the OFT and demonstrates that it has a substantial interest in the

proposed decision. We take “substantial interest” from the comments in paragraph 9.4 of the Tribunal’s guide to appeals, as being a more workable test than “sufficient interest”.

THE CHAIRMAN: You use the word “substantial” there.

MS SMITH: Sir, yes. The second part of that test: the OFT considers whether or not the interests of protecting competition would be adequately protected without the need to involve the complainant or the third party. That second aspect of the test arises from submissions which I would like to make, slightly higher level submissions, on what are the purposes of the investigation under the 1998 Act, which ties in to the question of reasonable exercise of discretion by the OFT conducting its procedure.

Sir, turning to the discretion, it is the fact that the OFT has disclosed a rule 14 notice in two occasions: the BSkyB investigation and the Freeserve litigation. Leaving the Freeserve litigation to one side, because in my submission that is a different situation, a case where an appeal was pending and it was as part of the litigation procedure – but in BSkyB, the OFT’s position is that it will consider disclosing a rule 14 notice, or more generally consulting complainants and third parties when it would facilitate the exercise of its functions under the Act.

The structure of the Act, in our submission, envisages an independent investigation by the OFT. That investigation may come about as a result of a complaint, or as a result of a whistle-blower from within the parties concerned, drawing conduct or agreements to the OFT’s attention. It may come about in any number of ways. Once the decision to investigate is made, the Act envisages an independent process, and an independent investigation by the OFT.

In a nutshell, in our submission, the OFT investigates conduct; it is not the arbitrator of complaints. It is concerned with competition, not with the position of competitors.

THE CHAIRMAN: But depending on the circumstances, those two

positions may not be antithetical. It could cover the same ground, could it not?

MS SMITH: Yes, and the OFT will consider, when it thinks that it is necessary, or that it would facilitate the exercise of its functions under the Act, consult with third parties. I am not up to speed on the details of the BSkyB investigation; my understanding is that the market there was so very complex that it was thought necessary to involve complainants at the rule 14 notice stage.

Sir, we also say that it is relevant to the exercise of the OFT's discretion that a distinction be drawn between the position of the applicants and the position of a party such as Bacardi that is the proposed subject of a decision at the rule 14 stage. The concerns that apply with regard to disclosure to Bacardi, the rights of defence and Article 6 rights that might obtain to the subject of the decision, who is potentially subject to fines, do not, we submit, apply with regard to the applicants.

In paragraph 16 of the applicants' skeleton argument, the applicants set out reasons why they say a third-party complainant should see a non-confidential version of the rule 14 notice. "It provides the opportunity for a complainant first of all (a) to make submissions counterbalancing the submissions of the party under investigation."

We say that that misunderstands and mischaracterises what the concerns of the Act should be. The investigative procedure under the Act is not litigation between two parties, with the OFT as an arbitrator or judge. As I have already said, the whole legislative structure is about an independent investigation into conduct.

In paragraph 16(b) and (c) the applicants say that it provides the opportunity for correcting factual inaccuracies and for supplementing the evidence before the OFT. As a matter of principle, by the rule 14 stage the OFT should not be issuing a rule 14 notice unless it

has collected facts and evidence required, and it is not the role of the complainant to ensure that the proposed decision is correct.

Perhaps more importantly, what was the position in this case? We say that the applicants were fully aware of the issues in the investigation and made full submissions to the OFT on it; and it was always open to them to make more if they felt they had not given the OFT all relevant information.

Sir, if I could remind you and your colleagues of some of the correspondence at annex 8 to the applicants' notice of application, I ask you to look at this at your leisure. It makes clear, in our submission, that the applicants were closely involved in the development of the investigation. I will take you in that regard to one document – and I am grateful to Mr Flynn for identifying this in his written submissions – it is page 65 of annex 8. This is just one e-mail by way of example. It is 19 October 2001, so before the issue of the rule 14 notice. It is from the relevant officer at the OFT to the applicants' solicitors who were dealing with the OFT during the course of the investigation. It encloses a copy of the questions we have asked the pub retailers and a selection of wholesalers. These are aimed at teasing out whether it is right to define the relevant market as either the supply of white rum at the wholesale level to the on-trade or the wholesale and retail supply of white rum to the on-trade. That is the first crucial issue: is the market on or off-trade or both? We need to test whether off-trade is in a separate market, and it gives examples.

Then on the big question of whether or not white rum is in the same market as other white spirits, especially vodka, we are examining the extent to which they are substitutable.

It says: "I would be grateful for any further views that Pernod-Ricard might have on the question of market definition.

THE CHAIRMAN: I was wondering whether this does not cut both

ways, because in a case where a complainant has been closely associated throughout the procedure with the OFT's investigation, is it not somewhat unsatisfactory that they should not, as it were, be associated with the final stage, the rule 14 notice and the reply to the ----

MS SMITH: Sir, we say that they have been involved and been invited to make full submissions on the two fundamental questions that then informed the rule 14 notice.

THE CHAIRMAN: Just looking at this case, on their case – and I know it is not accepted – their case is that this is a situation of dominance of Bacardi in relation to white rum. They are, according to them, the only credible entrant into that market, and they are trying to get into it. Is that not a particular fact situation where you could say they were not only closely associated with the investigation, but their interests are very closely affected by the outcome, if not directly affected?

MS SMITH: Sir, we would say that that goes back to the high-level submission that this is not an inter-partes investigation.

THE CHAIRMAN: No, that I accept; but accepting for argument's sake that the OFT is not just an arbitrator or somebody engaged in a rather elaborate form of alternative dispute resolution; it is performing a public duty. The conceptual issue in the case is whether that means that the OFT just runs it as it wishes, or whether the complainants, either generally or depending on their particular circumstances, have some kind of *locus* procedurally speaking.

MS SMITH: I would say, sir, that one has to look at the question of procedural fairness as a matter of substance rather than procedure.

THE CHAIRMAN: Yes.

MS SMITH: The OFT undertook an investigation where there were issues of dominance, but there were also very difficult issues of market definition. It obtained information from a number of relevant sources, including the applicants, and it gave the applicants plenty of opportunity to make submissions on specifically those

points before it took all that information and assessed it, and came to the proposed decision that was set out in the rule 14 notice. If the applicants can suggest that the OFT took no notice of what they were saying, or as a matter of substance had not obtained all the relevant information for their investigation, then they may get somewhere on a point of procedural unfairness. What we say is that the procedure up to the issue of the rule 14 notice was fair as a matter of substance. Once the rule 14 notice is issued, it is given to the applicants because of the rights of defence and the Article 6 rights that Bacardi, as the subject of the proposed decision, has.

