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IN THE COMPETITION  
APPEAL TRIBUNAL

Case No: 1030/4/1/04

Victoria House  
Bloomsbury Square  
London WC1

Friday, 7th May 2004

Sir Christopher Bellamy (President)  
Mr Michael Blair QC  
Professor Paul Stoneman

BETWEEN

FEDERATION OF WHOLESALE DISTRIBUTORS

Applicant

- v -

THE OFFICE OF FAIR TRADING

Respondent

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Mr Marc Israel and Mr Martin Ballantyne (instructed by McFarlanes) appeared for the Applicant

Mr Tim Ward (instructed by the Director of Legal Services, Office of Fair Trading) appeared for the Respondent

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CASE MANAGEMENT CONFERENCE

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Transcription of the stenographic notes of  
Harry Counsell & Co  
(incorporating Cliffords Inn Conference Centre)  
Cliffords Inn,  
Fetter Lane,  
London EC4A 1LD  
Telephone: 020 7269 0370

(At 3 p.m.)

1  
2 THE PRESIDENT: Good afternoon, ladies and gentlemen. Thank you  
3 for coming to this hearing of the Tribunal. The reason  
4 that we have asked to see the parties is that we have  
5 three points that we would like to deal with by way of a  
6 short judgment in this particular case and we thought it  
7 useful to have a brief discussion with the parties about  
8 those points.

9         The three points are: first of all, what is the right  
10 approach to the time for appealing merger decisions of the  
11 kind in question here under the Tribunal's Rules, Rule 26  
12 I think; the second point which arises only very  
13 indirectly in the events that have happened is what  
14 approach the Tribunal should take to applications to amend  
15 notices and applications for review in merger cases;  
16 thirdly, what approach the Tribunal should take to the  
17 costs of these proceedings on which we have already had  
18 helpful submissions from the parties.

19         On those three points, if we could perhaps take them  
20 in order, I wonder if I could look across first in the  
21 general direction of the applicants, that is to say  
22 McFarlanes and FWD, and just seek a little bit of  
23 clarification about what actually happened in this  
24 particular case about the timing of the Notice of Appeal  
25 and the information upon which the Notice of Appeal was  
26 based at the time it was lodged.

27         As we have understood it, and our understanding may  
28 be imperfect or incorrect, the acquisition in question was  
29 cleared by The Office of Fair Trading on 5th March 2004  
30 and the contested decision is in fact dated 5th March  
31 2004. There appears to have been a Press Release on that  
32 date. The application for a review was lodged with the  
33 Tribunal on 2nd April 2004. Although it is dated 31st  
34 March 2004 it was lodged on 2nd April.

35         In the meantime, the reasons for the decision had  
36 been published on 19th March, as we understand it, so I  
37 think the first question is whether you are able to help  
38 us, Mr Israel, on what, if anything, the applicants knew

1 about the contents of the decision when it was announced  
2 on 5th March 2004? Did they know anything beyond what was  
3 in the Press Release or did they have some further  
4 information about the decision, as far as you know? I  
5 think that is the first sort of factual question.

6 MR ISRAEL: Thank you, sir. The Federation is very happy to  
7 proceed on that basis and to answer those three questions.

8 THE PRESIDENT: Yes.

9 MR ISRAEL: As to the timing, my understanding is that the  
10 OFT, as in all cases, knew no more than what the Press  
11 Release said on 5th March, namely that the acquisition has  
12 been cleared.

13 THE PRESIDENT: Yes.

14 MR ISRAEL: And did not become aware of the specific reasons  
15 for that decision until the OFT published its decision on  
16 19th March.

17 THE PRESIDENT: Yes.

18 MR ISRAEL: Clearly the Federation, which had been to see the  
19 OFT about the merger, put forward its case but there was  
20 no way of knowing, until the decision was actually  
21 published, the extent to which those arguments had been  
22 accepted or not.

23 THE PRESIDENT: Yes.

24 MR ISRAEL: Therefore, I think in simple terms all that the  
25 Federation knew on 5th March was what was stated in the  
26 Press Release, namely that the acquisition had been  
27 cleared but had no understanding of the reasons for that  
28 clearance and, for example, did not know the extent to  
29 which the OFT had relied on the Competition Commission's  
30 reports in the Supermarkets inquiry or the Safeway  
31 inquiry, nor indeed the OFT's previous decision in Tesco  
32 TNS.

33 THE PRESIDENT: Yes. So why, in a few words, did the Federation  
34 put its application in on 2nd April instead of giving  
35 itself a month from 19th March when the reasons were  
36 published?

37 MR ISRAEL: The Federation believed that the four-week period  
38 for lodging the application pursuant to Rule 26 would  
39 begin on 19th March.

1 THE PRESIDENT: Yes.

2 MR ISRAEL: And had discussed that point in general terms with  
3 the Registry which also believed that that was the case  
4 but of course could not bind the Tribunal.

5 THE PRESIDENT: Yes.

6 MR ISRAEL: The Federation was in fact bounced into making its  
7 application on 2nd April, or by 2nd April because of the  
8 position of the OFT which had said that it could not rule  
9 out the possibility that were the application to be lodged  
10 after that date, it would not, as a first step, seek to  
11 have it dismissed as made out of time.

12 THE PRESIDENT: Yes.

13 MR ISRAEL: And therefore the Federation effectively only had  
14 two weeks in which to put its case together. At that time  
15 it did not have any funds in fact to seek legal  
16 representation and the Registry had in fact been very  
17 helpful in telling the Federation that it did not need  
18 legal representation and certain of the steps that it  
19 would need to go through in order to lodge the  
20 application.

21 THE PRESIDENT: Yes.

22 MR ISRAEL: If I may say so, sir, the issue of timing is  
23 probably an issue that is going to arise in many cases  
24 under Section 20.

25 THE PRESIDENT: Yes.

26 MR ISRAEL: It was in fact a matter for discussion with the  
27 Registry and IBA but, given the time within which the  
28 application was lodged, was never a point in issue.

