

This Transcript has not been proof read or corrected. It is a working tool for the Tribunal for use in preparing its judgment. It will be placed on the Tribunal Website for readers to see how matters were conducted at the public hearing of these proceedings and is not to be relied on or cited in the context of any other proceedings. The Tribunal's judgment in this matter will be the final and definitive record.

IN THE COMPETITION

Case No. 1048/1/1/05

APPEAL TRIBUNAL

Victoria House
Bloomsbury Place
London WC1A.2EB

10th February 2005

Before:
MARION SIMMONS QC
(Chairman)
PETER GRANT-HUTCHISON
GRAHAM MATHER

Sitting as a Tribunal in England and Wales

BETWEEN:

DOUBLE QUICK SUPPLYLINE LIMITED

Appellant

and

OFFICE OF FAIR TRADING

Respondent

Mr. Matthew Cook (instructed by Messrs M&A Solicitors, Cardiff) appeared for the Appellant.

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

Transcribed from the Shorthand notes of
Beverley F. Nunnery & Co.
Official Shorthand Writers and Tape Transcribers
Quality House, Quality Court, Chancery Lane, London WC2A 1HP
Tel: 020 7831 5627 Fax: 020 7831 7737

CASE MANAGEMENT CONFERENCE

1 THE CHAIRMAN: Can I just introduce the Tribunal – Mr. Grant-Hutchison on my right, and
2 Mr. Mather on my left. Yes, Mr. Ward?

3 MR. WARD: It may assist to say that things have moved on slightly since the skeletons that you will
4 have received earlier.

5 THE CHAIRMAN: I understand you have had some documents?

6 MR. WARD: We have.

7 THE CHAIRMAN: Have the documents sorted out the position?

8 MR. WARD: They have not sorted it out but they have helped enormously, and we are very grateful
9 for how quickly they were provided.

10 THE CHAIRMAN: Excellent. I do not know whether it would be helpful – I have not seen those
11 documents – if I say where I have got to and where I thought we need to go to, would that be
12 helpful?

13 MR. WARD: Certainly.

14 THE CHAIRMAN: We start at tab 3, the Agreement, which tell us that Double Quick Supplyline
15 was a trading name used by Hayward Williams Components Limited.

16 MR. COOK: That is correct.

17 THE CHAIRMAN: We also know that Silverwindow Limited was incorporated on 8th May 2001;
18 that on 12th June 2001 there would be agreement, which is at tab 3, and the business, which
19 was the business of Double Quick Supply was sold to Silverwindow Limited. Double Quick
20 Supply (the name) was part of the goodwill which was sold. So at that moment, if I can put it
21 that way, Silverwindow Limited would have been entitled to use the name Double Quick
22 Supply to trade – whether they did, or they did it a different way, I do not know, but they
23 would have been entitled so to do.

24
25 At para. 8.1.6 of the Agreement, there is a curious, or at least we find it a curious
26 clause. It says:

27
28 “a duly passed shareholders’ resolution of Double Quick Supplyline Limited changed
29 its name.”

30
31 I have only looked at this very briefly and you have probably looked at this much more
32 thoroughly, but I could not find another reference to Double Quick Supplyline Limited. So
33 I do not know if that is a mistake, or if it is leading to a trail of inquiry. Shall I go on and then
34 you will see where we get to?

1 What we do not know is when Double Quick Supplyline Limited was incorporated. We do
2 not have the Certificate of Incorporation or a company search to explain that. So on the
3 documents that we have, that is about as far as we have got – you may have got a bit further,
4 I do not know.

5 Can I now turn it on its head and look at it from a different perspective? The
6 infringement was between 1st March 2000 and 12th March 2002. There are two relevant
7 people as I understand it – a Mr. Stock and a Mr. Mitchell. Mr. Stock was there until June
8 2001 as, I think, the managing director, but I am not sure of what and I will come on to that.
9 Mr. Mitchell was there from 1999 as either operations’ director, or operations’ manager of
10 something, until August 2002. In August 2002 he became managing director of something, or
11 maybe he became managing director earlier, I am not sure.

