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IN THE COMPETITION
APPEAL TRIBUNAL

Case Nos. 1140/1/1/09
1141/1/1/09
1142/1/1/09

Victoria House,
Bloomsbury Place,
London WC1A 2EB

5 February 2010

Before:

THE HONOURABLE MR JUSTICE ROTH
(Chairman)
MICHAEL DAVEY
VINDELYN SMITH HILLMAN

Sitting as a Tribunal in England and Wales

EDEN BROWN LIMITED

Appellant

- v -

OFFICE OF FAIR TRADING

Respondent

CDI ANDERSELITE LIMITED & ANOR

Appellants

- v -

OFFICE OF FAIR TRADING

Respondent

HAYS PLC & ORS

Appellants

- v -

OFFICE OF FAIR TRADING

Respondent

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CASE MANAGEMENT CONFERENCE

APPEARANCES

Mr. Paul Harris (instructed by Addleshaw Goddard LLP) and Mr. Adam Aldred (of Addleshaw Goddard LLP) appeared on behalf of Eden Brown Limited.

Ms Ronit Kreisberger (instructed by Blake Laphorn) appeared on behalf of CDI AndersElite Limited and CDI Corp.

Mr. Mark Brealey Q.C. and Mr. Paul Harris (instructed by Freshfields Bruckhaus Deringer LLP) appeared for Hays Plc, Hays Specialist Recruitment Ltd and Hays Specialist Recruitment (Holdings) Ltd.

Mr. David Unterhalter S.C. and Mr. Alan Bates and Ms Maya Lester (instructed by the General Counsel, Office of Fair Trading) appeared on behalf of the Office of Fair Trading.

1 THE CHAIRMAN: We are grateful to the parties for their written observations and, in some
2 cases, supplementary written observations which we have, of course, read. On that basis we
3 can, at the outset, direct that pursuant to Rule 18 that the forum of these proceedings shall
4 be England & Wales.

5 Before we come to the question of timetable, can we just think for a moment about duration
6 of the appeals - how long they will last. As regards Hays, Mr. Brealey, the liability issue --
7 We get the impression - and welcome your confirmation - it is not anticipated there will be
8 any cross-examination on that; is that right?

9 MR. BREALEY: I doubt whether there will be any cross-examination on our part. I look to the
10 OFT?

11 MR. UNTERHALTER: We think not on that score.

12 THE CHAIRMAN: On that basis it seems to us that half a day should be ample for the liability
13 ground of our appeal. As regards what I will loosely call 'the rest' - that is to say, all the
14 appeals on penalty - various witness statements have been served by the appellants. Mr.
15 Unterhalter, for the OFT is it expected that there will be any cross-examination?

16 MR. UNTERHALTER: We do anticipate that there will be cross-examination. There are a
17 number of issues, the one being the net fees turnover debate in respect of which there is
18 likely to be cross-examination, at least from our side, in respect of the expert witness who
19 has been put forward. There may, in addition, be some cross-examination on the factual
20 contentions that are made on that score. So, we do see that at least on that issue there will be
21 some cross-examination. We think also that there may be cross-examination of Mr. Lawson
22 and Mr. Collins, who deal with this issue around senior management. That issue might also
23 attract some cross-examination. Those are the principal matters that we think might warrant
24 cross-examination.

25 THE CHAIRMAN: While you are on your feet, in the light of that we had thought that two and a
26 half days, even with cross-examination, which would be limited, should be ample for all the
27 issues there.

28 MR. UNTERHALTER: It depends a little bit on what our learned friends' view is on the
29 evidence that we intend to put up and what cross-examination they might want to direct to
30 our evidence.

31 THE CHAIRMAN: So, you are anticipating putting in witness statements.

32 MR. UNTERHALTER: Yes, we will. Just to give you a sense of that, sir, there will be evidence,
33 we think, of our own expert who deals with some of the accounting issues that are relevant
34 to the net fees issue. Then there may be some rebutting evidence which deals with the

1 liability infringement. That would go into the liability question. But, as to the penalty,
2 there are ----

3 THE CHAIRMAN: I find that last observation a bit surprising on the liability infringement,
4 because your case on liability is in the decision.

5 MR. UNTERHALTER: It is, but it may be that we will want to put in some rebutting evidence in
6 the light of what Mr. Collins has to say on the question of the extension of the infringement.
7 So, purely for the purposes of rebuttal and not for the purposes of, as it were, re-inventing
8 the basis upon which we came to conclusion that we did.

9 But, as to the questions of penalty, there will, as we envisage it, be a witness statement that
10 will cover some of the background to the positions that have been taken in respect of MDT
11 and the business year that has been chosen, as well as the issue around why turnover is the
12 correct measure as the basis for penalty impositions. Those matters will be ventilated, as we
13 see it now, in a witness statement.

14 The result of all of that is that in our estimation we do think that the three days with one day
15 in reserve may be a little short of what may be required.

16 THE CHAIRMAN: It may be that we will think about four days. I think we will be very
17 disinclined to say that these appeals should need more than four days.

18 MR. UNTERHALTER: We would have thought that in the event that all of the witnesses need to
19 be cross-examined to some degree by one or other side, it may be necessary to provide for
20 four.

21 MR. HARRIS: Sir, whilst you are on the topic of cross-examination, there are actually two
22 witnesses for Eden Brown as well. I do not know whether my learned friend is in a position
23 to give any indication as to whether or not the OFT would wish to cross-examine them.
24 They are Mr. Stirling, the Finance Director, and Mr. Walter, the Chairman. That plainly
25 bears on the timetable as well.

26 MR. UNTERHALTER: Sir, as far as Mr. Stirling is concerned, he gives evidence that covers
27 ground similar to that of Mr. Venables. We would probably then, depending if there remain
28 residual issues which warrant attention we would at least reserve the right to cross-examine
29 Mr. Stirling.

30 THE CHAIRMAN: Yes, and the other witness?

31 MR. UNTERHALTER: I think not.

32 THE CHAIRMAN: Yes, thank you. Then on the basis that the Hays liability ground is half a
33 day, Mr. Brealey, it seemed to us that it did not really matter very much whether that was at
34 the beginning or the end of the penalty, it does not impinge. Yes, thank you very much.

1 We are, as we have indicated, inclined very much to hear these appeals together with the
2 Hays liability ground probably at the end so that the other parties can then leave. On the
3 basis that one is looking at four days it is then of course a question of when that should be.
4 We have seen the observations on the dates that were originally proposed. We can
5 understand the concerns expressed by Hays and Eden Brown that they would like it heard
6 sooner rather than later. We cannot hear these appeals in May as was suggested by some.
7 We have put forward two alternative earlier dates, one in mid-June and the other at the end
8 of July. That would mean, on either of those dates that one could provide that the defence
9 from the OFT will not have to be before 31st March which was a concern the OFT
10 expressed in its observations, but we would like to hear from the parties their views on
11 those dates and in particular I think from the OFT because, Mr. Unterhalter, your clients
12 indicated not only a problem about the defence which we think can be taken care of but
13 regarding an earlier hearing date than September.

