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**IN THE COMPETITION
APPEAL TRIBUNAL**

Case No. 1144/4/8/09

Victoria House,
Bloomsbury Place,
London WC1A 2EB

3rd December 2009

Before:

THE HON SIR GERALD BARLING
(President)

Sitting as a Tribunal in England and Wales

BETWEEN:

WM MORRISON SUPERMARKETS PLC

Applicant

- v -

THE COMPETITION COMMISSION

Respondent

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INTERIM RELIEF HEARING

APPEARANCES

Mr. Michael Fordham QC and Mr. Meredith Pickford (instructed by Gordons LLP) appeared for the Applicant.

Mr. Ewan West (instructed by the Treasury Solicitor) appeared for the Respondent.

Miss Dinah Rose QC and Mr. B. Kennelly (instructed by Linklaters LLP) appeared for Sainsbury's Plc.

Mr. Mark Hoskins QC and Mr. Julian Gregory (instructed by Freshfields Bruckhaus Deringer LLP) appeared for Tesco.

1 THE PRESIDENT: Good afternoon, it is nice to see everybody. Yes?

2 MR. FORDHAM: Can I just tell you who is here? For the Commission, Ewan West, instructed
3 by TSol. For Tesco, Mark Hoskins QC instructed by Freshfields, and for Sainsbury's,
4 Dinah Rose QC and Brian Kennelly, instructed by Linklaters. I pause in case I have missed
5 anyone.

6 THE PRESIDENT: Right.

7 MR. FORDHAM: The issue for you to decide this afternoon is whether to direct the suspension
8 of the effect of a decision of the Competition Commission. I use those words because that is
9 the language of s.120(3) and also the language of Rule 61.
10 The decision which was reflected in an email, which is at the back of tab 5, and you may
11 have seen at p.83?

12 THE PRESIDENT: First of all, I have to tell you that I have had a chance to read very little, I am
13 afraid because I was otherwise engaged.

14 MR. FORDHAM: I will take you through then the key components.

15 THE PRESIDENT: I will tell you what I have read, only because they came to hand, I read a
16 draft application, I read that yesterday. I have not read, if there is a new application now or
17 an affected one, I have not read it, I will not know about any differences. I have read a
18 letter about confidentiality and I have read a skeleton that was put in my hand shortly before
19 I came into court from the Commission.

20 MR. FORDHAM: Well you are ahead of us on that one because that has not even been put in my
21 hand.

22 THE PRESIDENT: Right. Mr. Fordham, just a stream of consciousness, obviously we listed
23 this hearing because at the time when we had to make a decision whether to list something
24 we did not know what the urgency was, what the relevant dates were, there were ideas
25 floating around. It seems that the position now – it seems to be agreed - is that contracts
26 have been exchanged.

27 MR. WEST: Yes.

28 THE PRESIDENT: And were exchanged on, I think, 23rd November or thereabouts, and that
29 completion under those contracts is due on Monday at one o'clock.

30 MR. WEST: That is correct.

31 THE PRESIDENT: So, today may be the hearing -- I do not know what people are going to say
32 about preparedness, and so on. Obviously we do not have very long just now.

33 MR. WEST: That is right. One question is whether it is better to focus on directions for a prompt
34 substantive hearing so that the Tribunal grapples with the main issue. The other problem -

1 and you may have seen this - is that we are not going to get a decision document and
2 reasons until tomorrow from the Competition Commission.

3 THE PRESIDENT: I have not seen that, no.

4 MR. WEST: I do not think anyone is suggesting that interim relief be dealt with in two stages.

5 But, if they are, that is obviously one way - one does the half an hour today ----

6 THE PRESIDENT: That might be the way it has to happen.

7 MR. WEST: That may well be the consequence.

8 THE PRESIDENT: Just simply because of availabilities.

9 MR. WEST: In any event, we will be submitting that even if it is for a prompt return date to re-
10 visit questions relating to holding the ring that it would be appropriate for an order to be
11 given today to suspend the steps which we know are imminent - on the o'clock on Monday.
12 Can I just explain, in the light of what you have said some of the background? You do not
13 need me to take you to the statute or to the rule.

14 MR. HOSKINS: I hesitate to interrupt, but in terms of where we are going forward, before Mr.
15 Fordham begins to set out his stall, if you like, it might be useful to hear from everyone. I
16 would like to say something.

17 THE PRESIDENT: I think it would be quite useful, Mr. Fordham, you having said that, which
18 comes as no surprise, and I having said what I have said, just to have a quick reaction -
19 unless there is some other fundamental thing I ought to know about.

20 MR. WEST: No. We are all for a practical way forward. Anything that anyone wants to say
21 about the practical way forward is something that we would like to hear straightaway.

22 THE PRESIDENT: Mr. Hoskins, since you leapt to your feet first ----

23 MR. HOSKINS: Sir, we are not happy ----

24 THE PRESIDENT: None of us are happy!

25 MR. HOSKINS: We are not happy because we think we have been ambushed. You have not had
26 the chance, from what you have said, to see the witness statements we have put in. We
27 believe that there has been material delay. We believe these complaints could have been
28 made around three or four months ago, and at various stages up until now. The reason why
29 there is such urgency, i.e. we are here on a Thursday afternoon and completion is at 1.00
30 p.m. on Monday, we will submit, is entirely down to delay. Now, given that completion is
31 due for 1.00 p.m. on Monday, and we believe there is a potential risk to the deal if
32 completion does not take place then - and I would want to make submissions about why we
33 think that - it is completely unacceptable for there to be, because of delay, interim relief
34 imposed just because that is where we are, and we are where are because the claimants.

1 What I would like to do, if possible this evening - because I would like to treat this as a
2 permission hearing - and I know you do not have a permission application review in CAT -
3 and my submission would be that once you have heard our submissions on delay you will
4 come to the conclusion that even if the claimant is successful on its JR, you will not grant
5 them relief at the final hearing. If that is right, then there is no need for interim relief and
6 there is no need for the difficulty, time and expense, and also the serious legal risk that we
7 believe exists to completion of the deal potentially - all this being rolled over into next
8 week.

9 THE PRESIDENT: That is going to be quite difficult to deal with in forty-five minutes, is it not?

10 MR. HOSKINS: Sir, I stress that it is simply not fair to my clients to put us in this position
11 because of the claimant's delay. What they have actually done is sat on their hands and
12 created a situation of urgency. It is wrong that they should profit from that. Obviously, I
13 simply do not what the Tribunal's availability is but I want to make those submissions, if
14 possible, so that the court can decide on my permission opposition, if you like, before 1 pm
15 on Monday.

16 THE PRESIDENT: Any other sort of headline points.

17 MR. HOSKINS: If that is not possible then there will have to be careful consideration given to
18 the nature of any interim relief because of the legal difficulty I have identified. Again, we
19 would want a hearing and Judgment, if possible, during the course of next week. The two
20 witness statements we have put in are quite short - I do not know if it would help, because
21 at the moment it is all very well for me to stand up and claim terrible delay on the part of
22 you have not seen anything that goes to that.

23 THE PRESIDENT: I think I had started reading it.

24 MR. HOSKINS: I would like to make those submissions before 1 p.m. on Monday.

25 THE PRESIDENT: Thank you very much. Who else would like to have a go?

26 MR. WEST: If I may, Sir. The Commission are in a slightly different position because, as is so
27 often the case, we are to some extent holding the ring between different private parties and
28 the public interest. You have, Sir, a skeleton from me, and I apologise to those on whom it
29 has not been served, but you will see there that we make the same general point in relation
30 to delay. In this regard we say as follows, we like to think of ourselves as being a
31 reasonable Regulator, which is to say that we stand behind our decisions but that when
32 challenges are brought to our decisions and they seem reasonably arguable, we like to think
33 that we do not introduce procedural delay or other problems in them being heard; that is our
34 basic starting point.

1 In this instance, however, there has been delay and we are mindful of the effects that this
2 can have upon the transaction. So our position is therefore, Sir, a somewhat nuanced one
3 which is that if the parties themselves were content for the proceedings to be stayed then we
4 would not object, because although we have a public interest in seeing the significant
5 lessening of competition remedied as soon as practicable, the delay to that is relatively
6 small compared to the interest of the parties, so we therefore do attach some weight to the
7 position that the parties take, so if they were willing to accept a delay it is fair to say that
8 that would not cause us difficulties. But, absent that agreement then it seems to us in this
9 circumstance there has been delay that could have been avoided and there are potentially
10 serious consequences to follow.

11 THE PRESIDENT: Just so I understand it, because I only had a very short time to glance at your
12 skeleton, the delay you refer to ----

13 MR. WEST: The delay, as we would see it, Sir, is as follows: the notification of the decision was
14 on 18th November.

15 THE PRESIDENT: That was the notification to Morrisons that they were unsuccessful.

16 MR. WEST: Yes, and the first contact then was on 20th which was an inquiry as to the successful
17 purchaser, and there was then no contact between 20th and 27th November when the
18 Commission received a letter before action from Morrisons' previous legal advisers,
19 Ashurst. No information was requested on 20th November, and there was, as far as we
20 could see, no further information that would have been provided or would have come from
21 any other source, so it is not clear to us, having not heard Morrison put their case, what
22 happened on 27th that could not have happened on the 20th. In this regard, Sir, it is
23 important to recognise that the order itself proceeds to a fast timetable.

24 THE PRESIDENT: They knew on 20th that the time had been abridged to three days.

25 MR. WEST: Yes, because that was in the draft sale and purchase agreement, I am instructed –
26 three days for exchange, 10 days for completion and that would have been the same for all
27 parties. So we start from a position where Morrisons know when the order is made on 23rd
28 April what the timescale there is and they then know the timescale in the draft sale and
29 purchase agreement, so it is a fast timescale for a very good reason because it aligns the
30 interests of the Commission in seeing the significant lessening of competition reduced as
31 soon as possible, it aligns the interest of Tesco in seeing a disposal as soon as possible, and
32 it aligns the interest of Sainsbury's as a successful bidder in receiving a return on their
33 investment as soon as possible. There is a reason for it, and that reason is known to
34 Morrisons, so it is not a third party that does not know of that fact and that is why we say in

1 the circumstances we reluctantly moved to the position we say there has been delay that was
2 avoidable as far as we can see, and the reason for us that would cause us to resile from that
3 position would be if the parties were to take a different view. It is evidence from what Mr.
4 Hoskins says that he is not in a position, as one of the two parties, to agree to that.

5 MR. HOSKINS: Just to clarify that we have identified three aspects of delay, that is just one of
6 them. If I am allowed to make the submissions we will say that on or around 24th July 2009
7 Morrisons had all relevant information and could have made the challenge then.

8 THE PRESIDENT: That is when the decision was made about ----

9 MR. HOSKINS: It was as to the suitable purchaser.

10 THE PRESIDENT: Suitable purchaser, yes, 24th July 2009.

11 MR. HOSKINS: So we say they could and should have made the challenge then. If you are
12 against me on that we will say that they were in a position on 6th November 2009 to bring a
13 challenge because they were informed on that date by Competition Commission ----

14 THE PRESIDENT: Sorry, 6th when?

15 MR. HOSKINS: 6th November 2009 that the other bidders were Sainsbury's and Asda, and then
16 we have the final period of delay that Mr. West has just referred to which relates to the fact
17 on 20th November 2009.

18 THE PRESIDENT: On 6th they knew who the other bidders were?

19 MR. HOSKINS: That is right.

20 THE PRESIDENT: But they did not know which one of them would be successful.

21 MR. HOSKINS: I do not want to get caught into – I want you to have enough information to
22 know ----

23 THE PRESIDENT: I am just trying to think through your argument on that. What would they
24 have challenged then?

25 MR. HOSKINS: The argument, if we start on 24th July 2009, you can see from our evidence we
26 say that they must have known then, they were informed that there were a number of
27 suitable purchasers, they must have known that Sainsbury's were pursuing a planning
28 application, we are putting in evidence to establish that. Now, it does not take a genius to
29 work out that there were a number of suitable purchasers, and Sainsbury's ----

30 THE PRESIDENT: So they would challenge the decision to make Sainsbury's a suitable
31 purchaser?

32 MR. HOSKINS: Absolutely. But we say if one looks at the grounds that they have put forward
33 in their draft substantive application here, all the grounds which are put forward there could
34 have been put forward as of 24th July 2009, because their basic case is it is so obvious that

1 Sainsbury's does not come free from competition concerns that they should not have been
2 given the contract, but when one sees the structure of the bid process that point could have
3 been made as a result of Sainsbury's being selected as a suitable purchaser.

4 THE PRESIDENT: There are still some issues to be decided about the effectiveness of the
5 remedy after that?

6 MR. HOSKINS: Sir, the point is and we would have to go into a bit of detail for this, as part of
7 the decision to designate the suitable purchasers one of the criteria was that the proposed
8 purchaser would be free from competition concerns, so Sainsbury's as at 24th July 2009, the
9 Competition Commission decided they were free from competition concerns. When one
10 marries up the criteria as set out in the CC's order for the bid process with the grounds in
11 the draft application for substantive relief it becomes perfectly clear that the arguments that
12 have been put forward now could and should have been put forward as a result of the
13 decision to name Sainsbury's as a suitable purchaser.

14 THE PRESIDENT: Yes.

15 MR. HOSKINS: So that is the position as at 24th July 2009 decision. In relation to 6th November
16 2009 it is the same analysis.

17 THE PRESIDENT: They have now become a bidder, they know who the bidders are.

18 MR. HOSKINS: Exactly, Sainsbury's are a bidder.

19 THE PRESIDENT: As opposed to before when it was just potentially a bidder.

20 MR. HOSKINS: Well they had been designated a suitable purchaser.

21 THE PRESIDENT: So there is no real difference between 24th and

22 MR. HOSKINS: I am covering all bases. I would much rather delay ran from 24th July but if it
23 does not it runs from 6th November. Then you have the third date which is 20th November.
24 In the normal context you stand back because the first inkling to the CC that has to be kept
25 secret from us, that there was a possible challenge was on 27th, which is information
26 gathering.

27 THE PRESIDENT: Sorry, just to get the dates, the 18.11 is when they know that they are not t he
28 successful ----

29 MR. HOSKINS: They are not successful, and 20th November they are told that Sainsbury's was
30 the successful bidder. At that stage, Morrisons know that there is an obligation on all of the
31 parties that exchange should take place within three working days.

32 THE PRESIDENT: Do they know that?

33 MR. HOSKINS: They know that because each of the suitable purchasers gave undertakings to
34 that effect - that from the date of selection best endeavours would be used to exchange

1 within three days. So, Morrisons knew that. So, they knew from 18th that they were
2 unsuccessful. Then on 20th Sainsbury was successful. So, they know exchange must take
3 place within three working days. They do not even write to the Competition Commission to
4 ask for information until after exchange has taken place - because they write on 27th. In that
5 letter they ask for the fact of the letter to be kept secret from Tesco. From Sainsbury that is
6 extraordinary.

7 THE PRESIDENT: 27th?

8 MR. HOSKINS: That is the letter of 27th. If you are about to try and pull down a deal - or at least
9 put a very big stick in the works, why would you not go to Tesco and say, "We are
10 envisaging interim relief. We want to put you on notice" - not, "We are envisaging interim
11 relief and we want to keep it secret from you for a few further days". So, that is 27th. We
12 then got a fax late on Tuesday. It was after 9.00 p.m. I think, on Tuesday, 1st December.
13 That was the first time we were made aware that there was this issue. Everyone had gone
14 home. So, the first we knew about it was yesterday.

15 Sir, our submission is whether by accident or design, this is litigation by ambush. It is
16 entirely contrary to the public interest that we should be put in a position where we are told
17 effectively the day before a hearing that there is an interim relief application, and, "Oh, by
18 the way, because of the screaming urgency, 1.00 p.m. on Monday completion, we are going
19 to have to live with interim relief". We do say that on the basis of delay - and if needs be I
20 will take you through more of the detail - it is quite clear that this is a case where, for
21 example, if it was a permission application, the Administrative Court would say, "No, thank
22 you. You are not getting permission". The CAT does not have that, but CAT can take the
23 view today, or tomorrow, or Monday morning, and say, "We have heard what has been said
24 about delay, and it is quite clear to us that it is unacceptable. So, regardless of whether the
25 argument are good or not, we will not grant relief". If that is the position, CAT can decide
26 it, and we can all go home.

