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**IN THE COMPETITION**

Case No. 1065/1/1/06

**APPEAL TRIBUNAL**

Victoria House  
Bloomsbury Place  
London WC1A.2EB

21<sup>st</sup> June 2006

Before:  
MARION SIMMONS QC  
(Chairman)

MICHAEL BLAIR QC  
VIVIEN ROSE

Sitting as a Tribunal in England and Wales

BETWEEN:

PRATER LIMITED

Appellant

and

OFFICE OF FAIR TRADING

Respondent

Mr. Ben Rayment (instructed by Shadbolt & Co LLP) appeared for the Appellant.

Mr. Tim Ward (instructed by the Solicitor to the Office of Fair Trading) appeared for the Respondent.

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**CASE MANAGEMENT CONFERENCE**

1 THE CHAIRMAN: Good morning. Can I start by making sure that we understand what is  
2 happening this morning and what is happening this afternoon. As I understand it we are going  
3 to deal this morning with the confidentiality about the names which is a separate matter from  
4 the confidentiality in relation to turnover, and has to be dealt with separately not in front of  
5 everybody else.

6 MR. RAYMENT: That is right, except that we are not pursuing the issue about confidentiality of  
7 names.

8 THE CHAIRMAN: You are not?

9 MR. RAYMENT: No. I know there has been some correspondence about that but we have decided  
10 that we are not going to pursue that. So in terms of confidentiality, Ma'am, the only issue  
11 which arise for us is that we would like to ensure that the outstanding contract – if I can call it  
12 that – remains confidential as far as it is possible to do so during the proceedings.

13 THE CHAIRMAN: The one in which the OFT have not yet made a decision?

14 MR. RAYMENT: That is right, the one they proposed to take action against Prater in this Statement  
15 of Objections but which, when the decision was issued, it was not actually dealt with and it is  
16 still outstanding. As far as we are aware there has been no progress on when a decision on that  
17 issue might be forthcoming, which we say puts us in some difficulties but I will come back to  
18 that.

19 THE CHAIRMAN: So we are not mentioning that name this morning?

20 MR. RAYMENT: No, if that is possible. I do not understand my learned friend to have any problem  
21 with that, and certainly so far as the OFT is concerned at the moment that is information which  
22 they have gathered in the course of an investigation and it is not mentioned in the current  
23 decision. The only problem that I can foresee is the fact that we do make something of that  
24 contract as a basis for our appeal and therefore the situation I think will have to be kept under  
25 review by the Tribunal because it may be that in explaining its reasons for any decision and so  
26 on the Tribunal may feel that it is not possible for it to maintain confidentiality of that. In any  
27 event, there is a further point which is that if the decision is forthcoming it may be difficult to  
28 preserve the confidentiality in any event, but we are just asking at the moment that the ring is  
29 held for the time being.

30 THE CHAIRMAN: So we should shelve the question for the moment, and reopen it at a later stage?

31 MR. RAYMENT: As and when required in the light of developments. That is our position on that  
32 issue.

33 THE CHAIRMAN: All right. So we no longer have an issue on names, we do have an issue on  
34 another case in relation to keeping it confidential for the time being?

35 MR. RAYMENT: Yes, for the time being.

1 THE CHAIRMAN: We then have the timetable?

2 MR. RAYMENT: That is right.

3 THE CHAIRMAN: And, subject to what everybody says, I think the Tribunal's feeling at the  
4 moment is that your penalty case should be heard after, but at the same time, as the Makers'  
5 penalty case, which means trying to timetable it in a way that fits with Makers, which we are  
6 going to do this afternoon.

7 MR. RAYMENT: Yes. That is where there may be more of an issue, because my understanding at  
8 the moment is that the Makers' appeal, comprising both infringement issue and penalty, is to  
9 be heard at a hearing starting on 31<sup>st</sup> July.

10 THE CHAIRMAN: Well during the week of, depending on the Court of Appeal, yes.

11 MR. RAYMENT: We want to persuade you that our portion of the matter should be put back ----

12 THE CHAIRMAN: Counsels' convenience?

13 MR. RAYMENT: It is not just counsels' convenience, there are two other points we say ----

14 THE CHAIRMAN: Right, well let us not go on to that now, but we need to deal with that this  
15 morning.

16 MR. RAYMENT: That is the main issue so far as we are concerned this morning.

17 THE CHAIRMAN: All right. Are there any other issues, Mr. Ward?

18 MR. WARD: I do not believe so, Ma'am, no.

19 THE CHAIRMAN: Do you have anything to say about the problem about the names in the other  
20 case?

21 MR. WARD: No, we are content to leave that to the Tribunal.

22 THE CHAIRMAN: And that we should just leave the matter over for the time being?

23 MR. WARD: The OFT has no position on it one way or the other.

24 (The Tribunal confers)

25 THE CHAIRMAN: We will just leave the name of the case over so we will just see how it  
26 materialises over the next six weeks or whenever.

