IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1188/1/1/11

Victoria House,
Bloomsbury Place,
London WC1A 2EB

8 March 2012

Before:

LORD CARLILE OF BERRIEW CBE QC

(Sitting as a Tribunal in England and Wales)

BETWEEN:

(1) TESCO STORES LIMITED
(2) TESCO HOLDINGS LIMITED
(3) TESCO PLC Appellants

- and -

OFFICE OF FAIR TRADING Respondent

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HEARING (DISCLOSURE)

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APPEARANCES

Miss Dinah Rose QC and Mr Daniel Piccinin (instructed by Freshfields Bruckhaus Deringer LLP) appeared on behalf of the Appellants.

Mr Stephen Morris QC, Ms Kassie Smith and Ms Josephine Davies (instructed by the General Counsel of the Office of Fair Trading) appeared on behalf of the Respondent.

THE CHAIRMAN: Good morning.

MR. MORRIS: Good morning, Sir. In this application I appear on behalf of the OFT.

THE CHAIRMAN: Just before we start, this is the first hearing of the Tribunal since the very welcome announcement of honorary QC being given to our Registrar, Mr. Dhanowa, who I see sitting in front of me. I am sure that you and all counsel and solicitors would like join with me in congratulating Mr. Dhanowa on a most welcome appointment which he richly deserves and which has given, I think, great pleasure throughout what I will call the Competition community. (Applause) I will not commit anyone for contempt for clapping in court, but thank you all very much.

MR. MORRIS: Thank you, sir, for those words, I think the applause says it all.

THE CHAIRMAN: Can we record on the transcript that there was applause, please. It has never happened in my experience in a court room except from the public gallery, when it is not welcome. Carry on, Mr. Morris.

MR. MORRIS: Thank you very much. I appear on behalf of the Office of Fair Trading with my learned friends Miss Smith and Miss Davies, and my learned friends Miss Rose and Mr. Piccinin appear on behalf of Tesco. This is the hearing of an application made by the Office of Fair Trading dated 1st March. We thank the Tribunal for making itself available at such short notice, and indeed at this early hour of the morning.

You should have received, sir, a skeleton argument from Miss Rose, I think from two days ago, and I hope you received a brief position note from the Office of Fair Trading yesterday evening, which runs to a couple of pages.

THE CHAIRMAN: Yes.

MR. MORRIS: As you will see from that position note much has been agreed between the parties. Tesco has agreed to provide materials in response to the Office of Fair Trading's application and documents and further particulars were provided by Tesco yesterday evening. The Office of Fair Trading has responded to the request for clarification of the particulars it had served earlier, and Tesco has indicated that it does not pursue any further application in relation to that.

Tesco has now clarified the position in relation to the s.26 notice and I understand, although I am not sure a letter has been written to this effect, has further clarified, or will further clarify to the satisfaction of the Office of Fair Trading the precise meaning of the reference to the documents which are responsive. As far as I am aware, there will be no issue there.

The only outstanding issue, therefore, is the question of contact between Tesco and potential witnesses made in the course of the Office of Fair Trading's administrative investigation.

Sir, if I may turn to that, the Office of Fair Trading is seeking an order directing Tesco to disclose information and documents relating to the contact it, Tesco, or, more probably, its solicitors had with certain persons who were potential witnesses. The original application refers to the terms of the Office of Fair Trading's letter of 21st January, to which I shall turn in a moment. That will require some modification because some of the information sought there has been provided and some of it will not be sought.

The OFT's position is summarised, sir, in para.8 of our position note, which I imagine you have read.

THE CHAIRMAN: It is right in front of me and I have read it.

MR. MORRIS: What I propose to do briefly then is to set out the background to the application and then come to develop those four points, if I may. In the course of the administrative procedure before the Office of Fair Trading and after the supplemental statement of objections and after Tesco's second response to that document in November 2010, Tesco sought to obtain further evidence from potential witnesses and indeed informed the Office of Fair Trading that it was doing so. It so informed the Office of Fair Trading in January 2011. The OFT understands that in the period between then and around March Tesco interviewed a number of witnesses, including individuals who were or have been employees of McLelland and Dairy Crest. The last, in fact, that Tesco heard about this was from Tesco. The last the Office of Fair Trading heard about it was in January, but they had some indication from the companies themselves in March 2011 that Tesco were speaking to these individuals. Then in a letter of 27th July 2011 Tesco purported to submit two fresh witness statements and a further witness statement from a Mr. Irvine.

Can I take you, first, to that letter of 27th July, which is in the OFT's application bundle at tab 1. This is a letter from Freshfields to Mr. Groves of the Office of Fair Trading and it starts:

> "Thank you for your letter of 1 June 2011 providing an update on the status of this Investigation."

Then it says under the next heading:

> "As you are aware, we have been exploring whether there were other witnesses who could usefully give relevant evidence in relation to the Dairy case."

The letter then sets out propositions that Freshfields seek to derive from the *Construction* cases. Then over the page under the heading "New evidence" half way down:

> "Since my exchange of correspondence with the OFT earlier this year, we have spoken to a number of the individuals involved in the Cheese 2002/3 allegations. These individuals either expressed their unwillingness to be drawn into this process at this late stage or, somewhat unsurprisingly, have poor recollection of the facts and events at issue (which now happened over eight years ago). All of the individuals who were prepared to speak to us corroborated Tesco's case. Of these there were two individuals who had a sufficiently reliable and informative recollection of the events in relation to the cheese allegations at issue and who were willing to give us witness statements, namely:
>
> * Arthur Reeves [Dairy Crest] and
> * Tom Ferguson [of McLelland] …"

It does not actually say so, but he is from McLelland. Then it says:

> "Their witness statements are enclosed."

Then it carries on saying what the evidence says. The important passage for present purposes is the previous passage I read on p.2, where it identifies individuals other than Mr. Reeves and Mr. Ferguson to whom they have spoken and who, according to Tesco, corroborated Tesco's case.

THE CHAIRMAN: Is that any more than flummery? They have taken witness statements, so they tell you. They have plainly waived the privilege in the two that they have identified. Is that sentence more than puff?

MR. MORRIS: It may well be no more than puff, but the purpose for which I refer to it is to identify that there are witness statements and they are the ----

THE CHAIRMAN: I do not think that is in dispute. There are plainly witness statements.

MR. MORRIS: I am setting out the background to this application.

THE CHAIRMAN: All right.

MR. MORRIS: Then over the page you will see at the bottom of p.4:

> "We consider that the OFT cannot reach a final decision in this Investigation without taking account of this new evidence. In the light of the above, the new evidence enclosed provides sufficient grounds for the OFT now to drop the remaining Cheese allegations against Tesco."

The reason I refer you to that will become apparent a bit later, sir, but it is to support our submission that these witness statements were obtained, and these interviews took place, for the purpose of the investigation by the Office of Fair Trading and not any other purpose. I will come back to that later. That is why I have highlighted that paragraph. That is all to do with the question of privilege which I will come to in a moment.

If I could then go over the page just to point out on p.5, four paragraphs down:

> "For completeness, we also enclose a minor corrigendum to Alastair Irvine's first witness statement."

This corrigendum is for completeness and does not affect the reliance placed by Tesco on our SSO evidence. The point there is there was a second witness statement after Alastair Irvine's first statement and I will come back to that in a moment.

Then in the next paragraph:

> "We consider that the combination of the new evidence and an inability to remedy the evidence and procedural deficiencies in the OFT's case at this late stage in the Investigation fundamentally undermines [the case]. We believe the right course would be for the OFT to drop these allegations against Tesco."

THE CHAIRMAN: Yes, I have read the last paragraph as well, which is plainly material to the issue of privilege.

MR. MORRIS: The last paragraph does go on to suggest that if it is not dropped they will, if necessary, take their case to Court. So that is the 27th July letter.

THE CHAIRMAN: Sorry, you said "they will, if necessary, take their case to Court." That may well be right but the reason why I mention that I had read that last paragraph is because it refers to defending its position vigorously, and presumably that includes the context of an infringement penalty, does it not?

MR. MORRIS: Yes.

THE CHAIRMAN: Yes, well that may be material to privilege. If you look at the OFT's guidelines for investigations there is a very helpful flow chart, organogram, or whatever the appropriate term is, right at the beginning of those guidelines which I was just refreshing my memory from earlier, which makes it clear that the whole context of an investigation of this kind includes the eventuality of an infringement penalty which, in this case, was very large.

MR. MORRIS: Of course, I do not deny that the end may be an infringement penalty and that is the context – we will come to that when I get to the privilege issue, but I cannot obviously

resist the suggestion that the procedure is a procedure which may end in the imposition of a penalty.

THE CHAIRMAN: It is an Article 6 procedure, is it not?

MR. MORRIS: To that extent, yes.

THE CHAIRMAN: As the Director General of the Office of Fair Trading has conceded before this Tribunal in the past.

MR. MORRIS: Absolutely, yes.

What in fact then happened, and I do not need to take you to the detail of this, is the witness statements which were attached to this letter were, in fact, sent back by the Office of Fair Trading unopened on the grounds that they had been submitted well out of time, and that is dealt with in para.2.119 of the Decision, and I do not need to take you to that unless it would assist you. What had happened was that effectively the decision had already been taken and in any event in the Office's view time for representations had closed months earlier, and Tesco had been told that.

We then jump forward several months to these proceedings. The Defence was served by the OFT at the end of January and it was Tesco which then started the ball of this particular issue rolling by a letter of 13th February 2012, which you will find in one of the two Tesco white bundles, it is called Bundle of Documents, and it is tab 13. It acknowledges receipt of the Office's defence and then it refers to the case management conference that we had last time quoting matters I had raised about witnesses that the OFT was at that stage considering contacting. Paragraph 2 says:

> "The OFT declined to say whether or not it had at that stage contacted those witnesses, and made clear that it had not yet decided whether to call them."

The letter continues:

> "We note from paragraph 28 of the OFT's Defence that the OFT has now decided that it will not call any witnesses. We assume that this decision was taken in the light of the consideration to which the OFT referred at the CMC."

Then the next paragraph is important:

> "We ask the OFT now to state whether it made contact with any potential witnesses, and if so which people, and the nature and content of the communications between the OFT and those people. We would be grateful for your disclosure of all records or notes of all contacts between the OFT and the three potential witnesses alluded to at the CMC, and any other potential witnesses. If there were no such communications from the time the Supplementary Statement

of Objections was issued onwards, please confirm that this is the case and that the OFT did not make any contact with any potential witnesses from that time."

Then at the bottom it says:

"If you do not intend to comply with any of these requests by these dates, please revert to us by 15 February 2012, with reasons, so that we may make an application to the Tribunal."

The response to that letter is to be found back in the application bundle at tab 8. The first part of the letter deals with the request in relation to witnesses, and it says:

"We refer to your letter dated 13 February 2012 in which you make disclosure requests concerning potential witnesses and the OFT's case file. The OFT's response is set out below.

Witnesses.

The OFT has not made contact with any potential witnesses in this matter since the time the SSO was issued by the OFT. Therefore there are no documents to disclose to you in relation to this request."

I should also add in parenthesis, Sir, that since then there has been a further request from Tesco along the lines: "Did you attempt to contact any witnesses?" to which the OFT has answered subsequently "no". The letter then goes on:

"We refer to your letter dated 27 July where you state that you: '*have spoken to a number of individuals involved*'."

And then it sets out the passage from 27 July 2011 letter to which I have just referred you, Sir. It then makes the following request:

"We would be grateful if you would now please state:

1. the names of all 'the individuals involved' (other than Arthur Reeves and Tom Ferguson) to whom you refer in the quoted passage;
2. what you asked those individuals, and what those individuals said to you at that time and in any subsequent conversations or dealings;
3. if, before or since the date of your letter of 27 July 2011, your client (or your firm, or any other representatives of your client) has contacted any other potential witnesses in relation to whom your client did not adduce a witness statement to support its Appeal in the Notice of Appeal bundle;
4. in relation to 3 above …"

the same questions as in 2.

Then there are two questions about Mr. Ferguson's witness statement:

> "5. whether Tom Ferguson's witness statement, enclosed with your letter of 27 July 2011, was signed and dated by Mr. Ferguson and, if so, on what date;
>
> 6. whether that statement from Tom Ferguson is in identical terms to his statement dated 10th October".

That is a side issue which I think and hope has been resolved to the extent that Tesco has offered to provide Mr. Ferguson's statement on condition that that provision does not amount to any further waiver of privilege, but we can come back to that if need be. The wrinkle there is that there appears to be two versions of Mr. Ferguson's statement, and we were a bit baffled by that. There was the one that has now been served in these proceedings, which is dated 10th October, and there is an earlier version which is referred to in that letter. We were baffled as to why he had signed two different statements, or whether he had signed two witness statements. We can come back to that perhaps at the end depending on where we get to, and Tesco can state its position as to whether it is prepared to disclose that, as I had understood it was, subject to that condition. For the moment, if I can put the Ferguson statement issue to one side.