27 THE PRESIDENT: You say 'relief'. Do you mean interim relief?

28 MR. HOSKINS: No. I mean substantive relief.

29 THE PRESIDENT: Do you accept that if there is not interim relief -- One thing I am quite
30 interested to know about at some point - and probably Mr. Fordham will tell me anyway in
31 a minute - is what difference it makes now that there has been exchange of contracts.

32 MR. HOSKINS: That is one of the submissions I would like to make, Sir.

33 THE PRESIDENT: I am sure everyone would probably want to. So, that is the delay point. Miss
34 Rose has not said anything yet - but maybe she does not want to.

1 MR. HOSKINS: I think it is probably because I keep interrupt everyone.

2 THE PRESIDENT: Probably, yes. Miss Rose, do you want to say anything at this stage?

3 MISS ROSE: Yes, Sir. The concern that Sainsbury has is, in particular, that the interim relief that
4 is being sought includes an order prohibiting Tesco and Sainsbury from completing the sale
5 of the site. In other words, it is not, as Mr. Fordham suggested, simply interim relief that is
6 being sought to suspend the effect of a decision of the Competition Commission. But, he is
7 actually seeking an order that interferes with the private law rights of two third parties who
8 are not even alleged to have committed any wrongful act. To our, frank, amazement, that
9 relief is being sought without any undertaking in damages being offered. We specifically
10 invited the appellant to indicate whether they were prepared to offer a cross-undertaking in
11 damages, and they declined to do so. So, we find that, frankly, astonishing.

12 THE PRESIDENT: What would your position be if they did offer one?

13 MISS ROSE: Sir, our position is that if they did offer a cross-undertaking in damages we would
14 be content for there to be interim relief with an expedited hearing.

15 THE PRESIDENT: Of the substantive application.

16 MISS ROSE: We hear entirely what Mr. Hoskins has said about delay. There may, indeed, be a
17 good reason for dismissing this appeal on grounds that it is out of time, but we appreciate
18 that it may be very difficult for you to consider issues like that this afternoon.

19 THE PRESIDENT: The submission is that we should refuse interim relief on the basis that we
20 would not give final relief.

21 MISS ROSE: Yes, but, in fact, the logical result of this first submission - that the relevant date is
22 the July date - is that in fact the appeal is out of time. I take his point that there should be,
23 as a matter of discretion no relief because of the delay in November ----

24 THE PRESIDENT: He has not made that point.

25 MISS ROSE: No, Sir, but I am pointing out that actually the logical -----

26 MR. HOSKINS: It is a better point.

27 MISS ROSE: He is adopting it! (Laughter) It is adopted enthusiastically on the other side. The
28 logical result is that the appeal fails for limitation points. But, I appreciate the difficulty of
29 dealing with these points this afternoon. We would therefore, in principle, not object to
30 interim relief, subject to a cross-undertaking in damages with a closely monitored and
31 agreed expedited timetable for the main hearing. But, we can see the point that there is
32 something to be said for the substantive issues being dealt with when everybody has had
33 enough time to get their evidence together and put in their arguments. But, we cannot

1 tolerate a situation in which the completion of this contract is to be prohibited by an
2 injunction without a cross-undertaking in damages.

3 THE PRESIDENT: The immediate damages, I suppose, might be that there is probably
4 something in the contract which says that if completion does not take place ----

5 MISS ROSE: Penal interests, yes.

6 THE PRESIDENT: -- on the day, then the vendor -- I do not know. In this case it would be the
7 Tribunal who would be the cause of non-completion.

8 MISS ROSE: There are further problems. Obviously, one does not know exactly how long it is
9 going to take for this process to be completed. Even if there is an expedited hearing there
10 may then be a delay before judgment. From our perspective the main loss that we are
11 concerned about is the delay in being able to open the store and to profit. That is inevitably
12 going to happen that there will be ----

13 THE PRESIDENT: Forgive me. I ought to know this. Is the store trading at the moment?

14 MISS ROSE: No, it is not.

15 THE PRESIDENT: It is a site, is it?

16 MISS ROSE: It is a site, yes, but there is obviously a knock-on effect further down the line. We
17 say that in circumstances where we are an innocent third party, where there has been the
18 delay that you have heard about, where the parties had exchanged contracts, we ought to be
19 indemnified by the appellants if they are going to get any interim relief. It is quite obvious.

20 THE PRESIDENT: Let us ask Mr. Hoskins. You did not deal with that issue.

21 MR. HOSKINS: I am trying not to outstay my welcome each time I stand up!

22 THE PRESIDENT: Mr. Fordham, do not get worried. I am just setting up these ducks so that
23 you can then knock them all down.

24 MR. HOSKINS: Sir, can I make the point about the contract? It is not simply a question about
25 the damages. I think it is important that the first Rigby witness statement sets out the
26 standard terms and conditions. I can take you to them very quickly to show you why we are
27 worked up about it and why it is not just a question of, "Well, it might slip by a day or two".
28 There is a sales agreement which contains lots of confidential stuff, and therefore it is not
29 annexed.

30 THE PRESIDENT: This is the thing attached to your ---

31 MR. HOSKINS: To first Rigby. It is SAR1. A sales contract between the parties which has
32 individually agreed terms, including the completion date of 1.00 p.m. next Monday. It
33 incorporates, subject to some amendments, these standard terms, which are standard ... If I

1 can ask you please to look at Clause 1.1.3 there is a definition exactly of when a party is
2 ready, able and willing. It purports to be an exhaustive definition.

3 THE PRESIDENT: “(a) if it could be but for the default of the other party; (b) in the case of the
4 seller, even though a mortgage ----”

5 That does not apply, does it?

6 MR. HOSKINS: Sir, the relevance of that will become apparent in a minute. That is the
7 definition of when a party is ready, willing and able. 8.8:

8 “At any time on or after completion date, a party who is ready, able and willing to
9 complete, may give the other a notice to complete”.

10 Now, we get into an interesting legal point. If the CAT has granted interim relief, what is
11 the effect on the parties’ ability to serve a notice to complete?

12 THE PRESIDENT: Could the CAT not just order them not to?

13 MR. HOSKINS: It might, if it was prepared to do that. I will explain the risk, and it may be that
14 we can then work round that. This is where our concern comes from.

15 THE PRESIDENT: Just to go back one stage, if the order were to suspend the effect of the
16 Commission’s order – it is the approval order, is it not? Whatever they did in November ---

17 MR. HOSKINS: Yes.

18 THE PRESIDENT: If that was suspended, would you not be back to the position you were before
19 that? In a sense it would be in limbo. Would you then be entitled to take these steps?

20 MR. HOSKINS: That is one of the interesting -- A contract is a contract. In a contract you could
21 provide for what would happen in the event that a court or tribunal issued interim relief, this
22 contract – not surprisingly – is silent in relation to that. So if the Tribunal makes an order
23 for interim relief there will be the legal uncertainty of what is the interaction between the
24 Tribunal’s order and the contractual rights of the parties.

25 THE PRESIDENT: That slightly begs the question of what order the Tribunal would make.

26 MR. HOSKINS: I understand, and that is the reason I am so keen to show you the detail, to show
27 you what our concern is because if we can deal with it maybe we will all be happy.

28 THE PRESIDENT: So the question is then what would happen if you were given a notice to
29 complete.

30 MR. HOSKINS: Exactly, and you will see 9.5 is a buyer’s failure to comply with notice to
31 complete, so that is if we issue a notice to complete, and 9.5.2: “The seller may rescind the
32 contract...”, now the chances of the CC allowing us to do that are probably quite slim. 9.6
33 is probably more pertinent in this context: “Sellers failure to comply with notice to
34 complete”, so this is envisaging Sainsbury’s issues a notice to complete on us –

1 “... if the seller fails in accordance with a notice to complete, the following terms
2 will apply:

3 9.5.2 the buyer may rescind the contract.”

4 So our concern is that if completion cannot take place at 1 p.m. on Monday and if
5 Sainsbury’s, for whatever reason, decides to issue a notice to complete, and if we are
6 prevented by virtue of an order of the Tribunal from completing within 10 working days of
7 the notice, Sainsbury’s will have the power to rescind. It may well be Sainsbury’s say:
8 “That is not on our radar”, but strange things happen in business – I will say the word
9 “Dubai” and I think that is probably all I need say – we do not want to be left with the
10 uncertainty of this contract potentially being rescinded. That is our concern.

11 THE PRESIDENT: By the same token Miss Rose could make that point too, could she not?

12 MR. HOSKINS: That is right, absolutely. So that is what I am saying, I am unhappy about
13 having to wait to get interim relief by default, which means that completion cannot take
14 place at 1 p.m. on Monday, that is why I am worried, and that is why either that has to be
15 dealt with by an order or by undertakings or whatever, to make sure the contract cannot fall
16 away, or we say ----

17 THE PRESIDENT: You are protected. Can I ask you this: Do you take the same approach as
18 Miss Rose to the cross-undertaking point? If you were given a cross-undertaking in suitable
19 terms?

20 MR. HOSKINS: No, because it would not be enough, well if we were given a cross-undertaking
21 it would include damages suffered as a result of rescission.

22 THE PRESIDENT: Well it is in very broad terms, the standard one, is it not?

23 MR. HOSKINS: It would give me more comfort, it would give me complete comfort – I will take
24 instructions but I will tell you what my worry is and why I am not saying heartily “Yes”,
25 that is the answer, there may well be really difficult issues of causation of damage, because
26 if this goes on and the JR is successful, for example it goes back to a new process and it
27 turns out Morrisons are the only bidder ----

28 THE PRESIDENT: No, but if they were successful ----

29 MR. HOSKINS: Well that maybe a better one.

30 THE PRESIDENT: You would not get the benefit of the cross-undertaking.

31 MR. HOSKINS: So we may find that the contract has been rescinded and we are left with a new
32 bid situation where there is only one bidder. It is not looking great for Tesco – it is not
33 looking great for competition either. It is a completely falsified bid process then. So what
34 you have at the moment is a genuine bid process.

1 THE PRESIDENT: That assumes that you have the benefit of a cross-undertaking, but Mr.
2 Fordham wins the substantive case then obviously your cross-undertaking goes out ----
3 MR. HOSKINS: He will not be bound by any cross-undertaking.
4 THE PRESIDENT: No, he will not then.
5 MR. HOSKINS: We could suffer significant loss because they could have knocked Sainsbury's
6 out as a purchaser, there will have to be a new competition, Morrisons would be the only
7 person in the frame.
8 THE PRESIDENT: But if the decision was unlawful to put Sainsbury's in there, one would not
9 have much sympathy ----
10 MR. HOSKINS: What is being said, if Mr. Fordham ever gets a chance to speak, is this is all
11 terrible because we have raised this claim and there is a risk to competition. The point I am
12 making is that if interim relief is granted there is the potential that a carefully planned and
13 executed bidding process will be set at nought because you cannot go back to the position
14 you were in before.
15 THE PRESIDENT: That is assuming he wins the case.
16 MR. HOSKINS: Yes.
17 THE PRESIDENT: If he wins the case he wins the case, does he not?
18 MR. HOSKINS: Yes.
19 THE PRESIDENT: Looking at it from his perspective there is no point even bringing the case if
20 he cannot get interim relief.
21 MR. HOSKINS: There is, that is right, but the grant of interim relief may have these
22 consequences.
23 THE PRESIDENT: All I am trying to get at the moment, Mr. Hoskins, from you is if Mr.
24 Fordham were to proffer an appropriate cross-undertaking in damages, so that if he was
25 granted interim relief and lost the case you would be compensated under the cross-
26 undertaking for whatever loss you might have suffered. It might be a short period, if the
27 matter were to be expedited, I do not know what it would be. Miss Rose has said from the
28 point of view of Sainsbury's she would be content with that approach, of course, it may be
29 there will not be any question of a cross-undertaking being offered. All I am really trying to
30 elicit from you is that being the case you would feel the same.
31 MR. HOSKINS: Can I take instructions?
32 THE PRESIDENT: Please.
33 MR. HOSKINS: (After a pause) Sir, I think the problem we have is the one I was clumsily trying
34 to elucidate, which is, we say, there has been substantial delay here. If interim relief is

1 granted and Mr. Fordham wins at the end of the day we will be prejudiced, even if there is a
2 cross-undertaking in damages, the reason being that you can never go back to the position
3 we would have been in if this claim had been brought promptly, because if the claim had
4 been brought promptly when parties were bidding in the frame there would have been Asda,
5 Morrisons and Sainsbury's, but because there is water under the bridge now we know now
6 that Asda cannot re-enter. If the JR is won we will know that Sainsbury cannot re-enter, so
7 the effect will be that there is only one game in town and that is Morrison's and that is the
8 reason they are pursuing this so strongly. We will not be covered by cross-undertaking in
9 damages to the loss of that commercial pressure in the bidding process and we will have lost
10 that commercial pressure because of the delay in bringing this action, because if it had been
11 brought around about July, and had been successful, then at the very least Asda would still
12 have been in the frame. Now, it may have been as it went on with the bids, Asda and
13 Morrison, because remember they were both found to be suitable purchasers so Morrison in
14 making a bid would have to take account of the fact that Asda was bidding as well it would
15 not know at the end of the day Asda would not be selected, so that is the problem with this
16 interim relief. Interim relief is supposed to hold the ring, it cannot and that is the problem
17 with a cross-undertaking in damages.

18 THE PRESIDENT: I will take that as a "no" then.

19 MR. HOSKINS: It is a "no".

20 THE PRESIDENT: Mr. Fordham, there you are, you can see how the land lies.

21 MR. FORDHAM: I think I am facing two suggested knock-out blows for today. The first
22 suggested knock-out blow is Mr. Hoskins' red traffic light, he says "delay". The second
23 suggested knock-out blow is Miss Rose's amber light, she says "green, only with a cross-
24 undertaking." Can I seek to assist you in relation to those two points?

25 THE PRESIDENT: Yes.

26 MR. FORDHAM: You will have noted that nobody is submitting that our substantive challenge
27 is unarguable, so the starting point is that we have a viable, arguable and, indeed, challenge
28 to a decision.

29 The next point is that there is no getting 'round that which the Commission expressly
30 accept, namely, that the relevant decision which we are entitled under the Statute to seek to
31 review is the November decision, and that is a decision made under para. 63 of the order at
32 tab 11, p.43. This is stage 2, it is not stage 1 where an initial consideration is given, it is the
33 ultimate appraisal of candidates, it is a relative assessment and what the Commission has
34 done, we know, in this case, was that they decided that two bids achieved an equally

1 comprehensive solution, that was Morrisons and Sainsbury's and they decided therefore to
2 provide Tesco with the choice. That is the decision in respect of which the arguable
3 grounds arise and our statutory right to seek a review arises. We say it was unsustainable of
4 the Commission to conclude that Sainsbury's provided an equally comprehensive solution
5 with their two existing supermarkets in the relevant area to Morrisons.

6 THE PRESIDENT: And your ground is irrationality basically?

7 MR. FORDHAM: Our ground certainly includes unreasonableness, and I do not shrink from that.

8 Sir, you know, and it is one of the ironies of criticisms of us that we will find out the
9 reasons for this decision and the appraisal that underlay it tomorrow.

10 We are all for speed. You saw in the draft application for interim relief, and I can tell you
11 the perfected version did no more than take out the word "draft", that we undertook to
12 pursue this expeditiously. We prepared the application for review and if that means a
13 substantive hearing for, example, the week after next, so be it, we will be here to argue out
14 the substance. Given that the Tribunal applies judicial review principles, and considers a
15 quashing remedy, Mr. Hoskins will be able to argue as compellingly as he is able for delay
16 considerations to count against us, whether it is a July point supposedly, or three days or
17 five days or seven days in November, but that is our practical position. We say that is the
18 way forward.