27 MR. WARD: I am grateful.

28 THE CHAIRMAN: And then see how we deal with it at the time, depending on what happens.

29 MR. RAYMENT: I do not think a formal order is necessary.

30 THE CHAIRMAN: Not at the moment.

31 MR. RAYMENT: But we have mentioned it in our Notice of Appeal, and I suppose what I want to  
32 make clear at this stage is we are not waiving any issue about confidentiality of that for the  
33 moment.

34 THE CHAIRMAN: No, it depends how you do your submissions as to whether it is possible to keep  
35 it because all the facts may come out anyway.

1 MR. RAYMENT: No we understand that and that has been explained.

2 THE CHAIRMAN: So the only matter that now is left is that you are going to try and persuade us  
3 that we should hear the Prater's penalty after liability in Makers and at some other point?

4 MR. RAYMENT: That is right, yes – whether that is together with the Makers' penalty aspects or  
5 not we are not too concerned about that.

6 THE CHAIRMAN: Can I just ask Mr Ward something? I think you said last time, on the Makers'  
7 liability issue the Court of Appeal decisions may be relevant?

8 MR. WARD: They may be in so far as the Court of Appeal is considering the meaning of concerted  
9 practice. I am not aware that there is in truth any overlap at all between the actual contested  
10 issues in the Court of Appeal and the contested issues here. Our submission will be that really  
11 the issues here, or rather in the other case, are issues of fact and at the moment there do not  
12 appear to be any contentious points of law. No doubt if the Court of Appeal reaches its own  
13 formulation for the test for concerted practice that is something that the Tribunal will want to  
14 have regard to in its decision. But it is not my understanding that there is any specific  
15 contested point in those appeals which bears directly upon these, although I have not been  
16 instructed in those matters, so that is somewhat based on hearsay.

17 THE CHAIRMAN: But tangentially they may become relevant.

18 MR. WARD: No doubt we will want to consider them.

19 THE CHAIRMAN: The way that the submissions might be put might be different once you have the  
20 Court of Appeal decision?

21 MR. WARD: Yes, and no doubt formulated in the light of whatever new form of words the Court of  
22 Appeal adopts.

23 THE CHAIRMAN: Do we have any further information in relation to when the Court of Appeal is  
24 likely to produce a decision?

25 MR. WARD: May I just check?

26 THE CHAIRMAN: Yes.

27 MR. WARD: (After a pause) The latest information is just that we do not know. It is not very  
28 helpful, I am afraid.

29 THE CHAIRMAN: No. Well these things take a long time, and it was quite a long hearing for the  
30 Court of Appeal.

31 MR. WARD: It was a lengthy hearing and a great many issues were raised.

32 THE CHAIRMAN: And they have to deal with both cases. Right, Mr. Rayment, where does that  
33 take us?

34 MR. RAYMENT: On the toys and kits Appeal judgment issue, perhaps I can call it that, it is  
35 unusual, we submit, that the Tribunal should be called upon to consider issues which may be

1 relevant to the case before it arising out of the Court of Appeal Judgment. It is unusual that it  
2 should happen so close together. If it was clear that there was going to be a much longer  
3 interval of time between the two then one could see that the arguments in favour of the  
4 Tribunal just going ahead immediately would be stronger, but we say that given the proximity  
5 in time, given the fact that even in the other case it is admitted that there are at least potentially  
6 relevant issues we do say that that militates quite strongly in the Tribunal taking that into  
7 account in setting the timetable. I appreciate the uncertainty about the fact that we do not have  
8 a fixed date for the Court of Appeal Judgment, but nevertheless the timetable to which they run  
9 one can expect it to be ----

10 THE CHAIRMAN: You were not here last time ----

11 MR. RAYMENT: I do not think any of us on this side wee.

12 THE CHAIRMAN: -- but the way the 31<sup>st</sup> July week was fixed was on the basis that of an  
13 anticipation that we would have the Court of Appeal Judgment before the end of the legal term,  
14 and that the case is floating in that week in order that if it does come out on the last day there  
15 will be a few days to put in some further submissions in relation to it. If the Court of Appeal  
16 Judgment does not come out by then, then of course it is not going to come out on that basis  
17 until the beginning of the next term. It is unlikely that they will deliver it during August, I  
18 suspect, I do not know. On that basis we would then have to re-list. I think that is the way we  
19 left it. Is that fair, Mr. Ward?

20 MR. WARD: Yes, that is my recollection.

21 THE CHAIRMAN: So the idea was to try and do it by the week of the 31<sup>st</sup>, but if it turned out that  
22 that was not possible we were going to re-list. Does that assist you? Not really!