The applicants are not in the same position. One should compare a prosecution decision -----

THE CHAIRMAN: One can accept, for argument's sake, that the applicants are not in the same position. I do not think anyone is disputing the general proposition that it is the OFT that is left defining the position. The only question is whether the applicants have a *locus* to express their point of view.

MS SMITH: Sir, we say that there is clearly nothing in the legislation that gives them a right to see the rule 14 notice.

THE CHAIRMAN: So you say it is just a matter of discretion.

MS SMITH: It is a matter of discretion. In exercising the discretion, the OFT takes into account first of all the purpose of its investigations and the nature of those investigations; and second it takes into account the different position between Bacardi, on the one hand, and the applicants on the other. We say that over and above that, on the facts of this particular case, the applicants did in fact play a role in the investigation, and were given the opportunity to submit all relevant information to the OFT. Not only that, but they were also told what the issues exercising the OFT were so that it could focus its submissions on those issues.

THE CHAIRMAN: That was when?

MS SMITH: That was October 2001.

THE CHAIRMAN: Before that – I do not want to take you any further than you wish to go, Ms Smith, but we cannot help being aware of the fact that we are only three months away from 1 May, and although we must deal with this case on the basis of the law as it existed at the time, one wonders, I suppose, whether the EC regime that comes into force on 1 May would contain any different nuance to the one you have been submitting to us, in so far as the OFT was conducting an investigation under 81 and 82 as on that date - or would you say the position does not change?

MS SMITH: Sir, my understanding is that rules are in the process of being drafted to ensure that the UK's procedure is in line with the requirements of modernisation, and that is still -----

THE CHAIRMAN: Is there a view from the OFT's side as to whether to be in line with that legislation one would have to follow the procedures presently envisaged for a complainant under existing EC provisions?

MS SMITH: Sir, I think I would have to take instructions on that particular question. You have seen, and there are contained in the authorities bundle, the Government's proposals for modernisation, which include a proposal to put in place binding commitments. As regards the specific procedure under European law, my instructions are that the OFT's view is that modernisation does not require it to follow the same detailed procedure as the European complaints procedure.

THE CHAIRMAN: The present position is that if, after 1 May, a complainant goes to the European Commission and the European Commission takes the case, then the European rules, which used to be Article 6, Regulation 99 – but maybe the Article has changed – you then have the right to a statement of objections, and the complainant has to go to the court of first instance. But the OFT's position is that that does not apply if a complainant comes to the OFT; there is no equivalent domestic procedure.

MS SMITH: Sir, yes. The OFT will be able to investigate

substantive issues arising out of Articles 81 and 82, but as regards the details of the procedure, the details of the European complaints procedure are different from general principles of European law that are imported into UK law. Sir, my submissions on the OFT's position on section 60 that are set out in my skeleton argument are essentially to that effect.

Section 60 requires compliance with high-level procedures of European law.

THE CHAIRMAN: That is not under the Competition Act.

MS SMITH: Sir, yes.

THE CHAIRMAN: We are talking about Community law, not domestic law here.

MS SMITH: Sir, we are still in the realms of speculation, because the OFT is obviously still considering this internally. However, as far as I can be of assistance to the Tribunal at this stage -----

THE CHAIRMAN: That is the current state of thinking.

MS SMITH: Yes. It is as I have set out. Sir, I would stress that it is still very much speculation. The Government has given some guidance in the recently-issued response to consultation on its substantive position on matters. That is probably as far as I can take it.

THE CHAIRMAN: We are not ruling on what the future position might be – even more a future situation. However, because of the timing of this particular case, it seems somewhat artificial not to explore the parameters in which this judgment has to be given.

MS SMITH: Sir, yes. My instructions are that the European Commission's position on these issues has been that although substantive law will obviously apply in the Member States, they may apply national procedures in carrying out their obligations.

THE CHAIRMAN: One question might be whether in applying those national procedures, whatever they happen to be, the national authorities needed to have a procedure that was roughly speaking in line with cases like the decision of the Court of Justice in *Ufex* (referred to in footnote 3 of the applicant's decision) which effectively

gives the complainant the right to have a decision against which an action can be brought, which in domestic terms would be an appeal.

MS SMITH: Sir, with regard to the *Ufex* case, in so far as it is cited in support of arguments challenging the current position, we would say that first of all the customer does not have a right of appeal on the merits at the European level; it simply has a right to judicial review of the decision not to proceed with their complaint, which is what we are talking about today. Secondly, the rules in force at the present time in the UK are quite different, and we say deliberately so, from those at the European level. European rules set out a formal role for the complainant. It does not appear in the UK domestic rules. We say that that has to have been deliberate, particularly when one looks at the *Hansard* debates on the Act.

I can keep my submissions on the assurances short. It is now accepted by the applicants that there was no requirement on the OFT to disclose the draft assurances. Section 31(1) only applies to infringement decisions and therefore did not apply in this case.

As regards a discretion to disclose, you have already heard my submissions generally on the OFT's exercise of its discretion to disclose to third parties. The applicants had already made their views and particular concerns known in their complaint to the OFT, and in their subsequent involvement in the investigation.

We say that in light of the submission as to the nature of the investigations carried out by the OFT under the Act, it was up to the OFT to determine whether the assurances were adequate to protect competition.

I would stress that at the moment we are dealing with a challenge to the procedure that was carried out with regard to the assurances, not to the substance of those assurances. That is not whether the assurances were actually, as a matter of substance adequate – in fact they were riddled with ambiguities and holes, as Mr Green would submit – but whether the procedure was

reasonable and fair.

We say the assurances were published on 30 January, and at any time the applicants could make submissions to the OFT to the effect that the assurances were not adequate, and the OFT would consider those. Of course, the assurances are only informal; they are not binding commitments. It was made clear in the OFT's skeleton that the OFT can re-open its investigation into Bacardi at any time.

The OFT was of the view that the assurances were adequate, and that therefore there was no reason not to accept them from Bacardi and have them in place as soon as possible, pending any submission by the applicants or other parties that they were inadequate. Moreover pending any appeal, one cannot, when looking at procedural fairness, ignore the fact that there is a possibility of appeal, assuming of course this is an appeal for decision now; but there is a possibility of an appeal to the Tribunal on that decision, where criticisms can be made, and we have heard will be made by the applicants as to the adequacy of assurances.

We say, sir, when looking at the position as a whole, the discretion exercised by the OFT in this case not to disclose was not irrational or procedurally unfair.

The OFT's position on the relevance of the EC procedure I have touched upon already.

THE CHAIRMAN: Is this future procedure or existing procedure?

MS SMITH: Existing procedure.

THE CHAIRMAN: I think you have covered that.