14 MR. UNTERHALTER: Thank you, sir, if I might address that issue. Our first difficulty with the
15 dates in June and July relate to the hearing dates that have been set down for Construction.
16 The OFT has chosen to constitute its teams of counsel for these appeals and the
17 Construction appeals on the basis that there are two members of the team, including myself,
18 that overlap. It has done so because it is not only a measure for reasons of economy but
19 also because there are significant overlapping issues that arise in these matters. Contrary to
20 the observations made by Eden Brown, not only are there a significant number of
21 overlapping issues, but the appeals that are in issue here go to significant features of the
22 penalty regime that exists on the part of the OFT and the manner in which it is applied and
23 there are significant commonalities between the two sets of appeals.
24 That has a certain consequence, just from a purely practical point of view. If I might just
25 indicate to you in the event that it has not been brought fully to your attention, the hearing
26 dates that have been determined for the Construction appeals that they commence before
27 three Panels that are constituted on 28th June, and run through without interruption until 15th
28 July. There has then been provision made for largely a liability hearing in respect of one
29 appellant, Durkan, provision has been made for five days commencing on 19th July. The
30 effect of all of that is that the two common members of the team will be engaged before the
31 Tribunal in Construction from 28th June until the week that ends on 24th July. That, as I
32 have indicated, has practical consequences which is that if we were then to immediately
33 commence the hearing of these appeals on 26th June we do apprehend that we would have
34 had very little time to prepare for that hearing and indeed there will be some cumulative

1 exhaustion that may have set in at a certain point in the times that have already been
2 provided for construction.

3 Similarly, in respect of the June date, given what is contemplated in construction, we will
4 need the month of June to prepare for what promises to be a marathon exercise before the
5 Tribunal, at least from the point of view of the OFT's team. It is really for those practical
6 reasons that we would request that the June and July dates should rather yield to the original
7 suggestion of the September date.

8 If I could also just indicate why it is that we say that these overlaps are significant and not
9 incidental, as at least some of our learned friends have suggested; the key issues both in
10 these appeals in CRF and in Construction, you have the following issues that arise that are
11 common. First, the policy that arises in respect of the adoption of turnover as the
12 foundation or basis for the imposition of penalties rather than some alternative measure
13 whether it be a profit figure or a net fees basis as is in contention with these appeals. There
14 is then the issue around the starting point and how that is determined. There is the question
15 of step 3 and the adoption of the MDT. There are issues around the overall penalty
16 calculation and its relationship to the guidance and there is then how aggravating and
17 mitigating factors in various factual matrices are utilised as against the requirements for
18 consistency. So we do suggest that there are very substantial overlaps between these two
19 sets of appeals and though it will doubtless be said that each appeal has certain specific
20 components that are individual to it, it all rests on certain common predicates that are based
21 on positions adopted by the OFT in respect of how they have applied the regime of penalties
22 that they do. If those predicates are problematic then the individual applications will simply
23 perhaps be less availing for consideration than the foundation upon which they rest. So it
24 was for that reason that the OFT thought it both sensible and economical to have teams
25 which had common members and, as I have said, there are two – not just one member – that
26 are common to the two teams.

27 We would therefore submit that the OFT was not imprudent to adopt that position and some
28 allowance must be made for the fact that in managing these appeals there should be sensible
29 time allowances that should be given. One understands that from the perspective of each of
30 the appellants they see matters from their own perspective, which is how quickly can I get a
31 single appeal heard? That is perfectly understandable. But from the OFT's point of view it
32 is dealing with a large range of appeals which go to fundamental issues across a broad range
33 of matters and it has to manage the process, and it is for that practical, but also conceptual

1 reason that we would ask for an allowance and not have these dates adopted, but rather the
2 September date.

3 THE CHAIRMAN: Yes, I understand some of that, but I had thought that the Construction
4 appeals are actually being heard by different Panels and therefore presumably it is not the
5 same counsel in all of them.

6 MR. UNTERHALTER: There are three Panels but the two counsel who are common are going to
7 be fully engaged in that period on one or other – in other words, they will be fully engaged
8 throughout that period because although there will have to, again for practical reasons, be
9 some allocation of counsel to argue different appeals on different days because there are
10 parallel sittings, speaking for the counsel that are common they will be engaged in all of
11 that time in respect of one or other of the appeals that are taking place. I am not certain if
12 you have the timetable that was drawn up, but if one has a look at it one will see that there
13 are three panels, but they sit in two streams that happen simultaneously. So, counsel that
14 are common to the two sets of appeals will be engaged throughout the period.

15 THE CHAIRMAN: But there will be other counsel in the other stream; is that right?

16 MR. UNTERHALTER: There will be a counsel in the other stream - either assisting me in the
17 one case or assisting or arguing the appeals in the other. The teams are not large. There has
18 to be a division of labour.

19 THE CHAIRMAN: I am not quite clear. I can see that everyone of course desires their preferred
20 counsel. We have heard that here from one of the other parties. But, why is it not possible
21 for the OFT to have different counsel in this case, albeit liaising, as you have to already,
22 with two streams?

23 MR. UNTERHALTER: There will be different counsel - certain different counsel - who will be
24 dealing with construction case, but speaking, at least as far as my role is concerned, to
25 construction, as the lead counsel I will be probably rather more engaged over that period.
26 My learned friend, Mr. Bates will also be assisting, and probably arguing, portions of the
27 construction appeals as well.

28 Sir, just one final observation. The difference between July and September in the overall
29 scheme of these appeals and their gravity and range. Again, whilst expedition matters, we
30 are not clear really why it is that a couple of months is going to make such an enormous
31 difference to the overall disposal of these matters.

32 We have some things to say about the reputational concerns that have been raised, but
33 perhaps I can leave that insofar as that is of relevance to you in dealing with the matter.

34 THE CHAIRMAN: Thank you.

1 MR. BREALEY: Sir, may I make a few comments? Essentially the reference is made to two
2 difficulties. One is team. One is overlapping issues. The team issue essentially comes
3 down to whether Mr. Unterhalter can really stand three or four weeks of CAT rather than
4 just two and a half. The case team is different, as I understand it. Miss Lester is not in
5 construction. What it boils down to is that he does not really want to do a three, potentially
6 four day trial starting on 14th June when he is going to start the construction on 28th. He has
7 a full week before construction, with the greatest respect, to get himself sorted out,
8 prepared. He has got his own team to help him there. Really it is coming down to whether
9 he can do both. What he essentially wants is August and a bit of September off so that he
10 can prepare for this.