23 MR. RAYMENT: Well it does not, although I am grateful for the indication it does not help us  
24 entirely because we also rely on two other points which cumulatively we say again point in  
25 favour of putting it off. In fact, it all becomes mutually beneficial because on the Argos point  
26 it would give everybody time to consider the Court of Appeal's Judgment, not at their leisure  
27 but at least with more time – it is likely to be a big Judgment with implications going in a  
28 number of directions, and the additional points that we make are that we would also like to be  
29 in a position to consider what our position is under the other infringement that the OFT has  
30 suggested they are going to find us liable for, but have not yet taken a decision on. There is  
31 some support for my submission, which is that in considering our position Prater has, in the  
32 interests of fairness, a right to have a view of its position in the round before deciding where  
33 these proceedings are going. There is some support for that in the Judgment of the Tribunal in  
34 the *Hasbro* case, if you are aware of that case – I have brought some copies along just so I can  
35 show you the relevant passage. Would that be helpful?

1 THE CHAIRMAN: Yes. [Document handed to the Tribunal ]

2 MR. RAYMENT: The background to this case – I do not know if the Tribunal is familiar with it –  
3 was that the OFT were pursuing two investigations against Hasbro; one in relation to  
4 agreements with retailers (Argos and Littlewoods) which later became the big retail price  
5 maintenance case, which is on appeal to the Tribunal. It was also investigating Hasbro for  
6 some other vertical agreements with some smaller distributors that it used to distribute its  
7 products. What happened was that the OFT issued the decision in relation to the distributors’  
8 agreement first, and Hasbro, wanting to be able to consider its position as to whether it should  
9 appeal, applied to the Tribunal for an extension of time to lodge its appeal in relation to the  
10 distributors’ case because it wanted to see what the position was in relation to the retailers’  
11 case.

12 The Tribunal, in an earlier decision, rejected that application for an extension of time and said  
13 there were not exceptional circumstances within the meaning of the Rules, but later the OFT  
14 then did issue the retail decision and, in the light of that decision, and the distributors’ decision,  
15 Hasbro then applied to withdraw its appeal, having had the opportunity to consider its position  
16 in the round, and whether it made sense to appeal or not.

17 An issue on the withdrawal application then raised the question of who should pay for the costs  
18 and it is at that point that the Tribunal referred to the legitimate quandary, if you like, that  
19 Hasbro had found itself in and the real difficulty in being able to assess its overall position in  
20 relation to penalty. It made the remark that I would rely on in support of my submission at the  
21 bottom of p.6, starting at line 31, going through to the next page at line 25 – perhaps the  
22 Tribunal would be kind enough to read that to itself.

23 THE CHAIRMAN: Yes. (After a pause) What are the timing dates of this? The original distributor  
24 decision was when?

25 MR. RAYMENT: 28<sup>th</sup> November 2002.

26 THE CHAIRMAN: So they took a distributor decision 28<sup>th</sup> November 02, and what did they  
27 indicate at that stage about the retail decision?

28 MR. RAYMENT: Again, I must be careful – I am not sure it appears from the ----

29 THE CHAIRMAN: Because at that p.3 reference it says:

30 “When the Distributor Decision was taken on 28<sup>th</sup> November 2002, the Retail  
31 Investigation was still open. Apparently that investigation had been held up, we are  
32 told, by threats of judicial review of some aspects of the procedure followed in that  
33 case.. At all events, the Retail Investigation had still not been concluded by the time  
34 Hasbro’s time for appealing the Distributor Decision was due to expire on 29<sup>th</sup>  
35 January.”

1           They then applied for an extension of time for lodging their appeal.

2   MR. RAYMENT: That is correct.

3   THE CHAIRMAN: And that is refused.

4   MR. RAYMENT: That was refused. The Tribunal said you have to do effectively what we have  
5           done in this case, which his to lodge our appeal insofar as we are able against what we have  
6           got, but in my submission ----

7   THE CHAIRMAN: But is what you are really saying, that it should lie on the table until the other  
8           decision?

9   MR. RAYMENT: Well in unusual cases like this where things are running in parallel, yes, I do  
10           submit that. In many ways our case here is stronger than the case in Hasbro, because in  
11           Hasbro those were actually separate investigations albeit running in parallel, whereas here we  
12           have actually got a case where are dealing with a contract that is specifically mentioned in the  
13           statement of objections that led to the decision in question. It seems unreasonable that we  
14           cannot be given even an indication of when this further decision is going to come from the  
15           OFT, if it is going to come at all. That would help everybody.

16   THE CHAIRMAN: It appears that the second *Hasbro* decision was made on 19<sup>th</sup> February, which  
17           was effectively ----

18   MR. RAYMENT: Pretty quickly afterwards.

19   THE CHAIRMAN: Pretty quickly. We do not know what the indications were.

20   MR. RAYMENT: I would not want to give evidence but I was involved in that case and, as usual, I  
21           think the OFT said that it hoped that it would be able to produce a decision pretty quickly but,  
22           for understandable reasons was not going to absolutely commit itself. But in this case we have  
23           not even got an indication of that nature, as far as I understand it. I am sure my learned friend  
24           will put me right.

25   THE CHAIRMAN: That is right, there is no indication?

26   MR. WARD: No. The position is simply that that other case is under active consideration at the  
27           moment.