19 Mr. Hoskins' main point in relation to delay concerns the prejudice that he says is capable
20 of arising under the terms of this property deal which he showed you. But as regards that,
21 that is the idea that somehow the whole deal can be scuppered by the delay which is
22 injected by an order holding the ring by the Tribunal while it considers a viable judicial
23 review application. The problems with that suggested nuclear option with Sainsbury's
24 finger over the button are obvious as soon as you look at the very first provision that he took
25 you to, because Sainsbury would only be in a position where they are ready, able and
26 willing to complete if they could, but for the other party's default. But, if the Tribunal has
27 made a court order which has suspended the effect - and I hold to the fact that that is the
28 consequence of suspending the decision under para. 63 - it would mean that Sainsbury
29 cannot be treated as an approved purchaser for this deal to proceed to its completion.

30 THE PRESIDENT: You say that effective interim relief would be just to suspend the
31 Competition Commission's decision. You do not ask for anything else.

32 MR. FORDHAM: It has the same consequence that they cannot complete at one o'clock on
33 Monday. You cannot complete the deal with somebody where their qualification as the
34 purchaser rests on a decision of a public authority which is impugned in proceedings and

1 that decision has been suspended. We included para. 2 of the order. We thought it was
2 helpful to spell out what the consequence is. Of course we accept that that is the
3 consequence. But, there is no Armageddon for Mr. Hoskins at the hands of Sainsbury who
4 would not be able themselves to complete in the light of that order.

5 In any event, he has two further problems in relation to this. The first is that there is no
6 suggestion - and Sainsbury are here; they are parties in these proceedings - that they would
7 seek to do this and would scupper everything by exercising some purported power of
8 notification. On the contrary, Miss Rose has told you that she is content, subject to the
9 other point I have got to come to, which is the cross-undertaking ----

10 THE PRESIDENT: I suppose they might change their minds.

11 MR. FORDHAM: So be it. But, that is the third point. The third point is: assume the worst, and
12 rather surprising it would be, that Sainsbury decides at some stage to purport to issue a
13 notice - and let us suppose that there is plausibly the suggestion that they are in a position to
14 do that notwithstanding the order that this Tribunal has made, none of which do we accept -
15 - What would happen would be that there would then be a ten-day window. There would
16 be a ten-day period at which Mr. Hoskins would be urging finality in relation to the issues.
17 It is not an immediate termination.

18 THE PRESIDENT: The notice is ten days, is it?

19 MR. FORDHAM: It is a ten-day notice. Even if they issued one, all they would be doing -- All
20 Miss Rose's clients would be doing, if they decided to do that ----

21 THE PRESIDENT: Then they could rescind at the end of it.

22 MR. FORDHAM: We could be brought back here and we would need to get on like grease
23 lightning - something we are all prepared to do in any event. So, that is the nuclear option in
24 relation to delay. It cannot be the case that an exchange within three days of a decision
25 where the identity of the beneficiary is only communicated on Day 3 - we were only told
26 that on 20th, not on 18th November -- It cannot be the case that there are three days to get the
27 Competition Appeal Tribunal to rule because otherwise, as soon as you have got exchange
28 there can be no practical and effective remedy at the hands of the Tribunal who has the
29 statutory supervisory role.

30 THE PRESIDENT: People might feel they are prejudiced though if you knew obviously there
31 was going to be exchange of contracts and you allowed that to happen without going to the
32 court. I suppose that is the point that is being made.

33 MR. FORDHAM: They can make the point. They have made the point that within three days
34 there was an exchange of contracts. But, it cannot be the case that we are put out of court

1 on the basis of undue delay in relation to a three day window, especially one in which we
2 are not given a decision document; we are not given reasons for a decision; and we are not
3 even told at the time of the e-mail who the successful bidder has been. That is something
4 that we are only told on Day 3. We are only told on 20th. Yet, that is the logic.

5 THE PRESIDENT: You knew who the other two were though, did you not?

6 MR. FORDHAM: Yes, we did. We knew that Sainsbury were a bidder, yes.

7 THE PRESIDENT: So, the successful one was either going to be Sainsbury or ----

8 MR. FORDHAM: Sainsbury, Asda, Morrisons.

9 THE PRESIDENT: You knew it was not you on 18th. So, you knew it was either Sainsbury or
10 Asda.

11 MR. FORDHAM: Correct. That is right. It is particularly ironic that those who seek to suggest
12 that we are ambushing by writing a detailed and considered letter within seven days to the
13 commission to try and elicit information that we do not get promised until tomorrow. We
14 then write on 1st December to both the relevant supermarkets. They complain that it is not
15 long enough and they are ambushed and taken before the Tribunal at top speed. But, their
16 logic is that it all should have been done within a day or so on 20th November. Now, we are
17 in the Tribunal's hands, but this does not begin to be the undue delay that would put us out
18 of court irrespective of our merits because if we have legal merit in relation to our challenge
19 to this determination, the Commission has given competition equivalence where it did not
20 belong and the public interest considerations as well as the commercial considerations to
21 Morrisons are very serious.

22 THE PRESIDENT: What about Mr. Hoskins' point that you must have known that Sainsbury
23 were unsatisfactory back in July; that they should not have been in there?

24 MR. FORDHAM: The difficulty with that submission - and it was not an approach which the
25 Commission, rightly, we say, supported - is that it involves taking the Stage 1 process under
26 the order (you have not yet been taken through the evaluation) and saying, "Ah, well, if the
27 threshold is passed in relation to Sainsbury you have got your decision for judicial review
28 purposes". The truth of the matter is that you have got no such thing. You have got the
29 threshold test - and, again, I appreciate you have not seen these documents, but in the order
30 I was showing you, this is para. 6 on internal p.33 of Tab 11 - and there is an initial
31 consideration of who might be in the frame. If you turn the page to p.35, you then get a
32 detailed assessment. I am thinking in particular of para. 19. One proceeds to an ultimate
33 decision at Stage 2 on an assessment of suitability. You see at the bottom of p.41 that the

1 decision on how effectively a particular bidder remedies the SLC is the ultimate decision at
2 Stage 2 of the process.

3 So, the first point is that one only has an initial view. We are not challenging that decision.
4 We are out of time, as Miss Rose, rightly points out.

5 THE PRESIDENT: But, is para. 19 any different from -- I think Mr. Hoskins' point is that the
6 decision in July was to the effect that there were no competition concerns about those that
7 were left in, which included Sainsbury.

8 MR. FORDHAM: Sir, you are right. It is p.40, para. 46, where one has the process for the
9 detailed assessment. I did show you para. 52 which is the relevant decision at that stage.
10 Now, make no bones about it, were it otherwise it is not three days or seven days or ten
11 days, it would be an inability to challenge in any event because the decision would already
12 have been made. But, the decision has not already been made.

13 THE PRESIDENT: I am sorry, Mr. Fordham. Paragraph 52 is a decision which was taken in
14 November; is that right?

15 MR. FORDHAM: Yes. It is the ultimate Stage 2 decision. If we had brought a challenge at
16 Stage 1, we would have been told, "You are premature. This is a short-listing stage. The
17 detailed consideration of the competition implications is still to come".

18 THE PRESIDENT: It would depend what your grounds are, would it not?

19 MR. FORDHAM: All of this will be for argument, as no doubt it will be argued, by Mr. Hoskins
20 at the substantive hearing. That is the first point in relation to this aspect which you have
21 asked me about.

22 The second point in relation to this aspect is that the equally comprehensive test, which I
23 showed you at the foot of p.43, is the Stage 2 question. At para. 63, the penultimate line on
24 that page:

25 "If the Competition Commission considers that two or more bids achieve an
26 equally comprehensive solution then the Competition Commission can say to
27 Tesco, 'You choose'".

28 THE PRESIDENT: That is what happened?

29 MR. FORDHAM: That is what happened. The nub of our challenge - and you characterised it as
30 irrationality - and certainly that is included - is that it was unsustainable to regard Sainsbury
31 after this detailed appraisal as being equally comprehensive to Morrisons. That is not a
32 ground we could have taken in relation to a short-listing decision at Stage 1. It is peculiar to
33 Stage 2, the provisions that relate to Stage 2, and the reality of what the Commission has
34 actually decided. So, you can already see that to the extent that there are issues for

1 consideration and ruling by the Tribunal relating to remedy and delay, and relating to
2 whether points should have been advanced at an earlier stage, those are plainly arguable
3 matters that need to be considered when the nettle is grasped and the argument is had as
4 soon as possible.

5 That is the position in relation to delay. Mr. Hoskins had just one other point. His other
6 point was: “If they succeed, we will be put in a position where one bidder has gone”. But,
7 as you pointed out to him in argument, that is simply the logic of us being right, if we are
8 proved to be right, as to the unlawfulness of a decision in which they, Sainsbury, were
9 unjustifiably characterised as being a candidate. We are wrong about that, we will lose for
10 that reason, but if we are right that that was unsustainable, the logic follows that they are out
11 of the frame and the decision must be re-taken. None of that is a component or a
12 consequence of delay. That is simply the logic of the decision that has been taken and
13 whether or not it is a sustainable one.

14 Can I turn to the other point which has been raised, which is the amber light and the cross-
15 undertaking in damages? What we have said in relation to the cross-undertaking in
16 damages is that it is inappropriate for the Tribunal to require, as a pre-condition to a
17 suspensive direction, that we give such an undertaking. If we are right about that, then we
18 should not be offering it. The reason why we submit that is right was explained in a case
19 called *Genzyme* at Tab 9, paras. 129 and 130 at p.39 in this determination. We have put
20 together a bundle of relevant decisions so that they are before you, Sir, today. They really
21 prove a negative, which is that in this jurisdiction cross-undertakings in damages are not
22 required. There is one scenario in which an exception to that applies, I will come to that in
23 just a moment. But the parallel is drawn understandably with decisions of the European
24 Commission and of the European Courts, and here in this decision of *Genzyme*, the then
25 President, Sir Christopher Bellamy, is explaining that in the *NCB* case the European
26 Commission did grant interim relief on a cross-undertaking but that approach has not been
27 followed since either by the Commission, the Court of First Instance, or the Court of
28 Justice.

29 THE PRESIDENT: I rather read this as saying that there is no power to order it, that is not the
30 same as saying that there is no power in the exercise of discretion to say if a cross-
31 undertaking is offered that would make a difference.

32 MR. FORDHAM: That I would have to accept. The question is whether the Tribunal insists on
33 an undertaking as a pre-condition.

34 THE PRESIDENT: I do not think this dictum is really going to that.

1 MR. FORDHAM: Well it is making the point that it does not happen under the parallel ECJ
2 regime.

3 THE PRESIDENT: "... any power to order a cross-undertaking".

4 MR. FORDHAM: I am looking in the next sentence:
5 "It is true that in one old case ... the European Commission did grant interim relief
6 on the basis of a cross undertaking"
7 - now that is the point you have just made.

8 THE PRESIDENT: Yes.

9 MR. FORDHAM: Because that is not power ----

10 THE PRESIDENT: You cannot require it, but you can indicate that you would only give interim
11 relief if it were offered ----

12 MR. FORDHAM: Certainly.

13 THE PRESIDENT: -- because that would simply be one of the circumstances that would be taken
14 into account as to where the justice lay, the balance of convenience.

15 MR. FORDHAM: We entirely agree, and as he goes on to explain that approach of insisting on
16 it, but not ordering it has not been followed since, in the Commission or the Court of First
17 Instance.

18 THE PRESIDENT: Honestly, I do not think what the Commission does really is relevant.

19 MR. FORDHAM: I am going to give you one more reference before you make up your mind
20 finally as to whether you are concerned, because there is one other passage you ought to
21 see.

22 THE PRESIDENT: Of course.

23 MR. FORDHAM: Then in the next paragraph you will see there is a reference to the OFT when it
24 is enforcing its public duties, but then these points:
25 "This is not party and party litigation. The issue is a public one, the maintenance
26 of competition."
27 We say those are principled reasons. The reference to party and party is of interest because
28 the reason why undertakings in damages are called cross-undertakings in damages is
29 because they tend to provide asymmetry in party and party cases where you are looking at
30 damages as an adequate remedy for a plaintiff, and you are equalising things by saying:
31 "Are you prepared to put up what would be damages for the other side?" Of course there is
32 no question here of Miss Roses's clients ----

33 THE PRESIDENT: Obviously it is like a judicial review, it is a judicial review – what is the
34 position in judicial review?

1 MR. FORDHAM: The position in judicial review is that cross-undertakings in damages are often
2 put forward.

3 THE PRESIDENT: Of course they are, yes.

4 MR. FORDHAM: Yes, well I accept that.

5 THE PRESIDENT: This is a judicial review, this is what the statute said under s.120(4).

6 MR. FORDHAM: It is an application for review which you apply judicial review principles.

7 THE PRESIDENT: Well that is a judicial review principle. Honestly, unless there is some killer
8 – show me the other bit you wanted to show me.

9 MR. FORDHAM: Yes, I wanted you to see the one example, because you are about to break new
10 ground, and ----

11 THE PRESIDENT: I have not decided anything yet (Laughter) I am just not terribly convinced
12 by this argument that because the European Commission does not do something that the
13 Tribunal should not do it, it is operating under a different statutory framework.

14 MR. FORDHAM: So far I have shown you a parallel, I have shown you reasons which are
15 principled. I will show you the other ----

16 THE PRESIDENT: Well I have to take account, in theory if I were considering it, I would
17 obviously have to take account of the public interest and a whole range of other things, as
18 you would in a judicial review in the Admin. Court, but the idea that one should not even
19 contemplate doing it seems to me to be going a bit far.

20 MR. FORDHAM: My submission is that you should not insist on it as a pre-condition for the
21 granting of suspensive relief in this case. We have a far better solution which is an
22 expedited substantive hearing.

23 THE PRESIDENT: Well it may take a few weeks, we are coming up to Christmas. Is it not fairer
24 to have that option of ordering a cross-undertaking? How can one do justice without it in
25 these cases, and apart from anything else it makes it much harder to get interim relief, does
26 it not?

27 MR. FORDHAM: I repeat the point I have made about symmetry, because we do not have a
28 damages remedy in this context. It is not being said that it is a reason to refuse interim
29 relief that the claimant will be okay, as they might be in a private law context, because they
30 will be able to get their damages. Miss Rose does not say “refuse interim relief and I will
31 give a cross-undertaking on behalf of Morrisons”. That again is a principal point that I am
32 entitled to put forward.

33 The reference I wanted you to at least be aware of, Sir, is the case of *Napp* which is in the
34 authorities bundle and you ought to be aware of Sir Christopher Bellamy’s determination in

1 relation to interim relief. It really starts at para. 38, but he discusses *American Cyanamid* at
2 para. 39 saying that really that is not necessarily determinative, it is not party and party
3 litigation, the public interest features prominently. I just want you to see para. 40 so that
4 you have his view in relation to the European ----

5 THE PRESIDENT: The Court of First Instance.

6 MR. FORDHAM: And you know what the practice is in this parallel context, so I hope I can be
7 forgiven for showing you what that practice is in the context of those observations about
8 them being the closest analogy. I said there was one exception to the cross-undertaking
9 point in this jurisdiction and it is the *Napp* case and it also featured in *Genzyme* itself that
10 we have seen, but you will see it in *Napp* at paras. 50 and 51. He says:

11 “... a prominent, if not the most important, factor in the present case has been
12 *Napp*’s undertaking, properly and responsibly made, to indemnify the Department
13 of Health in respect of losses suffered in the interim if *Napp*’s appeal is
14 unsuccessful.”

15 That was a pricing control case, and they were saying: “If we lose, we will adjust
16 retrospectively our pricing so that the Department of Health does not lose out”. But if you
17 look at the end of para. 50 you see why that undertaking served a particular function
18 because it removed the competition concerns pending determination. There is no question
19 in a case like *Napp* that you are seeking to protect other drug providers who might be able
20 to put themselves in a different position and so we felt it right for the Tribunal to be aware
21 that undertakings have not been required in this jurisdiction and in fact the Tribunal’s guide,
22 which is also in the same bundle, and deals in some detail with the considerations that
23 influence the grant of interim relief in this jurisdiction.