11 On the other hand, we have Lord Pannick lined up to argue some of our case. He is not
12 available in September.

13 THE CHAIRMAN: But he is available for the June and July dates.

14 MR. BREALEY: He is available for 14/15th June slot, and for the July slot.

15 THE CHAIRMAN: Presumably, as I understand it, he is only arguing one ground. He may not be
16 here for the whole hearing anyway.

17 MR. BREALEY: Yes. It is important to my clients that he does argue that point. So, it is
18 inconvenient for us, as far as the team is concerned, for September. Mr. Unterhalter is
19 available in June. As I say, he has got that week, beginning 21st, to polish off the
20 construction. He is not prejudiced if 31st March is going to be the defence. Really it is of
21 their own making. They adopted these two decisions with similar issues. They are going to
22 be heard at roughly similar times. That is the team issue. It is a non-issue, in my respectful
23 submission.

24 On the overlapping issue there is an overlap - MDT. We would say it makes perfect sense
25 for this panel to hear the MDT issue on 14th/15th/16th June. So, in essence, it constitutes a
26 fourth panel. Otherwise, we are going to have a situation where, in construction, everything
27 is done and then there is going to be a period of two months, and then this panel is going to
28 hear the same issues. It would make sense, in my submission, for everything to be heard in
29 June and July rather than June, July, and then put off until the end of September. It may
30 well be that the other panels may have decided the MDT issue prior to you deciding the
31 Hays appeal.

32 THE CHAIRMAN: That can happen one way or the other. Once you have different courts, one
33 court will produce its judgment almost inevitably before the other one.

1 MR. BREALEY: It will. But, if you are starting on 14th June then really June and July is taken up
2 with all the common issues, whereas if one is pushed back by two months -- It just makes
3 more sense for it to be heard closer together than further apart.

4 THE CHAIRMAN: I am not sure I entirely follow that. Once they are different courts producing
5 their own judgments, whether they are heard one after the other, simultaneously, or a couple
6 of months apart -- What is the difference?

7 MR. BREALEY: It may well be that there are going to be Chinese walls then between all four
8 panels.

9 THE CHAIRMAN: I do not know what is happening in construction as regards the panels and
10 that may have been gone into at the CMC. But, as far as these appeals are concerned, we
11 are not going to be looking at the arguments in the construction appeals. We shall look at
12 the arguments we hear in these appeals.

13 MR. BREALEY: If that is the case, sir, then so far as Hays is concerned, it would prefer to have a
14 situation where its hands are not tied. If, for example, the first panel in construction makes
15 a decision saying that turnover is perfectly admissible, then as you wish. But, there will be a
16 risk of conflicting judgments as far as Hays is concerned, and it will not wish that the
17 Tribunal have made a decision which is against its interests prior to its hearing. So, as far as
18 Hays is concerned ----

19 THE CHAIRMAN: I do not think, if we heard this case in September - and I cannot fully speak
20 for the panel in the other case - there is much chance that they will have produced a
21 judgment before this case is heard at the end of September, especially given the long
22 vacation.

23 MR. BREALEY: Maybe the overlapping issue ----

24 THE CHAIRMAN: As is pointed out, it might be helpful because then you could put in written
25 submissions upon it - if there actually were a judgment. But, I think it is rather unlikely.

26 MR. BREALEY: If that is going to happen then the overlapping issue is a bit of a non-point. It
27 comes down to the convenience to the OFT's counsel at the end of the day. That is not a
28 good enough reason to put off the Hays appeal to the tune of two/two and a half months,
29 particularly when its own leading counsel is not available.

30 MR. HARRIS: Sir, I will deal with the OFT's two points without repeating anything Mr. Brealey
31 has said in just a moment. But, perhaps I could begin by just handing in an illustrative
32 document regarding the timetable that Mr. Unterhalter seeks to advance on behalf of the
33 OFT. (Same handed) The guiding principle, of course, is in Rule 19 of the CAT Rules,
34 expedition being a relevant principle for present purposes. We have advanced on behalf of

1 Eden Brown a timetable that leads to May as being a normally expeditious timetable. But,
2 we are quite content with the proposal that the Tribunal puts forward as to its availability in
3 mid-June. This document has been handed in just to illustrate quite the lack of expedition,
4 or the delay, in what the OFT proposes. It picks up very deliberately on a theme that Mr.
5 Unterhalter himself raised at the Construction cartel CMC some 10 days ago, when he
6 sought to analyse the average amount of time that the OFT had for its defences in that case
7 in support of a further extension of time in that case. Some elementary arithmetic set out
8 clearly on this piece of paper is even with a considerable extension beyond the normal level
9 of expedition in the Construction cartel appeals the average amount of time per defence is
10 5.12 days for Construction, and yet the OFT is now seriously advancing, it seems for the
11 contention that it should have 56 days per defence in these appeals. With the greatest of
12 respect a factor of over 10 times as much is manifestly not expeditious, and we also have
13 advanced the contention that it prejudices Eden Brown and Hays makes the same point,
14 supported by sworn evidence. So I would like to put to rest the suggestion in the OFT's
15 skeleton and, insofar as it is advanced today orally, that somehow the timetable that they
16 propose ending with hearings in September is somehow consistent with the way things
17 normally operate or, for that matter consistent with Rule 19. It is not, there is a very
18 considerable extension of time and that is on top of above and beyond the considerable
19 extension of time that the OFT has already had for its defence, beyond the normal rules, and
20 the considerable further extension of time that the Tribunal has already preliminarily
21 indicated it would be allowed to have even with a June hearing, namely putting a defence at
22 31st March. So a very considerable and generous indulgence is already being shown
23 towards the OFT.

24 Dealing with Mr. Unterhalter's two oral points, I have dealt with everything else he has
25 raised in his written submissions in our two sets of written submissions so I will not traverse
26 that ground again. I echo Mr. Brealey's submissions and only add on the first of Mr.
27 Unterhalter's point the self-evident additional point, which is that if the OFT's team of
28 counsel is as stretched as it is being suggested, then there is absolutely no reason why they
29 cannot appoint more counsel. That has been done, is my clear understanding, as a result of
30 the CMC 10 days ago in Construction; there is no reason whatsoever why it could not be
31 done in this case if the OFT really saw the need. That is the only additional point I make in
32 response to Mr. Unterhalter's first point.