28   MR. BLAIR: But it is also the submission of the OFT, I think in the defence, that that case is  
29           completely separate, sealed off in is own compartment and has no relevance to what we are  
30           engaged in now.

31   MR. WARD: Essentially yes, the case in the defence is that a potential future penalty for another  
32           infringement does not bear upon the penalty which is currently under appeal.

33   THE CHAIRMAN: Nothing to do with proportionality between the two?

34   MR. WARD: That could arise and we have accepted that in the defence. If a further penalty is  
35           issued in the future in respect of another infringement, as we have said in the defence it would,

1 of course, be open to the appellant to come back before the CAT in that case and say that the  
2 cumulative effect of the two penalties is somehow disproportionate, or somehow infringes the  
3 principle of equal treatment. But what the Tribunal is currently faced with is an appeal against  
4 a penalty which undoubtedly has been issued, and to that extent we say the possible future  
5 penalty is simply irrelevant.

6 But that, of course, is one of the quantum issues that CAT will have to decide when this case  
7 comes to hearing.

8 THE CHAIRMAN: I assume that this other case involves other people as well whom you have not  
9 made a decision in relation to either?

10 MR. WARD: I assume that too, but if I may I will just get confirmation.

11 MR. RAYMENT: I am not sure that is right.

12 MR. WARD: Yes, that is right, Ma'am. It is collusive conduct and there are other colluding parties  
13 involved allegedly.

14 (The Tribunal confer)

15 MR. RAYMENT: Ma'am, you will notice on p.3 of the Tribunal's judgment in the *Hasbro* case, at  
16 line 34 that of course in that case: "The Director [as he then was] submitted that the two  
17 investigations were quite separate ..." and therefore in their boxes as Mr. Blair said. But  
18 nevertheless the Tribunal, when it came to its conclusion said it could not rule out the fact that  
19 they were interlinked, the possibility of different methodologies being applied, or the question  
20 of overall totality which always comes into penalty issues.

21 Perhaps more importantly I should emphasise that Hasbro in that case should have been in a  
22 position to consider its position on the extant appeal in light of the overall picture. I think that  
23 was the key point that the Tribunal ended up focusing on in the passage that I have invited you  
24 to read, and we say that applies here, given that we cannot be talking about a significant delay  
25 in this decision being issued.

26 Those are our submissions on that aspect. We say that it has been recognised that we are  
27 entitled to consider our position overall in the light of the infringements that are proposed to be  
28 made against us and it is particularly notable about this case that the proposed infringement  
29 that has not been dealt with yet was in the same statement of objections as the contracts for  
30 which we have been acknowledged.

31 THE CHAIRMAN: The other parties, would you know whether there were also statements of  
32 objections put to them in relation to that as well?

33 MR. RAYMENT: Well insofar as the OFT had identified in the statement of objections that we have  
34 been colluding with people they would have had the same statement of objections.

1 THE CHAIRMAN: They were not, so everybody is at the same stage. So really what you are  
2 asking us to do, as I understand it, is to stay effectively your appeal until after the new case  
3 has had a decision?

4 MR. RAYMENT: Yes, that is effectively correct, no doubt having been informed by the OFT as to  
5 what sort of time frame they think is possible. They must have some idea given how long this  
6 has been going on. There is no particular urgency in this type of case we would respectfully  
7 submit. Obviously there is always an interest in deciding cases as expeditiously as possible,  
8 but we think balancing expedition and efficiency the way forward is to accommodate the  
9 OFT's taking of that further decision within the timetable.

10 THE CHAIRMAN: They are not indicating at the moment what their timetable is.

11 MR. RAYMENT: I appreciate that but, with respect ....

12 MR. BLAIR: Can I ask you a question, Mr. Rayment? What do you say about the offer in the  
13 defence, as it were, that the matter can be regulated the second time around?

14 MR. RAYMENT: I can see that that has some force, but I do not think that it addresses the issue  
15 about us being able to consider our overall position in relation to this decision now. For  
16 example, if the penalty imposed for this other infringement is extremely small, and I do not  
17 know whether that is a possibility or not, but if it is one might well consider one's position in  
18 relation to this appeal. This is purely hypothetical, you understand but that was the position  
19 that Hasbro was facing and, indeed, when Hasbro then found out what its penalty was in  
20 relation to the retail decision it decided to withdraw its appeal in relation to the distributors'  
21 decision, because whatever the merits these appeals are expensive and so on. In these types of  
22 cases where there is a close link between, in the Hasbro case those two investigations and, in  
23 this case, where it actually arises out of the same statement of objections, we say that is not an  
24 unreasonable thing to expect before we have to make final decisions.

25 THE CHAIRMAN: Are those your submissions?

26 MR. RAYMENT: So those are my submissions on the first two points as to why we say we prefer  
27 not to go ahead in the week of 31<sup>st</sup> July, that is the points relating to the kit and toys appeals.  
28 Secondly, this issue about the outstanding contract, and thirdly, is the point about the  
29 availability of counsel. Now, we entirely appreciate on this side that the Tribunal cannot  
30 possibly run proceedings on the basis of the availability of counsel, but we think cumulatively  
31 – taken together with the other circumstances – we do think that respectfully that is a factor  
32 that the Tribunal could take into account.