12 It seems to us that what is relevant is to look and see what company Mr. Stock was,
13 probably “employed by” is the easiest thing, and whether he was an officer of any company
14 during the period of 1st March 2000, to June 2001 when, as I understand it, he disappeared off
15 the scene.

16 Secondly, one does that for Mr. Mitchell. If one identifies the companies that they
17 were employed by and/or were officers of, and then identifies those companies within a group
18 structure, and works out what the group structure is, we would then – it seems to us but subject
19 to what you will say – start understanding the position of where we ought to be starting from in
20 looking at the issues. I do not know if that is helpful – I hope that it is helpful – and I do not
21 know if we could clear that up this morning, so that we have somewhere to start from this
22 morning.

23 MR. WARD: If I may say so it is helpful. It is very much how we see the problem as well. The plot
24 has thickened a little bit as I have said, because we have had this disclosure, which came
25 yesterday morning and which, I have to confess, we have not fully digested, but what is
26 immediately apparent is that there is great importance in the Subscription and Shareholders’
27 Agreement, which is referred to in the Sale Agreement that you have seen – or what you have
28 there is the unsigned draft. We now have the complete Sale Agreement and it is signed. As far
29 as we have been able to tell it is materially the same. It is just that it contains various
30 schedules that you will not have seen. But, what we do have, and are attempting to digest the
31 implications of, is the subscription and shareholders’ agreement which exists as between
32 Plastic Building Materials Limited, which is we understand the owner of DQS Limited and
33 Hayward Williams Group Plc, among others. One of the effects of this subscription and
34 Shareholders’ Agreement is that the Hayward Williams Group took a 20 per cent. interest in

1 the Plastic Buildings Materials company and was entitled to appoint a non-executive
2 investor/director, and thus far we have been able to establish that such a director was appointed
3 and has, indeed, changed at least once during the course of the Agreement.

4 THE CHAIRMAN: Can you tell me, what is the date of this Agreement?

5 MR. WARD: I think it is 12th June 2001. You must have seen it referred to ----

6 THE CHAIRMAN: Yes.

7 MR. WARD: -- at p.5 of the Sale Agreement. At page 5 of the Agreement you will see ----

8 THE CHAIRMAN: The Subscription and Shareholders' Agreement.

9 MR. WARD: Yes, and you will see that it is actually referred to as between the purchaser, which is
10 Silverwindow, and then these various other entities, including there Hayward Williams Group
11 Plc. the document that we have had disclosed is not between the Silverwindow entity but
12 Plastic Building Materials Limited.

13 THE CHAIRMAN: Who was not the purchaser?

14 MR. WARD: No, but was the owner of Silverwindow Limited. That is our understanding. We are
15 piecing together bits of the puzzle as we get ----

16 THE CHAIRMAN: I think we need to get to the bottom of this.

17 MR. WARD: We definitely do. Of course, as you may be aware, there is important case law about
18 how these relationships and control may affect this critical issue.

19 THE CHAIRMAN: We need to get to the bottom of this.

20 MR. WARD: We do.

21 THE CHAIRMAN: That is even more confusing.

22 MR. WARD: We have had **this** since yesterday, but that is not a criticism – it was extremely kind of
23 them to provide it so fast. We need to digest it, we need to know what questions to ask and
24 we need to know what documents to ask for, because again, without being discourteous, we
25 have had different stories here.

26 THE CHAIRMAN: Mr. Ward, what I was suggesting is that we do not do this piecemeal, we try and
27 see what the questions are today to be immediately asked, otherwise one keeps going
28 backwards and forwards, but there are actually some very easy questions to ask, and we should
29 not have to start trying to get pieces of jigsaw and then trying to work it out. We should have
30 the whole jigsaw in front of us.

31 MR. WARD: We would be very grateful for that approach, subject only to the caveat that when we
32 read the detail of this we may have more questions to ask.

33 THE CHAIRMAN: Absolutely.

34 MR. WARD: But the further we get today the better.

1 THE CHAIRMAN: I am not suggesting we start with **that** document, although **that** document has
2 caused another piece of the jigsaw to ----

3 MR. WARD: Fall out.

4 THE CHAIRMAN: Yes. Mr. Cook?

5 MR. COOK: Ma'am, might it help if I just answer some of those questions?

6 THE CHAIRMAN: Yes.

7 MR. COOK: I appreciate that in many cases I will be doing it by mere assertion and those are
8 something that my learned friend will want to test at a later stage with documentation as and
9 when we find it fills the blanks. But if I could help by at least telling you what our position is?