29 THE PRESIDENT: Yes.

30 MR ISRAEL: The OFT's position, as I understand it, as said to  
31 the Federation, was that probably the purposive approach  
32 to Rule 26 was that the four weeks would start from the  
33 date of publication of the decision but they did not want  
34 to accept that position necessarily.

35 THE PRESIDENT: Yes.

36 MR ISRAEL: And that is the position that was actually sent in  
37 writing to the Federation.

38 THE PRESIDENT: I am sorry, I do not ----

39 MR ISRAEL: I must say that the OFT was extremely helpful and

1 cooperative with the Federation when it was discussing  
2 with it, or discussing whether the Federation was going to  
3 appeal. But they would not commit and expressly stated  
4 that they might seek to have the application dismissed for  
5 having been lodged out of time, and therefore the  
6 Federation felt it had no option but to lodge the  
7 application by 2nd April. That is in correspondence  
8 between the Federation and the Tribunal.

9 THE PRESIDENT: But you say there is a letter from the OFT  
10 expressing a view about what the date of publication is or  
11 ought to be on a purposive -----

12 MR ISRAEL: There is an email to that effect. If it would  
13 assist the Tribunal, I have a copy.

14 THE PRESIDENT: I think we might as well see it, if we may. Is  
15 that the same document in which they might have said that  
16 they were also reserving their rights as to argue  
17 something different, or is that a different document?

18 MR ISRAEL: That is in a letter.

19 THE PRESIDENT: That is in a letter.

20 MR ISRAEL: A letter of 13th April.

21 THE PRESIDENT: I see.

22 MR ISRAEL: This is an email which says, "If the appeal is  
23 made later than this Friday", ie. I think that is 2nd  
24 April, "it is possible that we will, as a first step,  
25 seek to have rejected as out of time. We accept we might  
26 lose this application but we might have to do it to  
27 preserve our position."

28 THE PRESIDENT: I see. That is a letter of what date?

29 MR ISRAEL: That is an email dated 30th March.

30 THE PRESIDENT: That is an email of 30th March.

31 (Copies were distributed)

32 THE PRESIDENT: Right, so that is the timing point. At a later  
33 point, I think in discussion with the Registry and perhaps  
34 emerging from one or two letters from our Registrar, the  
35 possibility was floated that perhaps the Federation might  
36 introduce a fuller notice or a second notice or something  
37 to cope with the possibility that the time limit might be  
38 not 2nd April but 19th April. Was there any reason why  
39 that was not pursued or thought -----

1 MR ISRAEL: I am afraid, sir, I do not know the answer to that  
2 question.

3 THE PRESIDENT: Yes.

4 MR ISRAEL: That was before we were instructed.

5 THE PRESIDENT: Yes, I see.

6 MR ISRAEL: But I would say that the Federation did point out  
7 in its letter of 1st April that it might seek to develop  
8 its arguments further, given that it had, in effect, been  
9 bounced into making its application by the 2nd April.

10 THE PRESIDENT: Yes. Do you have any submissions that you would  
11 like to make to us, Mr Israel, on the way we should  
12 approach amendments to a Notice of Appeal in merger cases  
13 as we go along, which is the second point that I have  
14 indicated?

15 MR ISRAEL: As with an application for costs, each case should  
16 be, I would submit, dealt with on the particular  
17 circumstances of the case.

18 THE PRESIDENT: Yes.

19 MR ISRAEL: In this particular circumstance, the Federation  
20 did not have legal representation and that may be an  
21 exceptional circumstance. Indeed, Rule 7 of the Tribunal's  
22 Rules states that -- or does not state that an applicant  
23 has to have legal representation and the Registry  
24 confirmed that position to the Federation.

25 THE PRESIDENT: Yes.

26 MR ISRAEL: That may well, in certain circumstances, like this  
27 case, be an exceptional reason for permitting an  
28 application to amend, particularly in light of the fact  
29 that the Federation did not at that time have any funds to  
30 instruct a legal representative.

31 THE PRESIDENT: Yes.

32 MR ISRAEL: I would therefore submit that each case needs to  
33 be considered on its particular facts.

34 THE PRESIDENT: Yes.

35 MR ISRAEL: And would submit that had an application to amend  
36 been made in this case, we would have strongly argued that  
37 permission should have been granted.

38 THE PRESIDENT: Yes. Thank you.

39 MR ISRAEL: With respect, sir, on the point of when a Notice

1 of Application should be lodged, I actually do have  
2 another document which shows the delay between publication  
3 of a Press Release and publication of the reasons for a  
4 decision.

5 THE PRESIDENT: Yes.

6 MR ISRAEL: In many cases, and this is as the OFT has I think  
7 argued before, it is very much dependent on excision  
8 requests from third parties and how quickly they are  
9 turned around.

10 THE PRESIDENT: Yes.

11 MR ISRAEL: But in certain cases it has taken up to 28 days to  
12 publish the detailed reasons following announcement of the  
13 decision. In those cases, I would submit it is not  
14 possible for an applicant to put together a reasoned  
15 application without having seen the full details of the  
16 decision.

17 THE PRESIDENT: Yes.

18 MR ISRAEL: If it would assist the Tribunal, it is a snatching  
19 of cases. It was not put together in the context of these  
20 proceedings but it clearly shows -----  
21 (Copies were distributed)

22 THE PRESIDENT: This is just a summary taken off the website or  
23 something?

24 MR ISRAEL: Of various cases, yes. I mean, this was prepared  
25 actually in November, I think, again in the context of IBA  
26 when this could have been an issue.

27 THE PRESIDENT: Yes.

28 MR ISRAEL: I do not see that there was any need to update the  
29 table and we felt that, again on costs grounds, there was  
30 no reason to do so.

31 THE PRESIDENT: No.

32 MR ISRAEL: But it shows the delay that can sometimes happen  
33 between the publication of the Press Release and the  
34 publication of the decision.

35 THE PRESIDENT: So it varies between about three days and about  
36 28 days I see.

37 MR ISRAEL: Very much so.

38 THE PRESIDENT: Yes. Thank you for that. Do you want to say  
39 anything finally on costs, more than you have already

1 helpfully said in writing?