33 May I, in that regard, remind the Tribunal that these points have been set out in the note that  
34 you have received from us.

35 THE CHAIRMAN: Shall we hear what Mr. Ward says?

1 MR. RAYMENT: Yes.

2 MR. WARD: The OFT does not have a strongly felt position on this point. It is unusual, and  
3 perhaps surprising to hear an appellant asking for a delay in effect before the determination of  
4 what is their appeal; the OFT would obviously prefer things to be dealt with as quickly as is  
5 reasonably and sensibly possible. There is also the point that this case does substantially  
6 overlap with that of Makers, and the Tribunal might anticipate that Makers might not be so  
7 enthusiastic about a delay to its proceedings, because there is obviously procedural economy in  
8 both the liability and quantum issues all being heard together. We submitted on the last  
9 occasion that it could all be done in two days and we would be very unhappy about the  
10 prospect of increased costs by somehow splitting up the issues, or indeed the parties. There is  
11 clearly benefit in hearing the whole thing together.

12 As to the decision on the other infringement, it is right that it was mentioned in the statement  
13 of objections but it is also right to say that it involves a wholly separate contract. It is nothing  
14 to do with the factual basis of this case – it is a further allegation of collusion but in respect of  
15 a completely different bid. That investigation has not yet reached a decision but I can say that  
16 it is at a reasonably advanced stage. I cannot say more than that, I cannot possibly commit the  
17 OFT to any kind of timetable.

18 Here, unlike Hasbro, there has not been an application for an extension of time in which to file  
19 the notice of appeal, except of course retrospectively for 39 minutes. But it has not been said  
20 that the notice of appeal cannot be lodged. In fact, so far as the other contract is prayed in aid,  
21 what is really said is that somehow the uncertainty of that contract causes prejudice to the  
22 appellant and that uncertainty, obviously, would be resolved away one way or another by the  
23 decision. But, what you are being asked to do in effect is to stay this appeal indefinitely,  
24 because I cannot commit to a particular date for the decision. The new term begins on 2<sup>nd</sup>  
25 October in fact, so if we are to wait for the decision in ‘toys and football kit’, and if that  
26 decision does not come before the summer then one can see the time table for this appeal  
27 straggling a long way into the winter which we do respectfully submit is not terribly desirable  
28 and, indeed, we may be here on 10<sup>th</sup> October, complete with the toys and kit decision but no  
29 determination by the OFT in the other case, and we would still be hearing presumably the same  
30 submission that yet more time should be allowed.

31 THE CHAIRMAN: Can you just tell me, in the Hasbro case was the distributorship part and the  
32 retail part somehow much more connected?

33 MR. WARD: I can take instructions, I was not involved in that litigation.

34 MR. RAYMENT: The Director, of course, submitted that they were completely separate.

1 THE CHAIRMAN: But apart from that were they more connected than this? Were they two  
2 completely separate or was there some interconnection?

3 MR. WARD: I cannot help on this side with that.

4 MR. RAYMENT: I think the point was it was difficult to say what the connections, if any, would be  
5 until one had seen the decision, I think that was the main point being made.

6 THE CHAIRMAN: Yes, but by the time this decision of 3<sup>rd</sup> March, they had seen both decisions.

7 MR. RAYMENT: Yes, it was in light of that that they withdrew ----

8 THE CHAIRMAN: Absolutely.

9 MR. RAYMENT: Yes.

10 THE CHAIRMAN: So when the President was making the remarks he made, was he making them  
11 in the context of very intertwined matters, or was he making them in the context of two very  
12 separate matters?

13 MR. RAYMENT: I think in relation to the specific issues raised in each investigation he said that it  
14 was possible at the stage that Hasbro had to consider it that there were links, plus there was this  
15 other point which was that in order to consider whether to continue its appeal generally, and  
16 whether it was worth the candle and all the rest of it on that aspect Hasbro needed to be able to  
17 see how it was going to be sanctioned.

18 THE CHAIRMAN: It might be in the context of them being interlinked, and therefore deciding  
19 which bits to fight, rather than being two separate contracts, two completely independent  
20 incidents or events.

21 MR. RAYMENT: I am sorry, I probably have not made myself clear. What I am saying is that there  
22 was an issue about whether there were specific issues that interlinked them, plus there was a  
23 second issue which was the fact that in the end of both decisions potentially imposed a penalty  
24 and that was linking factor in the sense for Hasbro in deciding whether or not to press on and  
25 that was a factor that the Tribunal took into account. So even if there were not the specific  
26 links, although we say that there may be, there is still the second point about the overall  
27 consideration of our position vis-à-vis an appeal.