24 THE PRESIDENT: Do you want to take me to that?

25 MR. FORDHAM: It is tab 14 and it is pp. 62 and 63 and it discusses *Napp* and *Genzyme* and the
26 other authorities. You will see the other considerations, there are two references, 20.3 at the
27 end of that paragraph, and 20.11 at the end of that paragraph, to resolving uncertainties by
28 ensuring expedition. You have our undertaking in relation to that. It is fair again, I hope,
29 on behalf of my clients, to point out the so-called cross-undertaking in damages does not
30 feature in the Tribunal’s guide or analysis as to how interim relief is approached here. I am
31 asked to read: “The powers of the Tribunal ... to make interim orders ... and the procedures
32 to be followed, are set out in Rule 61.” I pause – there is no mention of a cross-undertaking
33 there either.

1 “The Tribunal has stated that this jurisdiction must remain flexible, ready to be
2 adapted to the particular circumstances of the case where the interests of justice so
3 require.”

4 There will be many cases where there will be third parties who will be affected in which the
5 Tribunal is considering appeals or applications for review, it has not previously been
6 considered to be appropriate.

7 THE PRESIDENT: There is always a first time for everything.

8 MR. FORDHAM: I of course accept there can always be a first time.

9 THE PRESIDENT: We do not have very many applications for interim relief, funnily enough, so
10 we have not had much opportunity to look at those.

11 MR. FORDHAM: Well I cannot improve on passages that explain principled reasons, on
12 passages that explain the closest parallel, which explain that it is not done in relation to that
13 closest parallel and that passages that identify the principles upon which interim relief is
14 approached.

15 THE PRESIDENT: You have been very helpful, thank you.

16 MR. FORDHAM: I ought to make clear, as I have made clear, and we have made clear in
17 correspondence, that of course we accept it is a matter for the Tribunal to decide in the
18 circumstances of any case whether something will or will not be regarded a pre-condition,
19 that is why it is an amber light. We have made our submissions, we submit that it is not
20 appropriate in circumstances where we can deal with this case by having an expedited
21 hearing, and my learned friends can make all of their submissions in relation to remedy.

22 THE PRESIDENT: Anyway you are not ----

23 MR. FORDHAM: I am not proffering one. It will be a matter for the Tribunal to decide whether
24 to impose one as a pre-condition for interim relief. Can I just check if there is anything
25 else? (After a pause) Mr. Pickford reminds me, and it is right to say, that few they may be,
26 but there are good examples, *National Grid* was a good example, I think you were involved
27 and that was a case of interim relief, and yes, third parties are affected, but one does not
28 have this cross-undertaking in damages being put forward as the pre-condition to relief.

29 THE PRESIDENT: It may not be appropriate. One has to look at each case on its own, it says in
30 the guidance at 21 that interim orders may be subject to such conditions as the Tribunal
31 thinks fit.

32 MR. FORDHAM: I have of course accepted that, I have not suggested that it would be
33 impossible for the Tribunal to reach that view. It is no accident that they have not been
34 required in this jurisdiction, it is not something which should be serving as an incentive ----

1 THE PRESIDENT: Well what is the principled reason that distinguishes these public law cases
2 from judicial review in the Admin Court for this purpose?

3 MR. FORDHAM: One could say the same point in relation to competition considerations in the
4 Court of First Instance, and the European Court of Justice, but the fact is that prominent,
5 indeed central, in all of these cases are the public interest considerations which always
6 arise ----

7 THE PRESIDENT: They arise in the Admin Court day in, day out, as you well know.

8 MR. FORDHAM: In competition cases one has central to each case those public interest
9 considerations, and my final submission in relation to this is that one ought not to have the
10 distortion of the incentive or disincentive for any party that is presented when one party
11 writes a blank cheque, it is far better for the mind to be focused on the expeditious
12 resolution of the substantive issue, those are our submissions. Those are our reasons why
13 we were not prepared to offer a cross-undertaking, and unless I can assist you further.

14 THE PRESIDENT: No, you have been very helpful.

15 MR. FORDHAM: Unless there is anything else, those I think were the two knock-out points that
16 we were said to face today. If it is felt that there is more to say or argue about in relation to
17 delay and there is some reason why that cannot be done at the substantive stage of this
18 statutory judicial review then one will have to take a view as to how that is to be dealt with.
19 But in the time available we have addressed the two headline points that have been put
20 forward, and those therefore are our submissions.

21 THE PRESIDENT: Thank you very much, Mr. Fordham. Who is going first?

22 MISS ROSE: Sir, I am going to deal with the question of the cross-undertaking. This is not a
23 case like the cases that Mr. Fordham has shown you where there is a situation where there
24 has been found to be a violation of competition law. Particular directions have been
25 imposed on the party found to have abused a dominant position. Then they seek suspension,
26 and then there are questions about what effect that might, or might not, have on the market.
27 This is a completely different sort of case.

28 What is happening in this situation is that the regulator has made a decision that a particular
29 commercial transaction should take place and that commercial transaction has commenced.
30 There are private law rights directly in play between two innocent third parties which Mr.
31 Fordham's client is directly seeking to disrupt. We have seen the form of the interim relief
32 sought in this case, which is interim relief directed at us, even though we are not actually a
33 party to this claim and there is no cause of action against us.

34 THE PRESIDENT: I think he says now he just wants a suspension of the order.

1 MISS ROSE: He does, but he says that its effect would be the same - to prohibit the completion
2 of a contract. In fact, there is an interesting question as to whether the effect would be the
3 same, but perhaps we do not need to go into that because it is clear that what he is seeking
4 to do is directly to impede two innocent third parties from completing their contractual
5 relationship. That is wholly different from cases like *Genzyme*.

6 We submit that in those circumstances it would be wholly unjust for interim relief to be
7 granted without a cross-undertaking in damages to indemnify the third parties whose rights
8 are being adversely affected. Indeed, it would be contrary to authority to do so. We have a
9 small bundle of authorities which I will hand up. (Same handed) The first is the *Belize*
10 *Alliance* case, a decision of the Privy Council in 2003, in which the Privy Council
11 considered the principles for the grant of interim relief in public law proceedings. If you go
12 to p.2849 you will see the heading 'Injunctions in public law cases'. In particular, paras.
13 37 to 39 consider the question of undertakings in damages. At 37,

14 "In some public law cases, such as *R v. Servite Houses, ex p Goldsmith* case, the
15 issue is a straightforward dispute between a public or quasi-public body and
16 citizens ... to whom the services are being provided. In such a case an injunction
17 may be granted to the citizen, without any undertaking in damages, if justice
18 requires that course".

19 In the following paragraph, para. 38, there is a reference to the *Greenpeace* case.

20 "... on the other hand, a campaigning organisation was challenging an official
21 decision which, if stayed, would have adverse financial implications for a
22 commercial company (British Nuclear Fuels plc) which was not a party to the
23 proceedings. Mr. Justice Brooke had refused a stay and the Court of Appeal
24 upheld this decision. Lord Justice Glidewell said,

25 'At the hearing before Mr. Justice Brook no offer was made by Greenpeace
26 to give an undertaking as to damages suffered by BNFL should they suffer
27 any; the sort of undertaking that would normally be required if an
28 interlocutory injunction were to be granted. I bear in mind that the judge
29 said he was influenced by the evidence about Greenpeace's likely inability
30 to pay for that financial loss, but he had earlier remarked he had not been
31 offered an undertaking. If we were dealing with this matter purely on the
32 matter material before the judge, I would find no difficulty at all. This was
33 essentially a matter for the discretion of the judge.

34 Lord Justice Scott said,

1 'If the purpose of the interlocutory stage is, as here, to prevent executive
2 action by a third party in pursuance of rights which have been granted by
3 the decision under attack, then, in my judgment, to require a cross-
4 undertaking in damages to be given is, as a matter of discretion, an entirely
5 permissible condition for the grant of interlocutory relief and, in general, I
6 would think, unless some special feature be present, a condition that ought
7 to be expected to be imposed'.

8 So, that is the general rule. Then it is said that a similar approach has been taken in New
9 South Wales.

10 "Some observations of Lord Jauncey of Tullichettle ... are also consistent with the
11 view that an undertaking in damages should normally be required, even in a public
12 law case with environmental implications if the commercial interests of a third
13 party are engaged".

14 We submit that is the normal rule in public law - that if the commercial interests of a third
15 party are engaged, unless there is some exceptional circumstance a cross-undertaking in
16 damages should be required.

17 Obviously of less authority, but of use because it draws a close analogy between the public
18 law cases in this context and the normal rule in injunctive proceedings is the next tab in this
19 bundle - the *Darlington Borough Council* case. At p. 9 of the print-out, just opposite the
20 first hole-punch,

21 "The second issue is whether the judge, if otherwise entitled to grant the interim
22 relief that he did, should have made it conditional on a cross-undertaking or some
23 security as to damages. In my view, the words of Kekewich, J. in *Fenner v.*
24 *Wilson*, that a court when granting interim relief should normally require such an
25 undertaking or security are as applicable to judicial review proceedings as to civil
26 disputes. There may be circumstances in which the court could properly grant
27 relief unconditionally, but only in an exception case [some examples are given].
28 And that may be so even where relief is claimed against a public or substantial
29 quasi public body and the loss though relatively small to that body is substantial to
30 the applicants".

31 We submit that what the case law shows is that where the commercial interests of a third
32 party are adversely affected, it will only be in an exceptional case, such as a very powerful
33 public interest litigation and an impecunious claimant that you would not require a cross-

1 undertaking in damages. It would be, frankly, unprecedented not to require a cross-
2 undertaking damages from an undertaking of the size and financial strength of Morrisons.
3 Then what is said by Mr. Fordham is that somehow it is different because we are in the
4 CAT. I have already made the submission that this is not a Competition Act case. This is a
5 judicial review under the Enterprise Act to which the principles of judicial review are said
6 to apply. The power which you are exercising is the power under Rule 61 of the CAT rules,
7 which entitles you to take into account - indeed, requires you to take into account - all the
8 circumstance of the case. So, we submit there is nothing, either in the statutory power
9 under which you operate or in the CAT rules dealing specifically with interim relief, which
10 suggests that it is inappropriate for interim relief to be granted.

11 We also submit that the cases on which Mr. Fordham relies do not in fact support the
12 proposition that cross-undertakings in damages are inappropriate in the CAT. The first on
13 which he relied was *Genzyme*, at Tab 9 of the authorities bundle, at para. 129. What is said
14 there is,

15 “In adopting what I regard as a minimalist approach I have been conscious of the
16 fact that neither the Director nor the Tribunal had, in my view, any power to order
17 a cross-undertaking from HH.”.

18 Now, it is important to bear in mind who HH is. HH is not the appellant. HH is the
19 interested party, Healthcare At Home, the beneficiary of this decision. The point that the
20 court is making in that case is that there is no power to order the interested party that is the
21 beneficiary of the decision to repay benefits that it receives if the decision is not stayed and
22 is later found to have been unlawful. That is a factor that is being taken into account in
23 drawing the balance. This paragraph simply has nothing whatever to do with the question
24 of whether the CAT has the power, as a condition of granting interim relief to a party
25 seeking interim relief, to do so on the basis that that party offers a cross-undertaking in
26 damages. It is irrelevant to that question.

27 *Napp*, with respect to Mr. Fordham, supports our position because the situation in *Napp*
28 was that the Oft had found that Napp was overcharging and had imposed a penalty and
29 ordered it to cut its prices to the NHS. The penalty was, of course, automatically suspended
30 by the appeal, but the direction to cut its prices to the NHS was not. So, Napp was seeking
31 interim relief to say it could continue to charge the full price the NHS pending the appeal.
32 Napp was seeking interim relief to say it could continue to charge the full price to the NHS
33 pending the appeal. Napp was offering a cross-undertaking in damages to the NHS. Napp

1 was saying, “We will undertake to repay the difference if our appeal fails”. We can see at
2 para. 50 that the CAT said,

3 “-- a prominent, if not the most important, factor in the present case, has been
4 Napp’s undertaking, properly and responsibly made, to indemnify the Department
5 of Health”.

6 So, what is clear is that when considering the question of balancing the relative interests, the
7 fact that Napp was offering a cross-undertaking to the Department of Health was not only a
8 factor, but it was a prominent, if not the most important, factor. So, for Mr. Fordham to seek
9 to rely, upon Napp in support of a proposition that it is inappropriate in principle for the
10 CAT to make it a pre-condition of a grant of interim relief that there should be a cross-
11 undertaking in damages is, we respectfully submit, a very remarkable submission indeed
12 because it is in fact authority for the opposite proposition.

13 So, we submit that there is nothing whatever to suggest that the normal practice that applies
14 in judicial review should not also be the normal practice that applies in the CAT, and most
15 particularly in an appeal such as this, and given the intense effect on third party rights.

16 What is then said is, “Oh, well, we do not need to offer a cross-undertaking because this can
17 all be dealt with very quickly”. Of course, if it can be dealt with very quickly, the cross-
18 undertaking may not be very onerous for them. But, why should we take the risk of their
19 appeal? Of course, there are risks that it may take considerably longer than they currently
20 anticipate. Not only may the matter turn out to be more complex ----

21 THE PRESIDENT: It might go to the Court of Appeal.

22 MISS ROSE: Precisely. You have exactly the next point I was about to make. That could mean
23 that we could be talking about months and not weeks. We submit that if they wish to bring
24 this appeal, they have the right to do that, but we should not be the ones put at financial risk
25 by them seeking to do that. We also, of course, remind you that at the moment their appeal
26 is speculative. They are reserving the right to withdraw it after they have received the
27 reasons.

28 Sir, for those reasons we submit that it would be wholly unjust for the interim relief to be
29 granted without the cross-undertaking.

30 THE PRESIDENT: Thank you very much. Mr. Hoskins, you want a third go, do you?

31 MR. HOSKINS: Sir, third or fourth. I am sorry. I will not repeat. I will happily adopt what
32 Miss Rose said about cross-undertakings. I make one point, which is that it is not acceptable
33 for Morrisons to try and game the Tribunal by saying, “We would like you to make the
34 decision on interim relief on the basis that we are not offering a cross-undertaking, but if

1 [nudge, nudge] you decide not to grant interim relief in the absence of a cross-undertaking,
2 come back and we will see what we can do". To mix food metaphors, they cannot have
3 their cake and eat it by having two bites at the cherry. It is a completely untenable
4 approach. It has not been said by Mr. Fordham - not surprisingly - that Morrisons cannot
5 afford this. I do not know why they will not give it, but it is really not acceptable to try and
6 game the Tribunal by saying, "Give us a decision on the basis we do not do it, and come
7 back to us and we will see what we can do --" It is an appalling way to treat the Tribunal.
8 Delay. Mr. Fordham starts from the point that -- Let me say this: Again, as they attempt to
9 shift everything off, because once this can be shifted off, the ball is rolling -- I will explain
10 as we go through why that is significant -- Mr. Fordham says, "We need a proper
11 argument". Let us treat this as a permission hearing. You have heard from me. You have
12 heard from him. I am going to reply. If you think that my argument on delay is a knock-out
13 blow, let us say so today, because that will save a lot of grief to everyone. That is the
14 approach I ask you to take.

15 Mr. Fordham's first point is that no-one here is submitting that his challenge is unarguable.
16 With respect, we do say - and I think the Competition Commission has said this in its
17 skeleton as well - that Morrisons' current draft substantive grounds of challenge are entirely
18 speculative. I am going to deal with that. There is a vicious circle here because what
19 Morrisons say is, "Well, we have not had the reasons". But, the reason that they have not
20 had the reasons yet is because of their delay. If, having been told on 20th, for example - and
21 you know my argument on delay is that it goes back much worse than that, but let us take
22 the best case on delay - we are told that Sainsbury is a successful bidder, then you write
23 within a day or two and say, "We need the reasons urgently, within a matter of days". It is
24 because they waited a week that we are in that situation.