2 MR ISRAEL: If the Tribunal would permit, I would, sir, thank  
3 you. Essentially the Federation's arguments are fourfold.

4 THE PRESIDENT: Yes.

5 MR ISRAEL: First of all, in this case it would be just not to  
6 award costs against the Federation. Secondly, the OFT  
7 -----

8 THE PRESIDENT: Why?

9 MR ISRAEL: Again, there are the policy considerations, as the  
10 Tribunal has set out in Gisc at paragraph 48, that the  
11 principal aim must be to deal with cases justly.

12 THE PRESIDENT: Yes.

13 MR ISRAEL: I would also refer the Tribunal to paragraph 54 of  
14 that costs judgment where it says:

15 "A general or rigid rule to the effect that  
16 losing appellants should normally be liable for the  
17 Director's costs, as well as their own, could tend to  
18 deter appeals and be seriously counter-productive from the  
19 point of view of achieving the objectives of the Act,  
20 particularly as regards smaller companies, representative  
21 bodies and consumers."

22 THE PRESIDENT: Yes.

23 MR ISRAEL: The Federation is a representative body, it has  
24 very limited financial resources, it is a non-profit  
25 making organisation and we would submit in this case,  
26 because the merits of the case -- or clearly the Tribunal  
27 could not go into the merits of the case, but the grounds  
28 of the appeal need not be gone into. So we would submit  
29 the Tribunal (sic) has neither lost nor won.

30 In this case, we feel it would be just, given all the  
31 circumstances, for example the fact that the Federation  
32 was bounced into making its appeal by 2nd April, the fact  
33 that there was no legal representation until 20th April,  
34 the fact that nine days is not unreasonable, and I can go  
35 into that if the Tribunal would like me to, those  
36 circumstances would, in the Federation's view, suggest  
37 that it would be just not to award costs against it.

38 THE PRESIDENT: Yes.

39 MR ISRAEL: Particularly because of the deterrent effect, and

1 | there may be legitimate cases which parties might not wish  
2 | to bring, given the possibility of an adverse costs  
3 | ruling.

4 |         If the Tribunal would like me to talk about the nine  
5 | days because it is a point -----

6 | THE PRESIDENT: Just before we talk about the nine days, the  
7 | period between 2nd April and 20th April, in order to  
8 | obtain legal representation -- I mean obviously legal  
9 | representation was eventually obtained so the question  
10 | arises as to why that did not happen earlier than it did.

11 | MR ISRAEL: My understanding is that the Federation's Annual  
12 | General Meeting had been planned in advance for 19th and  
13 | 20th April and it was at that meeting, where all the  
14 | members were brought together, that the issue of, as it  
15 | were, raising a fighting fund was brought to the fore and  
16 | various members decided to contribute, and therefore a  
17 | fund for legal representation was put together.

18 | THE PRESIDENT: I see. So that was when they found that they  
19 | had got the money to instruct you?

20 | MR ISRAEL: Absolutely.

21 | THE PRESIDENT: Yes, I see. In relation to the nine days, just  
22 | very briefly?

23 | MR ISRAEL: In relation to the nine days, we submit that  
24 | period was not unreasonable given that once we had been  
25 | instructed we had to effectively deconstruct the decision.  
26 | There were several hundred pages of the Safeway and the  
27 | Supermarkets reports to look at.

28 | THE PRESIDENT: Yes.

29 | MR ISRAEL: And to advise our client. Furthermore, we would  
30 | note that in the Hasbro decision, where the appellant in  
31 | that case had legal representation all the way through, it  
32 | actually took eight days from publication of the so-called  
33 | retail decision for Hasbro to seek permission to withdraw  
34 | its appeal in the distributor decision.

35 | THE PRESIDENT: Yes.

36 | MR ISRAEL: In that case, the Tribunal ruled that Hasbro had  
37 | not acted unreasonably in that case. I would submit that  
38 | the circumstances were very different. Hasbro had been  
39 | represented by legal representatives all the way through

1 and the decisions were very much closely related, the  
2 retail decision and the distributor decision.

3 THE PRESIDENT: Yes.

4 MR ISRAEL: That is really, in the Hasbro case, on pages five  
5 where you can work out the number of days, 19th February  
6 to 27th February, and the fact that the Tribunal held it  
7 was not unreasonable is stated on page seven, lines 32 to  
8 33.

9 THE PRESIDENT: Yes, thank you. That was your first point,  
10 unjustly, was it?

11 MR ISRAEL: Yes, that is correct, sir.

12 THE PRESIDENT: You had four points.

13 MR ISRAEL: The second point was that the OFT has incurred  
14 unnecessary costs.

15 THE PRESIDENT: Yes.

16 MR ISRAEL: That is because we submit it would have been  
17 appropriate for the OFT to seek permission for an  
18 extension of time in order to lodge its defence. That is  
19 because the deadline was originally 30th April but it was  
20 made quite clear, in fact, from the Federation's letter of  
21 1st April but particularly after the Tribunal's letter of  
22 22nd April that effectively the Federation had until today  
23 to file a draft amended Notice of Application and the  
24 reasons to support that.

25 Clearly it was possible, therefore, that the decision  
26 could have been lodged on 30th April and the Federation  
27 could have made an application to amend the next day. It  
28 therefore would have been appropriate to see what had  
29 happened and therefore to seek -----

30 THE PRESIDENT: While the procedural situation was sorting  
31 itself out, they could have asked or sought directions as  
32 to whether they should wait or not, or what they should  
33 do?

34 MR ISRAEL: Absolutely. The Tribunal's Rules, as we understand  
35 them, are in many ways designed to save costs. I think  
36 that is actually mentioned in Gisc again at paragraph 59,  
37 that the Tribunal's procedures are designed to save costs  
38 wherever possible.