28 MR. WARD: Just two short further points, if I may, on that? One can see the force of Mr.  
29 Rayment's submission if, at some subsequent point his client seeks to withdraw its appeal in  
30 the light of the OFT's decision in the other matter. All he is really asking for today is an  
31 indefinite stay on the wholly speculative basis that (a) ultimately a penalty is imposed upon his  
32 client in that other matter, which is still an open question; and (b), if it is, it somehow gives  
33 rise to some form of argument that might be deployed against the penalty in this case. There is  
34 a link insofar as they were both contained in the same statement of objections, but they are

1 separate allegations. In my respectful submission that is a very tenuous basis upon which to  
2 seek what may well prove to be a very lengthy stay on this appeal.

3 THE CHAIRMAN: Yes, if you look at p.7 of the *Hasbro* decision that we are looking at, and if you  
4 look at line 8:

5 “At the time when they were obliged to lodge their decision in the Distribution case,  
6 Hasbro was not in a position to see the whole picture, either as to the total amount of  
7 the penalty being imposed for the infringements in question which related to a similar  
8 time period in the same market, and concerned the same products.”

9 MR. WARD: Well that cannot be said in this case.

10 THE CHAIRMAN: No, that is what I was asking. It looks as if what he was saying was in the  
11 context of that.

12 MR. WARD: Yes, you will have seen from the defence at least, if not the decision, that the other  
13 infringement, whilst being involved in flat roofing in a general sense, and stemming from the  
14 same investigation quite critically in fact to the notice of appeal was in fact involved in a  
15 different market. That forms the basis of the complaint in the notice of appeal which is before  
16 you.

17 THE CHAIRMAN: It is a different market, a different time frame – is it? It may not be, the same  
18 time frame.

19 MR. WARD: The same time frame.

20 THE CHAIRMAN: But different market, different people.

21 MR. WARD: Different parties on the other side – the parties in the alleged collusion are different,  
22 and the only connection is, in truth, it is a flat roofing matter, and it has been dealt with in a  
23 global decision which deals with a large number of separate infringements.

24 THE CHAIRMAN: And a different third party involved?

25 MR. WARD: I will just check, but I believe so. (After a pause): It is a different third party. (After a  
26 pause) In fact, I am told the same third party is involved in both the matter under appeal, and  
27 the further possible penalty. Nevertheless, it is a totally separate contract.

28 THE CHAIRMAN: The same third party, different potentially colluding parties?

29 MR. WARD: I am sorry, I have not been clear. It is a different employer but the other colluding  
30 party – allegedly colluding party – is in fact the same, but separate market, separate  
31 infringement, separate contract.

32 MISS ROSE: Mr. Rayment, your client’s situation is roughly the same as Walker’s situation in the  
33 decision. If you look at paras. 909, 910 of the decision you can see that they were in the  
34 position that some of their infringements had been already decided in what is called the  
35 *Scottish Roofing (1)* decision, but that one contract was left over to be dealt with in this

1 decision, and the OFT took account of that by not calculating the fine afresh, as it were, but  
2 rather imposing a fine which it would have imposed had this been the eleventh infringement in  
3 the *Scottish Roofing (I)* decision, rather than a single infringement in this separate decision.

4 MR. RAYMENT: You will forgive me, I have not read the whole of the decision overnight, because  
5 it was a fairly late return. Was the point there that the deterrence component of the penalty at  
6 least had been effectively meted out in the previous decision and therefore that was taken into  
7 account in this decision, and it was ----

8 MISS ROSE: They do not refer particularly to deterrence, it is more in relation to the repeated  
9 infringements being an aggravating factor, but I am not sure how your situation now differs  
10 from the situation in which Walker found themselves, or whether that would be a satisfactory  
11 way of dealing with it?

12 MR. RAYMENT: I understand that that approach has some relevant to our case, but I still come  
13 back to perhaps what I say is the key point, which is that the Tribunal did acknowledge in  
14 *Hasbro*, we submit, that where there are substantial infringements that are close in time, and  
15 are related to some extent, it is fairer if we are given the opportunity to be able to assess  
16 whether or not to appeal in the light of what the OFT is going to do on that outstanding  
17 decision. That is a more general point, I think, which is not so specifically related to issues  
18 about whether in the second decision the OFT can take into account the first decision and  
19 modify the penalty accordingly.

20 THE CHAIRMAN: At the moment I do not understand – putting myself in your client’s shoes –  
21 why the second decision may make them decide that they are not going to appeal the first  
22 decision. In the first decision they have been fined, they look at everybody else’s fines, and  
23 they say – as I understand it – they have been fined too much. Why is that going to change  
24 when the second decision comes out?

25 MR. RAYMENT: There are costs of various kinds in mounting these appeals and not just in terms  
26 of legal costs and one in some circumstances decides to take things on the chin and not appeal.  
27 That was the decision in *Hasbro* and ultimately *Hasbro* decided to take the penalty in the  
28 Distributors’ case on the chin, given that it was not going to be penalised in relation to the  
29 retail decision. The Tribunal, it seems to me, acknowledged that difficulty, and although the  
30 Tribunal said “you cannot argue for an extension of time in which to put in your appeal on that  
31 basis, you could legitimately be entitled to take that into account in deciding your future course  
32 of action.”