MS SMITH: Yes, and it is in the written submissions, and our position on section 60, the interpretation of -----

THE CHAIRMAN: That is on substance, not procedure.

MS SMITH: Or that it is on substance and on high-level principles of European law, such as legitimate expectations and equality.

My submissions on discretion hold good as well in answer to the question whether the procedural decisions

made by the OFT in the present case were in line with any general principles of administrative fairness that may be imported into UK law through section 60.

Sir, that just leaves the third and last question.

THE CHAIRMAN: There does not seem to be much dispute about that.

MS SMITH: It is there in my skeleton. It is pretty much accepted by all the parties that that is the situation.

THE CHAIRMAN: Can I leave you with two questions, one of which is a question of fact that Professor Stoneham is asking. Were Pernod consulted again on market definition and substitutability after October 2001 especially in the light of LECG's econometrics and/or Charles Rivers Associates and Professor Yarrow's points?

The second question is a question from me. If section 60 does include high-level principles such as legitimate expectation, would one say from looking at Community law that a complainant in the position of this complainant would have a legitimate expectation to be consulted before the OFT closed its file? I hope that that question does not unduly spoil your lunch!

(Luncheon Adjournment)

MS SMITH: Sir, on the two questions you asked before the adjournment, the first was the question of fact about the consultation of Pernod after October 2001. The lines between the OFT and the applicants were open at all times during the course of the investigation, and the applicants were aware of the progress of the investigation in the context of phone calls between the OFT and the applicants. In that regard, can I take you to annex 8, to the appeal notice, page 101. That is the e-mail dated 15 November 2002 from Christopher Swift, the solicitor at DLA, to Martin Rees. This is an internal DLA or Pernod-Ricard e-mail, reporting on a discussion with Justin Woodward, the OFT case officer. "I spoke to Justin Woodward. Bacardi has responded to the rule 14 notice. The response raises interesting points. The OFT is looking carefully at and has not just dismissed it.

There are certain questions marks in the response that cast some doubt on the adequacy of the OFT reasoning. The issues raised concern product market definition but also other aspects of the case. He did not expand on these. The OFT has requested further information from Bacardi." That is the section 26 notice. "After that, they should have a better idea of what it needs and will seek more information from Pernod-Ricard." That is in line with what is set out in the defence; that at that stage the OFT's intention was to issue the section 26 notice to Bacardi, and then, if necessary, to seek further information from other participants in the market. He could not say when. "The case is certainly not closed, nor has the Bacardi response been dismissed as raising no defence. A quick decision is highly unlikely. I emphasise that we were ready to assist at any stage."

If you then turn to page 108, you will see a letter from DLA from Christopher Swift of 23 January 2003 to Mr Justin Woodward, containing further submissions on market definition. You see in the second paragraph of that letter: "The issue in the present case is of course whether white rum alternatively to be called 'white rum' is in the same product market as any other spirit, in particular vodka."

They go on to make various submissions on that point and to put in further information to the OFT.

THE CHAIRMAN: This is when the negotiations are virtually concluded, is it not?

MS SMITH: Yes, six days before the decision was made.

THE CHAIRMAN: The decision in principle to settle the case has already been taken by now, has it not?

MS SMITH: Sir, yes. It is simply an example of the point that I made; that the lines of communication were definitely open at all times. As you see from the e-mail in November, Pernod-Ricard were aware of the issues and of the opportunity to bring further relevant information to the OFT's attention.

MR GREEN: I wonder whether you could read the e-mail on

page 111 as well, please.
THE CHAIRMAN: They had been discussing the case with Bacardi.
MS SMITH: The next e-mail is 13 January, with the assurances.
THE CHAIRMAN: I am just relating the e-mail of 24 January to what we now know about the chronology of the discussions. At this stage in fact the settlement is by now agreed in principle and there are last-minute drafting points perhaps outstanding, but most things are done and dusted.
MS SMITH: Yes.
THE CHAIRMAN: Would it be fair to say, they are not really letting Pernod-Ricard in either on the fact that the discussions are going on with Bacardi, or on the nature of any discussions that might be taking place?
MS SMITH: Sir, no. As my submissions made clear this morning, the OFT did not choose to consult with the applicants for the reasons that I expanded upon.

Sir, the second question concerns legitimate expectation. As I understand it, you asked me whether the applicants would have had a legitimate expectation to be consulted before the closure of the file because of European law. The right of complainants to be consulted is contained in Article 6 of Regulation 2842 1998. We say that there is no legitimate expectation. The applicants cannot establish a legitimate expectation that the OFT would have followed Article 6. The European rules are clearly quite different from the domestic rules, and that is made clear in the relevant Acts, in the comments made in Parliament on the Bill, and in the Director's rules. The structure and detail of the rules are quite different. There cannot have been any legitimate expectation on the part of the applicants that the OFT would follow Article 6. Secondly, there is no course of conduct, nor has any been suggested on the part of the OFT that it would consult as general practice before accepting assurances.
THE CHAIRMAN: No raising of expectations.
MS SMITH: No, no raising of expectations, nor with regard

to practice.

MR FLYNN: Sir, Professor Stoneham, Mr Summers, I have just a few points to add to what the OFT has said in relation to admissibility and the procedural questions.

As to admissibility, as Ms Smith has said, the OFT made a single visit to close the file and accept assurances and not to proceed with its investigation. The applicant had been framing the basis of its appeal for that decision on a before-and-after basis, and it is now rather eliding that and not really pursuing the formal basis. I think it is right, if I may say so, not to pursue the "before" basis because it is very clear, in our submission that the OFT had not reached a final view as to whether or not there had been an infringement before. But it is relevant, if you will bear with me, just to recall one or two steps of that argument, looking at it in the context of the "after" argument.

The OFT was in a genuine state of uncertainty as at 29 January, as to whether or not there had been an infringement. That had arisen particularly since Bacardi's response to the rule 14 notice and the oral hearing and focused on market definition issues, not just the segmentation -----

THE CHAIRMAN: There had been an oral hearing as well by then.

MR FLYNN: Yes. I think the OFT called it "oral representations" but under the procedure the party under investigation can -----

THE CHAIRMAN: I am sure it is in the file.

MR FLYNN: Yes. It responded in writing to the rule 14 notice and elaborated on that response in what the OFT calls "oral representations" – for all intents and purposes, an oral hearing, as we heard today, without the complainant or other third parties present. They all went in the same direction, and the doubts that in particular came to the OFT's mind concerned market definition, both in relation to whether it was right to draw a distinction at the wholesale level between supply to the on and the off trade, and then what one of the

e-mails described as the “big” question, whether white rum competes with vodka or in a wider set of spirit drinks.