10 THE CHAIRMAN: Yes.

11 MR. COOK: That may answer at least some of the questions provisionally. The first is in relation
12 to Silverwindow Limited. Silverwindow Limited is in fact my client – its name was changed
13 within the 14 day period you identified, to the Double Quick Supplyline Limited, so that is the
14 explanation for the Silverwindow name being used.

15 THE CHAIRMAN: Right, we suspected that.

16 MR. COOK: Absolutely, but I thought I would confirm that. Could I just raise one other point
17 quickly that it may simply have been one said something without meaning it, but you refer to
18 the period of infringement as being 2002, the OFT identified it as finishing on 12th March
19 2003. There was a mistake I think in the summary of the Notice of Appeal that referred to
20 2002 - yes the Notice of Appeal summary does that.

21 THE CHAIRMAN: So what I was saying goes up to 12th March 2003?

22 MR. COOK: That is correct. So Ma'am, the easiest way to deal with some of the structure of this is
23 if you go to appendix 4 to our Notice of Appeal you will see there two structure charts.

24 THE CHAIRMAN: The difficulty with this is ----

25 MR. COOK: I appreciate they are undated ----

26 THE CHAIRMAN: Yes.

27 MR. COOK: -- I will fill in the date.

28 THE CHAIRMAN: Not only that, but something called Hayward Williams Group – is that
29 a company, or what?

30 MR. COOK: It is Hayward Williams Group Plc.

31 THE CHAIRMAN: Hayward Williams Group Plc., and that is a company?

32 MR. WARD: We had understood that the case is now that the business was owned by a company
33 which was a subsidiary of the Plc, which does not appear on this flow chart at all.

1 MR. COOK: Ma'am, I have taken instructions and I understand Hayward Williams Group Plc, one
2 of its subsidiaries was Hayward Williams Components Ltd, as you will see it was a party to
3 this transfer agreement.

4 THE CHAIRMAN: And there is nothing above Hayward Williams Group Plc?

5 MR. COOK: My instructions are "no".

6 THE CHAIRMAN: So if we are doing a flow chart of the company, we have Hayward Williams
7 Group Plc at the top – yes?

8 MR. COOK: Yes.

9 THE CHAIRMAN: We then have a subsidiary which is Hayward Williams ----

10 MR. COOK: Components Limited.

11 THE CHAIRMAN: -- Components Limited, which is the party to this agreement.

12 MR. COOK: Party to the business transfer agreement, yes.

13 THE CHAIRMAN: What else have we got?

14 MR. COOK: That limited company traded as, at least in relation to this bit of its business, as Double
15 Quick Supplyline.

16 THE CHAIRMAN: Right, then Hayward Williams components Limited sold Double Quick
17 Supplyline?

18 MR. COOK: Sold that bit of its business, yes.

19 THE CHAIRMAN: To?

20 MR. COOK: Silverwindow Limited now known as – its name has been changed – Double Quick
21 Supplyline Limited.

22 THE CHAIRMAN: And they changed their name to Double Quick Supplyline. Now, Silverwindow
23 Limited – or Double Quick Supplyline, but it would be Silverwindow Limited at the time ----

24 MR. COOK: Is a wholly owned subsidiary of Plastic Building Materials Limited.

25 THE CHAIRMAN: Wholly owned?

26 MR. COOK: Yes.

27 THE CHAIRMAN: Plastic Building Materials Limited.

28 MR. COOK: PBM.

29 THE CHAIRMAN: Limited, not Plc?

30 MR. COOK: Limited.

31 THE CHAIRMAN: And was Plastic Building Materials owned by anybody? Your solicitor is saying
32 "yes"!

33 MR. COOK: (After a pause): Yes, it is. It is respectively owned by St. Gerard Holdings Plc., which
34 is in turn owned by Precision Concepts Limited, and Precision Concepts Limited is in turn