39 THE PRESIDENT: Yes.

1 MR ISRAEL: To turn it on its head, had the deadline for the  
2 application to amend been 30th April and the deadline for  
3 lodging of the defence been 7th May, it would have been  
4 quite sensible for the OFT to wait and see whether an  
5 application to amend would have been made by 30th April.  
6 In this case, we submit it was not. Again, looking at  
7 -----  
8 THE PRESIDENT: I am slightly losing you. The dates you are  
9 working off -----  
10 MR ISRAEL: 30th April was the deadline by which the OFT's  
11 defence had to be lodged. As we interpret the Tribunal's  
12 letter of 22nd April, today was effectively the deadline  
13 for submitting an application for permission to amend the  
14 Notice of Application.  
15 THE PRESIDENT: Just a minute. Let us just look up that letter.  
16 MR ISRAEL: That is 22nd April from the Tribunal to  
17 McFarlanes. It states, "If you wish the Tribunal to  
18 consider an application for permission to amend the Notice  
19 of Application, pursuant to Rules 25 and 11 of the  
20 Tribunal's Rules of Procedure..." etc etc "...you should,  
21 as soon as practicable, file and serve a draft amended  
22 Notice of Appeal accompanied by detailed reasons in  
23 writing as to why the application should be permitted."  
24 We understood that as being that any application  
25 should be made by today, or this morning.  
26 THE PRESIDENT: Just wait a moment, Mr Israel. I am just  
27 sorting out what we have actually got in our file and what  
28 we have not. (Pause) Yes, I see. So you took the  
29 Registrar's letter of 22nd April as effectively saying if  
30 you want to seek leave to amend, then that can be argued  
31 on 7th May which is today?  
32 MR ISRAEL: That is correct, sir.  
33 THE PRESIDENT: And before that date, you should put in your  
34 amendments and the reasons why you want to do it?  
35 MR ISRAEL: Yes, by that date.  
36 THE PRESIDENT: By that date. Then you say, do you, in the  
37 light of that, then the OFT should have either put the  
38 brake on in some way, or at least sought some directions  
39 from us, or rung us up or something, to say, "What should

1 we do next? Should we put the defence on hold or what  
2 should we do?"

3 MR ISRAEL: Absolutely. In that respect, I would again refer  
4 to Hasbro which shows how quickly the Tribunal can deal  
5 with such matters. That is at Hasbro, page five, lines 32  
6 to 34 which effectively says:

7 "An application for an extension of time was made  
8 on 23rd January which was decided by the President on 24th  
9 January."

10 So it need only have been a very short letter to  
11 which the Tribunal would no doubt have responded rather  
12 quickly, and the OFT would then not have needed to incur  
13 extra costs had the Tribunal decided that the OFT should  
14 wait until an application to amend the Notice of  
15 Application had been submitted.

16 THE PRESIDENT: Yes. I am not sure we have a breakdown of what  
17 dates various things were done.

18 MR ISRAEL: I think that is correct in terms of Treasury  
19 Solicitor and OFT costs.

20 THE PRESIDENT: Yes.

21 MR ISRAEL: There is, in terms of counsel's.

22 THE PRESIDENT: We have got some details as to counsel's costs,  
23 yes absolutely.

24 MR ISRAEL: Yes.

25 THE PRESIDENT: Yes. That was the second point.

26 MR ISRAEL: Sir, that was the second point, that the OFT has  
27 incurred unnecessary costs.

28 THE PRESIDENT: Yes.

29 MR ISRAEL: The third point is that whatever the costs, the  
30 OFT seeking to recover 100% of its costs is unreasonable.

31 THE PRESIDENT: Yes.

32 MR ISRAEL: There are various reasons for that. The first one  
33 is, given that part of today's hearing and part of, in a  
34 sense, the discussion between the parties has been what is  
35 the correct time for lodging Notices of Application in  
36 cases under Section 120, that is a matter of general  
37 interest and there is no reason why the Federation should  
38 bear the costs of the OFT in seeking to defend its  
39 position on that.

1 THE PRESIDENT: Yes.

2 MR ISRAEL: Were that to be resolved by the Tribunal in this  
3 case, it is not a matter that other parties would have to  
4 incur costs on in the future.

5 THE PRESIDENT: Yes.

6 MR ISRAEL: The second reason why 100% is unreasonable, again  
7 referring to Hasbro, we note that the Director General, as  
8 he then was, in that case only sought to recover one-third  
9 of his costs. In fact, he was not able to recover any and  
10 each party bore its own costs. But in that case, on page  
11 two, lines 23 to 26, the Director sought one-third of his  
12 costs because he "believed that there was a public  
13 interest in encouraging appellants to discontinue their  
14 appeals."

15           Again, and very much part of the policy  
16 considerations and the issue of justness in these  
17 proceedings, we would say that were the Tribunal to award  
18 100% of the OFT's costs against the FWD, that would have a  
19 severe deterrent effect on possible future applications,  
20 particularly by smaller companies, by representative  
21 bodies and consumers as stated in Gisc.

22 THE PRESIDENT: Yes. Thank you.

23 MR ISRAEL: The fourth and final point that we would like to  
24 make is that, in any event, the OFT's costs that they are  
25 seeking, around £12,000, are excessive. We would note that  
26 the OFT Treasury Solicitor and counsel have spent around  
27 70 hours on preparing for this case, a case that is  
28 allegedly unmeritorious. Were that the case, we would have  
29 expected not nearly so much time to have been taken up in  
30 preparing the OFT's case, particularly because, in these  
31 proceedings, which is not a review on the merits, the  
32 decision should stand or fall on its face, and therefore  
33 the OFT need not go into very much detail, we would  
34 submit, to defend itself.

35           Another reason we submit for costs being excessive is  
36 that in this case the OFT is claiming around £12,000  
37 whereas in IBA, the OFT stated that its costs were below  
38 £50,000, and that is stated in the Tribunal's judgment on  
39 IBA (Costs).