33 His second point regarded overlaps and here I do echo and then amplify Mr. Brealey's
34 submissions briefly in the following ways. At its highest it now transpires the OFT's view,

1 which we do not share is that there are five overlapping issues. I will come back in a
2 minute, if I may, as to why we do not share that view; but even at its highest, five. I have in
3 this file – I do not see any need to pass it up – the OFT’s table that they created in
4 construction, just for theatrical effect I will flick it around a little bit with all these beautiful
5 coloured boxes, that has 22 issues and at least 12 sub-issues, making a total of at least 34
6 issues that the OFT identified in analysing the Construction cases. We are now told that at
7 its absolute highest there are five overlapping issues, which we do not accept, but even if
8 that were correct we cannot understand how and why it would be impossible for the OFT to
9 deal with what it says are the five overlapping issues towards the beginning of its work
10 stream – I say that actually with one hand behind my back, because of course we are
11 nowhere near the beginning, they have already had just over two months to deal with this
12 work stream. We do not see why those five could not be dealt with at the beginning of the
13 construction works in which case all the work would already be done on the so-called
14 overlapping issues well in time for the CRF appeals.

15 Be that as it may, and no answer has been given to that, we do not accept for one minute
16 that all of these five issues overlap. Let me take the most obvious, it is suggested that
17 somehow aggravating and mitigating features overlap as between Eden Brown’s appeal and
18 some Construction appeal. With respect, that cannot possibly be right. They are
19 quintessentially the example of fact dependent ----

20 THE CHAIRMAN: That is in virtually every penalty appeal.

21 MR. HARRIS: Well, Sir, yes. We do not accept some of the others, starting point – it is not
22 explained how that is supposed to be some kind of overlap. As regards MDT it pushes it far
23 too far to suggest there is some huge overlap. What has happened in MDT is that in these
24 appeals there is a challenge to the manner in which the OFT, it is advocated, changed its
25 guidelines, and that is a part overlap with some of the Construction appeals, but as regards
26 the application of the MDT that is a proportionality argument, and by definition, sir, that is
27 a fact specific and context dependent argument. Indeed, that was common ground before a
28 different constitution of this Tribunal some 10 days ago, which is why it was not split off as
29 a preliminary issue. So to suggest that MDT at large is somehow overlap cannot be
30 sustained.

31 Then two of the other issues Mr. Unterhalter put forward took at least me by surprise.
32 Number one was the adoption of turnover as a policy matter, and number four was the
33 adoption of, as a policy matter, the relationship between the guidelines and the overall

1 penalty assessment. With great respect to the OFT, surely if it is a policy matter they must
2 already know what the answer is, it is not as if they need months and months to work it out.

3 THE CHAIRMAN: Well it is not the time to prepare the defence, because I think we have made
4 allowance for that, so it is not months to work it out, it is actually appearing to argue it.

5 MR. HARRIS: Of course, Mr. Brealey has already dealt with that.

6 THE CHAIRMAN: In a sense they go together, if there are no overlapping issues at all then the
7 need to have the economy of having the same counsel would not arise, so it is only because
8 there are some overlapping issues that one gets into a discussion of the advantage for the
9 OFT of having the same counsel. That is how I understand it.

10 MR. HARRIS: There I have made my submissions, five at its highest in truth, not that many, and
11 all of that work can amply be dealt with and Mr. Brealey's point I specifically echo, which
12 is there is absolutely no reason at all why eminent leading counsel and such other
13 overlapping members of the team that there are cannot deal with a maximum of a four day
14 hearing starting two weeks before some other hearing. It does not make any sense with
15 respect.

16 Sir, members of the Tribunal unless I can assist any further with anything either in Eden
17 Brown's written submissions on timetabling points, or otherwise in response to Mr.
18 Unterhalter, those are our timetabling submissions.

19 THE CHAIRMAN: Yes, as between the two dates, the June and July date, which I can tell you is
20 unlikely to make much difference as regards preparation and delivery of the Judgment ----

21 MR. HARRIS: Strongly in favour of June, Sir, partly because as you know we have reasons for
22 wanting to go in May, therefore June makes more sense.

23 THE CHAIRMAN: Well your reasons are that you want an early decision.

24 MR. HARRIS: Our reasons are that we say we are entitled to expeditious conduct of our appeal
25 as a self-standing appeal and, yes, we are in a hurry because we have reputational concerns.

26 THE CHAIRMAN: But that all leads to the judgment rather than the hearing.

27 MR. HARRIS: It does in part, it is more focused on the decision I accept, but in part there is an
28 issue regarding the public ventilation of counterarguments, I accept that is not as powerful
29 as the decision.

30 THE CHAIRMAN: Public ventilation of arguments in favour as well, of course.

31 MR. HARRIS: I accept, Sir, so I do not put that point so highly. But there is another factor,
32 which is there are two of us representing Eden Brown at the hearing and Mr. Aldred will
33 not be available in July. I accept obviously that is not a particular weighty factor. Unless I
34 can be of further assistance.

1 THE CHAIRMAN: No, thank you. Yes, Miss Kreisberger?

2 MISS KREISBERGER: Sir, Mr. Harris has said much of what we were going to say on those
3 issues so I think I can be really quite brief, and I would just like to say a few words on two
4 points.

5 First, this question of common issues, and secondly the date of the defence on which my
6 learned friends have not made submissions. On the question of common issues, which has
7 been much talked about, in our submission, and it is one which differs from Mr. Brealey's I
8 say really there is no overlap between certainly CDI's appeal, and the 25 appeals in
9 Construction. The suggestion is that MDT is an area of overlap and Mr. Harris has already
10 said something on that. I think it is helpful to note that in the Construction appeals there are
11 25 appeals. As I understand it, only one party challenges the lawfulness of the MDT, the
12 other 24 challenge the application of the MDT to the facts pertinent to them, and those are
13 quite clearly fact specific challenges to the application of the MDT. On that basis there is
14 minimal, if any, overlap; there is certainly no overlap as regards CDI's appeal. CDI's
15 appeal on MDT is really a subsidiary point since it was applied to CDI. It is a hypothetical.
16 Just briefly to touch on the other grounds of CDI's appeal - there is the temporary wage
17 costs point, which does not arise in construction; the level of the starting percentage - well,
18 there is no common ground with construction there, and entirely different percentages set (5
19 percent vs. 9 percent in this case). The other grounds of CDI's challenge are wholly fact-
20 specific. One is a mechanical challenge effectively to the way in which the numbers were
21 processed by the OFT - not to the methodology. The fifth of CDI's grounds of appeal is
22 that the overall level is effectively disproportionate, unfair. So, it is a fact-specific
23 challenge again. So, we say, as far as CDI is concerned, that there is no overlap with
24 construction, and only minimal overlap with the other appellants in these proceedings. That
25 really relates to the temporary wage costs point in terms of a common issue of legal
26 principle. As an aside, I note they are differently argued, as it happens. That is all I
27 propose to say on common issues.