That, we would say, was a big problem, but despite that problem the OFT’s position can fairly be described as “bloodied but unbowed”. It recognised that it had taken a knock, but it returned to the charge with the section 26 notice of 10 December, with 14 extremely wide, demanding questions going to both aspects of those difficulties, the on/off trade issue and the white rum/vodka/other spirits issue. Furthermore, it is on the record that it was the OFT’s intention to secure that information not only from Bacardi but from others in the trade, equivalent or complementary information from others in the trade. That is said in the OFT’s draft defence at paragraph 41. It is said in Dr Mason’s letter to Simmons & Simons of 22 October 2002, which is in the correspondence bundle, that the OFT intended to widen the investigation.

There can be no doubt that if that had happened, Pernod would have been one of the parties whose views would have been sought, and that would be by way of a formal section 26 notice as had been addressed to other persons in the trade, or by way of invitation to comment, as seen in that, if I may say so, extremely fat annex 8 containing a great deal of correspondence between the OFT and Pernod. One does not know, but there is no reason to think that they would not have been closely associated with that effort.

As we have said in our written submissions, if Pernod had brought an appeal to this Tribunal at the stage of the 26 notice, there would not have been any doubt that it would have been an inadmissible appeal. Our submission is that the OFT’s position simply did not change materially between 10 December and 29 January. You have had the correspondence read to you this morning. The section 26 notice was suspended, as were Bacardi’s steps to judicially review the issue of that notice; and it did not need to be reactivated because in the end

settlement, on the basis of Bacardi moving forward assurances, was agreed.

But the OFT's understanding of the substance of the case simply did not advance. It was not an issue for discussion, as we suggest you can see from the description you have of those discussions, the headings of the discussions and the description that we provided. The press release issued at the time that the assurances were publicised, shows that Bacardi maintained its position. It did not have a dominant position and had not infringed the Chapter II prohibition. That was the basis on which the assurances were accepted.

As at 29 January, the position was no different from 10 December. If you put the questions to the OFT which the tribunal has identified as the relevant questions in the claim or express judgment, the answer would have been, "we do not know whether Bacardi has infringed, but we have identified some steps which may help us answer the question." We say they are serious steps as well.

Going forward from 29 January, in my submission the OFT's position is fairly summarised in the 15 May letter, the response to Pernod's first – what it considered to be a section 57 letter. The OFT is saying that so long as Bacardi does not engage in conduct of the type which it renounces through giving the assurances, the OFT will not have a reasonable suspicion of infringement. That is what it says in terms.

Our submission is that on the basis of that, Pernod can put the case no more highly than to say that the OFT had bound itself – although I suggest that is going too far – to find that there would be no infringement if, on examination, it turned out that Bacardi had in fact complied with the assurances. In our submission, that sort of decision, which would be an appealable decision because it would record that there was no infringement, could only arise on an actual examination of conduct.

We suggest that the OFT entirely reasonably trusted that Bacardi would comply with those assurances. It had Bacardi's word and it had the words of its solicitors,

despite the slightly disobliging remarks today. They were meant to be entirely complimentary, so I take back the word “disobliging”.

The OFT had every reason to believe that Bacardi would comply with those assurances, but as a matter of fact it had not examined the conduct. It simply did not know on 29 January whether or not Bacardi had complied with the assurances, and it was in no position to take a non-infringement at that time.

THE CHAIRMAN: It accepted the assurances on the assumption that Bacardi would comply with them, and on Mr Green’s argument they were already complying with them.

MR FLYNN: I was going to mention Mr Green’s argument. I simply do not know where he gets from the facts any basis for suggesting that the OFT knew that Bacardi were complying.

THE CHAIRMAN: He makes reference to a change of behaviour, but quite where we situate that in time I am not sure.

MR FLYNN: It is a promised change of behaviour. The only actual change of behaviour is the offering of the assurances. Bacardi promises, Bacardi offers by giving the assurances, to behave in a certain way. Specifically, as Ms Smith says, it is actually framed in the negative not to enter into certain types of agreements.

THE CHAIRMAN: Just as a matter of information, what is the effect on the assurances of existing arrangements that have already been entered into?

MR FLYNN: Bacardi’s position was that at the date it did not have agreements in place which violated the assurances. One of the objections that has been raised is of substance, and Mr Green has gone into that in some detail, but one of them is that there is nothing in the assurances that says “terminate existing behaviour”. From Bacardi’s point of view there was no need to give that because it did not have such agreements in place at the date of giving the assurances.

THE CHAIRMAN: I am a bit lost on the facts, but are you saying Bacardi had no solus pouring or solus optic or

promotional support arrangements at that date, or that they were to be treated as if the undertaking would be observed, or what? I somewhat got the impression, and maybe I am wrong, that there were a number of allegations about various practices. The existence of the practices as such was not denied, but there were arguments about the market and the vodka and so forth.

MR FLYNN: It is fair to say, sir, that because of the way the procedure has developed in this case, you have not got the rule 14 notice and you have not got Bacardi's detailed six-volume response to the rule 14 notice and so on. But if you look at paragraph 21 on our draft intervention statement, we were at pains to point out that any behaviour in the market was entirely negligible. It says in the second sentence: "In terms of numbers of outlets covered, the value of white rum sales covered by solus and de-listing agreements … and other competitors". Then we explain what we think is the value in terms of sales of white rum for such outlets could possibly be.

It is a fact from Bacardi's perspective, and whether or not it is accepted by the OFT we do not know; but our submission was that we did not have solus or de-listing agreements in place, not just at the time of the assurances but at the time of the rule 14 notice.

THE CHAIRMAN: What are we to infer from that, that between the time of the opening of the investigation and the time of the rule 14 notice, any agreements that there may have been had been abandoned.

MR FLYNN: Had been abandoned or had expired, yes. We put in the details in the rule 14 notice, and it showed a declining picture. As I said, at no point did it cover more than whatever it is – 2,400 outlets anyway, out of a total, on Bacardi's conservative basis, of 136,000.

THE CHAIRMAN: I do not want to get further discovery at this stage, but would it be fair to say that in relation to the conduct that is covered by the undertaking, Bacardi's case is that that conduct had already ceased by the time the assurances were given?

MR FLYNN: I am going to double-check. It is certainly the

case on solus and de-listing. (Pause) Sir, there is no-one from the clients here, but to the best of my and Simmons & Simmons's ability, the answer is that Bacardi had no such agreements in place at the time on 29 January.

THE CHAIRMAN: You can write to us later, but we have got in the undertaking the headings "de-listing, solus, solus pouring and solus optic". That is basically what we have.

MR FLYNN: That is right. I am grateful to Ms Smith – the position is stated more categorically in paragraph 92 of our draft intervention statement. I will read that to you. This is in response to the argument that there is no obligation to terminate existing agreements and assurances. The assurances do not ----

THE CHAIRMAN: That is your case, I see.