1 THE PRESIDENT: Yes.

2 MR ISRAEL: But the circumstances are very different. In the  
3 IBA case, sir, that involved a full day's hearing,  
4 representation by leading and junior counsel, detailed OFT  
5 submissions including, if I recall correctly, three  
6 witness statements, considerably more papers, indeed files  
7 and files of papers, and also extra work occasioned by two  
8 Intervenors. In this case, of course, Tesco has intervened  
9 but there have been effectively no papers.

10 THE PRESIDENT: Yes.

11 MR ISRAEL: Therefore, weighing up the amount of work done in  
12 IBA compared to the work done in this case, we submit that  
13 £12,000 is excessive.

14 THE PRESIDENT: Yes. Thank you.

15 MR ISRAEL: Those are our points, sir.

16 THE PRESIDENT: Thank you very much, Mr Israel. Yes, Mr Ward.  
17 Time for appealing?

18 MR WARD: Yes. We respectfully refer to the Rules, starting  
19 with Rule 26, if I may. Rule 26 says:  
20 "An application under Section 121 of the 2002  
21 Act..." down to the third line "...must be made within  
22 four weeks of the date on which the applicant was notified  
23 of the disputed decision" -- emphasising that word -- "or  
24 the date of the publication of the decision, whichever is  
25 the earlier."

26 THE PRESIDENT: Yes.

27 MR WARD: That language, we respectfully submit, should be  
28 contrasted with the language of Section 107 of The  
29 Enterprise Act which deals with publication. What we will  
30 see there is a distinction made between decisions and the  
31 reasons for those decisions.

32 THE PRESIDENT: Do you want us to look up Section 107?

33 MR WARD: Yes, please.

34 THE PRESIDENT: Yes.

35 MR WARD: Section 107(1)(a) is material to this case.  
36 "The OFT shall publish any reference made by it  
37 under Section 22 or 33 or any decision made by it not to  
38 make such a reference."  
39 That is of course what we are dealing with here.

1 THE PRESIDENT: Yes.

2 MR WARD: As you say, sir, the decision itself was published  
3 in a Press Release on 5th March.  
4 Then reading on to 107(4):  
5 "Where any person is under a duty by virtue of  
6 subsection (1) to publish the result of any action or any  
7 decision, the person concerned shall, subject to  
8 subsections (5) and (6), also publish that person's  
9 reasons."  
10 THE PRESIDENT: Yes.  
11 MR WARD: So it distinguishes between decisions and reasons.  
12 Then 107(5):  
13 "Such reasons need not, if it is not reasonably  
14 practicable to do so, be published at the same time as the  
15 result of the action concerned or, as the case may be, the  
16 decision."  
17 So The Enterprise Act distinguishes very clearly  
18 between decisions and the reasons for them and the Rules  
19 unambiguously refer to the decision.  
20 Now, my friend has suggested that the effect of this  
21 can be to bounce an appellant into putting in a Notice of  
22 Appeal in circumstances where it may not yet know what the  
23 reasons are.  
24 THE PRESIDENT: Yes.  
25 MR WARD: But we respectfully submit that is really dealt with  
26 by Rule 11. Could I invite you to turn to that?  
27 THE PRESIDENT: Yes.  
28 MR WARD: Rule 11(1):  
29 "The appellant may amend the Notice of Appeal only  
30 with the permission of the Tribunal.  
31 (2) Where the Tribunal grants permission, it may do so on  
32 such terms as it thinks fit and give such consequential  
33 directions as may be necessary."  
34 But then (3) of course states a pre-condition that  
35 must be satisfied before any permission can be granted.  
36 THE PRESIDENT: Yes.  
37 MR WARD: "The Tribunal shall not grant permission to  
38 amend in order to add a new ground for contesting the  
39 decision unless (a) such ground is based on matters of law

1 or fact which have come to light since the appeal was  
2 made."

3 So if one envisages a decision being made on, say,  
4 1st May and then an appeal being lodged on 7th May and  
5 then reasons being given on 14th May, one can see  
6 immediately that an applicant would have an argument under  
7 11(3)(a).

8 THE PRESIDENT: Would you oppose that argument?

9 MR WARD: I obviously cannot bind the OFT's imperpetuity on  
10 the facts of different cases, but I do simply submit that  
11 one can see there would be force in such a submission  
12 prima facie on the language of the Rules.

13 But then this is quite not that case of course  
14 because in this case the decision was published on the  
15 5th, the reasons were published on, I think it was the  
16 15th.

17 THE PRESIDENT: Just before we go to that.

18 MR WARD: Sorry.

19 THE PRESIDENT: In what sense do you say this applicant was  
20 notified of the disputed decision on the 5th? Is it the  
21 Press Release you rely on?

22 MR WARD: Yes, the Press Release. We go back to Rule 26, if I  
23 could ask -----

24 THE PRESIDENT: Is there some letter to this applicant or is it  
25 just a Press Release that goes on the web?

26 MR WARD: There need not be, sir. If I could ask you to turn  
27 back to Rule 26, of course the applicant was not one of  
28 the undertakings actually engaged in the merger.

29 THE PRESIDENT: No.

30 MR WARD: Rule 26 says that time runs from either the date the  
31 applicant was notified or the date of publication of the  
32 decision, whichever is the earlier.

33 So in this case, of course time -- so far as I know,  
34 the applicant was not individually notified. I  
35 respectfully submit one would not have expected them to  
36 be, but in any event the publication date is common  
37 ground.