1 owned by an individual – it is owned by Mr. Sander and his wife. I missed step out of that.
2 The 20 per cent. shareholder interest which Hayward Williams Plc has, that is in PBM.
3 THE CHAIRMAN: PBM is 20 per cent. owned ----
4 MR. COOK: By the Hayward Williams Group Plc.
5 THE CHAIRMAN: And 80 per cent. owned by St. Gerard holdings?
6 MR. COOK: That is correct, as a result of the Subscription and Shareholders' Agreement that was
7 connected to the Business Transfer Agreement.
8 THE CHAIRMAN: So what we have is now a company which was Hayward Williams Components
9 Limited traded as DQSL?
10 MR. COOK: No, DQS.
11 THE CHAIRMAN: DQS, sorry, yes.
12 MR. COOK: It was only part of the business. It presumably had a number of divisions and DQS was
13 the bit they sold to us.
14 THE CHAIRMAN: It probably does not matter for the time being.
15 MR. COOK: Not exactly, it may matter because on that basis they still exist and are trading within
16 their other divisions.
17 THE CHAIRMAN: Anyway, Hayward Williams Components Limited traded as DQS, as well as
18 other things. They were owned by Hayward Group Plc.?
19 MR. COOK: Yes.
20 THE CHAIRMAN: That was the position up to June 2001?
21 MR. COOK: Correct.
22 THE CHAIRMAN: In June 2001 Hayward Group Plc – is that what happened, they bought Plastic
23 Building Materials, 20 per cent. of it?
24 MR. COOK: It was part of the arrangement connected with the transfer of the business.
25 THE CHAIRMAN: All in June 2001.
26 MR. COOK: And that is this agreement that has been handed over now?
27 THE CHAIRMAN: Yes. So they bought 20 per cent. of Plastic Building Materials Limited.
28 MR. COOK: That is correct.
29 THE CHAIRMAN: Which was 80 per cent. owned by some independent ---
30 MR. COOK: It is 80 per cent. owned now, it was 100 per cent. owned.
31 THE CHAIRMAN: Up until then?
32 MR. COOK: Yes.
33 THE CHAIRMAN: Plastic Building Materials Limited, which was owned 100 per cent. by
34 St. Gerard Holdings, which was then owned, etc. etc. to Mr. S.

1 MR. COOK: Yes.

2 THE CHAIRMAN: Sold 20 per cent. to Hayward Group Limited.

3 MR. COOK: No, it was Hayward Group Plc.

4 THE CHAIRMAN: Hayward Group Plc. And, at the same time, the business of DQS was bought
5 by a subsidiary (Silverwindow) of Plastic Building Materials Limited, and the Silverwindow
6 changed its name to DQSL?

7 MR. COOK: You have it absolutely right.

8 THE CHAIRMAN: Right, so that is where we get to there. Now, where were you going to go from
9 that?

10 MR. COOK: Where I was going to go was to the diagrams which I now realise are perhaps even less
11 helpful than I thought before, but if you look at the diagrams that does at least tell you the
12 various responsibilities of individuals. I was starting off with Hayward Williams Group which,
13 as you rightly said, Ma'am, there is a subsidiary there but my understanding is that Mr. Scott
14 was therefore the managing director of the subsidiary, Hayward Williams Components
15 Limited.

16 THE CHAIRMAN: So let us write that down. Mr. Scott was managing director of Hayward
17 Williams Components Limited. Yes?

18 MR. COOK: You will see there over on the left Mr. Mitchell was operations' manager.

19 THE CHAIRMAN: Of Hayward Williams Components Limited?

20 MR. COOK: That would be correct, and both were closely involved in the business trading as
21 Double Quick Supplyline. That is the position up until 12th June 2001.

22 THE CHAIRMAN: Right.

23 MR. COOK: On 12th June 2001 that bit of business is transferred across to Silverwindow – now
24 Double Quick Supplyline Limited – and you will see that some of the staff go with it.
25 Mr. Mitchell goes with it and remains operations' director. Mr. Lea goes as well.