25 THE PRESIDENT: Do we know that?

26 MR. HOSKINS: We know the facts. They are told on 20th. They do nothing publicly - because
27 none of us gets told this is even in the offing until 27th ----

28 THE PRESIDENT: When does the Competition Commission give the reasons? In the ordinary
29 course?

30 MR. HOSKINS: They would, yes.

31 THE PRESIDENT: So, they would do it, regardless of any request.

32 MR. HOSKINS: That is right.

33 THE PRESIDENT: So, do we know, as it were, that they have changed their timing of giving the
34 reasons because of the absence of a request?

1 MR. HOSKINS: We know that because the letter of 27th asked for reasons by a set date - 5.00
2 p.m. tomorrow - and the Competition Commission said, "Yes".

3 THE PRESIDENT: Does that not mean that the reasons might be -- You are saying that if they
4 had asked sooner, they would have got them sooner?

5 MR. HOSKINS: That is right. It is a simple point. It is not hypothetical because we know that is
6 what is happening, but the problem is that they sat on their hands until after exchange,
7 before they even asked for the reasons. So with respect this point: "Poor us, we do not
8 know what the reasons are", it is entirely their fault, and they cannot pray that in aid to help
9 them now.

10 THE PRESIDENT: They put together -- I have not read it in detail because I have not had a
11 chance to -- a draft application.

12 MR. HOSKINS: I am going to take you to it, because I am going to show you -- it is the next
13 point I lead on to, which is their claim is entirely speculative, and the suggestion that the
14 relevant decision that they are seeking to challenge is the November one is, in substance,
15 not correct. One incredibly important point that came out of Mr. Fordham's submissions
16 and the interchange he had with you was -- I am not sure he went as far as accepting that
17 Morrisons knew that Sainsbury's was a suitable purchaser back in July. He said in response
18 to a question to you: "We knew Sainsbury's were a bidder" he did not say when, but it is
19 very telling. I made the point in my submissions they knew in July, they knew on 24th July
20 and that has not been denied.

21 THE PRESIDENT: That Sainsbury's was a bidder?

22 MR. HOSKINS: Yes.

23 THE PRESIDENT: I understood Mr. Fordham to accept that he knew that Sainsbury's was a
24 bidder then, along with another one.

25 MR. HOSKINS: The reason I am making heavy weather is that it is of fundamental importance,
26 and it is not reflected in their witness statements. Paragraph 10 of first Fletcher, it is tab 5, I
27 am told, of the bundle.

28 THE PRESIDENT: Bear in mind I have not read any of these.

29 MR. HOSKINS: I am trying to be gentle, but brisk. If I could just ask you to read para .10 of
30 first Fletcher to yourself, the point leaps out.

31 THE PRESIDENT: Right.

32 MR. HOSKINS: You will bear in mind there is an obligation both in judicial review and, indeed,
33 in seeking interim relief for full and frank disclosure. Now, with respect para. 10 of first
34 Fletcher made us doubt whether they did know in July, contrary to what has now been

1 confirmed to the court, and what happened was, we thought that was surprising because we
2 did some research, and if I can ask you to look at first Trapp, it is our witness statement, it is
3 not in the bundle, and the first exhibit to that statement of Miss Trapp. This is an email
4 from a divestiture trustee to Freshfields, dated 23rd July 2009 in which she said:

5 “The bidders will be informed that there are others who have been cleared as
6 being suitable purchasers. In my discussions today they all seemed to assume this
7 in any event, and are perfectly aware of who the competition is. Two planning
8 applications by Sainsbury’s and Morrisons does give their intentions away
9 somewhat.”

10 THE PRESIDENT: Who is this writing to whom?

11 MR. HOSKINS: This is the divestiture trustee, Lawrence Edwards writing to Tesco, Lucy Stride
12 works for Tesco. We did some digging and that is what we discovered.

13 THE PRESIDENT: So the digging reveals that this gentleman, Lawrence Edwards, thought that
14 it was pretty obvious that everyone knew who was bidding.

15 MR. HOSKINS: Well he goes further than that, he says they are all perfectly aware of who the
16 competition is, so to his knowledge they are aware.

17 THE PRESIDENT: Well competition could mean – this is on 23rd July?

18 MR. HOSKINS: That is right.

19 THE PRESIDENT: It does not mean they know who had been approved,

20 MR. HOSKINS: But they are told on 24th.

21 THE PRESIDENT: Vis-à-vis others who have been cleared, “will be informed that there are
22 others who have been cleared ...”

23 MR. HOSKINS: This is written the day before everyone is informed that they have passed the
24 test and that there are other bidders. The point the divestiture trustee makes, and we adopt it
25 is that, given that Sainsbury’s had an outstanding planning application are pursuing it.

26 THE PRESIDENT: Your point is that they knew anyway.

27 MR. HOSKINS: And we are not very happy with Mr. Fletcher but I will not dwell on that.

28 THE PRESIDENT: Mr. Fordham is going to say that para. 10 is right, obviously he will need to
29 comment on that

30 MR. HOSKINS: Yes.

31 THE PRESIDENT: But your point is that from the email it appears that people knew who was
32 being approved?

33 MR. HOSKINS: That is right. I do not need to take you to it now, but first Trapp para. 13 deals
34 further with some of the planning background, because in fact the planning applications of

1 Morrisons and Sainsbury's were heard at the same planning hearing, for example, and went
2 forward and Morrisons' planning consultants were involved. So the idea that they did not
3 know is untenable. So it is no surprise that Mr. Fordham has now accepted that they did
4 know. So they knew in July, we say they could and should have brought a challenge then.
5 Mr. Fordham's point is "No, no, no, we are challenging a later stage", but let us know what
6 was actually required at the first stage, i.e. in order to decide who a suitable purchaser was.
7 We need to go annex 6 of the remedies order, somebody will tell me where that is in your
8 bundle.

9 THE PRESIDENT: Tab 11.

10 MR. HOSKINS: Thank you. If one goes to para. 9 first of all, on p.34, one sees that there were
11 effectively three stages, the first of which was evaluation of the suitability of the purchaser,
12 and that is the July decision, and then the second stage and indeed, the third stage, are
13 effectively combined, the November decision.

14 In relation to the July decision, suitability of the purchaser, one finds what the CC
15 considered in order to reach that decision at para. 16 onwards.

16 THE PRESIDENT: Yes.

17 MR. HOSKINS: You will see that in order to be considered a suitable purchaser the CC had to
18 decide that that purchaser was free from competition concerns.

19 THE PRESIDENT: Yes.

20 MR. HOSKINS: The best thing I can do, Sir, it is quite short, is to ask you to read briefly paras.
21 16 to 21 please?

22 THE PRESIDENT: (After a pause) Yes.

23 MR. HOSKINS: And the first sentence of para. 19 is the crux of it.

24 THE PRESIDENT: Yes, well I have read that.

25 MR. HOSKINS: Sir, in order for the CC to decide that a company that was free from competition
26 concerns, and therefore a suitable purchaser ----

27 THE PRESIDENT: Sorry, the first sentence of 20 did not apply to Sainsbury's because they were
28 present, is that right?

29 MR. HOSKINS: That is right, so the first sentence does not apply.

30 THE PRESIDENT: They do not fall into that category.

31 MR. HOSKINS: It is the second sentence of para. 20 that covers Sainsbury's.

32 THE PRESIDENT: (After a pause) Yes.

33 MR. HOSKINS: So the crucial point is that:

1 “A grocery retailer who is free from competition concerns will be one whose
2 operation of a large grocery store from the site will not itself significantly lessen
3 competition.”

4 THE PRESIDENT: Yes.

5 MR. HOSKINS: So will not itself pose an SLC, we will come to that when we come to look at
6 Morrisons’ draft grounds.

7 THE PRESIDENT: Just so we get a feel for it, Mr. Hoskins, obviously I am looking at this at the
8 moment from the point of view of possibly dealing with interim relief, and I think your
9 argument is going to be that this is a hopeless case. Where are we in terms of timing on
10 that.

11 MR. HOSKINS: I will finish in the next 10 to 15 minutes.

12 THE PRESIDENT: Right.

13 MR. HOSKINS: One then has to look at Morrisons’ draft application for review.

14 THE PRESIDENT: Just while we have this open, can we just tie it in with para. 63, which is the
15 next stage that Mr. Fordham showed me.

16 MR. HOSKINS: If one goes back to para.9 ----

17 THE PRESIDENT: It says: “Once the CC have formed a final assessment ...” right.

18 MR. HOSKINS: So it has to decide whether they are suitable and that is made in July because
19 then if they are suitable ----

20 THE PRESIDENT: You have been showing me.

21 MR. HOSKINS: Yes, that is right, because then you go on obviously and invest a lot more time
22 and effort in going forward. You invest your time and effort and the CC decides stage 2
23 and evaluation of how effectively a particular bidder remedies the SLC, and certainly an
24 evaluation of whether the price, a particular bid is wholly unreasonable.

25 THE PRESIDENT: But also, and I think the bit he particularly emphasised was that if the two
26 bids are equally comprehensive in terms of a remedy to SLC, and that is the bit to which he
27 takes issue because I think he says that it is irrational, how can they properly equally ----

28 MR. HOSKINS: That is right, Sir, we are just about to go to the notice of appeal grounds, and
29 what you will see is that the nature of the challenge is in fact based on the fact that
30 Sainsbury’s itself posed an SLC, therefore it as contrary to para. 19, Sainsbury’s was not
31 free from competition.

32 THE PRESIDENT: Right, I am looking at a draft in this bundle, I assume.

33 MR. HOSKINS: That is right.

34 THE PRESIDENT: Yes.

1 MR. HOSKINS: And the substantive grounds in relation to this begin at p.12. You see the
2 grounds for review are set out in various different ways: “Follow guidance, irrationality”
3 etc. but the substance is then found in paras. 32 onwards. One need look no further than
4 para.60 at annex 6 to the order, so that argument is based on the order which of course was
5 adopted in April so that information was available in July, it is not information that post
6 dates July. 33: “It is not evident how allowing the CGL site” – that is the Co-Op site that
7 Tesco bought, “... to be purchased by Asda or Sainsbury could conceivably be said to fully
8 restore the competition that was lost.” The final sentence is fundamental: “Only a sale to a
9 fourth retailer would appear capable of such a result. As CGL was itself a fourth retailer in
10 the area prior to the sale of the site to Tesco ...” That argument could and should have been
11 made in July because what they are saying is that the only possible person who could satisfy
12 the stages 1, 2, and 3 of the bid were themselves.

13 Paragraph 34 says that the market concentration will increase in relation to Sainsbury, and
14 then there is an HHI analysis, and then there is a reference to the draft merger guidelines
15 about HHIs, i.e. 34 and 35 say that Sainsbury’s will lead to unacceptable market
16 concentration, ergo an SLC – that is what 34 and 35 say.

17 THE PRESIDENT: That is para. 34 is it?

18 MR. HOSKINS: That is paras. 34 and 35. Concentration will increase if Sainsbury’s get the site,
19 that will lead to an unacceptable HHI, if one looks at the draft merger guidelines, you find it
20 is unacceptable, i.e. there is an SCL.

21 THE PRESIDENT: So all could be made in July you say?

22 MR. HOSKINS: Yes, absolutely.

23 THE PRESIDENT: But what about the equivalence.

24 MR. HOSKINS: I am going to come to that, they do not actually make the equivalence point
25 because they do not have to because of the way they put it. If one goes on to 36 there are
26 general points about EQRS being affected, so you will be aware of the Tesco matter ----

27 THE PRESIDENT: It rings a bell.

28 MR. HOSKINS: -- so I do not have to labour that. Big conclusion at para. 38: “In such
29 circumstances it is implausible that the divestment of the site to Sainsbury would not raise
30 serious competition concerns.” So the putative grounds do not relate to equivalence, they
31 relate to the fact that Sainsbury’s should never have been in the running. Now, of course,
32 what happens is because, I presume, the claimants realised they had a time problem, it is
33 dressed up as an equivalence point because of course, if you say Sainsbury’s should never
34 have been in it because the effect on competition is so damaging, you can say well so

1 therefore they should not have been found to be equivalent. But the truth of the nature of
2 the challenge, one sees it particularly at paras. 34 and 38, is that Morrisons' case is that they
3 were the only show in town. It is not about equivalence. It is about Sainsbury from the
4 outset being unable to satisfy the freedom from competition test. It is dressed up - skilfully
5 dressed up - but that is what it amounts to.

6 THE PRESIDENT: You say that this is a complaint about Sainsbury free-standing rather than a
7 sort of comparative ----

8 MR. HOSKINS: Absolutely.

9 THE PRESIDENT: Supposing that is a good point - the equivalence -- They have obviously done
10 this on the hoof.

11 MR. HOSKINS: You come back to my point which I started with. It is said, "Please give us a bit
12 of slack because we do not know what the reasons are". Why do they not have the reasons?
13 Delay. They cannot have the benefit of their own delay to say, "We are terribly sorry, but
14 the grounds we have come up with just do not stand up". The Tribunal today has to look at:
15 Has there been delay? What is the case ----

16 THE PRESIDENT: There are two issues. One is delay in bringing interim relief, which is a
17 separate issue from the delay you are now talking about.

18 MR. HOSKINS: As things stand, if I am right that they could, and should, have brought all the
19 grounds that have so far surfaced back in July, they are out of time. If they want to come up
20 with a completely different case, the delay gets worse, does it not, because if they wanted to
21 make these sort of equivalence points because they thought that there is going to be
22 something in them, they could have done it. But, the point is that it is pie in the sky.

23 THE PRESIDENT: They could not do it until November. I think that would be Mr. Fordham's
24 point. Only in November was that decision ----

25 MR. FORDHAM: Sir, it is a fishing expedition. At the very least they should be able to come to
26 the Tribunal. What they have tried to do to their credit is they have tried to say, "We see
27 that Sainsbury have appointed -- There must be something wrong with it. What is it?" But
28 to say, "If and when the reasons come it may be that they have a different argument which
29 they could not have known about until the reasons came". I am sorry . That is completely
30 speculative. The idea that we should have to put up with interim relief and a JR on a purely
31 speculative basis is extraordinary. It just does not happen. They have to convince you
32 today that they may have some sort of case. They have not done it. They have not even put
33 the case in that way.

1 THE PRESIDENT: Just summing up your point on this -- The grounds as in the draft grounds are
2 an attack on Sainsbury as a suitable ----

3 MR. HOSKINS: -- purchaser ----

4 THE PRESIDENT: -- which could equally have been made in July.

5 MR. HOSKINS: -- should have been made in July. It is actually a challenge to the Stage 1
6 decision.

7 THE PRESIDENT: You say the equivalence point ----

8 MR. HOSKINS: -- has not been raised before the court.

9 THE PRESIDENT: -- has not been raised in the draft.

10 MR. HOSKINS: I do say it would be intolerable to say that there should be interim relief and a
11 substantive hearing fixed on the basis that where the reasons come there might be a point -
12 because it is their own fault that they do not have the reasons yet. Even if they were
13 concerned about the equivalence point then they should have raised it shortly after 20th and
14 it sat on their hands until 27th.

15 THE PRESIDENT: They could not have got the reasons until -- Let us assume they should have
16 asked for them on 20th or 21st. Let us assume they lost six days in asking for them.

17 MR. HOSKINS: It is still about a week. It is a working week in the context where there is only a
18 week between 20th -- Usually, if I came to you and said, "This is an intolerable delay. They
19 have lost a working week", you would laugh at me. But, this is a context in which we are
20 talking about exchange within three days and completion within ten - and Morrisons know
21 that. They know about the tight timetables.

22 The other point - and this goes to the point I have just been making submissions on, about
23 when they should have asked the questions - is that first *Fletcher*, para. 10 ----

24 THE PRESIDENT: That they knew?

25 MR. HOSKINS: This is the final sentence of first *Fletcher* at para. 10.
26 "Morrisons were subsequently informed on 6th November, 2009 by an e-mail from
27 Tim Oyler that the other bidders were Sainsbury and Asda".