38 THE PRESIDENT: What are you taking as the publication date?

39 MR WARD: The date of the Press Release which was 5th March.

1 THE PRESIDENT: I see. That is the publication of the fact of  
2 the decision rather than the decision itself, is it not?  
3 MR WARD: Yes. Yes, I see the distinction, sir.  
4 THE PRESIDENT: Yes.  
5 MR WARD: But of course the real issue here is in respect of  
6 the date of publication of the reasons, and the reasons, I  
7 understand, were published on 19th March.  
8 THE PRESIDENT: Yes.  
9 MR WARD: If we could turn back to Rule 11, I showed you Rule  
10 11(3)(a) and as I was about to submit that this is not a  
11 case of that kind because the reasons were published on  
12 19th March and the appeal was not lodged until 30th March,  
13 or perhaps even 2nd April, we do not know exactly.  
14 THE PRESIDENT: 2nd April is the date we have, yes.  
15 MR WARD: Yes. Thank you, sir.  
16 THE PRESIDENT: Yes.  
17 MR WARD: So this is not a case where, since the appeal was  
18 made, the reasons came to light. They had already come to  
19 light, albeit only about twelve days earlier, but then (b)  
20 or possibly even (c) might, on the facts of a particular  
21 case, be germane.  
22 THE PRESIDENT: Yes.  
23 MR WARD: Because (b) says that it was not practical to  
24 include such ground in the Notice of Appeal.  
25 THE PRESIDENT: Yes.  
26 MR WARD: If one changes the facts for a moment and imagines  
27 that the reasons came out on 30th March in this case, then  
28 one would again imagine a submission being made and say,  
29 "Well, it was just not practical for us to get it in."  
30 THE PRESIDENT: Yes.  
31 MR WARD: Obviously I am not making a submission about how the  
32 OFT would respond in the light of any particular  
33 application of this kind. But what I am submitting is that  
34 when one reads Rule 26 with Section 107 of The Enterprise  
35 Act and Rule 11, what emerges is a coherent statutory  
36 scheme for dealing with the timing of making these kinds  
37 of appeals.  
38 With that, could I turn to the question of costs?  
39 THE PRESIDENT: Yes.

1 MR WARD: The OFT has broadly four submissions as to why costs  
2 should be awarded in this case.

3 THE PRESIDENT: Yes.

4 MR WARD: The first is really to state the obvious: namely,  
5 that this appeal was of course withdrawn.

6 THE PRESIDENT: Yes.

7 MR WARD: We do rely on the general statement of principle in  
8 the Hasbro case to the effect that, if I may just quote:  
9 "It will often be the case that the withdrawing  
10 party should pay at least a proportion of the respondent's  
11 costs. That is the general principle."

12 THE PRESIDENT: Yes.

13 MR WARD: Our second submission is that it was entirely  
14 reasonable for the OFT to proceed to serve its -- to  
15 prepare its defence I am sorry, it did not serve it.  
16 According to the Tribunal's letter of 13th April, time  
17 expired on 30th April for service of the OFT defence. The  
18 first word we had of withdrawal was 29th April, so it was  
19 the day before.

20 It is hardly surprising, in our respectful submission  
21 therefore, that the OFT's plans were well advanced. The  
22 responsible course of action prima facie is to treat the  
23 rules as being there to be obeyed.

24 Now, the counter argument to that is that it was  
25 incumbent on the OFT to bring a halt to the procedural  
26 timetable just in case an application to amend  
27 materialised.

28 THE PRESIDENT: The argument is a little more than that. The  
29 argument is that it would have been reasonable to ring up  
30 the Registry and say, "What should we do? There seems to  
31 be a certain amount of procedural confusion here. What do  
32 you want us to do?"

33 MR WARD: Sorry, I do not mean to trivialise the argument.

34 THE PRESIDENT: No and I am not treating you as having done so.  
35 I am just saying the argument is, if you kept in closer  
36 touch with the Registry then you might have saved  
37 yourselves some effort.

38 MR WARD: Fine. There are two things to say about that.  
39 Firstly, that course may have been open to the OFT but was

1 it really mandatory because of course there was another  
2 important consideration at stake here which is the  
3 interests of third parties, namely the undertakings who  
4 had proposed this merger, and of course the Section 120  
5 procedure is designed to be a speedy one.

6 THE PRESIDENT: Yes.

7 MR WARD: Precisely so that third parties can quickly resolve  
8 the position and get on with their transaction whilst it  
9 is still purposeful.

10 THE PRESIDENT: Yes.

11 MR WARD: Inevitably the OFT is bound to be at least cautious  
12 about bringing delay into the proceedings.

13 THE PRESIDENT: Yes.

14 MR WARD: Here, what we had was not a clear indication that  
15 there would be an application to amend; rather, what we  
16 had was a letter that reserved the rights to make such an  
17 application and that was the letter of 22nd April, "We  
18 reserve the right to amend the Notice of Appeal."

19 That was met by the letter from the Tribunal which  
20 you have already seen, sir, which said, "If you are going  
21 to do so, you should, as soon as practicable, file and  
22 serve a draft amended Notice of Appeal." It does not say  
23 "by 7th May", it says "as soon as practicable". Actually,  
24 nothing happened at all. That, really, was met with  
25 silence.

26 The very next thing that happened from McFarlanes was  
27 the notification of the application to withdraw on the  
28 29th.

29 THE PRESIDENT: Yes.

30 MR WARD: So there was the OFT faced with a difficult problem.  
31 There was a Notice of Appeal, time was running, it was  
32 going to expire on the 30th. Solicitors had come in rather  
33 late in the day but nevertheless had come in and then  
34 said, "We reserve the right." The Tribunal had said,  
35 "Well, you had better get on with it" but nothing had  
36 actually happened.

37 True enough, we of course accept that we could have  
38 applied to the Tribunal to put a brake on this, but the  
39 OFT has a legitimate public interest in saying let's get

1 this resolved as quickly as we can.

2 THE PRESIDENT: Yes.

3 MR WARD: Let us find out whether this decision is defective  
4 and allow this merger to proceed if it is not.

5 THE PRESIDENT: So reasonable to carry on?

6 MR WARD: Reasonable to carry on is this in a nutshell, sir,  
7 yes.

8 THE PRESIDENT: Yes.

9 MR WARD: The third of my points is that the reason the OFT is  
10 being asked to bear a cost burden in this case, in effect,  
11 is that the FWD did not get legal representation earlier  
12 in the proceedings. We of course accept that it is open to  
13 parties to appear without representation in this Tribunal  
14 and have no wish to appear to be precluding that  
15 possibility. But what is really being said here is the FWD  
16 entered into this litigation without being clear about the  
17 consequences and the costs risks that it might face and,  
18 by implication, they found out once McFarlanes advised  
19 them of those risks.