The letter then continues:

> "Further to your responses in relation to requests 2 and 4 above, we would be grateful for your disclosure of all records and/or notes of, or relating to, all contact between your clients and/or your firm or other representatives of your client and any potential witnesses, or documents evidencing such contact."

That is the original basis of the application. On 29th February at tab 13, Tesco replied, p.55 of the application bundle. In para.2:

> "We are surprised both by the substance and the timing of this request, and it is not clear how the information now sought is relevant or necessary to this appeal.
>
> The information requested in the OFT's letter is privileged. Tesco does not intend to waive privilege, and accordingly does not propose to respond substantively to the OFT's requests on this topic."

The letter then goes on to make various points about the circumstances in which this material had been obtained.

Then the application is made in respect of that, and that is to be found at paras.28 to 33 of the application. It sets out the background and then it repeats that the information sought is

that listed in those six numbered paragraphs in the letter of 21st February. Sir, you will see at para.33 the order sought. It says answer the questions set out in the letter of 21st February, and then in (2) disclose documents, including Mr. Ferguson's earlier witness statement, and/or records and/or notes of, or relating to, any contact with potential witnesses.

Whilst you have that file open, the black one, rather than the white one, if I could take you back briefly to the letter just to clarify the scope of what we are now seeking. Essentially, we are seeking the orders in relation to sub-paras.1 and 2, which are the individuals involved ----

THE CHAIRMAN: This is p.45, top of the page, 1 and 2.

MR. MORRIS: Yes, 1 and 2. 5 and 6, we are still seeking, which is Mr. Ferguson.

THE CHAIRMAN: That is the sub-issue.

MR. MORRIS: That is the sub-issue. In relation to 3 and 4, we are not pursuing those. We accept that any interviews with witnesses or notes which were taken once the decision was issued would be subject to litigation privilege.

That is the background, Sir, and now, if I may, I will develop those four points that I make in my note. The first question is relevance. We submit that the material which Tesco asserts, flummery or not, corroborates Tesco's case, is likely to be relevant to the substantive issues in the case. Freshfields, as we say, expressly assert that it is relevant by referring to it as corroborating, but we submit that there may be inconsistencies in the detail. Even if the particular witness is not going to be called, this does not mean that such material contained either in draft witness statements or in notes of interviews could not be put to one of the witnesses who is going to be called, and on that basis is disclosable as relevant material.

For example, if the account given by one of these ----

THE CHAIRMAN: This is self-evident, is it not? If they are witnesses who are possibly connected with the matters in issue, then whatever they said may be relevant but it begs the question of whether it is privileged. Should we not focus on that?

MR. MORRIS: I can jump straight to privilege, and we will come back to relevance if we need to. In relation to privilege, our submission is this: any notes of discussions with these potential witnesses or draft or actual statements, are not subject to litigation privilege. This is because the material was prepared for the predominant purpose of use in the administrative procedure before the Office of Fair Trading.

THE CHAIRMAN: When does the administrative procedure cease to be such? I am just looking again at the diagram which I find at para.1.8 of the Guide. I am looking also at paras.7.1 to 7.3 of the Guide, "Privileged communications, limits on our power of investigation". The diagram being very useful, it is absolutely clear that a potential aspect of an investigation is an infringement decision and a financial penalty which might run into millions of pounds. When does it cease to be administrative and come into the Article 6 area? I say that bearing in mind that the European Court of Human Rights has held, certainly in relation to Italian competition investigations, that they are Article 6 investigations and "criminal in nature" consistent with the decision of the Tribunal in *Napp*.

MR. MORRIS: I do not contest that they are Article 6 procedures, but what I am saying is that that is not determinative of whether or not there is litigation privilege. What I am saying is that the question of whether litigation privilege arises turns on whether the procedure is adversarial or non-adversarial. The OFT's procedure is non-adversarial, it is an investigation. Because of that, it is not adversarial it is not litigation, and therefore litigation privilege does not arise until, at the earliest, after the decision is made.

THE CHAIRMAN: Why is it non-adversarial? "Adversarial" is not a term of art, it is a term of description. This is where, having read the application on the preliminaries, I am having, I am bound to say, a bit of difficulty.

MR. MORRIS: If I may, I am going to take you to the leading House of Lords authority which describes the distinction between "adversarial" and "non-adversarial", a case called *Re L*.

THE CHAIRMAN: Which was decided before the Human Rights Act?

MR. MORRIS: It was, but the human rights issue was raised in it and relied upon in a dissenting opinion of Lord Nicholls, but the majority by three to two held that it obviously ----

THE CHAIRMAN: We have to look at the landscape as it is now after 1998.

MR. MORRIS: We do.

THE CHAIRMAN: I just thought it might be helpful to know where I am, at the moment, having some difficulty with the proposition.

MR. MORRIS: As I have just said, in order to attract litigation privilege the standard double test, litigation must be in reasonable prospect and the predominant purpose of the preparation of the material is use in that litigation. We say, from the terms of Freshfields' letter, that the predominant purpose of these interviews was use in the course of the administrative procedure and not any subsequent appeal.

The question of whether or not litigation privilege applies at the administrative stage is not decided, but, as a matter of principle, we submit that, applying recognised principles, the answer is straightforward: "litigation" means only adversarial proceedings.

Can I take you, first of all, to a passage in **Phipson**. Can I hand up the passage. I hope my learned friends have copies.

THE CHAIRMAN: This is not a distinction that is made in para.7.2 of the Guide. Of course, I have in mind s.30 of the Competition Act as well. The reason I mention s.30, Mr. Morris, is in relation to what I will call "architecture". It seems to me at first blush that the "architecture" of these provisions, which start with s.30, which no doubt was very much in the mind of those who drafted s.12.63 of the Guide, was that legal professional privilege certainly applies to some aspects which may arise during the diagrammatic procedure depicted in the Guide. It just occurs to me that for your argument to be right, you have to draw a black line or a grey line somewhere in the investigative to infringement procedure which legal professional privilege begins to apply. If that is right, then why does it not appear in the architecture that has been set out by the OFT?

How can one say that this is not an adversarial procedure when, on the one hand, one has the OFT – and I hope this is not too simplistic, if it is please say because I will plead guilty to it – you have a procedure in which the OFT starts an investigation where one of the two potential out-turns is an infringement decision with potentially a heavy fine running into this case in millions of pounds. On the other hand, you have Tesco, or any other potential addressee, who are seeking to avoid liability for such an infringement by persuading the OFT that they were not guilty of an infringement, therefore should not be fined. Is that not classic Article 6 adversarial territory or am I being simplistic?

MR. MORRIS: If I may, I will draw a distinction between Article 6 and adversarial. Article 6 applies because ultimately there is a penalty. Article 6 is about fair procedures. It does not necessarily involve questions of legal privilege. You can have judicial proceedings which are non-adversarial.

THE CHAIRMAN: But fair procedures in a criminal context. I re-read at least part of the judgment in *Napp*. I do not know if you have it in front of you, but I have got it here somewhere. In *Napp*, which comes after the 1998 Act, I notice that the then President of the Competition Appeal Tribunal at para.98 of the judgment agreed with the directors' concession that these proceedings are criminal for the purposes of Article 6. That is particularly so since penalties under the Act are intended to be severe and to have a deterrent effect. Is that not characterising adversarial proceedings?

MR. MORRIS: In our submission, it does not follow that because a procedure is criminal and there are rights of defence, litigation privilege is part and parcel of those rights of defence. There is no equivalent privilege in the context of European Commission proceedings and there is legal advice privilege, but it is not thought within the European context necessary to have litigation privilege in order for proceedings to be Article 6 compliant.

THE CHAIRMAN: I will shut up now!

MR. MORRIS: As far as s.30 is concerned we would submit that that just begs the question of whether or not something is privileged, it does not answer the question of what the legal proceedings there referred to are.

If I may just take you to **Phipson** and then to *Re L*. I think **Phipson** has just been handed up and it is paragraph 23-98 at the bottom. I am going to call it *Re L* rather than *L, Re*.

> "In *Re L* the House of lords held by a 3:2 majority that litigation privilege could not apply to proceedings under Pt IV of the Children Act 1989 in respect of child care orders, because the proceedings were not adversarial in nature. In *Re L* Lord Jauncey described litigation privilege as an essential component of adversarial procedure. Lord Lloyd of Berwick and Lord Steyn agreed. The distinction drawn by the House of Lords was thus between proceedings that were adversarial in nature, where litigation privilege might be claimed, and proceedings which were investigative or inquisitorial, for which no claim could be made to litigation privilege, albeit a claim could be made to legal advice privilege. This distinction provided the basis for the Bank of England's crucial concession in *Three Rivers* that a claim for litigation privilege would not lie for documents prepared for the Bingham inquiry.
>
> In *Re L* the majority focused on the public interest nature of the proceedings under the Children Act 1989. Lord Jauncey cited Devlin J in *official Solicitor v K.*
>
> > 'Where the judge is not sitting purely or even primarily as an arbiter but is charged with the paramount duty of protecting the interests of one outside the conflict, a rule that is designed for just arbitrament cannot in all circumstances prevail.'
>
> A powerful dissenting speech by Lord Nicholls might be said to be more in tune with the attitude of the courts since the Human Rights Act. He said that clear words or a compelling context was required before Parliament can be taken to have intended that the right to rely on privilege should be ousted. Family proceedings were court proceedings. For the purpose of deciding whether privilege had been

ousted by parliamentary intention, legal advice and litigation privilege should be treated as integral parts of a single privilege. Lord Nicholls suggested that when the ECHR became law, the unavailability of privilege in child care proceedings might deny a parent a fair hearing contrary to Article 6."

That is the Human Rights point. It then carries on:

"In other respects the attitude of the courts to statutory abrogation of privilege has been to require express words or necessary implication. There may be some argument, therefore, that the decision in *Re L* should be reconsidered in the light of the HRA and subsequent authority on privilege. However, whilst the correctness of the decision in *Re L* was not in issue in the House of Lords in *Three Rivers* …"

- which is a post-Human Rights case:

"… nothing in the speeches cast doubt on its correctness. But even if *Re L* were reconsidered, the decision merely provides that in one particular type of proceedings litigation privilege may not be claimed. If litigation privilege requires litigation to be in reasonable prospect, there still must be some form of proceedings or adversarial process. So even if *Re L* were reconsidered, it seems unlikely that reconsideration would go beyond the particular statute there in question. It would be unlikely to change the basic distinction between 'adversarial' and 'non-adversarial' proceedings which is at the heart of the distinction between litigation and legal advice privilege."

Then over the page:

"Lord Jauncey drew a distinction between what is adversarial and proceedings which are 'primarily non-adversarial and investigative', where 'the notion of a fair trial between opposing parties assumes far less importance'. In contrast, he said that where an application is made under the Children Act 1989 the court is seeking to reach a decision in the best interests of someone who is not a direct party and is granted investigative powers to that end. Litigation privilege is regularly claimed in disciplinary proceedings. It can be claimed for proceedings in foreign courts, even if the foreign court knows no such privilege. So too there should be no difficulty in claiming litigation privilege for court, arbitration or employment tribunal proceedings. Tribunals and inquiries under the Companies Act 2006 or the Financial Services and Markets Act 2000 may present difficulties. The issue will usually be whether the proceedings were merely fact-gathering. Where a tribunal is administrative, it is unlikely that it will be possible to claim litigation

privilege. On the non-adversarial side of the line would appear to be inquests, tax or competition investigations, and many types of proceedings involving children."

THE CHAIRMAN: Can that be right? I read a strikingly similar passage in Mr. Hollander's book on litigation privilege, it is almost word for word the same.

MR. MORRIS: I think it is because Charles Hollander writes that chapter.

THE CHAIRMAN: That explains it. If you just think about an inquest, for example, supposing that there is a driver who is possibly responsible for the death of a number of people in an accident, he has the option whether or not to give evidence at the inquest, because he may say "self-incrimination", so he goes to a solicitor and he makes a statement in order to obtain advice as to whether he should give evidence at that inquest. The solicitor then writes to the Coroner and says: "My client will not be giving evidence at the inquest", can it really be right that the statement he made to his solicitor has to be disclosed to the Coroner?

MR. MORRIS: No, but that is legal advice privilege, he is the client, that is him speaking to his solicitor directly for the purpose of taking ----

THE CHAIRMAN: So if the solicitor interviews his wife, who is the passenger in the car at the time, that has to be disclosed to the Coroner?