26 THE CHAIRMAN: So Mr. Mitchell goes, but not Mr. Scott?

27 MR. COOK: No, Mr. Scott remains behind.

28 THE CHAIRMAN: And at that point Mr. Mitchell becomes what?

29 MR. COOK: He remains operations' director until the end of 2001.

30 THE CHAIRMAN: Operations' director, or operations' manager?

31 MR. COOK: Operations manager.

32 THE CHAIRMAN: And then what happens?

33 MR. COOK: I understand that the managing director of Double Quick Supplyline Limited was for
34 that period, the first six months, Mr. Ray Smith and then Mr. Mitchell was promoted

1 – Mr. Ray Smith was Chairman and was actually managing director as well. You see that
2 Mr. Mitchell was proposed as managing director from the beginning of 2002 onwards.

3 Ma'am, I think that answers most of the question he posed.

4 THE CHAIRMAN: Shall we ask Mr. Ward if he needs to know anything else?

5 MR. WARD: It is indeed very helpful. As I already intimated, the thing we are most interested in
6 now are the connections between Hayward Williams Group and PBM, and the companies that
7 it owns. We would like to go away and think about what we have been told, think carefully
8 about the documents that we have been disclosed.

9 THE CHAIRMAN: So what you are saying is that we should adjourn for a short while while you
10 can think about all that?

11 MR. WARD: A short while meaning not minutes or a couple of hours, but days, yes, because my
12 clients obviously are faced with the question of whether to make a very substantial concession
13 in this case. Before they do so they need to be sure. These documents are helpful, yes, the
14 information we have had today I helpful. It is not entirely consistent with everything we have
15 been told before, and it may be that we will want to ask for some further documents as well to
16 satisfy ourselves.

17 THE CHAIRMAN: Well I am wondering whether we could deal with that today in order that we
18 can be more effective?

19 MR. WARD: Yes of course. First, of course, we would like documents to verify everything that we
20 are being told. That, perhaps self-evidently is the circumstance. Also we obtained the
21 Subscription shareholders' Agreement by pursuing a line of inquiry on the basis of something
22 that was in the Agreement that was disclosed. There may be other things. We also want to
23 consult the public documents which are available on these various companies, and their
24 various owners.

25 THE CHAIRMAN: Yes, if you did a company search you would find the company structure.

26 MR. WARD: Yes.

27 THE CHAIRMAN: So that is a public document, and either it can be provided or you can do it, but
28 there should be no problem doing that.

29 MR. WARD: Certainly not.

30 THE CHAIRMAN: Is suppose one of the questions is whether you want the employment contracts
31 of the relevant people to see who they were employed by at the relevant time. Would that be
32 relevant?

33 MR. WARD: It would be helpful certainly for the main managerial ----

34 THE CHAIRMAN: Otherwise how do you get that information?

1 MR. COOK: Ma'am, in terms of employment contracts my client will only have the ones after it
2 came into existence post-acquisition. But it will certainly provide those if they are going to be
3 helpful.

4 THE CHAIRMAN: What has happened to Mr. Mitchell now? Is he still employed by you?

5 MR. COOK: He is not.

6 THE CHAIRMAN: He is not.

7 MR. WARD: Obviously we would be particularly interested in Mr. Mitchell's contract, and indeed,
8 Mr. Stock's if that is still held – understandably it may not be.

9 THE CHAIRMAN: Well they will have Mr. Mitchell's employment contracts as DQSL. What they
10 are saying is they would not have Mr. Mitchell's or Mr. Stock's because that was Hayward
11 Williams Components Limited. But what happened on the transfer? Would you not have had
12 it from the transfer?

13 MR. WARD: From incorporation, from the transfer.

14 THE CHAIRMAN: Would you not have the documents on the transfer.

15 MR. COOK: It may be and if we have material like that – we certainly will not have Mr. Stock
16 – because Mr. Stock stayed behind in charge ----

17 THE CHAIRMAN: You should have Mr. Mitchell's should you not?

18 MR. COOK: I think the answer is “we should do”.

19 THE CHAIRMAN: Your solicitor says you should do?

20 MR. COOK: Well, those type of documents should have been given to us then.

21 THE CHAIRMAN: Right, whether they were?

22 MR. COOK: Well not whether they were so much, but whether four years' later we still have an
23 employment contract with somebody who no longer works for us is something we will have to
24 look at, but we should have it – well, we should have had it.