28 THE PRESIDENT: Just let me look at first *Fletcher*, para. 10.

29 MR. HOSKINS: This is not something that is coming out of the blue. Suddenly on 18th and 20th -
30 -- "Oh! I wonder what has happened?" They have known since July - Sainsbury in the pot.
31 It is confirmed expressly on 6th November that Sainsbury is in the pot. They are told on 20th
32 that Sainsbury has won it. Now, with respect, any reasonable claimant who thinks they
33 might want to bring judicial review in these circumstances, knowing that exchange will take
34 place within three days and completion within ten will prepare themselves in advance - well

1 in advance - to push the button within a matter of days. So, when Mr. Fordham says, “Well,
2 it is terribly unfair” -- What is unfair is to sit on your hands until the train is right up in front
3 of you. They saw the train coming and they did not do anything about it.

4 THE PRESIDENT: On your case - and I think it is accepted - and I am not sure what the
5 significance of 6th November is, because they knew already, did they not, that Sainsbury ---

6 MR. HOSKINS: It is building on that point - that they could see the train coming. There is a
7 telling part in the letter that was sent to Tesco, to be found at Tab 14 in the bundle. This is
8 from Gordons, Morrisons’ current solicitor. The letter of 1st December, sent to Tesco after
9 9.00 p.m. The fifth paragraph begins,

10 “Our client’s initial concerns were set out in a letter to the Commission from our
11 client’s previous legal advisors dated 27th November, 2009, a copy of which we
12 attach. Following that letter and the response received from the Commission
13 yesterday afternoon we have sought the urgent advice of junior and leading
14 counsel ----“

15 That suggest that they did not actually bother to go to counsel until after they had got the
16 response from the Commission. Again, that is completely unacceptable. Even if it is said -
17 and Mr. Fordham will know the position -- If that is wrong and they went to counsel before,
18 with respect it is out of the frying pan and into the fire because if they were getting full-
19 scale legal advice from counsel before that date, then they should surely have been advised
20 to get a move on.

21 This whole delay problem is compounded, Sir, by the way in which they then approached
22 the issue, albeit at a late stage because what one should do in these urgent cases is
23 immediately notify the other interested parties. So, when they write to the Commission
24 saying, “Oh, by the way, we are likely to be about to drop a bombshell on completion of
25 this deal. Please do not tell Tesco and Sainsbury”.

26 THE PRESIDENT: Is this the letter in which they said that?

27 MR. HOSKINS: This is the first letter to Tesco ----

28 THE PRESIDENT: This is to Tesco.

29 MR. HOSKINS: that is right It is the one to the Competition Commission ----

30 THE PRESIDENT: It is the one on 27th, is it not?

31 MR. HOSKINS: Would you like me to take you to that, Sir?

32 THE PRESIDENT: Just tell me where it is?

33 MR. HOSKINS: Someone will have to tell me. Tab 4, I am told. It is a letter from Ashursts. It
34 is the final paragraph on the first page of that letter.

1 THE PRESIDENT: There are two letters.

2 MR. HOSKINS: It is the first one behind Exhibit GGM1. Sorry . It is Exhibit GGM1.

3 THE PRESIDENT: They are numbered paragraphs.

4 MR. HOSKINS: It is the first page of the letter. It should be from Ashursts to Tim Oyler. There
5 is a heading, “Immediate procedural concern”. It is the final paragraph on that page.
6 When one is going to come to the court to seek interim relief and/or judicial you have to put
7 your cards on the table. So, what should have been done is to come to Tesco and Sainsbury
8 at the same time and say, “We want to put you on notice of this possibility” - so that we can
9 react, and perhaps contribute, as to how the process can be managed. Of course, what
10 happened is that they did not effectively tell us until yesterday. That is why, as I have said,
11 this is an ambush. It is not simply a dry point. It is dealt with in Mr. Rigby’s witness
12 statements - that is, one of our witness statements. It is not in the bundle. It is one of the
13 ones we have provided.

14 THE PRESIDENT: Is it behind Miss Trapp.

15 MR. HOSKINS: I think it will probably be loose, Sir. Paragraph 7 sets out the background. It is
16 the final sentence (After a pause): So, it is not just a dry point.

17 THE PRESIDENT: This is just the point that they allowed you to exchange contracts.

18 MR. HOSKINS: That is right. So, Sir, with respect, this case could, and should, have been
19 brought back in July. We then come to the other side, in a sense: we have the question of
20 delay – obviously, if the court is considering whether to ‘refuse permission’ to bring the
21 claim on grounds of delay when one looks at the prejudice that might be suffered. I showed
22 you the contract.

23 THE PRESIDENT: As this is not a permission hearing, what is your suggestion? One simply
24 does it by refusing interim relief and that will have the effect of ----

25 MR. HOSKINS: You refuse interim relief, and you refuse it on the basis that the claim should
26 have been brought within a month of July, and then there would not be any substantive
27 application. It deals with the whole thing.
28 In relation to the contract, it is very comforting for Mr. Fordham to tell my clients that they
29 should not be worried about this, but the advice from our lawyers dealing with the property
30 aspect is that the law is unclear on this. So, I am not asking the court to decide the point. I
31 am simply asking the court to accept, as it must, that there is a legal risk involved here. It
32 comes from - I showed you - the definition of when a person is ready, willing, and able to
33 complete - Clause 1.1.3 - which does not deal with this situation. So, the problem is that
34 you have, in a sense, a public law exercise of power - interim relief; you have a pre-existing

1 contractual relationship; and it is not at all obvious how they interact. That is as far as I have
2 to put it - there is legal uncertainty.

3 Mr. Fordham suggests that there is no suggestion that Sainsbury are going to do their worst.
4 Well, Mr. Rigby, at para. 11, suggests a reason why they might. It is not encouragement to
5 them to do so, but it is a genuine concern on our part. Quite properly, Sainsbury have not
6 made any comment on that today. Why should they? If Dubai goes down the pan
7 tomorrow, they might not fancy buying an extra supermarket. We just do not know. It is a
8 risk. It is not a certainty. There is a clear risk.

9 The final point – I have dealt with the fact that there is substantial delay. They are actually
10 out of time. If I am right on that ----

11 THE PRESIDENT: This is Miss Rose’s point that you are adopting.

12 MR. HOSKINS: I am for the 24th July. If I am right on July, it does not apply to November. If I
13 am right on July, actually prejudice does not matter - unless and to the extent you are
14 prepared to grant an extension of time up to three months. But, none has been asked for.
15 So, actually the delay point is actually more hard-edged. If one looks at delay, one does not
16 get into prejudice if they are out of time, unless there is an extension. But, that has not been
17 made.

18 There is the point that Mr. Fordham says, “Well, if we win at the end of the day, so what?
19 That is what should have happened”. But, as I think I somewhat clumsily said in one of my
20 previous visits, it is not correct because we have now lost Asda for ever. If the challenge
21 had been made in July when Asda was still in the running and Morrisons had been ----

22 THE PRESIDENT: Why could Asda not come in again?

23 MR. HOSKINS: Because it has already been found by the Competition Commission that they are
24 not equivalent to Morrisons. So, if, in the next round, Morrisons are in and Asda come in ---
25 -

26 THE PRESIDENT: It just means that Asda should not have been in there in the first place.

27 MR. HOSKINS: No, because they were entitled -- The point is that there was bidding pressure,
28 because at the time that the final financial bids were put in, Asda were still in the running.

29 THE PRESIDENT: You mean that psychologically people knew there was, say, X number ----

30 MR. HOSKINS: As a result of delay, even if Mr. Fordham wins, there will not be any
31 competitive pressure on Morrisons.

32 THE PRESIDENT: We do not know. Some other people might come in.

33 MR. HOSKINS: We do not know, but what we do know is that only three people came in last
34 time. Again, with respect, you have got the hard facts. There are only three players. Two

1 of them are going to disappear. Sainsbury, one of them - properly if Mr. Fordham wins.
2 Asda, improperly, purely due to delay. So, that is why our submission is that it could, and
3 should, have been brought in July . Therefore, out of time. Knock-out blow. End of story.
4 You probably do not want me to help you further, but I will if I can, Sir.

5 THE PRESIDENT: Thank you very much. Mr. Fordham?

6 MR. FORDHAM: Sir, I have to ask for an opportunity to reply because I am the applicant.

7 THE PRESIDENT: You are.

8 MR. FORDHAM: If I might, Sir, I have a few points to make.

9 THE PRESIDENT: It is probably as well if you listen to Mr. West first, and then you can reply to
10 everyone.

11 MR. FORDHAM: Certainly.

12 MR. WEST: Sir, I reiterate what I said at the beginning, which is that the position of the
13 Commission is very much to try to hold the ring in these matters. I suggested then that if the
14 two parties - Tesco and Sainsbury - were willing to agree to a stay, it was unlikely that the
15 Commission would be proposing that. It seems fairly clear that that is not anything they are
16 offering, because even if Morrisons were willing to offer a cross-undertaking, it does not
17 appear it would satisfy Tesco at least.

18 So, we do come back to the issue effectively of delay. In addressing you on delay, Sir, that
19 is not to be taken, as it may have been taken, to mean that the Commission accepted that
20 there was what we have seen so far - an arguable case here. We accept, of course, that
21 Morrisons have not yet seen the reasoned decision. But, for the record, on the basis of the
22 application that has been made so far we do not accept that there is any reason for us to
23 resile from the decision made.

24 I will not go into as much detail as my learned friend Mr. Hoskins has done as to why we
25 would say that, but it is clear, it seems to us, that there are a number of strands that run
26 through the draft notice of appeal. There is, for example, a proposition that seems to surface
27 which is that a new entrant should be accorded of itself some sort of special status. Of
28 course, new entrants do have a particular place in competition. But, if that was in fact to be
29 a factor that was to be some kind of a trump card, that is a fact that would have been set out
30 in the order on 23rd April, and that would have been the appropriate point to make that
31 challenge. It does not quite come out in exactly that form at the moment - that a new entrant
32 is to be preferred under any circumstance, but there are certainly elements of that. So, we
33 say that in terms of the challenge that goes forward, similarly there are elements, we would

1 accept, of the challenge to Sainsbury that appear to be challenges that look more towards
2 suitability (as they are currently phrased) than to effectiveness of competition.

3 I do not propose to develop those points any further than simply to say, for the record, that
4 we do not accept that at the moment we have seen in the notice of appeal a challenge that
5 we consider is one that causes us to think we have any reason to not stand behind that
6 decision.

7 If I may, I would like to talk, therefore, about the issue of delay under two heads. The first
8 head is this period of the time in which to bring a challenge. Mr. Fordham, quite
9 attractively, puts the case that you only have three days and that this is somehow unrealistic,
10 unreasonable and an infringement of rights, and so forth. But, of course, all of these cases
11 must be considered on their specific facts. The specific fact here is that Morrisons was a
12 participant in a process of which it had complete visibility and transparency as regards the
13 timescales and the process. It would have been possible - if there was an objection to the
14 short period of time between the direction of Tesco as to which purchaser it should accept
15 and exchange of contracts and completion - to frame that as a challenge, again, to the order
16 itself. It is very clear from the order at the outset that there is going to be a very short period
17 of time here. It was also clear that the period could be changed with the approval of the
18 Competition Commission. The Commission did give its approval to a reduction to three
19 days for exchange and ten days for completion. That was known to Morrisons throughout
20 the process. They therefore knew what the process was. So, one has to weigh the three day
21 point in the context of the actual knowledge. We submit that is very important in this case.
22 The second point on delay that I want to address is this issue of what happened between 18th
23 November and, effectively, today - and I accept here the submission I think my learned
24 friend Mr. Hoskins was making - which is that one might expect a bidder to be gearing up
25 both for a lack of success as well success. In this case we do not have the situation of an
26 aggrieved third party not really understanding the process and suddenly discovering a
27 decision has been taken, and then feeling there is a need to challenge. We have here a
28 bidder participating in a process, knowing that it was one of a number of bidders, obviously
29 hoping for success, but knowing it might be unsuccessful. We have a large player in the
30 grocery market, supported by a large firm of legal advisors. It seems to us that therefore it
31 might reasonably be said that Morrisons might have been expecting the possibility at least
32 of being unsuccessful and being prepared for it. They would not necessarily know why they
33 were unsuccessful, but at least they would know.

1 Against that background, the delay that takes place is very hard to understand - a period of
2 two days first of all to find out who the successful bidder has been. One might say that if
3 you know that within three days there may be exchange, then picking up the 'phone on the
4 day you hear, or the day after rather than two days later ----

5 THE PRESIDENT: You are on 20th. I think that is common ground.

6 MR WEST: We are on 20th. Yes. But, there is then a gap to 27th. The 27th is a Friday. There is
7 no communication in that week with the Competition Commission. On the Friday - late on
8 the Friday - is when we have the letter before action. In that regard, when Mr. Fordham
9 says about not seeing the reasons, and not seeing the reasoned decision, there is an
10 important point that I should address you on, which is whether the Competition
11 Commission was going to make the reasons available. The answer in this case is that there
12 was no prior plan to do so for the simple reason that this was a commercially very
13 confidential process.

14 THE PRESIDENT: So, it would not have bothered had it not been ----

15 MR. WEST: It would not have done it if we had not been asked. We were in fact asked in
16 relation to another bidder very promptly and we did provide a redacted version of the
17 decision. There is extreme commercial sensitivity, as will be appreciated, surrounding this
18 process. You have heard today, Sir, about the two stages of evaluation - suitability of
19 purchasers and then the effectiveness of competition. It is important, Sir, to appreciate that
20 there are in fact three stages in the order because there is a third stage which is an
21 assessment of whether the bid is wholly unreasonable or not. That wholly unreasonableness
22 point clearly involves a consideration of matters that go directly to Tesco's interest. For
23 that reason the view was taken within the Commission - I think it is fair to say - that
24 providing a reasoned decision is difficult because so much is going to turn on commercially
25 confidential information. Indeed, if this appeal were to go further, there would need to be
26 appropriate confidentiality provisions put in place fairly promptly. That was the reason.
27 Nonetheless, on request it was provided in relation to the other bidder. There was no request
28 on 20th. There was no request until 27th.

29 THE PRESIDENT: When did the other one request it? Do you remember?

30 MR. WEST: I think on 18th or 19th November.

31 THE PRESIDENT: Would this be a different set of reasons - because that would be related to
32 the other person?

33 MR. WEST: It would effectively be a decision paper which sets out the reasoning leading to the
34 decision that was taken by the Commission. You will be redacting different parts.

1 THE PRESIDENT: Yes, I see.

2 MR. WEST: We say, yes, it is very attractive to say that we have not seen the reasons, but if the
3 reasons had been asked for, the reasons would have been provided sooner. Saying that we
4 are only seeing the reasons tomorrow -- There is a reason why that has been said.
5 Reference was made to the communiqué from the Commission. The letter before action
6 itself asked for information by 5.00 p.m. tomorrow. In responding we said, "We will
7 provide you by 5.00 p.m. tomorrow". That is a reason for the decision. So, that deadline is
8 actually a response to the deadline that Morrisons' former legal advisors asked us to reply
9 to.

10 THE PRESIDENT: The tomorrow deadline?

11 MR. WEST: The tomorrow deadline.

12 THE PRESIDENT: They only asked for it by then?

13 MR. WEST: Yes. They asked for a substantial reply to the letter of 27th - the letter we were not
14 told to show to Tesco and Asda. They asked for the reply by five o'clock. So, that is where
15 the deadline comes from. They did not say, "Please send it by return". They did not say,
16 "Any time between 20th or 27th could they see it?" So, when you hear a submission about
17 not seeing the reason, Sir, it is very important to contextualise this.
18 I come back, Sir, to where I began - that we try to be reasonable with the regulator. If we
19 see a challenge we think is reasonable, we try to deal with it. In this case, it seems to us
20 from what we have heard this afternoon from the parties, that the parties are not going to
21 agree on there being a stay, and in those circumstances, given the nature of the process,
22 given how it has evolved, we submit that regrettably this is an occasion where an
23 application for interim relief should be refused. It is not an easy position to come to, but
24 that, we say, on the balance, is where it comes out.