28 On the date of the defence, I note that you have suggested the end of March ----

29 THE CHAIRMAN: No. I think perhaps I did not make it clear. The OFT, in its observations,
30 said it would have great problems with the end of March. That was proposed by someone -
31 I do not remember whom - in conjunction with a May hearing date. I have said that we
32 cannot hear this in May, and the dates that we have put forward as alternatives to September
33 would enable the OFT to serve its defence later than the end of March. We do have
34 sympathy for the difficulties, having regard to the timetable on construction, and possibly

1 need to get instructions and approval and some policy issues that may arise if they had to
2 produce a defence by the end of March. So, on that we are envisaging, whichever date we
3 end up with, that they would have longer than the end of March for the defence. But, we
4 think that can be accommodated whether we start on 14th June, 26th July or, of course,
5 September.

6 MISS KREISBERGER: Sir, I should have said 'no sooner than the end of March'. We have real
7 concerns about this. I appreciate that the Tribunal have some sympathy with the OFT's
8 position. Given what has been said about the absence of overlapping issues, it just seems to
9 me then a resourcing point, if that is right.

10 We have a real concern as regards procedural fairness. Just very briefly, the usual rule is, of
11 course, six weeks under Rule 14 for the defence. The OFT has so far had almost ten weeks
12 (it will be ten weeks on Monday). We say - and this is in our written observations - that the
13 OFT should not be allowed time beyond 26th February. The reason we say this is because
14 as appellants we are required to comply with fairly punishing deadlines two months from
15 the date of the decision with no opportunity to extend. This was a decision running to some
16 343 pages. So, we say there is a potential risk of procedural inequity if the OFT is entitled
17 to longer than the twelve weeks they would get to the end of February. That is a concern on
18 our part.

19 Sir, that is all I was proposing to say unless I can assist you further.

20 THE CHAIRMAN: Miss Kreisberger, the same question I put to Mr. Harris, as between the June
21 and July dates is there any preference on your part? As I say, I do not think the one or the
22 other is going to make a material difference to production of the judgment.

23 MISS KREISBERGER: We have some preference for June. It is not a very strong preference.
24 You will have seen from our written observations that we have taken the view that we are in
25 the Tribunal's hands. However, the one thing we are concerned with is the length of the
26 hearing. We take the view that we can be dealt with really rather quickly - certainly no
27 more than a day. So, we would suggest that we certainly do not agree with any sub-division
28 between appeals according to topics for the reasons I have given as regards the absence of
29 common issues. So, we would submit that our appeal could be heard in a day at the outset.
30 Then we would not propose to treat it as a consolidated hearing where we attend the other
31 two appeals.

32 THE CHAIRMAN: That may be. On the other hand, it may be that other parties are concerned
33 about certain things you say - not just the respondent. What we had in mind is that we
34 would list them to be heard together. We would leave it to all of you, in your good sense, to

1 work out how the time should be split - whether to do it by issues; whether, as you have just
2 ventilated, you get heard first and then, as it were, can walk out and leave everybody else at
3 the party. If you cannot agree between you, then of course we can make a ruling. But, we
4 were not proposing today, other than the Hays liability ground - which really does seem
5 rather different on any view; it does not overlap with anything - which would be held at the
6 end. So, we are not going to get into a sort of micro-management of the four days at the
7 moment.

8 MISS KREISBERGER: Sir, we are content with that.

9 THE CHAIRMAN: Mr. Brealey, I did not ask you which you prefer?

10 MR. BREALEY: We have a strong preference for the June on the basis that one of our witnesses,
11 Mr. Collins, is not available in July.

12 THE CHAIRMAN: Mr. Unterhalter?

13 MR. UNTERHALTER: Sir, can I come first to the team issue? The suggestion is that a week's
14 preparation for the construction appeals will suffice. So, we should not be unduly resistant
15 to the June date.

16 THE CHAIRMAN: I am not sure it is quite look like that. I think it is said that a week will allow
17 you to recover from the rigours of arguing this appeal. No doubt between now and June
18 you will be preparing all these appeals. Insofar as there are overlapping issues, of course,
19 that helps the preparation.

20 MR. UNTERHALTER: Doubtless preparation is an ongoing task. But, the truth of it is that the
21 number of appeals in construction is so large and so unusual that it simply is difficult to
22 imagine that for the kind of preparation that is sensibly done before this three week - in
23 fact, in this case it will be a four-week process because it includes the Durkan liability trial
24 which happens at the end -- That all of that can be done by way of one week pre-hearing
25 preparation, let me put it that way, is simply fantastical in our conception of things. It does
26 have this consequence: that if these dates are adhered to there is a very real possibility that
27 the OFT might need to appoint different counsel for the CRF matter. That would be a huge
28 waste of resources given the time that has already been devoted and the investment made in
29 counsel for CRF, and we would respectfully suggest that that is an outcome that should not
30 be permitted unless sit is absolutely necessary.

31 THE CHAIRMAN: It would still enable you to, as it were, oversee and be involved in the
32 drafting of the defences, and co-ordinating the lines of argument taken as between the
33 appeals, even if we would not have the pleasure of actually hearing you argue it.

1 MR. UNTERHALTER: The difficulty is, and certainly an additional counsel would need to be
2 brought in and there would therefore be a kind of duplication in the process because it
3 would be unlikely that that counsel would simply come in for the purposes of arguing,
4 though that is certainly, I suppose, a possibility. We just would submit that this involves an
5 undue extension of resources when it is needless to do so in the light of the fact that all that
6 is at stake here as, you correctly pointed out is: when will the judgment ultimately be
7 rendered in the CRF appeal. We are not certain that anything about that time is so material
8 to the parties, that there must be this hastening towards the dates in June as our learned
9 friends have suggested.

10 If I could also indicate one other feature of the Construction case ----

11 THE CHAIRMAN: Well it is not quite hastening, it is delay because they are really rather
12 exceptional circumstances, and I think we take issue with "hastening", it has been put off,
13 but you say because these are very unusual circumstances.

14 MR. UNTERHALTER: With respect that is so. The fact is that these are sets of very large
15 appeals involving many and difficult issues and they need to be properly dealt with and for
16 a matter of a month or two it is hard to see what significant interests are at stake here that
17 would be so deeply prejudiced that these early dates must take place rather than the later
18 ones. So we do raise the issue as to the harshness from the prospective of the OFT of
19 having to bring additional counsel in, including a lead counsel, for this purpose and the
20 duplication of investment that that involves.