25 THE CHAIRMAN: Otherwise, how are you intending to show – I will not say “prove” – to show
26 who – it does not actually make any difference to the OFT, if the situation is that it is admitted
27 for these purposes that Mr. Stock was the managing director of Components, and that
28 Mr. Mitchell was Operations' Director of components, is that not all you need? Do you need
29 any more, if it is admitted for this purpose?

30 MR. WARD: It may well be that we do not. As I said, what we do not have is a concluded view on
31 this.

32 THE CHAIRMAN: At the moment I am wondering whether you do need any more than an
33 admission.

1 MR. WARD: I think it is admitted that Mr. Mitchell continued to work for the undertaking under its
2 new ownership.

3 THE CHAIRMAN: Yes.

4 MR. WARD: You have also seen attached to the transfer contract, and now we have the full
5 document, that there is a lengthy schedule of employees who were transferred over and
6 Mr. Stock was expressly excluded.

7 THE CHAIRMAN: So you have got that, you know where you are?

8 MR. WARD: I take it, and there may be a concession made which would help us now, but there is
9 no dispute that DQS undertaking remained economically the same even where the ownership
10 changed. If that is in dispute it may mean further lines of inquiry.

11 THE CHAIRMAN: Well we need to explore that a bit.

12 MR. WARD: Well that is perhaps for my friend to address you on.

13 THE CHAIRMAN: yes.

14 MR. COOK: But the DQS business was transferred a cross, management change – Mr. Stock did not
15 come with it. There is a bit of a change, it is then run by PBM essentially so it may have
16 changed thereafter, but as at 11th June 2001, and as at 12th June 2001 when it moved between
17 the ownership of two limited companies there was not a massive change to the business it was
18 carrying out – other than in terms of a few employees changed.

19 MR. WARD: I do not want to put my friend in a difficult position ----

20 THE CHAIRMAN: No, I mean you cannot go as far as you are asking me to.

21 MR. WARD: No, but I think it may assist in the conduct of this Appeal at some stage to get a formal
22 concession or not on this question of whether it is the same economic undertaking that is
23 transferred across.

24 THE CHAIRMAN: I can see that they may not want to make that concession.

25 MR. WARD: If they do not want to make it then the point will have to be fought. That may itself
26 reflect on the question of what further materials are needed to fairly dispose with the appeal.

27 MR. COOK: Ma'am, I am not in a position to make that concession today. It is something we will
28 have to go away and think about in context of – as much as anything else – of where the OFT
29 starts to get this case in forum. Maybe we are in a position to make it, maybe we have to fight
30 it, we will have to see.

31 THE CHAIRMAN: That leaves us with what we are going to do today. Can I just make another
32 comment? We have been wondering and I do not know if it is relevant or not, but there is
33 a CFI Decision and an Advocate General's Opinion in *Kupp Thyssen* – do you know the case?
34 We just wonder if what has been said at all in that case is at all relevant in this one.

1 MR. WARD: I do not think we have looked at it Ma'am. Do you have the T number?

2 THE CHAIRMAN: Yes. T4598 and 4698 – so it is two joined cases; and it's "C" number is
3 C-57/O2P. I suppose in that context one of the issues which might be relevant here is the
4 liabilities for the quantification of penalties in the UK, and under the Competition Act, may not
5 necessarily follow European Jurisprudence – that goes back to what you were saying about
6 undertakings.

7 Is there anything else we can do today, because I think you have to consider whether
8 you want some more documentation? It seems from what has been today it may be that you
9 have got to the end of the road that it is necessary to go down.

10 MR. WARD: I am a little cautious about accepting ----

11 THE CHAIRMAN: No, I know, but hopefully there will be co-operation?

12 MR. WARD: Yes, we would like a little time to consider and to ask for more documentation. If
13 co-operation is maintained it should not take long. This is an important issue but not in truth
14 one's most complex, so I hope that there will be a very small delay to the timetable, but it does
15 not really make sense for us to serve a defence until we have reached a position on this,
16 whether it be a concession or whether it be contested.

17 MR. COOK: Ma'am, my I add that from our point of view obviously we are keen to have the point
18 dealt with as soon as possible ----

19 THE CHAIRMAN: Absolutely.

20 MR. COOK: -- and we will therefore co-operate as much as we can – in the past there has been
21 disclosure of documents within 24 hours and this week we have been tending to demonstrate
22 that is our intention, and subject to the material capable of being found and reasonably to be
23 required it will be disclosed.