MR FLYNN: I have to say that whether any of that or those numbers are accepted by the OFT we simply do not know, because we never came to the point of the rule 14 -----

THE CHAIRMAN: That is your case.

MR FLYNN: That is Bacardi's case in the rule 14 notice – larger numbers were quoted against us of solus and de-listing agreements which the OFT assumes to be in place. Our case is that they were not in place at the time of giving assurances. I do not think one can infer from that that the OFT - I would not hold them to it – accepts that that is the case.

THE CHAIRMAN: I suppose, Mr Flynn, the percentages as regards retail outlets given in paragraph 21 of your intervention do not tell us anything about what that would be in terms of volume of sales of rum.

MR FLYNN: They do not tell you what volumes they are. Obviously, there is a limit to how much anyone can buy and sell in rums. I do not think I have the information to tell you what the volumes are. I simply say that that was the highest in the period that was covered by the investigation and it declined to March so there were zero in March 2002, the rule 14 notice being issued in June 2002. All the detail of that is obviously in our

response to the rule 14 notice.

Sir, all that said, it is still our position that the OFT does not know, or has not investigated or satisfied itself, as to whether going forward from 29 January Bacardi has complied with its assurances. As I said, it is reasonable for them to assume so, but as a matter of fact they have not investigated.

THE CHAIRMAN: Is there any reason why they should have done?

MR FLYNN: It is a large part of my case that there is absolutely no reason why they should have done, and I shall come on to that.

To deal with Mr Green's point, as you have already signalled it, there is no basis on the facts of the case suggesting that the OFT has, first, examined some actual conduct, and then accepted assurances. It all happened at one go. The basis of the settlement was that the investigation would be laid aside on Bacardi offering the assurances – not a step-wise process, but simply something that happened: on Bacardi offering assurances, the investigation was laid aside.

Whether in those circumstances one is in the presence of an appealable decision within the section, the tribunal has said that this is largely an issue of statutory construction of section 46. In our submission, in line with that, the OFT - the past tense is highly significant. It suggests that we are only in the presence of an appealable decision if the OFT has examined actual conduct which has taken place of the specified undertakings. It is not referring to a prospective indication of what its view will be likely to be, assuming compliance.

THE CHAIRMAN: So it would not cover a clearance decision of some kind of an agreement that had not yet been put into effect.

MR FLYNN: Sir, particularly on conduct, the Act is clear, the point on sections 21 and 22 that was raised this morning. Section 21 clearly says you can get guidance as to whether conduct is likely to infringe, but you can only get a decision as to whether the prohibition has

been infringed. That is the difference between section 21 and section 22.

In relation to negative clearance of agreements, the position may be different, but in relation to conduct – and we are concerned with the Chapter II prohibition here – the statutory position in my submission is clear.

THE CHAIRMAN: The words "has been infringed" cannot mean something different according to whether you are talking about Chapter I or Chapter II.

MR FLYNN: Sir, in principle I would say not. The statute is very clear; that you can only get a decision in relation to Chapter II. My submission would be naturally that that would feed back into Chapter I, but that is not the point we were on. It certainly was not suggested when Mr Green and I were arguing the *IIB* case that we could not bring an appeal against a negative clearance at that stage. The issue was not actually raised for consideration.

THE CHAIRMAN: In the first *IIB* case, they had not put it in, had they?

MR FLYNN: The agreement?

THE CHAIRMAN: The agreement – or had they?

MR FLYNN: I would only be going by memory.

THE CHAIRMAN: They were just about to, but it will be in the judgment.

MR FLYNN: I think it had come into effect in relation to insurers, but had not quite -----

THE CHAIRMAN: Because there was some question of interim relief at some point.

MR FLYNN: I think it was a proposed amendment. Mr Robertson acted in that case, and I will trust him. He said rule … had not come into effect. Mr Green is making disobliging remarks about Mr Robertson!

In relation to conduct, we say not only is that the effect of the statute, but that the tribunal has also come to a very similar conclusion, in fact an identical conclusion, in the *Aquavitae* case, where again the tribunal specifically says in respect of one aspect "we are not even sure that the Director knew what

Northumbrian Water had done, so you cannot take it as a decision in respect of their conduct". We say that is exactly the same here. We know the person we are talking about but the OFT does not know what its actual conduct is. On the face of the record, its position is entirely conditional: so long as Bacardi complies; if Bacardi complies; provided Bacardi complies, as Mr Green himself said this morning, everything that has been read to you suggests that it is a forward-looking, conditional hypothetical statement of the position.

To answer a question you put to me a while ago – has the OFT any reason? The answer is, in our submission, that it has not because no-one has given it sufficient reason to re-open its investigation. The OFT plainly left it open to third parties to inform it. If Bacardi is not complying with their assurances, or if any other aspect of Bacardi's conduct gives cause for concern, they can raise it with the OFT; but no-one has done so. As the OFT says in paragraph 141 of the defence, it had no reason to go looking into Bacardi's conduct. We do ask the Tribunal to bear very firmly in mind that Pernod is not suggesting to the Tribunal that there is anything wrong with Bacardi's conduct, nor does it suggest that Bacardi at the moment is committing any infringement of the Chapter II prohibition; all we have from Pernod is some theoretical objections to the scope and meaning of assurances, which we say are completely unfounded. I will not go into the substance today because I do not think that is what the Tribunal wants.

THE CHAIRMAN: No.

MR FLYNN: We addressed in our outline intervention statement the arguments that were raised in the application. Mr Green came up with some new points today, but I do not propose to respond to them at the moment.

The position today is that even today the OFT simply does not know what Bacardi's conduct has been, or indeed whether it has changed. The OFT does not know, and certainly did not know at the time that it accepted the

assurances; and that makes the decision completely different from the formal non-infringement decision. As Ms Smith has said, neither side are bound. The OFT is free to re-open its inquiry. Bacardi can give notice that it does not intend to comply with the assurances. If anybody raises valid objections, the OFT will reconsider.

It may be going through the Tribunal's mind that that is precisely what Pernod did do. Perhaps I could point you briefly to tab 13 of the application notice, which contains the Pernod section 47 application. At page 7 of paragraph 23 you have the points that were put to the OFT in that letter in relation to the assurances themselves. That is nothing like as elaborate as the application which the Tribunal has. It does not contain any of the points that Mr Green made this morning. It contains effectively a couple of points about the assurances themselves, and the rest are quibbles about entering into assurances in the first place. They are bullet-point suggestions which, in our submission, the OFT could easily reject; and it is not a detailed reasoned argument to the OFT as to why it has got the assurances wrong.