25 THE PRESIDENT: Thank you.

26 MR. FORDHAM: Sir, I am going to focus on the points that actually relate to interim relief. I
27 will also reply briefly in relation to the attempt to turn this into a stage that does not exist,
28 which is a permission stage.

29 As to interim relief, the undertaking which would satisfy Miss Rose and her clients, as she
30 fairly made clear is no a situation of saying, "We will come back next week if you decide
31 you should give one". We have made clear, and we are perfectly entitled to do this, we
32 argue it is inappropriate, but that we will provide it if it is a pre-condition. If Mr. Hoskins
33 were right that, "That is cake, and eat it", then no party would ever be able to raise with the
34 Tribunal the question of whether an undertaking is actually appropriate. It is entirely proper

1 for us submit that it is not. Miss Rose, for all her submissions, cannot get round *Genzyme*
2 and *Napp*, where *Genzyme* is making a general point in relation to the EC position as to the
3 good reasons for it, and *Napp* is making clear that it was only concerned with an
4 undertaking to address competition concerns - not other drug companies who were affected.
5 That is all I want to say in relation to interim relief.

6 In relation to delay, can I ask you to go back to the grounds because we have been criticised
7 in relation to our draft grounds for review which you have seen at Tab 3, which are said to
8 be all framed by reference to issues arising under a July decision, and not a November
9 decision. If you turn, please, to p.6 in the internal numbering, you will see at para. 15 - and
10 this is by reference to 64 which we have quoted, which is Stage 2,

11 “It is clear, therefore, that it is only where two bids (neither of which is wholly
12 unreasonable) both achieved an equally comprehensive solution to the SLC, that
13 Tesco was to be offered a choice of which to accept”.

14 The Commission confirmed by e-mail of 18th November 2009 that they regarded the
15 solution as equally comprehensive.

16 “For the reasons given below in Section D, that decision is untenable.”

17 The first one that you get under the Grounds for Review, at the top of 12, at 3.1 is by
18 reference to the duty to secure as comprehensive a solution as is reasonable. It is there in
19 clear terms in our grounds. It is there at the bottom of the very first page of our grounds in
20 para. 5, p.1.

21 “In short, the CC mystifyingly decided that sale to Sainsbury achieved an equally
22 comprehensive solution”.

23 One cannot possibly say that because in July someone is let through into the shortlist that it
24 follows that the decision is being made, or will be made that they are equally
25 comprehensive Asda was let through in July to the shortlist, but the conclusion was not
26 reached that Asda were equivalent to Morrisons in relation to the application of the test
27 applicable only at Stage 2 in para. 64.

28 So, that is fairly and squarely the focus of our challenge, and it is fairly and squarely a
29 challenge which arises out of the November 2009 decision. It cannot be said, and it is not
30 said, that that challenge is obviously unsustainable. Yet, that is the only relevant question to
31 interim relief. I only need a prima facie case. One does not delve further in relation to the
32 underlying merits. But, in any event, there is a strongly arguable case in relation to that
33 conclusion. Mr. Hoskins touched lightly on his contract point, but cannot get round the
34 word ‘could’. Sainsbury would not be in a position where they could complete if we have

1 got our interim relief. So, it all then comes back to a single point: are you going to say, for
2 the purposes of obviously unsustainable claim not worthy of interim relief, that Morrisons
3 should have brought its application within three days having prepared grounds in relation to
4 a decision that had not been made, still less communicated, and in the context of a statutory
5 entitlement to challenge within four weeks in a case in which we stand before you on notice
6 within fourteen days, and in circumstances where you have the irony that the Commission
7 had not kept us informed as to what status they had reached. They had not provided us with
8 a reasoned decision document, and they still have not. There is no concealment. When we
9 said to them, “We are considering what to do, what our options are in relation to making an
10 application”. We get a response, and then send a copy of the letter we sent two days earlier
11 to both Tesco and to Sainsbury. In those circumstances the Commission does not come
12 back and say, “The one thing you have got to do is go with the utmost speed. Of course you
13 can have the reasons, and here they are.” They promised that they will provide them, and
14 that what they are going along with is a reasonable timeframe, which is tomorrow. None of
15 that is anything which is our fault. The court should go nowhere near, we say, the
16 conclusion that we were obliged to bring our application for statutory review within some
17 special three day, five day, ten day requirement. Of course, promptness is relevant to the
18 principles of judicial review which the Tribunal will be applying in the context of remedies.
19 But, there is nothing approaching sort of undue delay that should put us out of court in
20 circumstances where the cross-undertaking issue has been raised, and it has been dealt with,
21 and the Tribunal is in a position to hold the ring for a viable claim so that these arguments
22 can be dealt with on their merits - because the consequence is otherwise that we have not
23 only a viable, but a winning challenge to the ultimate conclusion that was only reached, and
24 could only be reached, at Stage 2 of this process, the conclusion of equivalence. The
25 hypothesis has to be that we are right - that the Commission cannot sustain the conclusion
26 that Sainsbury are equivalent to Morrisons in the application of that equally comprehensive
27 test. It is not being said that that is unsustainable. What is being said is that even if that is
28 right, our case should fail, and it should fail today by inventing a permission stage and by
29 holding our grounds to be unarguable. There is no basis for that, we submit, at all.
30 We were asked about the state of knowledge in relation to the July point. I have already
31 taken you to the passages which demonstrate beyond any doubt that we are necessarily at
32 the November 2009 decision and not the July 2009 decision. But, it is fair to say, and we
33 have not suggested to the contrary, that Morrisons would have had an idea that Sainsbury

1 would have been a bidder. What we have said in our evidence, which is accurate, is that we
2 only knew that to be the position when it was confirmed on 6th November.

3 So, deal with interim relief on its merits by reference to the undertaking point that has
4 properly been raised. There is no other basis for dismissing this claim before it has had an
5 opportunity to be argued substantively in relation to issues which plainly do relate, with
6 respect, to the November 2009 decision.

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

8 THE PRESIDENT: Mr. Fordham, I am sure you have already dealt with this, but remind me: you
9 wanted to keep this secret - the initial correspondence, at any rate. I cannot remember if
10 you said why that was.

11 MR. FORDHAM: Yes. You have got the letter of 27th November. We write to the Commission
12 and only to the Commission at that stage.

13 THE PRESIDENT: Yes. Why was that?

14 MR. FORDHAM: That is because we are seeking to elicit from the Commission two things:
15 firstly, information as to what they have in fact done; secondly, their response as to what
16 our way forward would be. You will see the heading on the first page - 'The immediate
17 procedural concern'. This is at Tab 4, p.5. We are asking for views as to what the correct
18 legal course is.

19 THE PRESIDENT: Why would you be asking them for that though?

20 MR. FORDHAM: We are asking the Commission because we wished to canvas with them - and
21 we were right to do it - they in fact do have power to act - whether they would give a
22 direction to hold the ring. They declined it. We respect that.

23 THE PRESIDENT: But why would you not let the other interested parties know that you were
24 asking? Why would you keep them in the dark when they are intimately involved?

25 MR. FORDHAM: Because at that stage we are only asking that limited question. There is no
26 concealment here. I emphasise that when we write, as we do, promptly, to both of the other
27 affected supermarkets we enclose a copy of this letter.

28 THE PRESIDENT: Meanwhile you just let them exchange contracts, knowing that they would.

29 MR. FORDHAM: No. They have already exchanged contracts.

30 THE PRESIDENT: No. They exchanged contracts on 23rd presumably, or thereabouts.

31 MR. FORDHAM: This letter is 27th.

32 THE PRESIDENT: Yes. But, why did you not notify them? Why not come to the Tribunal
33 before? You do not have to start proceedings, as you know. You have not started
34 proceedings yet.

1 MR. FORDHAM: Yes.

2 THE PRESIDENT: I am sorry. There are several questions there.

3 MR. FORDHAM: No. That is fine. I was answering, I hope properly, the question that you
4 asked me about us writing this letter initially only to the Commission. I hope I have given
5 you an answer to that.

6 THE PRESIDENT: You have.

7 MR. FORDHAM: If we were defensive about that, or concealing anything, we would hardly
8 have sent a copy of that letter a couple of days later as we did.

9 THE PRESIDENT: What I cannot understand is why the contents are strictly confidential at this
10 stage and should not be disclosed to third parties, including Tesco and Sainsbury, because it
11 seems to me that what you are asking concerned them. There must have been a reason
12 anyway.

13 MR. FORDHAM: I can make a submission, if it would assist the Tribunal. The submission
14 would be that if you are in doubt as to what your procedural position is in order to secure a
15 stay or a suspension to prevent something, you would want to try and clarify that before you
16 notify those that you are stopping, because if you are in an interim position where you are
17 doubting how you should go about it, you may provoke the thing that you want to stop.

18 THE PRESIDENT: The thing that you would have provoked would have been the completion.
19 That was all that was left now.

20 MR. FORDHAM: We did not know that there had been exchange.

21 THE PRESIDENT: I thought you did because you knew the timing. You knew that everyone
22 had to do it within three days.

23 MR. FORDHAM: What I am told - and this is not dealt with in the evidence - is that we are
24 aware, of course, from the terms of the order that there is a timeframe set out in the order of
25 twenty days and ten days.

26 THE PRESIDENT: Yes - and then that was abridged. Everyone was told that that was being
27 abridged to three and ten.

28 MR. FORDHAM: It has been said in witness statement evidence that we saw this afternoon that
29 it was all abridged to three days and everybody knew. I have got no evidence.

30 THE PRESIDENT: I think we need to bottom this out, if we may.

31 MR. HOSKINS: Sir, if it helps, it is Miss Trapp at para. 5(a). If you turn to the top of the page,
32 "-- all bidders[including Morrisons] gave legally binding undertakings on or
33 around 9th October 2009 that, should they be selected as the Redevelopment
34 Option Approved Purchaser, contracts would be exchanged within an expedited

1 timeframe (three working days from selection). All bidders (including Morrisons)
2 were aware of that compressed time frame”.

3 All bidders gave legally binding undertakings.

4 THE PRESIDENT: Mr. Fordham, you had better take instructions.

5 MR. FORDHAM: (After a pause): Sir, I was taking instructions while Mr. Hoskins was reading
6 from his witness statement ----

7 THE PRESIDENT: Do you accept what Miss Trapp says? Do your clients accept that?

8 MR. FORDHAM: (After a pause): I am only taking my time because I am not going to answer
9 something when I do not know what I am answering.

10 MISS ROSE: (After a pause): As a matter of fact it is also Sainsbury’s understanding that what
11 Miss Trapp says is correct.

12 THE PRESIDENT: Take your time, Mr. Fordham.

13 MR. HOSKINS: This is Miss Trapp’s statement at para. 5(a). Turn over the page, at the top of the
14 page -- That is the passage I read.

15 MR. FORDHAM: My instructions are that we do not accept that that is Morrisons’ position. That
16 is not our evidence. There is no contemporaneous document that supports it. I can seek
17 further instructions, but I am not going to mislead you. I am not going to go along with
18 something that I do not have evidence to support.

19 THE PRESIDENT: You are not in a position at the moment to agree with that.

20 MR. FORDHAM: No, I am not.

21 MR. WEST: Sir, I am sorry to interrupt my learned friend. I actually have a document in front of
22 me - the relevant document - signed ----

23 THE PRESIDENT: Is it in the bundle?

24 MR. WEST: It is not in the bundle. It has obviously got commercially confidential material ----

25 THE PRESIDENT: Is it possible to show it to Mr. Fordham without breaching confidence?

26 MR. FORDHAM: (After a pause): Sir, we are clarifying that. I am content to proceed on the
27 following basis: that it was certainly the case under the order that there was a tight
28 timeframe of twenty days for exchange; of course, that was a longstop.

29 THE PRESIDENT: That was best endeavours, I think, to do it within that timeframe.

30 MR. FORDHAM: It was best endeavours, but it was within twenty days. That is the first point.
31 Secondly, we have come before the Tribunal acknowledging that although we never had
32 confirmation this afternoon when we saw these witness statements, acknowledging that it
33 may well be the position that exchange has taken place, albeit not yet completion. That is

1 the position that we recognised in our application for interim relief. Can I just show you
2 para. 6?

3 THE PRESIDENT: Before you go there, your solicitor's letter of 27th November seems to
4 assume that exchange has taken place. It says: "The immediate concern is that Morrisons
5 understands that completion of the purchase is imminent."

6 MR. FORDHAM: That is the point I hope properly that I am making before you, because we
7 have proceeded before the Tribunal on that basis. You will see it in para. 6 of the interim
8 relief application at tab 1.

9 THE PRESIDENT: Yes.

10 MR. FORDHAM: Paragraph 6 explains our understanding, we understand completion planned
11 for Monday 7th, it may well be that contracts have already been exchanged.

12 THE PRESIDENT: Yes, but you seem to have known that on 27th as well.

13 MR. FORDHAM: We are certainly envisaging that is the position and I am making no bones
14 about it.

15 THE PRESIDENT: And if you had given an undertaking, as Miss Trapp suggests that all the
16 bidders did, to do it within three days then you would assume that it had taken place.

17 MR. FORDHAM: If that is the factual premise I would have to accept that consequence.

18 THE PRESIDENT: So, that being so, the question is I suppose, why did you not seek to stop the
19 exchange taking place?

20 MR. FORDHAM: Yes, and what it would come to is that we were obliged, having received an
21 email telling us that we had failed but not telling us who had succeeded, no decision, no
22 reasons for a decision, no underlying analysis, no warning that it was imminent. We were
23 obliged to lodge with the Tribunal on notice and secure an order for interim relief within a
24 period of three days.

25 THE PRESIDENT: You can do it by telephone in an urgent case, can you not, if something is
26 truly urgent?

27 MR. FORDHAM: I am not saying it is impossible, I am saying it is not a ground for shutting us
28 out from having our challenge in circumstances where we have dealt with the undertaking
29 in damages, and you are in a position to make a decision as to the giving of that
30 undertaking in order to advance a viable challenge.

31 THE PRESIDENT: The point that is put against you is that you have allowed the legal position to
32 change and therefore some uncertainties to be created as to how the court's order would
33 interact with the private – I have your points on that.

1 MR. FORDHAM: There are only two aspects to that; there is nothing else. One aspect to that is
2 that if damage is incurred as a result of this challenge it should be covered by an
3 undertaking.

4 THE PRESIDENT: Yes.

5 MR. FORDHAM: And if you require one it will be; that is one point. The only other point that
6 relates to that matter is Mr. Hoskins pointing to his contract and saying there could be a 10
7 day notice period which might lead to a termination – I have made three points in relation to
8 that.

9 THE PRESIDENT: Yes, I have your points, you say: “We can get on with it”, basically, “we
10 have 10 days.”

11 MR. FORDHAM: It is a very, very weak point. It is far more fanciful than that which we are
12 accused of being speculative about, but in any event it has a 10 day period built within it.
13 That is all there is that relates to this three day point, so when you weigh up what to do
14 about a viable challenge that has been brought before you within 14 days on notice of
15 course you will consider the circumstances, and if it is your view that we should have acted
16 differently you will say so, but none of it amounts to a reason for shutting us out when Miss
17 Rose’s protection that has been put forward and can be dealt with, and when Mr. Hoskins’
18 Armageddon scenario under the contract is not, with respect, the fatal blow that he seeks to
19 administer.

20 THE PRESIDENT: Can you just help me with one other thing – you have probably already dealt
21 with this, it might have slipped my mind? The difference between the exchange of
22 contracts and the completion, I am sure someone must have dealt with this already. They
23 are owners in equity, as I remember from my old days of land law, but is the position so
24 much worse if completion actually goes ahead – assuming there is expedition of your case?
25 What is the advantage to you of getting interim relief?