24 THE CHAIRMAN: Is there anything else that we can do today, or is it a matter of adjourning it for
25 another Case Management Conference?

26 MR. WARD: That is our overwhelming preference.

27 MR. COOK: Ma'am, from our side I think the question is whether before the next Case
28 Management Conference the Defence should be produced or not? From our point of view
29 however it happens, we would ideally like to the next Case Management Conference knowing
30 where the case was going to go from there. That would ideally involve knowing where the
31 case would go in every way at all. It may be that if a significant concession is made this entire
32 case may go away, and the OFT may want to reconsider their Decision from the start. But it
33 may be it can fight on in some small measure or large measure. But we suggest that the
34 Defence was actually filed before a new CMC.

1 THE CHAIRMAN: Today is 10th February. You do not need very long to decide whether you need
2 some more information.

3 MR. WARD: I think it is more or less a foregone conclusion that we will be asking for some more
4 information on the basis of the preliminary discussions that we had.

5 THE CHAIRMAN: What are you going to be asking for?

6 MR. WARD: Well we do not want to go back on performance repeatedly, but we do want to explore
7 a little more what the links are between these two groups of companies. I do not want to
8 commit myself now because I do not have a final view – I have not even read all of the
9 material in any detail. We are not going to be obstructionist about this of course, nevertheless
10 we do want a chance to think about it. What I was going to ask for was effectively just a two
11 week delay in the timetable while we do that and whilst my friend and his clients have a
12 chance to consider what we ask for.

13 THE CHAIRMAN: If you had a two week delay in the timetable, when would you be putting in
14 your defence?

15 MR. WARD: Well I had hoped to delay that for two weeks as well.

16 THE CHAIRMAN: I am just wondering what the date is?

17 MR. WARD: I am sorry. The Defence is due at the moment on 24th February, so two weeks after
18 that -----

19 THE CHAIRMAN: I am working to a date here, so let me tell you what the date is – we have
20 difficulty with our diaries – we could do a CMC on Tuesday 8th March, so I propose to fix
21 a CMC for that date. If we can work back from that date and work out when you put in a
22 defence so that it is available before that date, then it seems to me to be plenty of time – we are
23 only two days out.

24 MR. WARD: I would ask that we put it in the previous Friday, or sooner of course if we are able.

25 MR. COOK: Ma'am, without wishing to appear obstructionist, to get it on Friday evening which
26 effectively would give us only one day to consider things.

27 THE CHAIRMAN: Yes. Thursday.

28 MR. WARD: Thursday.

29 THE CHAIRMAN: So that is then the 3rd. So the Defence 3rd March, CMC 8th March. Clearly you
30 are co-operating, or trying to co-operate. Hopefully you will not need to have an order, but if
31 you can keep us informed then it may be that we can have a look and see what is going on –
32 that might be useful – on the disclosure.

1 MR. WARD: Certainly Ma'am. My solicitor suggests that it might be helpful if the Tribunal is
2 copied in on any further documents that are disclosed – perhaps not all the party to party
3 correspondence, which is just cumbersome.

4 THE CHAIRMAN: Yes. I think only the party and party correspondence is if it results in the fact
5 that there is no co-operation and you need us to intervene, we might be able to intervene on
6 paper.

7 MR. WARD: Just to flag up a possible issue in the way that you are proposing to dispose of this.
8 We are very content with what you have suggested but it does raise at least the possibility that
9 come 3rd March we are still saying “Actually we still cannot produce our defence.” I very
10 much hope that will not be the case, but ----

11 THE CHAIRMAN: I think perhaps you can produce a document that explains why you cannot
12 produce the final document, but you could produce something. You may have to say that you
13 do not admit something because you have not seen X, Y and Z.

14 MR. WARD: I can readily see how we can do that if it was going to be helpful.

15 THE CHAIRMAN: Yes, but at the moment a lot of the material which you would need you now
16 have from what has been said this morning, and it may be that you can produce your defence
17 subject to the fact that if it went one way **that** was the position, and if it went another way **that**
18 was the position, we would know what the issue was.