33 THE CHAIRMAN: So what you are really saying is that you started the appeal because you have  
34 to?

35 MR. RAYMENT: Yes.

1 THE CHAIRMAN: But you want to now wait for the other decision and if it turns out that  
2 financially you think that is about right between the two of them you will not continue the  
3 appeal and therefore you do not want to incur the costs of the appeal.

4 MR. RAYMENT: That is correct.

5 THE CHAIRMAN: But if you think about all these roofing cases that would mean that in a lot of the  
6 roofing cases there are the same parties involved in the various decisions, and there have been  
7 a number of decisions, it would mean that nobody would actually have an appeal heard until  
8 the end because there may be another decision in which they become involved.

9 MR. RAYMENT: I see that in general, but in the specific circumstances of this case, here we have a  
10 situation where the OFT is telling us that our request is indefinite and speculative, yet at the  
11 same time they are saying that their decision is at an advanced stage. Given the particular  
12 circumstances of this case we say that it is not asking too much to produce the decision and to  
13 wait a bit, given that there are other considerations involved as well. It is slightly unusual; we  
14 are not saying that the Tribunal is setting any general precedent in this case if they decided that  
15 it was appropriate to elongate the timetable a bit on the penalty question.

16 THE CHAIRMAN: You would say because it was included in the statement of objections in any  
17 event it was all part of the same thing?

18 MR. RAYMENT: And that is important from a fairness point of view.

19 THE CHAIRMAN: Sorry, did we interrupt Mr. Ward, or did he finish?

20 MR. WARD: No, ma'am, thank you.

21 MR. RAYMENT: Excuse me, ma'am. (After a pause) Thank you.

22 THE CHAIRMAN: We will adjourn for five minutes so that we can discuss the matter.

23 (The hearing adjourned at 10.48 a.m. and resumed at 11.05 p.m.)

24 THE CHAIRMAN: The application before us is, in effect, to stay the Prater's Appeal until after the  
25 OFT has made a decision in respect to a separate roofing contract. The statement of objections  
26 in relation to the matter now the subject of this Appeal also contained the objections in that  
27 separate matter. However, the OFT did not issue the decision in that separate matter at the  
28 same time as issuing the present decision and they have told us today that the investigation in  
29 that separate matter is at an advanced stage but that they can give no indication as to when any  
30 decision might be issued. In those circumstances we do not consider it appropriate to stay the  
31 present appeal. The fact that the Appellant may be fined in relation to a separate infringement  
32 is not a sufficient reason for staying an appeal against an existing decision. Any future fine  
33 can be calculated in the context of the results of the present appeal. We note that the OFT took  
34 account of similar circumstances at paras. 908 – 910 of the present Decision. Accordingly we  
35 dismiss Prater's application for a stay.

1 We consider that the most efficient timetabling is for Prater's Appeal on the fine to be heard  
2 immediately following the Makers' Appeal on the fine. At present the Makers' Appeal is  
3 floating on 31<sup>st</sup> July on the basis that we summarised earlier. We understand that submissions  
4 are to be made in relation to timetabling in the Makers' Appeal this afternoon, so it may be that  
5 the date for the hearing needs to be revisited this afternoon.

6 Can we now deal with all the other case management conference issues and leave over the  
7 timetabling until this afternoon? If we can go through the agenda?

8 - The forum is England and Wales.

9 - Permissions to intervene – I do not think there are any.

10 - It should be heard consecutively, we have decided that.

11 - To undertake preliminary discussions of the issues?

12 MR. RAYMENT: I do not think that is necessary.

13 THE CHAIRMAN: No – agreed?

14 - Establish further documents necessary.

15 There probably are none, are there?

16 MR. RAYMENT: Not at the moment, there may be an issue this afternoon about turnover figures, I  
17 understand.

18 THE CHAIRMAN: Yes.

19 - Disclosure

20 That is this afternoon.

21 - Confidentiality.

22 The only confidentiality is in relation to this afternoon.

23 MR. RAYMENT: The issue I have raised, yes.

24 THE CHAIRMAN: There will not be any witnesses, will there?

25 MR. RAYMENT: No.

26 THE CHAIRMAN: Are there any agreed facts?

27 MR. RAYMENT: I do not think there are any material facts in dispute – no, not primary facts.

28 THE CHAIRMAN: The defence has already been served.

29 - Directions for preparation and conduct of the hearing.

30 I think we should deal with Makers this afternoon.

31 MR. RAYMENT: And also the filing of any further documents, or is it going to be convenient to  
32 deal with that issue this afternoon as well, and skeletons, and possibly a reply.