26 MR. FORDHAM: We would be delighted to be told that there is no problem but the concern that
27 we have is that if we are proved correct at the substantive hearing, and it is appropriate for
28 the Tribunal therefore to give practical and effective relief in order to quash the
29 determination made at stage 2 of the Commission there, we submit, is no difficulty where
30 the transfer has not been completed, the Tribunal will be able to quash the determination
31 and, just like the interim relief it cannot go any further; it cannot go through to completion.
32 Our concern is if it does go through to completion and the Tribunal there gives its quashing
33 remedy and quashes the decision of the Commission as being erroneous in law or
34 unreasonable, there will still be a completed property transaction between two supermarkets

1 which, on that basis, the order of the Tribunal notwithstanding the breadth of its jurisdiction
2 would not inhibit.

3 THE PRESIDENT: And how would a quashing order of that kind leave the position if there had
4 merely been an exchange of contracts?

5 MR. FORDHAM: If one steps into the shoes of the public law court and quashes the decision
6 under which Sainsbury's count as a qualifying purchaser, you cannot take the next turn ----

7 THE PRESIDENT: So that effectively means there cannot then be a completion?

8 MR. FORDHAM: Exactly.

9 THE PRESIDENT: There has to be an unravelling, otherwise the parties are in limbo.

10 MR. FORDHAM: If you say it after the event where they have already purchased and the
11 transaction is completed then it might be we would face arguments which would say:
12 "Congratulations, you have won on your statutory judicial review; they were not a
13 qualifying purchaser, but the purchase has been completed.

14 THE PRESIDENT: You do not think that in those circumstances ----

15 MR. FORDHAM: I am not making any concession as to what the Tribunal might or might not be
16 able to do, but what I am doing is drawing attention to the obvious difficulties which arise
17 in those circumstances.

18 THE PRESIDENT: It may be that everyone is in agreement that actually there is a utility.

19 MR. FORDHAM: Of all the many traffic light arguments and knock-out blows that I have had to
20 deal with and endeavoured to deal with, one that I have not faced is the argument that says:
21 "What is your problem, you have our expedited hearing, the Tribunal has it within its hands
22 to give you practical and effective relief to unravel property transactions, you do not need to
23 be here." Of course, if that were right we would not need our interim relief, and we would
24 not need our cross undertaking, but there is a utility in it and this case should now proceed
25 to have the substantive arguments – I almost hesitate to say it after Mr. Hoskins'
26 admonitions, but he will be in a position to make any submissions he wants to about
27 whether relief should be granted under judicial review principles.
28 Unless there is anything else, those are our submissions.

29 MISS ROSE: Sir, may I very briefly say something about the last point on which you were
30 questioning Mr. Fordham?

31 THE PRESIDENT: Yes, I think I will allow anyone to say something about that.

32 MISS ROSE: Can I make it clear that we agree with Mr. Fordham's analysis that if the
33 transaction completes the CAT would not have any power to unravel a private property

1 transaction between two commercial parties, and indeed if it were to be suggested that the
2 CAT ----

3 THE PRESIDENT: Nor would the Competition Commission.

4 MISS ROSE: Nor could the Competition Commission.

5 THE PRESIDENT: It would be more for the Competition Commission.

6 MISS ROSE: If the contrary were to be suggested by any party to these proceedings that would
7 leave Sainsbury's in an intolerable situation because we cannot be left in a situation, if
8 interim relief is not granted – where we are then required to complete, to pay over the
9 money, but then have the uncertainty: can we develop the site? Can we invest in the site
10 while this appeal is proceeding, because if they are successful on their appeal the whole
11 transaction may be unravelled, well we might get our purchase price back but we will not
12 get back the money we have invested in the site, so we are then put in a truly intolerable
13 situation.

14 THE PRESIDENT: You would quite like interim relief?

15 MISS ROSE: Well, sir, you have heard my situation and you will understand why. If there were
16 to be any suggestion that either the CAT or the Competition Commission could unravel the
17 completed transaction and that we could be required to complete while the validity of our
18 purchase is under question, that would put us in grave difficulties.

19 THE PRESIDENT: That is an interesting point, is it not, because does that mean that if I were to
20 refuse interim relief you would be in difficulties?

21 MISS ROSE: It does, sir, unless it were accepted by everybody that in that situation the only
22 relief would be purely declaratory and the security of our purchase was not impugned.

23 THE PRESIDENT: On that basis, if I refuse interim relief you are then in a position where you
24 have to complete ----

25 MISS ROSE: Yes, but we cannot invest if there is uncertainty.

26 THE PRESIDENT: We do not know what the position will be in the substantive -----

27 MISS ROSE: Yes, and that is why our position is ----

28 THE PRESIDENT: It is rather an important point, is it not?

29 MISS ROSE: Absolutely, Sir, and that is why our position is that either this appeal stops now on
30 the grounds that you accept that it is out of time or if the appeal is to proceed the right
31 course is for there to be interim relief with appropriate cross undertakings. But we are the
32 victim here, we are the third party ----

33 THE PRESIDENT: Yes, well I must say I had not quite appreciated that point.

1 MISS ROSE: We are the party here who has entered into a contractual arrangement and now
2 everything is uncertain for us.

3 MR. HOSKINS: In response to that, that is precisely the reason why it should be knocked out
4 now because Mr. Fordham is too late, and that is the intolerable doubt that his delay has
5 created; that is Sainsbury's position. We have a different concern, that is a result of his
6 delay, and that is why I am not suggesting there is some sort of half way house, no interim
7 relief, but we will give them a substantive hearing – knock it out now.

8 In relation to what would happen on completion if you did not knock it out now, and did not
9 grant interim relief – I must admit my initial reaction is the Competition Commission must
10 have power, because it was to be a relevant merger situation in just the way of Tesco's
11 acquisition of the site, because it does not matter how you come to acquire the site.

12 THE PRESIDENT: What we normally do in these sort of cases, and the default position is that
13 we quash it and send it back with a direction to make a new decision in accordance with the
14 Tribunal's ruling, so I suppose if it were quashed on the basis that it was irrational, or
15 whatever reason, and to make a new decision in accordance with that, the new decision
16 might – this is all completely hypothetical – might have to involve an order to unravel the
17 sale.

18 MR. HOSKINS: The CAT would make its judgment and the Competition Commission would
19 then, because there was then an SLC as a result of Sainsbury's acquisition of the site, would
20 have power to take whatever steps were necessary. I fully accept Miss Rose's position, it is
21 intolerable for her clients, it is intolerable for ours, you have my point.

22 THE PRESIDENT: Yes. It is a pity though, appreciating that point, you did not all get your
23 heads together and just agree a nice order with cross-undertakings.

24 MISS ROSE: We did try to do that earlier today and we were rebuffed by Mr. Fordham.

25 THE PRESIDENT: Well do you want to try now?

26 MR. HOSKINS: The problem is Mr. Fordham says it is only about 10 days, once he gets his feet
27 under the table.

28 THE PRESIDENT: Well seeing as ----

29 MR. HOSKINS: Just let me finish this, please. Once he gets his feet under the table there is a
30 substantive hearing which takes place before Christmas or after Christmas, Mr. Fordham
31 loses, it goes to the Court of Appeal.

32 THE PRESIDENT: Well he would have to get permission, yes.

33 MR. HOSKINS: Yes, but it is perfectly possible, that is the basis it is put.

34 THE PRESIDENT: Yes.

1 MR. HOSKINS: In the meantime Dubai has gone up the spout, Sainsbury's say: "I do not fancy
2 this supermarket, I am going to give the notice"; it is not a very attractive situation and that
3 is again a reason why it should be knocked out now.

4 THE PRESIDENT: Mr. Fordham's clients have to pay you for any loss on that basis, if he loses
5 ultimately.

6 MR. HOSKINS: Well Tesco's position is we would much rather have the security of a
7 transaction which has gone through a process which has listed a significant amount of time
8 and has been approved by the Competition Commission and the only reason we are in this
9 problem today is their delay. I am not going to repeat myself.

10 THE PRESIDENT: Is there any point in my giving you a few minutes to talk?

11 MR. HOSKINS: It may be, because this is not by any means an indication of defeat but if ----

12 THE PRESIDENT: I am not suggesting that for one moment because you do not know what I am
13 going to say.

14 MR. HOSKINS: That is the point – we are mirroring each other here. If there were to be an
15 order, it would have to be very carefully drafted to protect the interests of my client and
16 Sainsbury's.

17 THE PRESIDENT: Of course. Well it is a quarter past six – I know it is terribly late – if I rise
18 for 15 minutes to give you an opportunity to see whether, given what has been said, you can
19 deal with it. I will rise for 15 minutes unless you send a message through to say you want
20 another five minutes.

21 (Short break)

22 MR. HOSKINS: I have a gloomy face!

23 THE PRESIDENT: Gloomy face?

24 MR. HOSKINS: I will be perfectly frank, it is simply because Tesco believe that a cross
25 undertaking will not protect them, so let me just explain as briefly as I can why that is. If
26 Morrisons loses the substantive judicial review, the cross-undertaking is fine because if they
27 lose any financial loss we suffer we recover.

28 THE PRESIDENT: What you are worried about is if they win?

29 MR. HOSKINS: Exactly. I am worried about if they win. Let me explain that is a concern. If
30 Morrisons had brought this claim in July and they won on the back of a challenge to the
31 July decision, then the matter would have gone on with both Asda and Morrison bidding.
32 That would have been the bidding process.

33 THE PRESIDENT: With Asda and Morrisons?

1 MR. HOSKINS: With Asda and Morrisons, that is right, because at that stage they were both
2 suitable purchasers. Now, it may well be, it is *de facto*, it is commonsense ----

3 THE PRESIDENT: Sainsbury's would have been out.

4 MR. HOSKINS: Because Morrisons had won the judicial review. The likelihood is, because as
5 we know Asda have been found to be not equivalent to Morrisons in addressing the SLC,
6 that Morrisons would have won that bid, but the point is there would have been competitive
7 pressure in the bidding process, it would not have been a one horse race.

8 THE PRESIDENT: Yes.

9 MR. HOSKINS: Let us jump forward to today. Let us assume the judicial review takes place and
10 Morrisons win, what would the bidding process look like?

11 THE PRESIDENT: Well we do not have the faintest idea, do we?

12 MR. HOSKINS: With respect, Sir, we do, because we know who came in last time: Morrisons,
13 Sainsbury's and Asda.

14 THE PRESIDENT: There are people out there saying: "If only we had gone in".

15 MR. HOSKINS: Sir, if that is the basis of a decision, I know it is late, but with respect ----
16 (Laughter)

17 THE PRESIDENT: So Asda would not be there?

18 MR. HOSKINS: Sainsbury's would not be there, Morrisons is a one horse race, so they can bid
19 whatever they like as long as it satisfies the "not unreasonable" test it will be substantially
20 less than the price we are currently holding from Sainsbury and we will have no means of
21 recovering the shortfall because the cross-undertaking will not cover us. The crucial point
22 about that is the whole purpose of interim relief is to hold the ring. If you grant the interim
23 relief sought then because of the delay it cannot hold the ring because we cannot go back to
24 the situation that we had, the *status quo* which was a bidding process in which there was
25 competitive pressure as a result of three people. If interim relief is granted and Morrisons
26 win the overwhelmingly likely situation with Asda and Sainsbury's out is that there would
27 be a one-horse race.

28 THE PRESIDENT: Just remind me, Asda was out because ----

29 MR. HOSKINS: They were not sufficiently equivalent to Morrisons in addressing the SLC.

30 THE PRESIDENT: So they would not be in next time?

31 MR. HOSKINS: That is right, there would be no point in them going in. Let us be honest, this is
32 fantastic for Morrisons because what they want is the site cheaply, and what they will get
33 as a result of this interim relief, if they win the judicial review is a one horse crack at the
34 site. You have seen the care with which the Competition Commission has approached the

1 bidding process. With respect interim relief cannot hold the ring if it cannot present the
2 *status quo* then that is a fundamental reason for refusing it.

3 THE PRESIDENT: That is assuming they brought it in in July, now the equivalence point Mr.
4 Fordham showed us where that was in his claim?

5 MR. HOSKINS: Yes.

6 THE PRESIDENT: That is a decision that is dealt with in November, so that is not July, and
7 Asda therefore would be out on that scenario?

8 MR. HOSKINS: That is right, they would be out.

9 THE PRESIDENT: Yes.

10 MR. HOSKINS: My strongest case is the July date, and I have shown you that, and you have my
11 points. They do not have an equivalence argument. It is referred to at the start and said for
12 the grounds below we have an equivalence point, we actually go to section D the grounds,
13 there is no equivalence argument. An arguable case is not simply saying: "This is the
14 argument, and here is why it has some merit", and they have endeavoured at all to explain
15 why the equivalence point has any merit, other than by saying that Sainsbury's was
16 completely unsuitable which is a stage one point.

17 THE PRESIDENT: And was raised as one interim relief refused.

18 MR. HOSKINS: No, but Miss Rose would be delighted if the whole thing went away today, just
19 as I would, and that is the primary submission, knock the whole thing out. It comes back to
20 delay, delay. But, Sir, I am glad someone has worked this out, it is too late in the evening
21 for me, apparently if the challenge had been brought on 6th November, which is the second
22 date I had, then the equivalence decision would not have been taken by that stage, i.e. we
23 would not have known that Asda would have been out.

24 THE PRESIDENT: No.

25 MR. HOSKINS: So I have two cracks at the window of delay on this argument – July and 6th
26 November, which is when they knew that Sainsbury's and Asda were bidders, it is just a
27 second iteration of the first.

28 THE PRESIDENT: When was the decision taken to take Asda out, remind me?

29 MR. HOSKINS: Someone will have to help me on that. (After a pause): 18th November I am
30 told.

31 THE PRESIDENT: That was the decision to take out Asda.

32 MR. HOSKINS: 5th November, I am sorry. It was communicated to us but not to anyone else
33 until 18th, and you have a copy of that document, but for confidentiality reasons nobody else
34 does.

1 THE PRESIDENT: I am being a bit slow here. Why is that another window?
2 MR. HOSKINS: Because as at 6th, which is just another iteration of 24th, it is another date on
3 which they confirmed they knew that Sainsbury's was a bidder.
4 THE PRESIDENT: Yes.
5 MR. HOSKINS: Therefore they have run the grounds then, and if it had happened before it was
6 made public that Asda were out, you could have had another bidding process which would
7 have included Asda and Morrisons.
8 THE PRESIDENT: So they would not have then gone on had they challenged the 6th, they would
9 not have then gone on to make the decision the 18th about Asda.
10 MR. HOSKINS: If the challenge on the 6th had won you would not have had a public
11 announcement on the 18th that Asda were not in the running as against Morrisons.
12 THE PRESIDENT: You would not have had a decision on a judicial review by then, would you?
13 MR. HOSKINS: Well you might have done, I must confess, I am hoping if you are against me
14 that we are going to have this judgment within a week or two.
15 THE PRESIDENT: Right.
16 MR. HOSKINS: Thank you very much.
17 THE PRESIDENT: Mr. Fordham?
18 MR. FORDHAM: Well all of those concerns are on the premise that we have won our judicial
19 review. If we have won our judicial review it is because we have a ground which relates to
20 the November 2009 decision which had not been taken on 6th November. We have a good
21 ground and we have shown that that is an unlawful decision. If Mr. Hoskins is right that
22 there is some ground that arouse out of an earlier decision we are out of time and we will
23 lose. Everything else that he says is simply a function of the fact that a decision is made in
24 November, we have an entitlement to challenge and it would have been found to have been
25 an unlawful decision. Well that is where we are, and he would equally be able to make all
26 the same points if we challenge within three days.
27 THE PRESIDENT: Thank you very much. Well thanks, everybody; I am sorry about the
28 lateness of the hour. I will give judgment at 3 o'clock tomorrow. Thank you.
29 MR. HOSKINS: Should we attend, because there may well be submissions about the form of the
30 order.
31 THE PRESIDENT: There may well be. I think someone should attend.

32 _____
33