MR. MORRIS: That is the distinction that we seek to draw.

THE CHAIRMAN: But where is the authority for this proposition? I see it repeated now in two very distinguished text books, albeit edited by the same also very distinguished person.

MR. MORRIS: I was going to bring **Hollander** along as well, but I thought I might get caught out by the repetition.

THE CHAIRMAN: But where is the authority? I focused when I read that passage in **Hollander** on inquests, the same could be said about tax investigations too. There are many cases before Commissioners, for example, in which I would have thought at first blush statements made to the solicitor for the person being investigated are privileged, are they not?

MR. MORRIS: The person being investigated, yes.

THE CHAIRMAN: And his witnesses. Why not? I am just puzzled by this sentence. It is a sweeping statement of authority, but I do not know what its derivation is.

MR. MORRIS: Well I do not, save for *Re L* and I am using that as illustration. We go back to *Re L* effectively, and the distinction between adversarial and inquisitorial.

If I could take you, Sir, then to *Re L*, just to see exactly what Lord Jauncey said. I do not know whether you are familiar with the facts. It was to do with care proceedings. A child aged two:

"… was admitted to hospital having consumed a quantity of methadone. The parents were heroin addicts. The mother's explanation was the child had accidentally drunk the substance. Having obtained an emergency protection order from the court the local authority instituted care proceedings under s.31. The mother was given leave by the District Judge to disclose the court papers to a consultant chemical pathologist, and he is the expert who was to give an independent opinion as to whether the medical condition when admitted was consistent with the mother's account of events. The District Judge's order required the report to be filed with the court and therefore made available to other parties. The area police authority, having learned of the report's existence, issued a summons in the High Court for leave to be given sight of the report to assist in their investigation as to whether a criminal offence had been committed. The Judge held that she had jurisdiction to order disclosure to non-parties and, having balanced the importance of confidentiality in care proceedings against the public interest in the administration of justice and held that the interests of the child lay in the police making an informed decision as to whether prosecution should follow, exercised her discretion in favour of making an order for disclosure to the police. The Court of Appeal, dismissing the mother's appeal, held that she could not resist disclosure on grounds of legal professional privilege or privilege against self-incrimination."

The House of Lords dismissed the further appeal by a majority, holding:

"that in relation to legal professional privilege a distinction has to be drawn between legal advice privilege, which attached to all communications between legal advisers and their clients and which was absolute, and litigation privilege, which attached only to the written reports of third parties commissioned by the client for the purpose of legal proceedings and which was a component of the courts' adversarial procedure; that since proceedings under Part IV of the Children Act 1989 were investigative and non-adversarial in nature and placed the welfare of the child as the primary consideration, litigation privilege was by necessary implication excluded from the terms and overall purpose of the Act and did not extend to reports obtained by a party to care proceedings which could not have been prepared without the leave of the court to disclose documents already filed …"

Then if I can take you to the speech of Lord Jauncey, which is the majority speech – I do not think I need to take you to the facts. At p.24F Lord Jauncey starts dealing with the issue of legal professional privilege and if I can take you to p.24H at the bottom, Lord Jauncey records a submission by Miss Kushner (who was for the mother), and then says:

> "There is, as Mr. Harris, for the city council and the police authority, pointed out, a clear distinction between the privilege attaching to communications between a solicitor and client and that attaching to reports by third parties prepared on the instructions of the client for the purposes of litigation. In the former case the privilege attaches to all communications whether related to litigation or not, but in the latter case it attaches only to documents or other written communications prepared with a view to litigation."

- then citing *Waugh*.

> "There is this further distinction that where as a solicitor could not without his client's consent be compelled to express an opinion on the factual or legal merits of the case, a third party who has provided a report to a client can be subpoenaed to give evidence …. There is no property in the opinion of an expert witness."

Then at "C":

> "Litigation privilege, as it has been called, is an essential component of adversarial procedure. In *Worrall v Reich* it was held that one party to litigation could not be compelled to produce to the other party a medical report obtained for the purposes of the action."

Then moving down to *Causton v Mann Egerton*, a passage from Lord Justice Roskill:

> 'I am clearly of the view that this court has no power to order production of privileged documents … so long as we have an adversarial system, a party is entitled not to produce documents which are properly protected by privilege if it is not to his advantage to produce them, and even though their production might assist his adversary …'
>
> "Finally, in *Waugh v British Railways Board* Lord Simon of Glaisdale said:
>
> 'This system of adversarial forensic procedure with legal professional advice and representation demands that communications between lawyer and client should be confidential, since the lawyer is for the purpose of litigation merely the client's alter ego. So too material which is to go into the lawyer's (i.e. the client's) brief or file for litigation. This is the basis

for the privilege against disclosure of material collected by or on behalf of a client for the use of his lawyer in pending or anticipated litigation …"

Lord Denning MR, Roskill LJ and Lord Simon of Glaisdale all emphasised the important part which litigation privilege plays in a fair trial under the adversarial system. This raises the question of whether proceedings under Part IV of the Act are essentially adversarial in their nature. If they are, litigation privilege must continue to play its normal part. If they are not, different considerations may apply."

Then he refers to *Re K*, Lord Evershed points out:

"That the purpose of the judicial inquiry was to make a decision about the future upbringing of the infant, whereby the infant …"

Then he cites the cases in relation to wardship and children, and then at the bottom of the page, 26H: "I agree with Sir Stephen Brown P" which was, I think in the Oxfordshire case:

"that care proceedings are essentially non-adversarial. Having reached that conclusion, and also that litigation privilege is essentially a creature of adversarial proceedings …"

- and that is the distinction I make. Non-adversarial procedures have to be fair, but litigation privilege is essentially part of the A v B, not all cards on the table approach of the adversarial system. He says:

"It follows that the matter is at large for this House to determine what if any role it has to play in care proceedings."

Then down the page at 27B he refers to *Re Saxon*:

"However, in these proceedings, which are primarily non-adversarial and investigative as opposed to adversarial, the notion of a fair trial between opposing parties assumes far less importance. In the latter case the judge must decide the case in favour of one or other party upon such evidence as they choose to adduce, however much he might wish for further evidence on any point."

Then he says at the bottom that the better view is that litigation privilege never arose rather than it was being overridden.

So the essential point is that in a situation where you have an adversarial system that each side can choose how it runs its case, that is the adversarial system, and that is why litigation privilege applies. But in the investigative system that is not the same situation. Here the OFT is investigating in the public interest. It is seeking by way of investigation and inquisitorial approach to get to the bottom of the facts. There is not the same equality of

each party coxing and boxing because, of course, the party under investigation is entitled to see everything that the OFT gets.

THE CHAIRMAN: If you are right, why does para.7.1 appear in the guidance? Paragraph 7.1 appears to me to make a clear and explicit concession that privilege of whatever kind may arise when the OFT is "using its powers of investigation", whereas in *Re L* – I can absolutely see that in care proceedings where the main subject of the proceedings is not a party even, or may at best be – I notice that the child's interests were represented by Mr. Ryder, as he then was, in these proceedings – but the child is not a party. The paramount consideration is the welfare of the child and the court is carrying out an inquisition as to where the child's best interests lie, particularly in relation to where the child should live. It is not a case of I, the State, accuse you, an individual, of doing something which can be met with a penalty.

MR. MORRIS: Ultimately the background was that was not the care proceedings.

THE CHAIRMAN: The purpose of the proceedings was to decide where the child should reside, was it not?

MR. MORRIS: Yes, but the purpose of the application for disclosure was to determine whether there was likely to be a criminal offence. It is a different procedure. She is not generally there to help.

THE CHAIRMAN: No, but the rationale of the decision is absolutely clear, is it not? They quoted Sir Stephen Brown, I think then President of the Family Division, these kinds of proceedings are not adversarial in nature. That was quite specific to family care proceedings where the paramount consideration is the welfare of the child.

MR. MORRIS: It is not a perfect analogy, but the paramount consideration, the paramount objective, of the Office of Fair Trading's investigations is ultimately enforcement of competition law, which is ultimately concerned with the public interest and ultimately consumer welfare. There is an analogy. It is not a perfect analogy. Here, on the one hand, you have one child; on the other hand, you have the enforcement of competition policy and consumer welfare. There is an analogy to be drawn there, and we do say at that stage this is a public interest inquiry by the Office of Fair Trading. Yes, it does have powers of enforcement, and serious powers of enforcement, in the imposition of a penalty, but we do not accept that it follows that litigation privilege is a necessary ingredient of Article 6 rights of defence, and we would submit that there is no such equivalent before the European Commission. There is legal advice privilege, but there is no suggestion that litigation

privilege applies in the Continental systems at all, and it is not a necessary ingredient of Article 6.

We would say that para.7 is dealing with pre-existing privileged communications and not communications that necessarily come into being. It begs the question of whether they are privileged for a start, and it is not necessarily dealing with matters which come into existence in the course of the investigation. It says that the OFT will not ask for privileged documents. It does not define what is and is not privileged.

THE CHAIRMAN: No.

MR. MORRIS: "Made in connection with or in contemplation of legal proceedings" begs the question of whether you have got legal proceedings in existence by the beginning of, and the pursuance of, an investigation. We would submit that the term "legal proceedings" is actually used in contra distinction to what is going on in an investigation. On that basis we do submit that the materials gathered in the course of an investigation are not subject to litigation privilege.

We confine the application – although we could go further we do not – to that particular bracket of time effectively in early 2011 which is referred to Freshfields' letter of 27th July 2011. We do say that there is a public interest in the Office of Fair Trading having available all material that is potentially relevant to its investigation.

Can I, with those submissions made, then turn to the question of waiver, and our submission is this: in any event, we say that it is quite clear that in respect of certain of this material Tesco has waived such privilege that does exist, if I am wrong on my first submission. The material in respect of which privilege has been waived are notes of interviews or witness statements it has from Mr. Ferguson and Mr. McGregor. That is established by taking you, Sir, first to Mr. Irvine's second witness statement, which you will find in the main bundles. It is Tesco's main bundle rather than the documents bundle, and it is tab L.

THE CHAIRMAN: Yes, I have got it, John Alastair Irvine, second witness statement.

MR. MORRIS: This is his second statement, and this, I understand, was one of the documents that was, in fact, enclosed with the 27th July letter. You will see that he made a first statement in November 2009. In his second statement he says:

> "I make this statement in the context of Case CE/3094-03, the Dairy Retail Price Initiatives Investigation by the Office of Fair Trading (the 'OFT') to correct one factual issue in my First Statement in this matter made on 19 November 2009.

My First Statement referred to the fact that, on 6 October 2003, I attended a meeting at the Tesco offices in Cheshunt with John Scouler and Lisa Rowbottom of Tesco and my colleagues James McGregor and Tom Ferguson."

It is the next paragraph which is the important one for present purposes:

"I understand that both James McGregor and Tom Ferguson have been interviewed in these proceedings …"

We would submit that that is almost certainly a reference to the interviews to which Freshfields refer in their 27th July 2011 letter:

"… and that

a James [McGregor] is very strongly of the view that only he and I attended that meeting, and

b Tom is certain that he did not attend.

On this issue, I defer to their recollection."

Just to add, for completeness, that witness statement has been expressly relied upon in this appeal in the notice of appeal at para.4(f).

That witness statement refers expressly to the interviews of Mr. McGregor and Mr. Ferguson for the purpose of establishing that Mr. Ferguson was not at the meeting of 6th October. Those interviews must necessarily be interviews conducted in the course of and for the purposes of the administrative procedure, and we submit that they are, in fact, the interviews referred to in the July letter.

We submit that in this way by relying upon the contents of Mr. Irvine's witness statement, Tesco is clearly relying upon the contents of the interviews with Mr. Ferguson and Mr. McGregor, and for that reason any privilege in the content of those interviews and related materials has been waived by this effective deployment of them in these appeal proceedings.

Sir, that is the short point and in that respect we submit that there should be disclosure at the least of the materials of Mr. Ferguson and Mr. McGregor.

Then I move on to my final point, which is the point that Tesco seeks to make much of the fact that there should be no disclosure because the Office of Fair Trading has, itself, not contacted any of the witnesses. Obviously this is accepted as a matter of fact that the Office of Fair Trading has not done that. However, in our submission, it is entirely irrelevant to the issue which arises for your decision, Sir, namely whether disclosure is relevant, necessary and proportionate. The material is relevant and readily available. The fact that it may, or some of it may have been obtained by another route is neither here nor there.