THE CHAIRMAN: It is paragraph 23.

MR FLYNN: It says: "An exhaustive analysis of the deficiencies is beyond the immediate scope of the present application." Perhaps if they had made an exhaustive analysis, that is something that the OFT would have responded to, and no doubt it would. But on the short point you raise, the OFT had a ready answer, particularly if you look at the seven points, of which only three have been described as directed to protect the assurances, and the rest are more general points – that Bacardi is entitled to withdraw the assurance unilaterally. "They do not require Bacardi to terminate existing … ensuring compliance."

Sir, that was all in the context of saying this is not a formal non-infringement; it is a statement by the OFT that it has accepted assurances which are publicised

and which anyone is free to comment on should they wish. It is certainly not saying, “no, we have now decided that Bacardi’s behaviour is non-infringing and we will not be listening to complainants in respect of anything they want to bring to the OFT about Bacardi’s behaviour. It is simply not that sort of decision.

I should also say that there is no suggestion on the face of the record that the OFT through accepting the assurances sought to approve or validate anything that Bacardi had done previously. That includes the point you raised early on in the hearing on “must stock” and “preferred status” agreements. In our submission, you cannot infer from the accepting of assurances that the OFT found for the past that such agreements were non-infringing. Had there been no assurances, and the investigation proceeded, there is no basis for saying the OFT would not have found that type of agreement to be infringing if it had also found exclusive deals, completely exclusive deals, to be infringing.

Those also, in so far as the OFT has reached a position on it, is the provisional future position.

The focus of the tribunal’s enquiry should be on the facts of what has happened and not on speculation as to what conclusion the OFT has reached, when it is not there to be found. The OFT simply says that provided Bacardi’s behaviour is in line with the assurances, they think that removes the competition question. Asked the question: has Bacardi infringed; has Bacardi complied with the assurances, what is the answer? They cannot say because they simply do not know the facts.

I was not going to make detailed legal submissions or make a comparison with the EC system. I would like to make some more practical points about this case. You have the points on section 60 in our written submissions, and the comparison between EC law and the high-level principles, among which – if I may differ from Ms Smith, I would include legitimate expectations. I think one is looking more at fundamental rights of defence points, rather than points of principle of administrative law.

Given that in these circumstances it is accepted the OFT has discretion in relation to a party that does not have defence rights, it must be wider than it is. We are operating in the field of discretion and what can it do. In our submission, its discretion should be wider when it is not affecting fundamental rights of defence.

Two aspects have been raised: should they have seen the rule 14 notice, should they have been consulted on assurances? If the suggestion was made that Bacardi threatened the OFT in any way in relation to disclosure of the rule 14 notice, that has absolutely no basis in anything Mr Green has read. It simply came from his fertile mind. I can also say that it did not happen. There is simply no basis for that. You have heard the OFT give its reasons for not showing the rule 14 notice, and that is the position.

I would second everything Ms Smith has said about the extensive and open manner which the OFT displayed towards Pernod. She has pointed you towards the question, which could hardly have been more open, "help us with our inquiry in every way in relation to market definition". You have subsequently said that in January that was all a bit late. Sir, that is no doubt the case, but if it was late, that was Pernod's own fault.

THE CHAIRMAN: Hang on, Mr Flynn. Our understanding of the argument so far is that the OFT is not revealing to Pernod any of the arguments that Bacardi is putting up and is quietly negotiating a settlement of the case while Pernod is still saying "is there anything more we can do to help you; can we send you more things?"

MR FLYNN: Yes, indeed. Ms Smith read to you the e-mail on page 65, which was in October 2001 – "please help us with our inquiry".

THE CHAIRMAN: Things have moved on in 2002.

MR FLYNN: If you turn to page 73, in April 2002, in other words when the OFT is trying to put its rule 14 to bed, six months after the e-mail of October 2001, there is an e-mail from DLA -----

THE CHAIRMAN: They are going to issue a rule 14 notice.

MR FLYNN: We do not know what is said in the world of open disclosure. We do not know what has been blanked out. Towards the bottom of the page: "Some information which the OFT has sought from us has not been supplied. Further inquiries about product market definition, see attachment below forwarded to you on 19 October."

So here we have DLA saying to their clients: "We have not helped the OFT with market definition six months on; they are about to take a rule 14 notice. I do not think it necessary to supply this information immediately now the decision to issue proceedings has effectively been taken, but it would be useful to have it ready so we can supplement the complaint when we see the statement."

THE CHAIRMAN: He is obviously assuming he is going to see it.

MR FLYNN: Yes. "We should also comply with the request as an indication of our enthusiasm to pursue the complaint." Reading on, does one then see detailed information on market definition to assist the OFT? No, one sees some figures about Pernod's own sales.

THE CHAIRMAN: When was the rule 14 notice issued?

MR FLYNN: In June 2002. This is while the OFT is desperately trying to finalise things. On page 78 there is an e-mail of 26 June from the OFT to DLA about confidentiality of material that is needed for the rule 14 notice, saying "apologies for the short notice". That correspondence continues on the next two pages. I think it was in late June. This is very much last-minute stuff. Then on page 81, just to finish the story of the rule 14 notice, there were extensive redactions from our point of view, but the last line "the OFT say they will not provide us with a copy of the rule 14 notice" and the rest is blanked out. There you see Pernod's – it is not putting it too high to say dilatory behaviour in responding to the request made in October the previous year, when the OFT, having asked for help basically did not get anything until April, six months later. That was not information going to market definition as such; it was simply internal figures from Pernod.

In my submission, sir, it is not right, in the light of that exchange, to suggest that the complainant was not closely associated with the procedure to the extent that it wished to help. It is not right for Mr Green to suggest that at that point it was kept at arm's length.

Our complaint, referred to in paragraph 101 of our draft intervention statement, is not limited to – we are not trying to box them in to the original complaint at all; we are simply saying they did not provide the OFT with much assistance during the entire period of this very lengthy investigation. They had ever opportunity, first when putting in their complaint, to make a gratuitous reference to the snip test but they do not supply the OFT with any economic material or any econometric material suggesting that any such snip test was carried out, and they never did.

In relation to the draft assurances, by then the game had moved on. I do not think the OFT can be criticised for not saying to Pernod at that stage, "we are in "without prejudice" discussions with Bacardi as to whether we can reach a settlement in this case. They are keeping Pernod at that point at arm's length because they are not going to reveal that fact. If it had all fallen apart and the assurances that Bacardi was prepared to offer were not acceptable to the OFT, the procedure would have resumed. I do not think it is a valid criticism at that point to say they were not letting Pernod into the charmed circle. In my submission, that would have been entirely inappropriate.