20 But we respectfully submit that of course it was open  
21 to the FWD to take that approach (litigate first, find out  
22 about the consequences later), of course it could. Indeed  
23 it could have proceeded throughout and then been in front  
24 of you arguing about costs had it been unsuccessful and  
25 simply said, "Well, we did not know that you could have  
26 costs awarded in one of these cases." But the reality is,  
27 the question for you is what is the just thing to do in  
28 these circumstances?

29 THE PRESIDENT: Yes.

30 MR WARD: Is it just, because of that ignorance on the part of  
31 the FWD as to the risks, that the OFT should be obliged to  
32 bear the cost consequences? We respectfully submit that it  
33 is not. If litigants in person choose to come to court,  
34 whether it be this Tribunal or any other, they are of  
35 course exposed to the risks of an adverse costs order.

36 THE PRESIDENT: Our discretion, I think, is a bit wider than  
37 the High Court. The rules are drawn differently.

38 MR WARD: Indeed. So that is our third point.

39 THE PRESIDENT: Yes.

1 MR WARD: Our fourth point, it is really a defensive point, if  
2 you like, we refute the suggestion that there is anything  
3 intrinsically unjust about using the heavy stick of costs  
4 to beat off this particular applicant, which is  
5 essentially the case being made. It is being said the FWD  
6 is a representative organisation, it has limited funds, I  
7 think it was said they had £113,000 in net profit last  
8 year and it is all terribly heavy-handed and there is a  
9 danger that meritorious appeals will be shut out.

10 THE PRESIDENT: Yes.

11 MR WARD: But the difficulty here, of course, is this is not  
12 the first representative association to bring proceedings  
13 and what typically happens in these cases, of course, is  
14 that it approaches its members to obtain a fighting fund.  
15 We know that this trade association represents some  
16 substantial bodies because they say in their application  
17 that their members serve 55,000 businesses, including  
18 groups such as Spar, Londis, Mace, CostCutter and Premier  
19 etc, 55,000 independent retailers. So there is substantial  
20 financial muscle behind this organisation.

21 Now, what we heard from Mr Israel a few moments ago  
22 is that a fighting fund was indeed assembled but only on  
23 19th and 20th April. By then, of course, the horse had  
24 rather bolted because time was coming to an end for the  
25 OFT to finish its defence and so on and so forth.

26 THE PRESIDENT: Yes.

27 MR WARD: But it cannot be right that substantial commercial  
28 interests can shelter behind a poorly-funded trade  
29 association and then say the trade association should not  
30 be asked to bear the costs because it does not have deep  
31 pockets. Its pockets are as deep as its members choose  
32 them to be.

33 THE PRESIDENT: Yes.

34 MR WARD: So this should not be equated with a small  
35 independent retailer taking on the mighty Tesco. That is  
36 just not the position.

37 THE PRESIDENT: Yes.

38 MR WARD: Indeed there is a clear public interest in not  
39 encouraging that kind of approach to litigation.



1 defence. To that we say, firstly, we would refer to the  
2 kind of hourly rates which are attracted by public sector  
3 lawyers which are more modest than some that appear in  
4 this Tribunal, but also the costs reflect the fact that  
5 this was a challenge to a merger; inevitably it involved  
6 litigators, it involved economists, it involved members of  
7 the Merger Task Force and it is not surprising that the  
8 OFT took it very seriously indeed.

9 THE PRESIDENT: Yes.

10 MR WARD: The fact that it eventually concluded that the  
11 application was without merit did not mean that it could  
12 afford to avoid the step of carefully considering whether  
13 the decision was one that properly should be defended.

14 THE PRESIDENT: Yes.

15 MR WARD: So we would respectfully submit that that is not an  
16 excessive amount at all and, really, the way to have  
17 avoided these costs being incurred was to effectively have  
18 withdrawn earlier or at least made the position clear at  
19 an earlier time.

20 THE PRESIDENT: Yes.

21 MR WARD: Unless I can assist further?

22 THE PRESIDENT: Thank you. Beyond the points you have already  
23 made to us about Rule 11, your submission was effectively,  
24 I think, you should get the appeal in and then seek to  
25 amend later when you have got the reasons.

26 MR WARD: That seems to be the logic of the Rules.

27 THE PRESIDENT: Do you have any other submission to make on our  
28 general approach to amendments in merger cases?

29 MR WARD: Would you give me a moment, sir? (Brief pause) We  
30 respectfully leave that to the Tribunal, sir.

31 THE PRESIDENT: Yes. Could I just ask, there is one technical  
32 point which is raised, I hasten to say, by a member of the  
33 Tribunal who is not a lawyer. It just shows that everybody  
34 is getting good at everybody else's discipline. One of the  
35 things you have to do when you are introducing your appeal  
36 under Rule 8(6) is to annex to the Notice of Appeal a copy  
37 of the disputed decision.

38 MR WARD: Yes.

39 THE PRESIDENT: Is that not a bit difficult to do if you have

1 not yet got the reasons for the decision?

2 MR WARD: As you have rightly pointed out, sir, the decision  
3 is not the same thing as a Press Release, but the Press  
4 Release which is published on the OFT's website expresses  
5 the content of the decision. The question, really, would  
6 be: would the annexing of a Press Release containing the  
7 decision in any sense render the application defective, so  
8 as to render it capable of being rejected or challenged  
9 under Rule 9 or 10? We would say evidently not.

10 THE PRESIDENT: So you annex the Press Release to comply with  
11 Rule 8, that is your submission?

12 MR WARD: Yes. That is the form in which the decision is  
13 published. Even though, of course, in a kind of  
14 metaphysical sense it is not the decision itself.

15 THE PRESIDENT: Yes, okay.

16 MR WARD: But then the decision in the form of the reasons  
17 does not come into being, or in a case of this kind, until  
18 a somewhat later date.

19 THE PRESIDENT: Yes, thank you. Do you want to come back on  
20 those points, Mr Israel?

21 MR ISRAEL: If I may, sir, I would like to come back on a  
22 number of those points. As to the timing of lodging  
23 application, I hear what Mr Ward has said about Rule 26  
24 and Rule 11.