The fallacy in Tesco's point here arises in that if one envisages a situation where the Office of Fair Trading had, in fact, attempted to contact any such witness and the witness had, in fact, declined to speak to the Office of Fair Trading, then, on analysis, Tesco could not make the criticism which it now seeks to make. So the refusal of the witness to speak could not be an objection to disclosure of Tesco's material which it had obtained as a result of its success in speaking to the witness.

Sir, all this boils down to is a complaint that the Office of Fair Trading did not seek to make contact with the witness, but the OFT is not compelled to do so, and that cannot be a reason not to order disclosure.

THE CHAIRMAN: Were I to be of the view that Tesco had waived privilege in relation to the interviews containing (a) and (b), what is the extent of the waiver that you submit has occurred? Is it in relation to those interviews alone or is it in relation to every contact, for example, with James McGregor and Tom Ferguson?

MR. MORRIS: I think in the first place obviously it is in relation to those interviews, and we would submit that the fruits of those interviews – for example, if there was a witness statement which had come out of those interviews – we would say the waiver went that far. I am not sure we would say it went to any contact with him previously.

THE CHAIRMAN: All right, thank you, that is helpful.

MR. MORRIS: I have had a further point put before me which I will put to you because it seems to me that it is a good point.

THE CHAIRMAN: If it came from Miss Smith it is bound to be a good point! Even better, it did not come from Miss Smith, it came from your second junior, Miss Davies, so I am sure it is an even better point!

MR. MORRIS: If you were to hold and decide that, contrary to my submission, there is litigation privilege at the investigative stage and that that is to be equated to some form of ongoing process – litigation process, it would have to be – then we would submit that if you go back to the 27th July 2011 letter, in fact the reference there to this material is, itself, a waiver, because at that point there is a deployment.

THE CHAIRMAN: This is connected with my use of the words "flummery" and "puff" earlier, but I suppose there is an argument that that letter is flummery and puff but the much more specific references in this statement are a waiver because they are of substance?

MR. MORRIS: Yes.

THE CHAIRMAN: Is that distinction a tenable one?

MR. MORRIS: Well, possibly, but actually it is not quite flummery because there is a sort of assertion. In the 27th July letter there is a positive assertion that this material supports Tesco's case. They are not showing the material. Let us assume that that was litigation – let us disregard all the argument about what is adversarial – let us put our litigation hat on. Would the other side in those circumstances not be entitled to say, "Let's see it then". That sentence is put in for a reason. It is part of the attempt to persuade the Office of Fair Trading that they have got no case. It is more than flummery and puff, it is an assertion or a deployment, and we would be entitled to say, "Let us see it then, we do not believe you".

THE CHAIRMAN: And if the answer is, "Sorry, chum, it is privileged"?

MR. MORRIS: The answer to "Sorry, chum, it is privileged", is "You have waived that privilege by actually seeking to rely on it".

THE CHAIRMAN: By that sentence in the letter?

MR. MORRIS: By that sentence in the letter. That is not the way I have put my case.

THE CHAIRMAN: No, I understand.

MR. MORRIS: And deliberately so, because I take the other line, but if you were to decide that there was a litigation privilege, then in those circumstances we say that fairness requires that once you have actually asserted it and sought to rely on it the Office of Fair Trading should be ---- If you look at the thing at the time, never mind about where we are now, look at it at the time, why should the OFT not be entitled to say - and assuming against myself that it is privileged and we could not have asked them for it, but once they have said, "We have got these other six witnesses, or four witnesses apart from the two we are sending you, and they all support Tesco's case and although their recollection is a bit vague, it nevertheless supports Tesco's case – in this adversarial procedure, "Put your money where your mouth is"?

Can I make one other observation as well, and it is this, and it goes back to your diagram?

THE CHAIRMAN: It is your diagram. It is not my diagram, I just read it, it is your diagram.

MR. MORRIS: I just would make this further submission: if you were, contrary to my submissions, to take the view that litigation privilege does apply during the Office of Fair Trading's investigation, we would submit that it only applies from the statement of objections onwards, because at that point only does the thing effectively put a party on notice that a case is going to be made against them. Material gathered before then, after the opening of an investigation but before the issue of a statement of objections, would not, we say, be subject to privilege. It does not apply for present purposes, but, as a matter of principle, the Office would wish to make that submission, and it is an important one.

THE CHAIRMAN: So that they can rely on documents that would otherwise have been privileged if they had arisen in legal proceedings in the investigative phase for the purposes of a penalty? Do you get my meaning? Say no if you do not.

MR. MORRIS: I think I do. I will say no and then ----

THE CHAIRMAN: Shall I try again. During the course of the investigative stage the company in question obtains a statement, say, from somebody who is plainly relevant. They cannot rely on legal professional privilege of any kind, or privilege of any kind, so it is liable to disclosure.

MR. MORRIS: Sorry, they cannot rely on litigation privilege if they go and gather evidence?

THE CHAIRMAN: They cannot rely on litigation privilege.

MR. MORRIS: From third parties. They can rely on legal advice privilege.

THE CHAIRMAN: They cannot rely on litigation privilege so they are obliged to disclose it. That having been disclosed, once you get into the infringement and penalty part of the investigation, it can be relied upon even though at that stage it might be privileged – is that right? I think it must be.

MR. MORRIS: Yes, it is right. The material that has been obtained from a third party at the early stage can be relied upon by the Office of Fair Trading at the later stage. That is the OFT's position in answer to your question.

THE CHAIRMAN: It is just so I understand it. What about the issue raised in - I will call it Miss Rose's skeleton argument – in the skeleton argument for Tesco in relation to *Brennan v. Sunderland City Council*? This goes to your point about the letter. Might it be helpful to just have a look at that case now whilst you are on your feet?

MR. MORRIS: Yes.

THE CHAIRMAN: It is tab 4 of Tesco's bundle of authorities.

MR. MORRIS: It is the distinction between reliance and reference, I think, is it not, paras.68 and 69.

THE CHAIRMAN: Yes, I have read those.

MR. MORRIS: Our submission is that this is not just a passing reference to these other witnesses, this is positive reliance in our parallel universe of OFT litigation, that I do not admit exists but we will go there for the time being. In the litigation of the adversaries, the OFT and Tesco, Tesco is positively relying not just on – and I am looking for the actual letter, which is in tab 1 of the application bundle. It is a slightly odd passage because it, first of all, points out that they:

"… expressed their unwillingness to be drawn into this process at this late stage or, somewhat unsurprisingly, have poor recollection of the facts and events at issue … All of the individuals who were prepared to speak to us corroborated Tesco's case."

That is the sentence.

"Of these there were two individuals who had a sufficiently reliable and informative recollection of the events … and who were willing to give us witness statement statements."

There is obviously, in our submission, an assertion that "we have got two witnesses here, but we have also got others and they support Tesco's case". That is a reliance expressly on the contents of what they had been told. Obviously there is an oddity there because, on the one hand, everybody they spoke to has corroborated their case, but on the other hand it looks as though the ones from whom they have not got witness statements, who knows why, is stated to have a poor recollection. In my submission, the Office of Fair Trading would be entitled, as I said a moment ago, to go back to them and say, "We have seen the two that you have sent us, you say the others corroborate the case, we would like to see what they say, and it is only fair that we should".

THE CHAIRMAN: So if in a criminal case, for example ----

MR. MORRIS: You keep referring to criminal cases, Sir.

THE CHAIRMAN: I am sorry about that. We all have different experiences which we share and I am sharing my experience with you.

MR. MORRIS: I have some too, but a lot less. A little knowledge is a dangerous thing.

THE CHAIRMAN: The principles are the same, I think, are they not? If in a criminal case a solicitor, in an attempt to stave off a prosecution, write to the Crown Prosecution Service and says, "I have interviewed loads of witnesses and they support the defendant's account of events", obviously the first reaction of the prosecution would be to write back and say, "Give us the witnesses, we would be very interested in them". If they then respond and say, "Legal professional privilege", it is an analogous situation, is it not? Is privilege in even the question of whether those statements exist being waived? I would find that a very difficult proposition to sustain in a criminal court, but maybe that is because criminal courts are less sophisticated than this Tribunal.

MR. MORRIS: They are less sophisticated than ----

THE CHAIRMAN: I think you are supposed to reply, "Oh no, they are not", but carry on!

MR. MORRIS: There is another distinction, is there not, because the Office of Fair Trading in this context has a dual capacity.

THE CHAIRMAN: I recognise that.

MR. MORRIS: That is why it is not really adversarial in the same way, because it is the investigator. To the extent that it is ultimately going to be the decision maker, which it is, it is also the court, so to speak. So a submission is here being made almost to the decision maker, not just to the other side. You might say that is effectively the OFT with its decision making hat – I will call it "court hat" – on at that point. This letter is being written, very obviously, to the OFT as a decision maker. You would say that the point was being deployed in court. So the analogy is not perfect.

THE CHAIRMAN: I understand.

MR. MORRIS: Can I just make one other point, which you probably picked up, and it is this: as I pointed out, this issue arose because Tesco itself considered it was entitled to disclosure of the material of the very same kind. Had the Office of Fair Trading held any such material but not called the witness in the same way, Tesco would have been pushing hard for its disclosure. We submit that in those circumstances in a situation where both parties had such material, equality of arms before the Tribunal would require that both sides' material should be disclosed. It so happens that the Office of Fair Trading does not have that material. We say there is no compelling reason as to why such disclosure, leaving aside the privilege issue as a matter of principle – I am going back to the fourth point – on a reciprocal basis should not be available.

I think those are my submissions, Sir.

THE CHAIRMAN: Thank you very much, you have been most helpful, Mr. Morris.

Miss Rose, if I may say this - and I have read your skeleton, obviously, and, as you will have gathered, quite a lot of other material: it would be helpful to me if you would focus your submissions on the question of whether, on the facts of this case and at the material time, there was an adversarial process in existence; and then, secondly, on the waiver point, which has been raised.

MISS ROSE: Thank you, Sir, for that indication. There are just two points I want to make initially. The first is, of course, that the whole issue of privilege is not logically the first question. Logically, the first question is whether these materials are disclosable at all. That depends on the question not just of relevance, but also a question of whether they are necessary and proportionate to the efficient, just and expeditious determination of the appeal. I just want to make that point, and I would like to come back to that point.

The second point I want to make at the outset is that we do have some significant concern about the way in which this issue has arisen. As you will have seen, there was an application made last week by the OFT in which there was no suggestion that it was going to be disputed that this material was privileged. The only point that was taken in that application notice was that it was said that there had been a waiver of privilege. We then, in our skeleton argument, proceeded on the basis that it was common ground that there was privilege and that the issue we needed to address was waiver.

What then happened was that late yesterday afternoon we received a three page note ----

THE CHAIRMAN: This is para.8?

MISS ROSE: Yes, Sir – which for the first time set out an argument on the part of the OFT indicating that their intention was to argue that litigation privilege had no application to the investigation stage of an investigation under the Competition Act.

I am troubled by that, because this is a question of principle of fundamental importance for the conduct of all appeals under the Competition Act. It indeed is a question of some constitutional significance which goes to fundamental rights. It is being put to us for the first time at close of business on the evening before a hearing scheduled to start at 9.30 am. We have done the best that we can overnight in gathering materials, but there is a serious risk in a situation like that that you will not be assisted by the comprehensive and full submissions that you are entitled to be.

THE CHAIRMAN: That is why, when you rose, I put to you the question in the terms I did, my first question, whether there was an adversarial process on the facts of this case and at that time, because I recognise that this may not be the hearing in which a pretty important, fundamental and general principle should be decided.

MISS ROSE: Of course, Sir. Indeed you cannot decide this application against us without deciding two important and fundamental questions of law. The first is whether, as a matter of principle, litigation privilege applies at the investigative stage of an OFT investigation. That is a general matter of principle. That is not fact sensitive, it is a question of law.

The second question is whether there has been a waiver, which again we submit involves the application of legal principles, which, with respect to Mr. Morris, he has not shown to you.

I just wanted to flag up those real concerns before I address the question of privilege.

Can I now turn to the first question of whether litigation privilege applies to the investigation stage? The argument that Mr. Morris advances is essentially that litigation privilege only applies to adversarial proceedings – see *Re L*; this is an investigative process,

therefore it is not an adversarial process, therefore litigation privilege does not apply. We say that whole analysis is based on a fundamental misunderstanding of *Re L* and fails to appreciate the purpose of the right to privilege, and it is, of course, a fundamental right. *Re L*, as you pointed out, Sir, is a case that deals with a very specialised jurisdiction of the High Court dealing with care proceedings. The purpose in care proceedings is not to resolve any dispute between parties, or to punish any party, or penalise any party. The sole purpose of care proceedings is to prioritise the needs of the child and the welfare of the child and to ensure that the child is going to be properly cared for in the place that is best for them. That is why there are a number of authorities in different but related fields which say that the normal safeguards of natural justice do not apply to this type of case because the requirements of fairness to the parties, typically the parents plus the local authority, who are engaged in argument before the court are not the purpose of the court hearing. Therefore, their right to fairness is subordinated to the interests of the child.