21 There is one other feature of the construction case which I should draw to your attention,
22 which is that in terms of the timetable which is proposed, there will be the possibility in
23 September in Construction for parties to read the transcripts and any party in one appeal that
24 has something to say about an issue that has arisen in another appeal is given the
25 opportunity to make submissions in September. So the notion that Construction is going to
26 come to an end and there will be no further stage is not correct. Construction is in fact
27 going to carry on in another form, at least until September. So these processes are likely to
28 be somewhat extended, simply by reason of their unusual nature.

29 As to the question of the availability of counsel, we take a more accommodating view than
30 our learned friends, and particularly as Lord Pannick's availability is concerned. We have
31 indicated and indicate again that within any reasonable framework that is convenient to the
32 Tribunal we will seek to accommodate his appearance on the issue for which he has been
33 instructed, and we would have hoped that perhaps some similar accommodation would be
34 made in respect to the OFT's position.

1 If I might then deal with the question of the overlap and how many issues are at stake, and
2 our learned friend, Mr. Harris's concern with the quantitative aspects of the appeal, and the
3 arithmetic that he has offered to you, we would make two submissions.

4 First, one cannot really determine what is at stake in putting up defences and preparing
5 these appeals simply by counting numbers, because it is not a quantitative exercise. The
6 truth is that the CRF appeal has raised fundamental issues, as I have indicated, about
7 significant features of the penalty regime of the OFT, and we will have to defend those in
8 these appeals. The fact that there are, if you simply count the number of defences, fewer in
9 number does not mean that the gravity and scope of what is being raised is not highly
10 significant. Again, and I do not mean for a moment to undertake the exercise, but in
11 Construction there is a huge amount of repetitious pleading as between one appellant and
12 another, and very similar themes emerge.

13 The second feature is that our learned friend suggested that I had raised but five areas of
14 overlap and when we made our submissions in the Construction case there were some 25-
15 odd items, so there are that many fewer issues. That would not be, in our submission, a
16 correct view of what we are saying. The issues that we tabulated in Construction for the
17 purposes of trying to understand what issues were raised in particular appeals, did so under
18 very broad headings, and those broad headings largely replicate the overlapping issues that
19 we have referred to. So the issue of MDT for example has a number of sub-points to it but
20 it is a general theme which has a number of specific aspects which are common. In respect
21 of the use of turnover, as I have said, as the fundamental element, or unit of analysis for the
22 purposes of the imposition of penalties, that too is a common issue that arises in these two
23 cases. It is true that in construction it turns around whether the alternative would be a net
24 profit figure, and here it goes to a different question around temporary workers, but
25 nevertheless the starting point is common as between the two cases. The business year that
26 is relevant for the purposes of determining a penalty is common between these two matters,
27 and although we have identified five broad areas they carry with them a number of sub-
28 themes, and in terms of the essential principles that are at stake, there is very considerable
29 commonality between the two. So we would submit that it is simply not a matter of
30 counting numbers at different levels of generality for the purposes of making the point. The
31 truth is at the end of the day: how much of substance overlaps on important points of
32 principle? We submit there is a very considerable overlap and it is for that reason that there
33 were common counsel and common work being done between the two sets of appeals.

1 The other submission that we would make is that if the OFT is put to having to appoint new
2 counsel, then it is going to occasion yet further delays which we would have thought none
3 of the appellants in CRF would wish, because whoever is brought in will have to spend
4 some time coming up to speed in the case.

5 THE CHAIRMAN: We are only at the beginning of February.

6 MR. UNTERHALTER: That may be so, but these are very big appeals, and it would take time.
7 Sir, we think it would be unfortunate to have new counsel coming in because it would
8 occasion further delay which nobody wants.

9 THE CHAIRMAN: I understand the cost point to some extent, but it is not being suggested for
10 the OFT, is it, that if you did have to instruct further counsel they would not be able to be
11 ready by mid-June?

12 MR. UNTERHALTER: No, it is more in respect of the defences which would have to be done
13 some time after.

14 THE CHAIRMAN: We have indicated, although Miss Kreisberger has urged us to take a
15 different view, that we would be flexible, as it were, and extend already beyond the norm
16 and take account of this matter for defences.

17 MR. UNTERHALTER: We would obviously urge you and ask you to consider the point that it
18 would be much preferred by the OFT not to have to change the team if at all possible, and
19 for those reasons we would ask for the present suggestion of September to be adhered to.
20 If it does come to a choice as between June and July, again plainly we would, I think, prefer
21 July as between the two.

22 THE CHAIRMAN: Well there is a problem, you wish to cross-examine Mr. Collins?

23 MR. UNTERHALTER: Yes, we would probably have to consider that issue in the light of
24 whether we might yield the date and hence give up that right if ----

25 THE CHAIRMAN: It would be helpful – I do not want to put you on the spot because these are
26 difficult decisions – if you were able to indicate that now that the preference was such that
27 you would, because I do not see having been told in clear terms that Mr. Collins is not
28 available, it would be wrong for us to fix this in July and then say, “You need to cross-
29 examine Mr. Collins”.

30 MR. UNTERHALTER: We would probably need a very short opportunity just to consider our
31 position on Mr. Collins. I did indicate that we thought we might need to, but if we can take
32 an instruction as far as that is concerned.

1 Perhaps I should make one or two final submissions before seeking some time just to take
2 an instruction? On this question of the overlap in respect of CDI, where it is suggested that
3 there is really little overlap ----

4 THE CHAIRMAN: I can see that there maybe less with CDI, but on the basis that they are all
5 there together - the overlap and the other ones - it applies even if CDI's overlap is less.

6 MR. UNTERHALTER: Yes. We think ultimately the overlap is somewhat more than our learned
7 friend has suggested, but we do not want to get into a counting of heads. The fact is that in
8 respect of the temporary wages there is still the conceptual question around turnover, which
9 is implied in that debate. As to MDT, there still remains the question of principle which has
10 to be determined before the specific applications of it in a particular case are concerned.
11 The starting point has a similar question, which is: What is the basic principle upon which
12 the starting point is adopted. So, whilst every case of course can be understood on the basis
13 of its particular application, it proceeds from certain Collins premises which are necessarily
14 ones for scrutiny by the Tribunal. So, again, we would suggest that there is perhaps too
15 parsimonious a view taken about those overlaps.

16 Those are our submissions.

17 THE CHAIRMAN: Thank you very much.

18 MR. HARRIS: If I may just respond briefly on one or two of the issues? First, my learned friend
19 uses the term 'harshness', which conjures up the image of, apparently, anything
20 beyond/earlier than September being somehow harsh on the OFT. With respect, that
21 submission should be treated with quite some circumspection. That that would result in a
22 hearing of a limited penalty-only appeal well over one year after -- about a year after the
23 decision is very, very generous. Even the June proposed hearing dates is much more
24 generous than usual. It is far from being harsh.