25 THE PRESIDENT: Yes.

26 MR ISRAEL: If I understand him correctly, he has accepted  
27 that a Press Release is not the same as a disputed  
28 decision and Rule 26 refers to "...when the applicant was  
29 notified of the disputed decision." The Press Release is,  
30 in a sense, just being notified of aspects relating to the  
31 disputed decision.

32 THE PRESIDENT: Yes.

33 MR ISRAEL: We would submit that the OFT's position as regards  
34 Rule 11 would inevitably lead to almost any application  
35 under Section 120 being sought to amend the Notice of  
36 Application because, as the Tribunal will have seen from  
37 the schedule that I handed up earlier, in some cases if  
38 the decision is within two days of publication of the  
39 Press Release, are those circumstances exceptional, is it

1 practical, but what happens if it is 28 days later or 26?  
2 Where is the cut off point?

3 THE PRESIDENT: Yes.

4 MR ISRAEL: I think it would be difficult to draw a hard and  
5 fast rule to say that if the decision is, for example,  
6 published seven days after publication of the Press  
7 Release, well then you cannot have leave to amend; but if  
8 it is published eight days afterwards, then maybe you  
9 can.

10 I think that would be very difficult and I fear, in  
11 every case, that the Tribunal would have to deal with  
12 these applications and that would only add to costs  
13 implications.

14 I hear what Mr Ward says about cases under Section  
15 120 being dealt with speedily and would fully endorse  
16 that; however, I do believe, as you have just indicated,  
17 that all it took was a phone call to the Registry to say,  
18 "Where do we stand? What should we do?" Indeed, that is  
19 what the Federation did and spoke to the Registry, which  
20 was extremely helpful, sir.

21 I would only like to pick up on two points that Mr  
22 Ward mentioned in support of the OFT's application for  
23 costs. The first one was that -----

24 THE PRESIDENT: On costs he said Hasbro says that there should,  
25 in principle, be a proportion of the costs.

26 MR ISRAEL: Yes.

27 THE PRESIDENT: He says it was reasonable for the OFT to carry  
28 on; he said the OFT should not have to bear the cost of  
29 the FWD being late in getting legal representation; and  
30 that your clients are not as impecunious as might be being  
31 suggested.

32 MR ISRAEL: Thank you, sir.

33 THE PRESIDENT: That is what he said.

34 MR ISRAEL: I could not read my handwriting on some of the  
35 particular issues.

36 THE PRESIDENT: My handwriting is not very good, Mr Israel, but  
37 I think that is probably the gist of what he said.

38 MR ISRAEL: Yes, I think that is right. Thank you, sir. The  
39 two points I would wish to make on costs, as I say, are

1 that the Federation did speak to the Registry, which was  
2 extremely helpful, and the Registry did indicate that it  
3 might be very unlikely that costs would be awarded against  
4 it, and that is one of the bases on which the Federation  
5 actually decided to proceed.

6 The second point -----

7 THE PRESIDENT: Have we got something in writing about that?

8 MR ISRAEL: No, I am afraid we do not, sir. That was a  
9 telephone conversation, as I understand it.

10 THE PRESIDENT: Yes, I see.

11 MR ISRAEL: One of the other points is that if the OFT were  
12 not awarded its costs, it would encourage small  
13 representative bodies to make allegedly unmeritorious  
14 appeals. We submit this is only the second case under  
15 Section 120 and the Tribunal may respectfully therefore  
16 feel it might be appropriate to give some guidelines on  
17 this particular issue for future cases. We feel, as we  
18 were approaching it, that there are no hard and fast rules  
19 and it would therefore be unjust for all of the OFT's  
20 costs, or indeed a significant proportion of those costs,  
21 to be awarded against the FWD.

22 THE PRESIDENT: Yes.

23 MR ISRAEL: Sorry, one final point, sir. Mr Ward referred to  
24 Hasbro and the general principle that costs could be  
25 awarded against appellants or applicants.

26 THE PRESIDENT: Yes.

27 MR ISRAEL: In that case we would note that the Tribunal  
28 decided not to award costs. Whilst that may be the general  
29 rule, this particular case may be another one in which it  
30 is appropriate not to award costs against the FWD.

31 Subject to anything my clients wish to say, I think  
32 that is all I have to say.

33 (Pause)

34 Sir, the Federation has pointed out that whether or  
35 not companies which are the members of the Federation are  
36 substantial, the Federation's own funds are actually  
37 rather limited and therefore it is difficult in certain  
38 cases to raise fighting funds.

39 THE PRESIDENT: Yes.

1 MR ISRAEL: That is all I would like to say. Thank you, sir.  
2 MR WARD: Could I just clarify one point, just about what we  
3 say the role of the Press Release is in relation to the  
4 decision.  
5 THE PRESIDENT: Yes.  
6 MR WARD: I felt my learned friend may not have quite captured  
7 what we meant to say. The position is that the Press  
8 Release is the form in which the decision is published. So  
9 the Press Release, which in this case came out on 5th  
10 March, is actually the document containing the decision  
11 which goes into public circulation and it is published on  
12 the website.  
13 If it would help, I can hand up a copy of the one in  
14 this particular case.  
15 THE PRESIDENT: I think we have looked at the website for  
16 ourselves.  
17 MR WARD: I am sure you have.  
18 THE PRESIDENT: Yes, I see. Just completing that, you  
19 distinguish between the publication of the decision and  
20 the publication of the reasons, having taken us to the  
21 relevant sections of The Enterprise Act which makes that  
22 distinction?  
23 MR WARD: Exactly.  
24 THE PRESIDENT: Yes. We will rise and consider what has been  
25 said. I should not think we will be back for at least half  
26 an hour.  
27 (Adjourned at 3.55 p.m. and resumed at 4.35 p.m.)  
28 (Extempore judgment delivered - see separate transcript)  
29 (The hearing concluded at 5.10 p.m.)