The most famous of those cases is a case that is actually referred to in *Re L*, the case of *In re K*. In *In re K* is a case, Sir, that I am very familiar with and I am sure you are also very familiar with, because it is the case that is distinguished by the Supreme Court in *Al Rawi and others v The Security Service*. The point about *In re K (Infants)* is that it is in the awardship proceedings that the court says one side does not have what is otherwise an absolute common law right to know the case against them. You can put in secret evidence, excluding it from the mother or the father, and the reason is that it is not an adversarial process, its whole purpose is to safeguard the interests of the child. That is an indication of just how special and different this jurisdiction is. Indeed, you will have seen from the passages that we just looked at in *Re L* that *In re K* is specifically referred to in *Re L*. That is the rationale and the ratio of *Re L*.

In my submission, it really tells you nothing useful about the question of whether litigation privilege should apply in an OFT Competition Act investigation. That is a question that must be resolved looking at common law principle, looking at human rights principles which are, it is common ground, engaged, Article 6 is engaged, indeed in its criminal aspect, and looking at the purpose of the statute. It is a matter of statutory construction. We do submit that the dissent of Lord Nicholls in *Re L* where he flags up the change in climate that will apply after the Human Rights Act comes in is of significance here. What you would be looking for in the Competition Act is express wording or some form of necessary implication to oust what is otherwise the presumption of the application of privilege. Of course, what you actually see in the Competition Act is precisely the opposite. What you

see in the Competition Act is s.30 appearing in the very context of the investigation and stressing that normal privilege rights apply in the context of an investigation.

Now, had Parliament intended to say, "This is a very special type of process in which litigation privilege does not apply", that was their perfect opportunity to do so, but they did not.

Sir, as you have just pointed out, neither did the OFT take the opportunity to point that out when it established its own guidance for the application of the Competition Act and investigations under the Competition Act. What you would expect is a great big red warning sign from the OFT saying, "By the way, if you seek any evidence or assistance from third parties in the course of our investigation, we are entitled to require you to disclose that to us".

Sir, just think for a moment about the implications of this. In very many Competition Act investigations parties will be consulting expert economists, seeking advice from them and potentially seeking expert reports from them.

If the OFT's case is right, the OFT could, in the course of an investigation, by a s.26 notice require parties under investigation to disclose to the OFT the notes of their interviews with expert economists that were undertaken in order to assist those parties to know whether they have a defence to the allegations that were being made, and, if so, what that defence ought to be.

In my submission, the effect of such a process would be to abrogate the fairness of the procedure for the party under investigation, because effectively the hands of that party's lawyers would be tied. They would be unable to conduct the investigation that they needed to do in order to assist their client in determining whether the OFT's allegations, set out, one assumes, in its statement of objections, were well founded as a matter of economics or well founded as a matter of fact, and whether a defence could be mounted to them.

THE CHAIRMAN: Can I just be sure that I am clear about the submission, and it is my fault if I am being slow. Section 26 is in Chapter 3 of the Act, and that is the section that allows, for example, powers of entry, power to obtain documents.

MISS ROSE: Yes, and also gives the power to require the production of documents, subject to criminal ----

THE CHAIRMAN: Section 30(1) provides that a person "shall not be required under any provision of this part to produce or disclose a privileged communication".

MISS ROSE: Yes, sir.

THE CHAIRMAN: So you are saying the connection between s.30 and 26 is very clear?

MISS ROSE: Is very clear. My learned friend says, "Oh, well, you can interpret s.30 as only applying to pre-existing documents that happened already to be in the possession of the solicitors which had been prepared for some other legal proceedings". That is quite a surprising interpretation of the provision in context. The natural reading is that what is being said to parties is the OFT can require you to produce documents, subject to criminal penalty, for the purposes of its investigation, but it cannot require you to produce documents that are protected by privilege. What you would expect, in my submission, is a great big caveat in that section if the intention was that litigation privilege should not apply to investigations. You simply do not see it. There is no hint of any parliamentary intent to that end. Ultimately, my learned friend's submission has to be a submission based on statutory construction.

His submission becomes more bizarre when one considers that this is a statute which is providing for investigation which admittedly is analogous to a criminal prosecution and which engages Article 6 in its criminal aspect. Central of course to the protection of Article 6 is the protection of the right to a fair hearing and the right of access to court.

The submission I have just been making to you, Sir, is that if my learned friend is right, the party under investigation and their solicitors' hands are tied. They are simply not in a position to seek to gather evidence to defend themselves with for fear that it will be seized from them by force and used against them.

Remember, if my learned friend is right, that process, the s.26 notice would not be a process ordered by a court, it would be the OFT itself that had the power to issue the notice backed by criminal sanction.

THE CHAIRMAN: Is there any limit to the number of s.26 acts that can take place?

MISS ROSE: No, Sir.

THE CHAIRMAN: So it is not confined to entering once?

MISS ROSE: No, there can be repeated entries, and indeed there often are, repeated seizures of documents, and they can also require people to attend ----

THE CHAIRMAN: So there could be gathering of, let us call it evidence, gathering of material continually. There could be another raid.

MISS ROSE: Yes, so every time you consult another economist ----

THE CHAIRMAN: That is why I asked the question.

MISS ROSE: -- there is another raid.

THE CHAIRMAN: I am sorry, bear with me for a moment.

MISS ROSE: 27 is raids, but the same point applies. 26 is the power to require production of documents.

THE CHAIRMAN: I am helpfully reminded by the Réfèrendaire that at para. 2.77 of the decision it sets out six s.26 notices in this inquiry.

MISS ROSE: Yes, Sir.

THE CHAIRMAN: Thank you, that is helpful.

MISS ROSE: Sir, we submit that, as a matter of statutory construction and considering the statute in the context of the Human Rights Act and in the context of basic fairness and workability, my learned friend's submission is highly unlikely.

The reliance that he places on **Phipson** and **Hollander**, we submit, gets him nowhere. It is, as you pointed out, Sir, no more than a sweeping generalisation made by Mr. Hollander, who is, of course, an eminent QC, but nevertheless a human being. It is also, with respect to him, far from clear what he means by "competition investigation". He could be talking, for example, about a market investigation carried out under the Enterprise Act to which different considerations might apply, because that is truly a fact gathering exercise and not an exercise that is likely to result in the imposition of a large penalty for alleged *quasi* criminal wrongdoing. We say you take nothing from that.

What I do want to show you, Sir, is a recent authority in the public law field which confines *Re L* in a post- human rights context. This is a decision of the Upper Tribunal. I hope it was in the bundle that was handed up to you this morning. It is a case called *LM*.

THE CHAIRMAN: This is the case of *LM v. Lewisham*?

MISS ROSE: That is correct.

THE CHAIRMAN: I now have it.

MISS ROSE: This is an appeal to the Upper Tribunal, and if you turn to the second page, you can see "Background and Procedure":

> "The appellant is the mother of a girl who is a child with special educational needs … [there was] a statement of special educational needs …"

Case management directions and the requirement for the appellant to provide a copy of any specialist report obtained. That was the issue, whether or not that requirement to disclose that specialist report was a breach of litigation privilege. The respondent relied on *Re L*. If you turn to p.7 you will see the heading "Litigation Privilege". There is a description of the situation in relation to experts, the normal position in relation to privilege. Then at 28 there is a reference to *Re L*. Then at para.29, the proceedings before the first tier Tribunal are principally inquisitorial rather than adversarial, are not litigation and therefore do not attract

common law privilege in the first place. Of course, one of the points Mr. Morris made earlier was he said that this is a public law context, there is a public interest issue here, and of course precisely the same may be said of proceedings before the first tier Tribunal in this situation that there is a public interest issue. Indeed, they are not penal these proceedings. Then the Upper Tribunal goes on:

> "However, In *Re L* does not decide that there is never any litigation privilege in care proceedings, their Lordships being careful to confine themselves to cases where the filing of the report requires the leave of the court in order that documents already filed in the proceedings … may be disclosed to the expert or that the child may be examined. It is true it was suggested that subordinating the welfare of the child in the interests of the mother and preserving confidentiality might appear to frustrate the primary object of the Children Act, but that consideration is not relevant in this case."

Then they go on:

> "Litigation privilege was available for the old prerogative order proceedings and applies to modern judicial review proceedings, although many of the features of a fully contested adversarial contest would be absent in such cases. We see no basis for not regarding proceedings before the First tier Tribunal as litigation for the purposes of legal professional privilege in both of its aspects."

The point that is made there about the old prerogative writs and judicial review in my submission is again of some interest and significance because, of course, judicial review proceedings are not technically adversarial proceedings, they are proceedings in which the court exercises the supervisory jurisdiction over an inferior court or a public body to ensure the lawfulness of its decisions or Judgments, and that is why they are issued in the name of the Crown and not in the name of the claimant. There is classically no *lis inter partes* in a claim for judicial review and yet, as pointed out there, litigation privilege has always applied.

So what is clear is that the House of Lords in *Re L* cannot have been using the term 'adversarial proceeding' in some highly technical way meaning a common law claim for damages between two parties. What they were seeking to distinguish was simply a process which essentially involved two parties in conflict from a process in which a completely different exercise was being undertaken which was not about the interests of parties that were before the court but about the interests of a completely separate party. Again, to take the Bingham Inquiry example, that was a situation that was simply an inquiry that was

aimed at gathering and finding facts, it was not an inquiry that was intended to impose any sort of penalty or penal consequence on anybody.

THE CHAIRMAN: It could make recommendations ----

MISS ROSE: Yes.

THE CHAIRMAN: -- but of a general nature which might inform policy and thereby legislation.

MISS ROSE: Absolutely, and one can see why that is a long way removed from the sort of context in which you expect there to be litigation privilege, but we submit this is a million miles from that situation. This is a situation in which a particular private party is under investigation, has received a statement of objections setting out effectively charges, is seeking to defend itself against those charges in a situation where it knows it might be liable to a financial penalty of up to 10 per cent of relevant turnover, and we submit that is classically an adversarial situation and has been held to be analogous to not only an adversarial situation but a criminal situation, and the requirements of procedural fairness are higher in such a situation, not lower, than in a common law claim for damages.

THE CHAIRMAN: I was just pondering what I could remember of the *Bloody Sunday* Inquiry, of course, there are specific statutory provisions are there not?

MISS ROSE: Yes, that was under the Inquiries Act.

THE CHAIRMAN: Tribunals and Inquiries Act.

MISS ROSE: Yes.

THE CHAIRMAN: Yes, that is probably not relevant.

MISS ROSE: Let us not get into Leveson.

THE CHAIRMAN: No, no, please let us not get into Leveson!

MISS ROSE: So we submit for that reason, as a matter of principle, litigation privilege clearly does apply to all parts of the process.

We also submit that, even if we are wrong about that, this is not a case in which it could properly be said that the material in question was not obtained for the predominant purpose of litigation because it is wholly artificial to seek to separate out the investigation stage of this process from the appellate stage, it is a single process which the parties were engaged in and should be treated as a single purpose.

The case that we rely on for that proposition is *Highgrade Traders* in the new bundle. If we just go to the headnote, you can see that the situation was that the premises of a family company and its stock were destroyed by fire and there was an arson prosecution. Then the insurance company, which was rather suspicious of the circumstances surrounding the fire, had prepared a number of reports. They included a report by a firm of loss adjusters, and a

report by a firm of specialists in fire investigations and a report by a firm of chartered accountants. From the time they received the first report it was clear any claim might be disputed, not only as to quantum but also as to liability. They also instructed a firm of solicitors and they formed the opinion the fire had been deliberately started and that they had no obligation to honour the insurance companies.

There was an application for production of the three reports, and the judge held that the reports were not protected by legal professional privilege.

We can see what the Court of Appeal said about that if we go to p.172, at the bottom of the page just above "I", reciting the *Waugh* case, which is the classic case about dual purpose material, he says:

> "… it is, I think, clear that, if litigation is reasonably in prospect, documents brought into being for the purpose of enabling the solicitors to advise whether a claim shall be made or resisted are protected by privilege, subject only to the caveat that that is the dominant purpose for their having been brought into being. I need, I think, only refer to the passage from the judgment of Sir George Jessel MR in *Anderson v bank of British Columbia* …"

And that is then set out. Then the point made that that privilege extends to documents coming into existence for the purpose of obtaining advice in connection with the prosecution or defence of claim, supported by Lord Justice Buckley. Then he turns to the facts of the particular case, and then he says it was obvious that litigation was in reasonable prospect, and then he says:

> "What, then, was the purpose of the reports? The learned judge found a duality of purpose because, he said, the insurers wanted not only to obtain the advice of their solicitors, but also wanted to ascertain the cause of the fire. Now, for my part, I find these two quite inseparable. The insurers were not seeking the cause of the fire as a matter of academic interest in spontaneous combustion. Their purpose in instigating the enquiries can only be determined by asking why they needed to find out the cause of the fire. And the only reason that can be ascribed to them is that of ascertaining whether, as they suspected, it had been fraudulently started by the insured. … It was entirely clear that if the claim was persisted and if it was resisted, litigation would inevitably follow."