25 The subordinate comment I make on that is that what my learned friend effectively says is,
26 "Well, look at all the other work I am doing. Gosh! We do not really want to do any
27 more".

28 THE CHAIRMAN: I do not think that is quite what is being said, Mr. Harris.

29 MR. HARRIS: In many ways we respectfully submit that that is what it comes down to. But, two
30 points to bear in mind there, if I may, sir. First of all, the way in which this timetable has
31 started life has been brought about entirely of the OFT's own making. These investigations
32 - construction on the one hand and CRF on the other - lasted a great deal of time. Then
33 they happened, by the OFT's own choice, to Aberdeen published within a week of each
34 other, therefore setting the appeal timetables in motion. There is absolutely no reason why

1 the OFT had to do that. They should, and could, have foreseen the problems that would
2 arise with appeals.

3 Secondly, and perhaps rather more importantly, there is a danger in my learned friend's
4 submissions in treating Eden Brown's appeal as somehow subordinate to, or should be held
5 behind, some other, completely different freestanding appeals in something called the
6 construction cartel.

7 Our submissions make the point - and I stand by it - that Eden Brown is entitled to have its
8 appeal determined as a freestanding appeal on its own merit.

9 That leads me into the second point, sir, which is that whilst we do firmly advocate, if you
10 like, a joint hearing in the sense of sequential, and then micro-managed in the usual way -
11 and I just want to reiterate a point we put in our written submissions - ultimately were the
12 Tribunal nevertheless persuaded that somehow a September date were appropriate, Eden
13 Brown would seek in those circumstances to be split off entirely separately.

14 THE CHAIRMAN: You have said that in your written submissions.

15 MR. HARRIS: Sir, those are our submissions.

16 THE CHAIRMAN: I not sure you actually have a right of reply. We shall withdraw to consider
17 the matter. Mr. Unterhalter, if you could take instructions on Mr. Collins? Perhaps a
18 message could be sent through to us. We would find that helpful.

19
20 (Short break)
21

22 THE CHAIRMAN: We have had to decide the question of the dates for the hearing of these three
23 appeals on the basis that they will be listed for four days for the hearing together of the three
24 appeals against penalty and a half day for the Hays appeal on the particular issue of liability.
25 The September dates that were put forward as a suggestion by the Tribunal have been
26 resisted by all three appellants, who point out that this would be an extension of the hearing
27 date way beyond the norm for this Tribunal. There have been some other appeals when
28 they have been heard nine months after the service of notice of appeal, but we recognise
29 that that would be an extended time. We have had urged upon us that there are significant
30 overlapping issues between these three appeals and the construction cartel appeals which
31 have led the OFT, for reasons of resources and policy to instruct common counsel. We do
32 not feel able to assess the degree of overlap, not least as we are not apprised of the issues, in
33 the construction appeals in which we are not the Tribunal, other than in the most general
34 terms. But, we can see that there may be at least a level of policy, and possibly more - a

1 need for co-ordination in the conduct of those appeals and supervision by the Office of Fair
2 Trading of points that are raised and put forward.

3 The time for defence. The OFT has urged upon us that a date of 31st March would be almost
4 unworkable for them, whereas the appellants have said that is already considerably longer
5 than the norm. We will take an unusual course in these appeals of giving the respondent
6 considerably longer time than usual for preparation and service of their defence out of
7 recognition of the problems that the OFT faces in dealing with an unprecedented number of
8 appeals on the construction cartel in which the proceedings are running in parallel with
9 these appeals. We think it would be somewhat myopic to ignore altogether the resource
10 issues facing a common respondent. We do not think an extension of time of that nature for
11 defences gives rise to any substantive disadvantage for the appellants. But, we have regard
12 to Rule 19 of the Tribunal rules and the need to ensure a just, expeditious and economical
13 conduct of the proceedings. We think that to the extent that there is some overlap in the
14 issues, the preparation time for the hearing of the construction appeals will assist in
15 preparation for the hearing of these appeals.

16 We understand that the week of 19th July in the construction appeals is to deal with a
17 separate liability appeal, which therefore has no overlap, as we can see it, with these
18 appeals. If, therefore, as we have proposed as one of the alternatives, these appeals were
19 heard in the week of 26th July, the OFT will have the choice of either using different counsel
20 for the Durkan appeal, thus releasing its team on the penalty appeals for this appeal, or
21 instructing new counsel for the hearing of this appeal, or relying on the undoubted stamina
22 and resilience of their counsel in the construction appeals to have the same team for the
23 entirety of the construction appeals - both penalty and liability in the present appeals.

24 Bearing in mind the need to be fair to all sides, and recognising also that the solicitor on the
25 team for one of the appellants is not available the week of 26th July, we are nonetheless
26 satisfied that it is the right course to list these appeals for hearing in the week of 26th July.

27 Contrary to what was submitted by Mr. Unterhalter, senior counsel for the OFT, that is
28 likely to have an effect on the time when we may be able to deliver a judgment in these
29 appeals as that will enable some part of the long vacation - and I stress 'some part' - to be
30 used for the preparation of the judgment, and not, as would happen if these appeals were
31 heard at the end of September, that preparation of the judgment would then be pushed into
32 the Michaelmas term and coincide with judicial business in hearing other cases. Therefore,
33 it would be, in our view, of material benefit beyond simply counting the months in between
34 the two dates. That is therefore what we have decided to do.

1 We will do it on the basis that the three appeals to be heard together on penalties will go
2 first, with the Hays liability ground to follow at the end with a time estimate for half a day.
3 We have had a message regarding the issue about Mr. Collins. As we understand it, he
4 arises only on the Hays liability appeal. I see someone is shaking their head. As I
5 understood, looking at his witness statement, Mr. Unterhalter, if there is any need to cross-
6 examine him, it goes to the issue of the liability ground in relation to Atkins. Is that right?

7 MR. UNTERHALTER: There is also this issue concerning senior management.

8 THE CHAIRMAN: But there is another witness, is there not?

9 MR. UNTERHALTER: There is, yes.

10 THE CHAIRMAN: I think we will cross that bridge when we get there, if it is necessary to have
11 some separate hearing to deal with him.. We hope very much that that can be avoided.
12 That takes us then to the timetabling for pleadings. As I have just indicated, on that we
13 propose giving the OFT until 30th April for preparation of your defences. On that basis
14 skeletons from the appellants to incorporate any points in reply by 1st June. Skeletons from
15 the OFT and bundles to be lodged, we would suggest, by Monday, 5th July. We have, in
16 setting those dates, Mr. Unterhalter, looked at the timetable in the construction appeals.
17 I think that just leaves the issue of confidentiality. Some bits, I think, of the witness
18 statements are marked as 'Confidential'.