In relation to the draft assurances, again I support what the OFT has to say. They gave Pernod what it wanted. Bacardi simply agrees not to enter into exclusive deals – solus and de-listing deals, solus pouring and solus optic deals are just not happening.

THE CHAIRMAN: Subject to the exception.

MR FLYNN: Yes, subject to the exception. Mr Green says "weasel wording" but it is a limited exception, and as far as I am aware it has not been needed to be called upon. But what must be far worse are completely

exclusive deals, solus deals or de-listing deals when some promotional fee is paid for a specific competitor's brand being taken out of the bar. That is not happening and there is no exception for that.

In relation to the assurances, in my submission it is reasonable for the OFT to say – it is very hard to see what Pernod could have added. They are not that complex; it is not a technical field where you might – an economic regulator might need the views of, say, people expert in the computer industry to understand precisely what was being offered and whether it would meet the requirements of the trade. It is a very straightforward proposition: no more exclusive deals.

On either basis, we say there is no room for criticising the OFT's discretion.

The very last point I make is the formal point about the pleading. We do say that the only point taken in the application and therefore the one on which the Tribunal must rule, is the argument that has not been pressed today on section 31.2 in relation to consultation when closing a file.

As regards the rule 14 notice, Mr Green says the complaint has come too late. The complaint was made in the draft defence and in the intervention statement that no objection had been taken in the application. The applicants were not seeking leave of the tribunal in respect of the failure to show the complainants the rule 14 notice. We of course raise no objection to the tribunal wishing to hear argument on that in the context of the preliminary issue, designed to give guidance not only for this case but for others. We have no objection to that and are happy to have assisted to a limited degree. But it is right to say we have had no indication until today that Pernod proposed to seek relief in respect of that. It is only right that such points should be put in the pleading, and the defendant and intervener are allowed to respond to the points and the way they are put.

MR GREEN: I have a relatively small number of points. In

relation to the point of admissibility and the question of chronology, the OFT's explanation of how the chronology arose is set out helpfully in paragraph 7 of their section 47 letter, in which they make it clear that they adopted their decision (tab 14 to the notice of application) and treated Bacardi's conduct as having changed on the 28th by the giving of the assurances. That is stated explicitly on two occasions in paragraph 7. Indeed, they italicised it to emphasise the point and the very last sentence makes it explicit that there were reasonable grounds for suspecting an infringement until the date the assurances were given, and that is the 28th. We know it is the 28th because it is clear from both the statement of intervention and draft defence; but also the OFT's letter to Simmons & Simmons of 29 January (tab 5 of ring-binder bundle) refers to the Bacardi letter of 28th and the assurances which were offered by that letter.

The assurances were offered on the 28th. The decision was taken, because of the acceptance, on the 29th, a day after, and the section 47 letter states that so far as the OFT is concerned the change of position occurred with the offering and giving of the assurances on the 28th. It may sound as if one is splitting temporal hairs, but for reasons I will come to it is not; but there is a one-day difference.

In cases where assurances are accepted, there is always going to be three temporal stages: the offering of the assurance, which is point in time one; there will be acceptance of the assurance at point in time two; and there will be a decision taken which closes the file and reflects the previous two stages.

THE CHAIRMAN: You are saying the offer is on the 28th, the acceptance is on the 29th -----

MR GREEN: And the decision is either the 29th or it is in some point of time after the acceptance, because it has to be.

THE CHAIRMAN: The press release is the 30th. When is the letter -----

MS SMITH: The letter on the 7th said: "The assurances are

given and the investigation is therefore closed." They happened at exactly the same time.

MR GREEN: That is the 29th, yes, but the section 47 letter says that the change of position occurred when they were given and offered, which is the day before. It makes the conceptual point, which is very important to analyse; that there were always these three stages. There was the offer of the assurance; there was then the acceptance; and there was then – and it must always be then – the decision. Whether it occurs through an exchange of letters on the same day or as a matter of analysis at the same point of time legally, it must always operate in those stages.

The absurdity of my friend's submissions can be tested in this way. Assume that the assurances are made at point in time one; they are accepted at point in time two, but the decision is delayed six weeks: the distribution in those circumstances plainly covers a state of affairs which is existing, namely the compliance and adherence to the assurances by the defendant company. If it is three months before the decision is finally taken because the case officer wishes to write it up in great detail and have it approved, then you have got three months of compliance.

THE CHAIRMAN: You mean the OFT could have said "okay, this is quite an interesting case; we will now turn this into a formal decision of no infringement".

MR GREEN: Yes, they could have done that.

THE CHAIRMAN: As from the date of the assurances.

MR GREEN: I do not think it really matters. The important point is that the OFT communicates with Bacardi that they accept the assurances, but the decision which closes the file and which then reflects the non-infringement may take place a considerable period of time afterwards.

THE CHAIRMAN: Because it has to go to the board or something else.

MR GREEN: Yes. When that decision is taken, which then records that assurances were offered and that these were then accepted, this then enabled the OFT to take the

decision closing the file and it must be on the basis of a state of affairs which is present extant and reflects adherence to Chapter II by the defendant company. The position cannot legally be different simply because we have compressed in time a decision following the acceptance. This is not *Alice in Wonderland*; it is just that we have here an efficient OFT taking a quick decision for sound administrative reasons; but if they had wished to write the decision *in extenso* to give proper detailed reasons, it could have taken a matter of weeks or months, in which case to say "we have this conceptual absurdity because everything is compressed into a moment in time" just would not arise; but analytically it must take place in three stages: offer, acceptance, decision. It is the latter act which reflects the absence of infringement and must necessarily be taken in relation to the present state of affairs.

THE CHAIRMAN: So there would be a gap according, to you, between the acceptance of the decision, which will vary according to the facts between the scintilla of time and some period, but it must always be in that sequence.

MR GREEN: It must always be in that sequence, and that is a proper conceptual way of looking at any assurance case. It cannot be the case that the tribunal has jurisdiction when the OFT delayed the decision six weeks, but do not have jurisdiction when we can all squirrel around in the papers and argue on the tip of a pinhead as to what happened first. It is very important that assurance decisions should be reviewable. Conceptually, provided those three stages are intellectually right – which I submit they are – then it really does not matter whether it is a scintilla in time or a year; the analysis still stands, and it is the proper way to look at any case where assurances are accepted.

I turn to Ms Smith's point to the effect that this goes to judicial review. I remind you of paragraphs 161-2 of *Claymore*.

THE CHAIRMAN: Before we leave that, going back to the letter of the 29th in tab 7 of the Simmons & Simmons bundle ----

MR GREEN: Whilst you are turning that up, one other point that is significant is that the assurances did not have transitional arrangements in them. The OFT plainly was of the view that as of the date of acceptance there was, legally speaking, adherence, which is quite consistent with Mr Flynn's explanation as far as Bacardi was concerned. They had already complied. They were in a state of compliance, and Bacardi had communicated that view to the Office in the course of its discussions over the assurances.