If we then go over the page, after setting out a passage of the Judgment:

> "He seems here, as I read his Judgment, at this point to have been of the opinion that *Waugh's* case established that it was only if the documents were brought into

existence for the dominant purpose of actually being used as evidence in the anticipated proceedings that privilege could attach and that the purpose of taking advice on whether or not to litigate (which is, in substance, what the decision to resist the claim amounted to) was some separate purpose which did not qualify for privilege. That, in my judgment, is to confine litigation privilege within too narrow bounds and it reproduces what I believe to be the fallacy inherent in the note in the Supreme Court Practice to which I have referred. No doubt the purpose was 'dual' in the sense that the documents might well serve both to inform the solicitors and as proofs of evidence if proceedings materialised. But, in my judgment, the learned judge failed to appreciate that the former purpose was itself one which would cause the privilege to attach.

The instant case is not, in my judgment, on all fours either with *Crompton's* case or *Waugh's* case. In the former there was a quite independent primary statutory duty which motivated (and indeed practically compelled) the bringing into being of the documents. In the latter the documents in question would, in any event, have had to be produced for the Board's internal purposes in connection with railway safety. Those seem to me to be quite different circumstances from those of the instant case where there was no purpose for bringing the documents into being other than that of obtaining the professional legal advice which would lead to a decision whether or not to litigate. That, in my judgment, was a sufficient purpose on its own to entitle them to [litigation] privilege …"

Hollander comments on this case.

THE CHAIRMAN: I may not have the latest edition, which is the latest edition?

MISS ROSE: I have copied large chunks of **Hollander** in your new bundle. Can we go to chapter 14, and that is the chapter on litigation privilege which you have in its entirety. He deals with this case at 14-05, "Single wider purpose" – p.300, he says:

"Once one has identified whose purpose it is that matters, it is necessary to determine what that purpose is. There will often be more than one purpose …"

and he cites *Waugh* where there are two purposes, and then he says:

"The possibility of a 'single wider purpose' had attracted the House of Lords in *Alfred Crompton Amusement Machines v CCE (No.2)* …"

and then he goes on to discuss the *Highgrade Traders* case in that paragraph. Then:

"When will it be appropriate to treat communications as part of a 'single wider purpose'? On one view the insurers in *Highgrade* had two purposes: one to decide

whether to resist the insurance claim, and only if they decided to do so, to use the information in litigation. But in such a case, one purpose simply follows from the other: there are simply two stages in the same journey made by the same person or entity and the second purpose follows on immediately from the first."

We say there is a close analogy between what is said there about the rationale for the *Highgrade* case and our situation because if you consider the interviewing of witnesses in this case in one sense for two purposes, one for the purpose of deciding whether to resist the investigation and secondly, if so, to appeal. Again, two stages on a single journey, not two distinct separate duties as in cases like *Waugh* where you have a report that is provided first in order to ensure that a company satisfies its own health and safety obligations which have nothing to do with litigation, and secondly, for the purposes of litigation.

We submit that if we are wrong on our primary submission, which is that the investigation stage attracts litigation privilege anyway, our second submission is that this is a single inseparable purpose case where you cannot seek to divide the purposes for which the documents were created, namely, in order to get legal advice so that Tesco could decide should we resist the OFT and, if so, should we resist it at all stages – should we resist it in the investigation and should we resist it by appealing to the Competition Appeal Tribunal? One process, one journey.

Before I leave the question of litigation privilege, can I also draw your attention to the European Commission note on best practice in Article 101 and 102 cases. This is the Commission's latest guidance on the enforcement of Articles 101 and 102. You have it in the Competition Law Handbook, p.1484. If you look at footnote 43 I invite you to read the whole of that footnote, but in particular I invite your attention to the last two sentences.

THE CHAIRMAN: (After a pause) Yes.

MISS ROSE: So if we look at para.(51) of the Commission Notice, the last sentence, that is a point at which the footnote arises:

"Communications between lawyer and client are protected by LPP provided that they are made for the purpose and interest of the exercise of the client's right of defence in competition proceedings and they emanate from independent lawyers."

THE CHAIRMAN: Yes, I have read that.

MISS ROSE: It is clear from the footnote that the Commission envisages that legal professional privilege applies during the investigation of a violation. My learned friend says that this is dealing only with legal advice privilege and does not deal with litigation privilege, but the fact is that there is no authority at the European level to indicate whether the concept of

litigation privilege is a concept recognised in EU law or not. So my learned friend can gain no comfort from that at all. All that one can see from this is that insofar as the concept of privilege is a recognised European privilege, it clearly applies during the investigation of Article 101 and 102 breaches, so certainly no support for my learned friend's proposition. The final point I just want to flag before I leave the question of the existence of privilege and turn to waiver is that as you have seen, the OFT's guidance certainly gives no hint of a suggestion that materials prepared during the course of an investigation could be required to be disclosed by the OFT, or regarded as not the subject of privilege, neither does the Statute, and we are not aware of any case prior to this and indeed prior to yesterday evening in which the OFT has ever asserted any such right.

In that situation, even if I am wrong in all the submissions I have made about the legal position, I would submit that it would be an abuse of process and an abuse of power for the OFT to be permitted to pursue this application in circumstances in which it has been the invariable practice since it was established to recognise litigation privilege and parties have relied upon that by making investigations and talking to third party witnesses in the belief that such privilege would apply, otherwise we submit there would be very serious unfairness in the process and a serious undermining of the rights of a defence if at this stage it were to be said for the first time that they were entitled to do that. For that we rely, of course, on the cases of *Re Preston* and *Unilever*. I am sorry that I do not have the authorities here but, as I said, this whole issue was only raised for the first time last night, but I did not want the point to go without me at least flagging it as an argument. Mr. Piccinin makes the point – can I just hand these up? (Document handed) This is a letter from the OFT to Freshfields in January 2011 responding to Tesco informing the OFT that it was intending to seek to make contact with potential witnesses who had been employed or who were still employed by third parties, and the OFT said that:

> "… the OFT considers that this is a matter for Tesco, the specific individual involved and, where relevant, the company involved. The OFT would not seek to influence any of the parties in any way. Ultimately, it should be for the individual to decide whether to provide evidence to Tesco, any other party, or the OFT. Of course, in deciding whether to provide evidence, an individual will wish to take into account the fact that, in any appeal to the CAT, they may be called to speak to their evidence and we would expect this fact to be drawn to their attention. We would also expect the implications of serving a witness statement which is known

to be false, or knowingly or recklessly providing false or misleading information to the OFT, would be made clear."

Strikingly not suggested: "and by the way, we reserve the right to demand disclosure of your discussions with such witnesses on the basis that they are not subject to privilege."

We say that given the statutory framework, the guidance and the universal practice of the OFT, it is simply too late for it to seek to take that point now because of the serious unfairness that will result from it doing so.

Can I now turn to the question of waiver? The OFT makes two arguments here. One was raised in its application notice, and the other was raised yesterday. In its application notice it relied on the letter of 27th July and said that that constituted a waiver of privilege in all of Tesco's communications with all potential witnesses. In the materials it served yesterday it argued that the second witness statement of Mr. Irvine constituted a waiver of all communications with both Mr. McGregor and Mr. Ferguson.

Can we just establish what the principles are for waiver, because one thing for sure is that Tesco certainly has not waived privilege by delivering the whole of its communications with any of these witnesses, so what must be being invoked by the OFT, although it has not used the term, is the 'cherry picking' principle, the notion that if you rely on some part of a privileged communication you are thereby to have been taken to waive privilege in other parts of it.

The cherry picking principle is that where a party discloses one part of a privileged communication in circumstances in which it would be unfair to allow that party not to disclose further privileged material, because it would risk the court and the other party having a partial and potentially misleading understanding of the situation, in that situation the court may order further disclosure, and that is a principle that you will see in **Hollander**, chapter 19, para. 19-06. I would invite you to read the whole of 19-06, and what you will see in particular in the middle of p.416 is that it is apparent from this that waiver and privilege is a doctrine of fairness.

THE CHAIRMAN: Let me just read this, please. (After a pause) Yes.

MISS ROSE: The second point is that mere partial disclosure is not enough to engage the cherry picking principle. There must have been reliance or deployment on the material. If you turn to 19-09, p.419, there is a distinction to be drawn between a reference to the fact of legal advice and to reliance on its contents.

"Because the fact that legal advice has been taken is not of itself privileged, merely referring to the fact that legal advice has been taken will not normally give rise to a

waiver of privilege. As the cherry picking doctrine only comes into play where a party has sought to rely on a privileged document, mere reference to the existence of a privileged document will not be sufficient, there must be reference to or reliance on its content.

THE CHAIRMAN: Is that not exactly what is done in Mr. Irvine's statement of 18th May?

MISS ROSE: Well the next point I want to make about that is, of course, it has actually got to be relevant to something that is in issue in the proceedings. The only thing that Mr. Irvine says is: "I made a mistake in my earlier statement because I said in my earlier statement that Mr. Ferguson came to this meeting". He has now made it clear that he recalls that he did not, and Mr. McGregor, who was at the meeting also recalls that Mr. Ferguson did not and he bowed to their recollection.

The problem for the OFT is this: it is not in dispute in this appeal that Mr. Ferguson did not attend the meeting. The OFT are not seeking to maintain on this appeal that he did. All that was being done by Tesco was correcting a factual inaccuracy for the sake of completeness. The issue in question has no bearing at all on this appeal. Of course, that correction was made in the process of the investigation but it is certainly not being deployed or relied upon in any sense in this appeal, because it is irrelevant to the issues on this appeal. Yet what my learned friend seeks to say is that because of the correction of that inaccuracy that is not in dispute the effect is that Tesco has thereby waived privilege not only in such parts of its interview notes that address the question whether Mr. Ferguson attended the meeting, which I could understand – at least at some level – but all other parts of their interview notes or any statement taken either from Mr. Ferguson or Mr. McGregor, dealing with wholly unconnected incidents. The question is what is there in what Tesco has done that deployed or relied upon their evidence in any way so as to make it unfair for Tesco to continue to claim privilege over that material. We say it simply does not even begin to satisfy the test for waiver, it is a million miles from it.

THE CHAIRMAN: I am just going to pause, if you do not mind for about five or ten minutes, we will have a short break.

MISS ROSE: Yes, of course, Sir.

(Short break)

THE CHAIRMAN: Yes, Miss Rose?

MISS ROSE: Sir, if I can just pick up some minor points. You asked me the specific question about the process, why is it adversarial on the facts. My principal response to that is that that is a question of general principle, but so far as the facts of this case go since 2007 Tesco

has been the only party under investigation by the OFT pursuant to its statement of objections so it has been a straight two-way fight since 2007, so this is at the upper end of adversarial.

THE CHAIRMAN: And the potential penalty, remind me, is it 10 per cent of worldwide turnover?

MISS ROSE: The relevant product.

THE CHAIRMAN: I think it is 10 per cent of worldwide turnover, is it not?

MISS ROSE: In the relevant year, yes, so it is huge ----

THE CHAIRMAN: Yes, I suspect £10 million is a fraction of 10 per cent of worldwide turnover.

MISS ROSE: I hope it is. So we say about as adversarial as you could imagine.

Coming back to the issue of waiver, and the question of unfairness, we make the point that of course if the OFT were now to say – and they never have disputed it – that they do wish to dispute the question whether Mr. Ferguson attended the meeting, and certainly not in their defence have they disputed, but if they were to say that they did wish to dispute it, he is going to be here giving evidence, so they can ask him about that. So we submit what is the problem? The fact of the matter is that they never have disputed that question.

Can I just come back to an extract from **Hollander** and then *Brennan* in relation to waiver. If we go back to Chapter 19-09 in **Hollander**, there are some examples given at the bottom of p.419 of circumstances in which privilege was held not to have been waived, and some of them are quite striking.