19 MR. WARD: Certainly, if it does not become impossibly cumbersome to do it that way, of course
20 we will do whatever is necessary.

21 THE CHAIRMAN: I tell you why, because it does seem to me that one gets down to getting so
22 much information that one knows it is either **this** way, or it is **that** way, but to get the rest of
23 the information it is really disclosure in the proceedings – do you see what I mean?

24 MR. WARD: Yes.

25 THE CHAIRMAN: And you need to join issue.

26 MR. WARD: Yes. We are very content to deal with it in that way.

27 THE CHAIRMAN: So hopefully you will be able to do something by 3rd March and you can see
28 where the issues are.

29 MR. COOK: From our point of view we would hope that any disclosure that is needed could be
30 done before the Defence – it would be nice to see where the entire case is going and, from our
31 side, documents that are reasonably needed they will be given.

32 THE CHAIRMAN: Maybe from your side you ought to be then considering putting yourself in the
33 OFT's position, or putting yourself in your position because you are saying that there is a cut
34 off date here, and the question is “Why are you saying it?” Therefore it is in your interests to

1 produce the documents before they are asked for. So perhaps you could go back and think
2 about that and see if there is information, having heard the way that I have been putting it that
3 would be helpful.

4 MR. COOK: Ma'am, I am going to suggest to my learned friend that we have ten minutes ourselves
5 outside when we finish just to try and see if we can work through ourselves a quick list, an
6 informal list, knowing a more detailed one may follow, so we can start doing some work ----

7 MR. WARD: I am very willing to do that, but I would also reiterate that we would ask that the
8 Appellant produces documents simply to substantiate what my friend has explained this
9 morning.

10 THE CHAIRMAN: Absolutely.

11 MR. WARD: As a minimum.

12 THE CHAIRMAN: Yes. But I think what you are saying is there may be something behind that,
13 which is really evidence – I am not sure how far it goes.

14 MR. WARD: We will reflect and see if there are things that are properly relevant that we should be
15 asking for.

16 MR. COOK: There was a suggestion that we should copy you in on all the documentation disclosed.
17 I was going to suggest it might be better if we disclose all documentation and then agree before
18 the next CMC what material will be helpful, if only that we start disclosing large amounts of
19 documentation ----

20 THE CHAIRMAN: Can I make a suggestion on this? Instead of disclosing us piecemeal, which is
21 quite irritating from our side, why do we not have an agreed bundle for the next hearing which
22 contains the relevant documentation, and why do we not have that by 3rd March as well? So
23 we would have an agreed bundle containing the relevant disclosure by 3rd March.

24 MR. COOK: Can I suggest it be by 4th March. Given I said 4th March was too late, I do not want to
25 do the same thing to you, but it would be silly to prepare a bundle when it may be that
26 whatever comes out of the Defence essentially makes some of these documents irrelevant
27 because their contents are admitted as a matter of fact.

28 MR. WARD: Or the documents are appended as the case may be.

29 MR. COOK: I would suggest the bundle on Friday, which would give us a day to agree between
30 ourselves.

31 THE CHAIRMAN: If you can put in the bundle on the Friday. (After a pause) We would prefer it
32 earlier because we have a problem here in getting to the members.

33 MR. WARD: I am sure we can co-operate sensibly over this.

1 THE CHAIRMAN: And see whether you can do it by the Thursday. If you cannot, then the earliest
2 on the Friday morning, but let us make the order on the Thursday. So we will have an agreed
3 bundle giving all the relevant disclosure by 3rd march. Is there anything else we need on that
4 CMC?

5 MR. COOK: Ma'am, the only thing I would consider was skeleton arguments, whether you wanted
6 shortened submissions again? If so I would suggest that they should be on the Friday.

7 MR. WARD: Assuming we have produced a Defence, it would be largely self-explanatory.

8 THE CHAIRMAN: Why do we not have skeleton arguments by Friday, 4th March. You are going
9 to have to have seen the Defence before you can do that.

10 MR. COOK: Indeed.

11 THE CHAIRMAN: Anything else? (After a pause) Well thank you very much. I hope that the
12 position is resolved by the next CMC.

13 (The hearing concluded at 12.15 p.m.)