THE CHAIRMAN: On the letter of the 29th, he says that the investigation has now been closed; but it is effectively on the 30th as a result of the press release and the letter to DLA of that date, that we get the reason for the closure of the file. "We believe that the assurances remove the competition problem." Are they conceptually two decisions or one, a decision to close the file and a decision according to you that there is no longer an infringement? Is that all on the 29th?

MR GREEN: Theoretically there must be a decision taken at some point in time, and it is then reflected in correspondence. As so often arises in administrative law cases, one knows there is a decision but no-one addresses their minds to the point in time at which theoretically the Chairman or the Director General takes formally the decision. The 29 January letter does record the fact that the Director accepts an assurance, and the logic of that second paragraph is "and therefore there is a decision which has been taken that the investigation is now closed".

Turning to the judicial review point, the same argument was advanced in *Claymore*, which the tribunal dealt with in paragraphs 161-162. They stated that Parliament had created a specialist tribunal, and inferred that the tribunal would be slow to encourage a regime which had split off appeals to the administrative court, which was not the place where these sorts of issues were best adjudicated upon.

THE CHAIRMAN: Yes.

MR GREEN: Can I move to non-disclosure? Ms Smith's test is a reasonableness and a rationality test. With respect, we would say that under Schedule 8, this is a merits appeal. The test was whether they were right or wrong. She says that if it is wrong, the next question is whether the non-disclosure would have made any difference. For reasons we have said in relation to our fairly cursory analysis of the wording of the assurances, we submit that there is at the very least a risk, or a probability, that the OFT error, such as it was, was a material error.

Those criticisms that have been made simply come out of a scrutiny of the language. Other complainants apparently, according to the OFT, put in complaints. We know not what they said, but they may have had other views, and they may have expressed the sorts of views they made this morning.

The next point is the relevance of the rule 14 notice. It is right to say that the point we made in relation to section 31 in the notice of application is not one which is sustained here specifically. On the other hand, there are a limited number of points I want to make about rule 14. We made the point in paragraph 4.42 of our application that rule 14 had relevance in relation to a non-infringement decision, and we accept that section 31 does not say that. But section 31, as it is presently drafted, is normative, but we would submit that the Director's rules cannot limit the scope of the Act. Director's rules come in the form of subordinate legislation, and it is not entirely self-evident that section 31.2 is necessarily to be construed as limited only to defendants: "persons affected" is a broader concept.

It is, however, correct to say on the facts of this case that if the Tribunal accepted our principal submission in relation to assurances and remitted it, asking the OFT then to provide us with a copy of the rule 14 is going to be of limited value given the change in the nature of the case. It may have one relevance, which

is that it was apparently as a response to the rule 14 that the OFT changed its view on certain types of practice, which were then not later included in the assurances; so to that extent, if we were right on the assurances point, and the failure to disclose the assurances was a material error, then the failure to have provided us with the rule 14 compounds that error. However, it is clearly my clients' primary case that the wording of the assurances is the vice, and if the matter were remitted and we simply got hold a copy of the rule 14 now, we would really be addressing issues which were 75-80 per cent historical save for those two points where the OFT changed its mind.

As to Pernod's involvement, I do not want to go over past territory in any great detail, but the documents attached to tab 8 of the notice of application show that (a) the OFT refused to provide a copy of the rule 14, which is common ground; (b) at the time that that was an issue, Pernod was gearing itself up to provide additional information. It took the view that once it saw the rule 14 it would complement/supplement its complaint. It then learnt that it was not going to be given the rule 14. It did provide certain information to the OFT because the OFT asked that information that it, in its rule 14 was relying upon relating to Pernod, be disclosed to Bacardi; and the documents show a confidentiality issue arising. One comes to the point in time when the OFT received the Bacardi reply, which is page 101 of the bundle, tab 8.

As you, sir, succinctly summarised earlier on, Pernod were in a position to say "we wish to co-operate, please allow us to co-operate". This was on 15 November. At that point, all the OFT had said to Pernod was "Bacardi raised interesting points" but they refused to expand on them, so he did not know what those interesting points were. He then shot blind on 23 January 2003 by reminding them of a merger task force decision that by that time we were whistling in the dark – the cat was well and truly out of the bag and the assurances were all

but concluded. On page 110 of the same bundle at the end of that letter from Christopher Swift to Justin Woodward at the OFT, Mr Swift reveals his misunderstanding of what is going on within the OFT because he says "when we spoke on 15 November" which is the last communication "you said that when you had considered Bacardi's response to the rule 14, you would almost certainly have further questions with Pernod-Ricard. Pernod-Ricard will be happy to assist the Office further, if at all possible, as it is to expand on any aspect of this letter."

The next day, on the 24th, there is an e-mail from Christopher Swift (page 111) recording a conversation between Mr Swift and Mr McDowell at the OFT. Again, it is quite plain that the OFT are just holding Pernod at arm's length and not giving them information; and Pernod has no idea as to what is really happening. The next communication is the final assurances.

After the reply to his rule 14, at which point the OFT itself was in a state of confusion and uncertainty as to certain key matters, we were then not just kept at arm's length; we were kept completely in the dark. That is the crucial point.

There are two final points as to Ms Smith's suggestion that Pernod could make submissions after the event. If that is the case, why not before? The argument is really akin to cutting off your nose to spite your face. The decision had legal effects. The file was closed. The section 26 demand was withdrawn. It was not suspended, it was legally withdrawn.

THE CHAIRMAN: There was no longer any basis for maintaining it.

MR GREEN: Yes. Legally, an affected person makes submissions before a decision, not after it; there is no point in making submissions after it. After the decision the press release was made; the assurances were published. Trying to shift the OFT from that position, after the matter was in the public domain was a hopeless task.

Finally, in relation to the legitimate expectations,

as a matter of principle they can arise from conduct or from law. Here, we say they arise primarily from law. The Act reflects and respects to a degree complainants' rights. Section 47 is a powerful reflection of the complainants' rights, but there are also powers in the Director's rules, rule 12, which reflects the right of the third parties to be consulted. These were public assurances. They are intended to protect a company in the position of Pernod, and if not Pernod who else? Indeed, it is fair to say that Pernod was the intended beneficiary of the assurances. In such a case we would submit that the threshold to create a legitimate expectation arising out of both the law and indeed the circumstances of the case would be very strong.

THE CHAIRMAN: Thank you for your submissions. We will reserve out judgment and give judgment in due course.