> "In *Tate & Lyle v Government Trading Corp*, a statement by a deponent that the information to which he deposed was derived from Iranian lawyers was held not to amount to a waiver of privilege in respect of communications with the lawyers. In *Marubeni v Alafouzos*, reference in an affidavit for leave to serve out of the jurisdiction that the plaintiffs had obtained outside Japanese legal advice which categorically stated that a particular defence lacked merit was held not to amount to a waiver of privilege in respect of the Japanese advice."

Then that case was followed in *Dubai Bank v Galadari (No.3)*. So even in cases where a witness statement expressly stated that advice had been obtained which said that there was no defence, there was held to be no waiver of privilege in that advice, and we submit that those examples clearly go beyond either of the statements in this case which are said to amount to a waiver of privilege in terms of deployment or reliance.

THE CHAIRMAN: So you say this is a reference rather than ----

MISS ROSE: Yes, Sir, this is a reference. In relation to the witness statement of Mr. Irvine it is simply a piece of background information correcting an error which is not and never has been in dispute.

Insofar as the 27th July letter is concerned, what Tesco were saying was: "We rely on the witness statements that we are sending you", and that was in contrast to material from other witnesses from whom we had spoken, and who they said did not have a clear recollection of events, and the comment that those witnesses corroborated Tesco's case is clearly not something Tesco is relying on because Tesco was not submitting their witness statements. It was submitting the witness statements from the people it was relying on, that was Mr. Reeves and Mr. Ferguson and both of those are people who will be giving evidence to this Tribunal. What, of course, is significant is that the OFT's reaction to that letter was not to say: "We want those witness statements, and we also want disclosure of all your interview notes with all the other people you spoke to". On the contrary, the OFT's reaction was to send back the witness statements of Mr. Reeves and Mr. Ferguson to refuse to look at them, and they certainly were not asking for any other material. So we say again there is no unfairness to the OFT given that they were rejecting what was actually being provided to them.

Of course, it is not suggested by my learned friend that Tesco is seeking to rely on any of this material on this appeal. Tesco is relying on the witnesses that it is putting forward on this appeal, not on witnesses that it is not putting forward.

THE CHAIRMAN: That is a kind of a statement of the obvious but never mind!

MISS ROSE: Of course it is, Sir, but it is not a statement of the obvious because my learned friend wanted to establish a case of waiver and has to establish that we are deploying in court, or relying on material while still claiming privilege over it.

THE CHAIRMAN: Well I think I have made it clear at the moment I remain to be persuaded that the letter amounts to a waiver.

MISS ROSE: Yes, Sir.

THE CHAIRMAN: It may be that the writer of that letter would not write that sentence in a letter again but that is another matter.

MISS ROSE: But when you look at that letter in the context of these two authorities in **Hollander** we submit they are obviously *a fortiori* by a very considerable margin, and so far as the Irvine witness statement is concerned, it is simply a statement of undisputed fact which goes to nothing, that is in issue on the appeal, and it has not been deployed, it is just for clarification.

Can I just show you the relevant passages in *Brennan* before I leave this point?

THE CHAIRMAN: Yes.

MISS ROSE: Paragraph 63, here Mr. Justice Elias sets out the basic point, that it is about fairness:

> "… the fundamental question is whether, in the light of what has been disclosed and the context in which disclosure has occurred, it would be unfair to allow the party making disclosure not to reveal the whole of the relevant information because it would risk the court and the other party only having a partial and potentially misleading understanding of the material."

Now if you apply that test to Mr. Irvine's witness statement you say: "Where on earth is the unfairness?"

> "The court must not allow cherry picking, but the question is: when has a cherry been relevantly placed before the court?"

Then paras. 68 and 69 they say there is no waiver:

> "There was little detailed identification of the advice save with respect to the fifth reference. Even accepting that it spells out in part the substance of the advice given, we do not think it follows that fairness requires that the whole advice be provided.
>
> In our view the authorities demonstrate that reliance is necessary and there is currently no indication that the council have any intention of relying on the advice. The disputed material was put before the court as an exhibit to a lengthy witness statement. The legal advice has not been specifically referred to in the pleadings nor in the witness statements themselves and in our view the mere reference to the advice – even to the content of it – was not in the circumstances sufficient to constitute a waiver of privilege. The council are not seeking to rely upon the advice to justify the reason why they decided to implement pay protection for a period of four years."

We say similar points could be made in relation to Mr. Irvine's witness statement.

Those are the submissions we make on waiver. Can I now turn briefly to the issue of necessity, because the practice of this Tribunal, and you will have seen from our skeleton argument that we set out para. 19 of the CAT Rules, and also the relevant case law and the test to be applied, and it is a test of whether the material is not just relevant but whether it is necessary and proportionate for the just, expeditious and efficient determination of the appeal.

We do submit that Mr. Morris has failed to identify even why he says this material is relevant. The only purpose that the OFT has actually put forward for saying why it wants it is that it thinks it might be inconsistent with witness statements that have been served, and it wants to test evidence in cross-examination. That is classically not a valid reason for disclosure because that is material going to credit which is on very long standing authority not properly disclosable.

So far as necessity is concerned, you have seen in our skeleton argument the points that we make about the fact that the OFT, which had powers under s.26 and had specific contractual powers under the earlier resolution agreement to require witnesses to co-operate has chosen itself not even to attempt to contact any of the parties in this case, there has been no attempt by the OFT to contact McLelland or Dairy Crest at any stage in its investigation; that is something that we will be returning to on the substantive appeal for fairly obvious reasons. But why is it significant for these purposes? The reason is because of the reason that the OFT itself gives for why it has not sought that evidence.

Sir, if you take up the OFT's defence, it is para. 28:

> "In this appeal, the OFT will rely upon the strong documentary evidence. It does not intend to call witnesses to give oral evidence. At §20 to §22 of the Notice of Appeal, Tesco is critical of the OFT's approach to witnesses in this case, and in particular, its failure to interview witnesses. However this criticism is misplaced. The documentary evidence in this case is contemporaneous and it is clear and strong. No amplification of this evidence is required, by further documentary evidence or oral testimony, when considering the nature of the infringements found by the OFT."

So the OFT's own case on this appeal is that the documentary evidence already before the Tribunal is so strong that there is no need for it to be amplified by any further documentary or oral material and we submit that in that situation the OFT cannot maintain the submission that it is nonetheless necessary for the fair resolution of this appeal for it to have disclosure of further material. Indeed, given that that is its position it is very difficult to see how the material would even be admissible.

The CAT has in the past been reluctant to permit the OFT to adduce evidence which was not before it at the time that it made its original decision on an appeal because the general approach first set out in *Napp* has been that the OFT has taken a public law administrative decision, and must stand by that decision on the basis that it made it. There are exceptions to that, particularly where an appellant runs a new argument or develops their case so that

the OFT has to be permitted to adduce evidence to rebut a new argument, but that is certainly not being alleged by the OFT in this case.

THE CHAIRMAN: Can they call evidence that goes only as to credit in any event?

MISS ROSE: No, Sir, it is impossible to see how they could. They are in general constrained by the evidence that they relied upon in their decision, and the CAT has recently held that disclosure should not be ordered of material which in fact the OFT would not be permitted to deploy – this is *Durkan* which is in our original authorities bundle at tab 5. If you go to para. 12 the CAT refers to:

> "… the distinction between the position of the respondent and the appellant as regards adducing evidence that was not relied on in the decision challenged in the appeal."

It refers to *Napp*.

> " '77. …In our view the exercise of the discretion to allow new evidence by the Director at the appeal stage should take strongly into account the principle the Director should normally be prepared to defend the decision on the basis of the material before him when he took that decision. It is particularly important that the Director's decision should not be seen as something that can be elaborated on, embroidered or adapted at will once the matter reaches the Tribunal. It is a final administrative act, with important legal consequences, which in principle fixes the Director's position. In our view further investigations after the decision of primary facts, in an attempt to strengthen by better evidence a decision already taken, should not in general be countenanced."

Then there is a presumption against it, and then the exception is identified at para.17, and at para. 18:

> "These passages show that there may be circumstances where it is appropriate to allow the OFT to rely on new evidence that was available but not relied on at the time of the decision. One example – but not the only instance – of such circumstances is when a new point is raised by the appellant and the regulator seeks to adduce new evidence to rebut it."

Then the point is made that there is no distinction between a witness statement and contemporaneous documents, and then at para.21:

> "In my judgment the question is simply whether the presumption against allowing the OFT to rely on new evidence would apply to anything included in the

documents now being sought. If it would, then there is no point in ordering them to be disclosed."

And the CAT in that case went on to hold that the presumption did not apply on the facts of that case.

We submit that nothing has been said in this application by Mr. Morris that would displace the normal presumption that the OFT is bound by the evidence on which it made its original decision, indeed, the OFT's own stance at para. 28 of its defence is a very strong reason why that presumption should be applied in this case, because the OFT is standing on its decision and standing on the evidence it had and saying it does not need anything else. So we submit that for that reason as well these documents are not properly disclosable, and therefore the very interesting debate about privilege and waiver is not a matter with which you even need to engage.

There is one further point I just wanted to make briefly before I sit down. It was suggested by Mr. Morris that there was some equality of arms issue here because we had asked the OFT to tell us about its contacts with witnesses. That, with respect to Mr. Morris, is quite a remarkable submission, because the parties here are not in an equal position. The OFT is a public authority in a situation analogous to a prosecutor. It has a duty of candour and a continuing duty to disclose unused material that might be exculpatory to Tesco. There is no comparison whatsoever between the OFT's position and the position of Tesco.

Sir, unless I can be of further assistance.

THE CHAIRMAN: Thank you very much indeed, Miss Rose. Yes, Mr. Morris?

MR. MORRIS: I am going to deal with a number of points in the order in which Miss Rose raised them. Can I deal first with the points on s.30 of the Competition Act? In our submission it is plain, as a matter of construction of the words there used, that the privilege referred to there is referring in particular to s.30(2)(b) which is the litigation privilege, as a matter of construction it must be referring to proceedings other than the very "proceedings in which the request is being made". Here we have a situation where a s.26 notice is issued, that is an investigation, and let us, for argument's sake, call that 'a proceeding' because for the purposes of Miss Rose's argument it must be.

If you read the words:

"Privileged communication means a communication made in connection with or in contemplation of legal proceedings and for the purposes of those proceedings."

And: "… shall not be required to produce or disclose a privileged communication." In our submission that is plainly talking about proceedings other than the proceedings said to be constituted by the information request.

THE CHAIRMAN: Why does it not say so?

MR. MORRIS: Well the purposes of those proceedings, because it is talking about pre-existing legal proceedings.

THE CHAIRMAN: It does not say "Other pre-existing" or any other qualifying adjective, does it? To remove LPP I think it is common ground that there have to be clear words, do there not?

MR. MORRIS: Well that is one way of looking at it but there is a prior question: does LPP apply at all?

THE CHAIRMAN: If it applies there have to be clear words. We are back to the adversarial point.

MR. MORRIS: This is a heading, this section is dealing with investigation and enforcement, and s.26(1) says: "For the purposes of an investigation". The power to require information under s.26(1) is "for the purposes of an investigation". In our submission that is something which, by definition, must be distinct from the legal proceedings which are being referred to in 32(b). I have assumed wrongly against myself that the 'investigation' can be characterised as 'proceedings', but two entirely different words are used.

If I may, I then make an observation on the Upper Tribunal case my learned friend referred to, and the reference to judicial review as not being adversarial procedure. The response to that point is this: judicial review, whether one regards it as adversarial or not, is an entirely different procedure from the care proceedings that were in issue in *Re L* and there is a much closer correlation or analogy on the one hand between care proceedings and an OFT investigation than there is between either of those two and judicial review. The key distinguishing factor in both care proceedings and in the present procedure is that they are both effectively investigative and the body, the court or the OFT have powers of investigation. In the judicial review there is very limited disclosure and the court is not in the position of going out and being able to obtain material. Page 27 of *Re L,* without taking you to it, establishes that the court itself has the power to carry out investigations.

As regards the submission relating to 'single wider purpose' and the insurance case, we would say in the case of an OFT investigation there is no one single journey to an appeal. It is not a foregone conclusion in the present case that the parties under investigation will

appeal and in many cases they choose not to do so, and that choice is in itself an aspect which breaks the chain in the creation of the 'single wider purpose'.

THE CHAIRMAN: Supposing the material, Mr. Morris, is obtained partly for the purposes of the investigative phase of the OFT investigation and partly for the purposes of the eventuality that there will be an adverse finding followed by a sanction, is that a dual purpose?

MR. MORRIS: Well I would say that is not a single purpose. I would say that is two purposes.

THE CHAIRMAN: Yes.

MR. MORRIS: The case, *Re Highgrade* ----

THE CHAIRMAN: But we are then into a judgment of fairness, are we not?