19 MR. BREALEY: Sir, I am very sorry. I am unsure as to what is happening with Mr. Collins?

20 THE CHAIRMAN: I think what we have been told is that the OFT has no present intention to
21 call him, but they wish to reserve their position. I have said that if, notwithstanding that,
22 they do decide, having reserved their position, that they do wish to call him, it appears to
23 relate only to the liability issue ----

24 MR. BREALEY: -- and the senior management issue.

25 THE CHAIRMAN: I have said that that seems to me that can be dealt with with another witness.
26 You have another witness dealing with that as well, do you not?

27 MR. BREALEY: Yes. As long as they are not going to try and put it to a separate hearing in
28 September, which just defeats the purpose that we have been debating for the last hour and
29 a half.

30 THE CHAIRMAN: It would not defeat the purpose altogether because it will enable the penalty
31 judgment to be prepared. I of course understand that if that part of the infringement were
32 set aside it will have some implication on penalty, but in terms of preparation of the
33 judgment I think it can be accommodated, producing a judgment in the same timeframe - if
34 it were really necessary to schedule an hour or so in September.

1 MR. BREALEY: But the present intention is no cross-examination but there is liberty to apply?

2 THE CHAIRMAN: I think the present indication is “not going to cross-examine but position
3 reserved”. There is no order as such that there is a liberty to apply.

4 On confidentiality certain passages are marked “Confidential”, I do not think we can deal
5 with that realistically today. It is for the good sense of the parties given that these will be
6 heard together. If there is to be cross-examination and if it is on material that is confidential
7 very often one can find a way in which that is done such that figures are not read out and
8 therefore there is no risk, but I think it is for you to consider that as appropriate, and you can
9 raise that at the start of the hearing. I do not think we are in a position to make any further
10 order and nobody has asked us to as we understand it.

11 Finally, from our side, we would ask if we could please have electronic copies of the
12 parties’ pleadings and skeletons.

13 MR. HARRIS: Sir, may I ventilate two matters? Do I take it that there is no opportunity for me
14 seeking to persuade this Tribunal that the limited amount of time between the defence and
15 the appellants’ skeletons of one month is insufficient in the context of this case, the remedy
16 being to bring forward at least by several weeks the OFT’s defence. What I have in mind as
17 problematic is as follows, that the OFT has told us that these raise many issues of
18 fundamental principle, one would therefore expect their defence to be weighty and profound
19 – point one. Point two, we have been told that there will be evidence of fact in reply with
20 the possible necessity for people like myself to cross-examine; and point three, that the OFT
21 is going to adduce expert evidence. With great respect, we say that there is a real danger of
22 prejudice to the appellants, certainly speaking on behalf of Eden Brown, if we are only to
23 have effectively the month of May, four weeks, in which to deal with that volume of that
24 weighty and that complex evidence, particularly against the background of the OFT on this
25 timetable, having had five months to put it together, and that is a real problem in our mind.
26 The one remedy I have suggested is bringing forward the defence, that is the one I would
27 urge upon the Tribunal. A possibility otherwise is to put back the skeletons of the appellant
28 to considerably later in June, but leave the OFT’s deadline for skeletons as it is on 5th July. I
29 would urge the former, but I do accept that the latter is a possibility. So I do make those
30 submissions.

31 The second matter is that, with some regret, I have to inform the Tribunal that as regards
32 Mr. Stirling, who is the finance director of Eden Brown, we have not been able to ascertain
33 definitively his availability in July despite our best efforts. I do apologise that this was not
34 drawn to my attention before the short adjournment. Can we just leave it on the basis that

1 since he is not contactable today, and my instructions are that there is a real possibility that
2 he may not be around for some of the July period due to holiday commitments that we will
3 just have to liaise as best we can, as soon as we can with the OFT and with the Tribunal in
4 that regard.

5 THE CHAIRMAN: If he is not available for the whole week he can be slotted in.

6 MR. HARRIS: Yes, I accept that. We will obviously make every effort to not interrupt the
7 timetable, but I feel I should raise that with the Tribunal now it has been drawn to my
8 attention. I did ask Mr. Unterhalter, although of course I accept that he has had a very
9 limited time to take instructions, whether or not in those circumstances they did not wish to
10 cross-examine him at all. My suspicion is that his response will be the same as regards Mr.
11 Collins for Hays, that they are not currently minded to but strictly their position is reserved.
12 I am simply ventilating that this is the case.

13 THE CHAIRMAN: Is this also an extended sabbatical?

14 MR. HARRIS: No, no, not at all. Mr. Collins is completely different, this is just the standard
15 holiday plans.

16 THE CHAIRMAN: It may be that he may have to alter his holiday plans.

17 MR. HARRIS: I accept that. All of those things will be made clear to him.

18 THE CHAIRMAN: We have ordered a July date, partly on the urging of your clients.

19 MR. HARRIS: I ventilate that just for the sake of completeness, but the former point is much
20 more profound and contentious.

21 THE CHAIRMAN: Yes.

22 (The Tribunal conferred)

23 THE CHAIRMAN: Mr. Unterhalter, on the point raised by Mr. Harris, which we can see some
24 force in, we are not going to advance the date for your defences, but we do think that if you
25 are intending to serve expert evidence, that that is something that perhaps could be done
26 earlier.

27 MR. UNTERHALTER: Yes, the expert evidence is on a discrete part of the case, and that is
28 something ----

29 THE CHAIRMAN: Yes, can you serve that by 31st March?

30 MR. UNTERHALTER: The suggestion we would offer from our side is 15th April would suffice,
31 to give two extra weeks to deal with the expert evidence.

32 THE CHAIRMAN: Well let us say Friday, 16th April for expert evidence. Secondly, as regards
33 skeletons by the appellants we have in mind to give them what is almost an extra week – the

1 1st is a Tuesday – because of the Bank holiday, but to make it 7th June, that will still give
2 you a full month.

3 MR. UNTERHALTER: We can accommodate that.

4 THE CHAIRMAN: As I say, we have some sympathy with what Mr. Harris said, so we will say
5 the expert evidence 16th April, defences 30th April, skeletons by the appellants, including
6 any points in reply, 7th June and, as I said before, 5th July for the skeleton by the OFT.

7 MR. UNTERHALTER: Thank you.

8 THE CHAIRMAN: Is there anything else that we need to deal with today.

9 MR. UNTERHALTER: We would just indicate that there will in all likelihood be confidential
10 material that will figure in our defence, but it would be subject to regime either agreed or
11 determined by the Tribunal.

12 THE CHAIRMAN: Yes, well we would hope that you could, as we have said, sort that out
13 between you. If not we will have to give a ruling. Thank you all very much.

14
15 _____
16