MR. MORRIS: Well I will come to that in a moment. The point there is that there are circumstances where there is only ever one purpose because one will lead to the other, the insurers investigate it and they will decide whether or not to accept the claim, if not there will be litigation.

Here my submission is you cannot say it is a single purpose, you have just identified a dual purpose. Now, accepting your premise you then have to ask yourself the question on the test: which is the predominant purpose? Because then you have two and you have to decide which is the predominant. If you have only got one there is no predominance because there is only one. But if there is a dual purpose then the question is: which is the predominant purpose and we say plainly on the facts of this case the predominant purpose at the time that the material was obtained was for submission in the context of the administrative procedure. Yes, it is possible that down the line there may or may not be an appeal and, yes, it may or may not be used, but the predominant purpose in the mind of the party who is obtaining the material was for submission, so I submit once I persuade you, Sir, that this is not a single purpose case then it is plain that the predominant purpose was the OFT investigation.

THE CHAIRMAN: But let us just forget about an appeal for the moment, I probably did not make myself clear. Supposing there are two equal purposes one of which is to try and persuade the OFT that they should not impose a penalty at all, because there has been no breach. The other is, if they decide to impose a sanction, that the sanction should be very limited because of the nature of the evidence that is in question.

MR. MORRIS: Sir, i.e. the fine should be lower?

THE CHAIRMAN: Yes.

MR. MORRIS: So this is all within the administrative process?

THE CHAIRMAN: Yes, it is all within the administrative process, but it may have two equal purposes within the administrative process. What then?

MR. MORRIS: I would say that predominantly it would be one purpose, namely use in the administrative process.

THE CHAIRMAN: Which is an Article 6 procedure of a criminal nature.

MR. MORRIS: Then we get back to the arguments about whether you need litigation privilege. I do not dispute that this is Article 6 criminal procedure. I cannot and I do not. My point is that it does not follow that you have to have a litigation privilege in an Article 6 procedure.

THE CHAIRMAN: I understand.

MR. MORRIS: Then if I may comment briefly on the Commission's guidance in that footnote. The page number was given by my learned friend and I have got it in a loose copy. It is 1486, I think. The first point I would make is that the text to which you drew Miss Rose's attention at the end of para.51 is talking plainly about communications between lawyer and client. If you "and" the requirement that they emanate from an independent lawyer it is primarily addressing, as I think Miss Rose probably conceded, what we would call legal advice privilege, because she accepted that it does not appear that the concept of litigation privilege is known. That is the first point. It says nothing about litigation privilege and it emphasises the fact that you do not necessarily have a litigation privilege.

Secondly, if you look at footnote 43 itself, if you look at item 2, which is in line 5, it refers to "preparatory documents prepared by the client". That does not even go so far as materials obtained from third parties, "even if not exchanged with a lawyer, provided they were drawn up exclusively for the purpose of seeking legal advice from a lawyer". That is classically what we refer to as "legal advice privilege". I think it is established that merely going to get witness statements or obtaining information from witnesses does not necessarily give that material legal advice privilege. If it did there would be no call for litigation privilege at all.

Can I then move on and deal with the question of waiver and reliance, and can I deal, first, with the reliance in the context of the statement of Mr. Irvine. Can I make two points? The first point is the point of principle about what is and is not waiver in terms of reference or reliance. We say that this case plainly falls on the side – and I am talking now about the witness statement of Mr. Irvine on reliance on the content rather than with reference to the "existence of".

Can I take you to a passage in the *Brennan* case which is recited in **Hollander**, but which I will take you to in the report itself, which is in bundle ----

THE CHAIRMAN: I have got it.

MR. MORRIS: This paragraph, which is para.67 of the judgment, actually is cited in the passage in **Hollander** immediately following **Hollander's** reference to those old cases of *Marubeni* and *Tate & Lyle* and *Dubai Bank v. Galadari*. I think I can make the point clearly by reading para.67:

> "… the answer to the question whether waiver has occurred or not depends upon considering together both what has been disclosed and the circumstances in which disclosure has occurred. As to the latter, the authorities in England strongly support the view that a degree of reliance is required before waiver arises, but there may be issues as to the extent of the reliance. Ultimately, there is the single composite question of whether, having regard to these considerations, fairness requires that the full advice be made available."

That is legal advice, not documents.

> "A court might, for example, find it difficult to say which side of the contents/effect line a particular disclosure falls, but the answer to whether there has been waiver may be easier to discern if the focus is on the question whether fairness requires full disclosure."

If we look at the facts in relation to that passage in Mr. Irvine's witness statement, what we have is Mr. Irvine, having said one thing in a witness statement, his first witness statement, about his recollection, then changes his recollection apparently based on what he has been told by somebody about what Mr Ferguson himself has told him. In our submission, we would be entitled to explore why he had changed his evidence, not least in circumstances where, at the present, is not dealt with at all by Mr. Ferguson in the witness statement he has served. The contents and attendance of persons at the 6th October meeting is a matter which is referred to both in the notice of appeal and it is referred to at para.257 of the defence, I accept albeit shortly, but it does not mean ----

MISS ROSE: That ought to be shown to you, sir.

THE CHAIRMAN: I have got it here.

MR. MORRIS: It is the contention that is made in the notice of appeal that the information was rejected at the meeting of 6th October footnote 37:

> "Tesco has, however, produced no contemporaneous record at all of any such complaint or any steps taken in the light of it."

We submit that we are entitled to explore in cross-examination what happened at that meeting. If Mr. Irvine's recollection has changed, we would be entitled to explore why his recollection has changed.

MISS ROSE: I am sorry, I just do not understand what this paragraph is said to have to do with whether Mr. Ferguson attended a meeting.

THE CHAIRMAN: I looked at para.257. Is that the paragraph you intended to refer to?

MR. MORRIS: It was. That is the paragraph where – para.147 ----

THE CHAIRMAN: Paragraph 147?

MR. MORRIS: Sorry, 147 of the notice of appeal deals with the 6th October meeting.

THE CHAIRMAN: Yes, but you referred me to para.257 of the defence which does not seem to me to have anything to do with this point.

MR. MORRIS: The footnote refers to the 6th October meeting.

THE CHAIRMAN: Mr. Morris, what this statement by Mr. Irvine does is say, "I have checked with Mr. McGregor and Mr. Ferguson and I made the mistake, the people who were present in Cheshunt were myself, John Scouler and Lisa Rowbottom and Mr. McGregor, not Mr. Ferguson". So what is the cross-examination that flows from that, "Why did you then say that Mr. Ferguson was there, you have been making your evidence up?" How much further can you go? "You have got a very defective memory because you forgot that Mr. Ferguson was not present?"

MR. MORRIS: In our submission, there is something at least odd about the way this has been dealt with, that it is not Mr. Ferguson who says, "I was not at the meeting", but it is Mr. Irvine who says, "On information". Why is there the reference to the interview?

THE CHAIRMAN: Supposing he came along and gave evidence, as I think he is intending to, and he had not served a statement. He is asked in chief so far as it goes, "Is the statement you have made true?" and he said, "It is true, except for one thing, I made a mistake, Mr. Ferguson, Tom, was not present at the meeting". Where does that get us? You can cross-examine him as to why he said Mr. Ferguson was present at the meeting. Does that go any furtherance credit?

MR. MORRIS: It might lead into questions about who was at the meeting and what the content of the meeting was.

THE CHAIRMAN: Might it?

MR. MORRIS: It may be very important in due course to explore exactly what is said. This is an allegation that they pushed back at that meeting. We know this was, "You must not discuss all this". It is a potentially important point on the Cheese 03 allegation, and it may be that the recollection, not just of who was there, but the recollection of what had happened at that meeting -----

THE CHAIRMAN: Mr. Ferguson, not having been at that meeting, you can hardly ask him what happened at a meeting he was not present at. Where does this actually get us?

MISS ROSE: Mr. Ferguson is going to give evidence so we can ask him if he was there.

MR. MORRIS: Our point is, why is this referred to? Why do they need to rely on the fact, "It is not me, I have suddenly remembered, I have been told that Mr. So and So has told effectively Freshfields that he was not at the meeting, and therefore now that I have been told that I accept that". We say that fairness requires, if they have made an express – and this is about fairness – reference to these interviews, why put the reference to the interviews in? We should be entitled to see what is said in those interview notes.

THE CHAIRMAN: I understand.

MR. MORRIS: Can I just deal with the question of relevance? Initially you did not ask me to, but Miss Rose has made the point. She relies on an authority about disclosure in relation to matters relating to credit. I think it is a Magistrates Court case, the name of which now escapes me, *Thorpe*. This is not about credit in that sense. This is not about getting material to cross-examine them as to their character in relation to whether or not they are truthful witnesses in the true sense of credit. This is material that we say is potentially relevant to the credibility of their accounts – in other words, it goes to the underlying substance of their evidence. The distinction must clearly be drawn between disclosure of material which might put into question their account as to the consistency or credibility of the account that they give, as opposed to whether they are generally truthful witnesses. We are not suggesting that this goes to the credit, and the authority upon which Miss Rose relies is not in point at all.

The second point we would submit is this: there is a complete difference between disclosure of material and its admissibility. In our submission, a party is always entitled to disclosure of documents which may or may not turn out to be admissible evidence. We are not seeking to adduce this evidence, we are seeking to have before the Tribunal all available material which may be relevant. The fact that the OFT says, and will assert, that its case in terms of proof is clear and strong on the documents is entirely irrelevant, in our submission, to the separate question about whether there is material which may put into question the strength or credibility of Tesco's account as given by their witnesses.

THE CHAIRMAN: Is it merely a question of relevance, or is it a question of relevance to the necessary and proportionate disposal of the proceedings?

MR. MORRIS: It is that, and on proportionality we say this: we say that the material that we are seeking is confined, it is there and disclosure of it, I imagine, would involve no great

trouble. We are not asking people to search for documents. There is going to be a limited amount of materials and I am sure they are readily available. That is the proportionality. As far as necessity is concerned, we do submit that it is necessary for the just and fair disposal of this case that the Tribunal should have before it this material.

THE CHAIRMAN: Yes.

MR. MORRIS: That, we say, is all the case law relating to bolstering in a light with which everybody is entirely familiar. We are not seeking here to adduce this as evidence to bolster our case. We are not going to be leading it as evidence. We want to see whether it is material that can be usefully put to witnesses.

Those are my submissions.

THE CHAIRMAN: Thank you very much. I am very grateful to all counsel, including those who have been passing notes from various sides. I shall take a little but not very much time before giving a judgment on this issue. It certainly will not be today. We will now adjourn. Thank you all very much.

MISS ROSE: Sir, there is one ----

THE CHAIRMAN: Miss Rose, please.

MISS ROSE: I beg your pardon, sir. Obviously with the hearing coming upon us apace, we have been seeking to agree other matters, including the timetable for the hearing. I am waiting for a response from Mr. Morris as to whether our proposals for the timetable are acceptable. I just do not want there to be unresolved issues which are later likely to cause conflict.

There is also a question about unused material that the OFT has. I do not know whether it would be a good idea for us to perhaps fix a potential pre-trial review date if there are remaining issues that need to be cleared up.

THE CHAIRMAN: I think what I would rather do – do we have a date by which the timetable should be agreed? Shall we impose a date as to when the timetable should be agreed, and then, if not agreed, we will simply have a hearing at fairly short notice?

MISS ROSE: Yes. I am just wondering whether it might be an idea for us to perhaps fix a hearing date in case there are any issues that need to be swept up, given that people may have other commitments, and we can use it if we needed it.

THE CHAIRMAN: Is there any reason why the timetable should not be agreed by the end of this week?

MISS ROSE: I cannot see any reason at all.

MR. MORRIS: The end of this week is tomorrow. Can I just say on that issue, I am entirely aware of it, Miss Rose has been perfectly fair about it. I was inundated, I have just come

back from holiday, but we are nearly there. I should also add that, in fact, we had set the ball rolling on this a couple of weeks earlier. There may be an issue, but not much of an issue.

THE CHAIRMAN: Shall we say by close of play on the 13th, which is next Tuesday – by 4 pm on Tuesday – the timetable should be agreed. If not agreed, then this Tribunal is very helpfully, I am sure to you all, sitting in Cardiff for the next two weeks. You are very welcome to turn up at half past eight one morning at the Cardiff Civil Justice Centre, this being a UK wide Tribunal. I notice that we have Miss Davies here, I am sure she knows where Wales is!

MR. MORRIS: Yes, that is fine.

THE CHAIRMAN: Let us hope it can be agreed by the 13th. I am actually semi-serious about the Tribunal sitting in Cardiff. The following week is completely impossible for me and I may be in the Far East the week after that on professional work.

Thank you all very much.

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