33 THE CHAIRMAN: Yes, because we cannot work out the dates unless we know ....

34 MR. RAYMENT: Indeed.

1 MR. WARD: Perhaps one point that could be dealt with now is any timetable for a potential reply.  
2 Makers, of course, asked for time to serve a reply but then did not do so, so perhaps Prater  
3 would like the same facility.

4 MR. RAYMENT: We would like the opportunity, if so advised, to file a reply.

5 THE CHAIRMAN: And how long do you want?

6 MR. RAYMENT: 14 days.

7 MR. WARD: I am sure there is no objection to that.

8 THE CHAIRMAN: This afternoon starts at 2.30 and unfortunately has to finish at 4.30. We have  
9 sent a message to Mr. Robertson, who is, I think, appearing for Makers. I wonder if it might  
10 be possible, because you now have some time between now and 2.30, if a timetable was  
11 provisionally agreed for a hearing in the week of 31<sup>st</sup> July, so that we do not have to work out  
12 the times at 4 o'clock or whatever time we get to it, but that we have some idea of how we ill  
13 do it. That might be useful – I am not holding anybody to it, and when I say “agreed” I mean  
14 some form of timetable.

15 MR. WARD: Yes, I will ring Mr. Robertson ----

16 THE CHAIRMAN: -- and see whether that can be done, because the timetable for Prater is very  
17 short on to that, once the Makers’ one is done. That then leaves the confidentiality. I assume  
18 the same problems of confidentiality arise in Prater as in Makers.

19 MR. WARD: They are precisely the same third parties.

20 THE CHAIRMAN: Absolutely. So one way forward may be to deal with it in a confidentiality ring  
21 and I do not know if the parties have thought about that?

22 MR. WARD: I think both Makers and Prater have written to the OFT and the Tribunal to suggest  
23 that a confidentiality ring would be appropriate. The OFT certainly has no objection to that  
24 proposed course of action. As I made clear at the last case management conference and, of  
25 course, as is obvious, it is really not the OFT’s confidential information that is at stake, so we  
26 are very much taking a back seat in that issue.

27 THE CHAIRMAN: It may be that between now and 2.30 that may be potentially resolved between  
28 you as to how to deal with that, so that if we go down that line – I am not saying anything  
29 because Mr. Robertson is not here – because I am concerned that otherwise if there has not  
30 been some advanced thought about this we may not be able to finish at 4.30 and I am afraid we  
31 have to finish at 4.30. Perhaps that message could go back.

32 MR. WARD: If I can speak to Mr. Robertson I will try and draw up a proposed draft order, working  
33 back from a trial date without fixing a particular trial date given that it is floating.

34 THE CHAIRMAN: Our indication is the idea that it is floating in that week on the basis that the  
35 appeal decision will have been made, and the Court of Appeal will have come up with a

1 decision by the end of Term. The way that my mind was thinking, one way of doing this  
2 would be that assuming that one was going to put in skeleton arguments, say, a week before, so  
3 there is a week before that which is the preparation of the skeleton arguments. If it became  
4 clear at that stage that there was going to be no decision by the last day of Term an application  
5 could be made on that basis which would save having to do the skeleton arguments, and we  
6 could then decide whether it comes out. Then, of course, it is going to have to go over until  
7 October, because I assume the Court of Appeal are not going to give a decision during the  
8 summer.

9 MR. WARD: May I just explore that a little further, ma'am, so I understand what you have in mind.  
10 Obviously, the preparation of skeleton arguments will take some time internally – it is not the  
11 sort of case one can do in three hours. There will be a date for providing skeleton arguments to  
12 the Tribunal – I think you suggested one week before the hearing – one would need to take a  
13 view perhaps a week before that to know whether the skeleton arguments should be proceeded  
14 with. Thinking out loud that takes us to something like the middle of July. The thought,  
15 therefore, is to perhaps review the position in the middle of July, see if the Court of Appeal's  
16 decision has come out, see if any Judge's clerk can be prevailed upon to give any kind of  
17 indication, and then apply to the CAT if matters have clarified.

18 THE CHAIRMAN: Yes.

19 MR. BLAIR: I think our minds were all working on the same direction. What I was suggesting is  
20 that if this is going to be listed for two days, the latest we could do it is on Thursday 3<sup>rd</sup>  
21 August, so if one worked out skeleton arguments assuming that that was the latest date, we  
22 would then find, and we may have to decide this afternoon on a point of no return, as it were,  
23 the latest date for going nap on the 3<sup>rd</sup> would be a date when we either did have or did not have  
24 the Court of Appeal decision.

25 MR. WARD: I wonder if there might be something to be said for simply fixing the case for those  
26 last two days in that window in the sense that there cannot be any really material prejudice to  
27 any party whether the case starts on the Monday or the Thursday, and then the time table can  
28 be fixed subject only to the possibility of vacating it if we still do not have the decision.

29 MR. BLAIR: What if it takes more than two days?

30 MR. WARD: The possibility that it might take more than two days seems to be really rather remote  
31 in my respectful submission.

32 THE CHAIRMAN: The reason it was done the first time the way we did it is that if it was all  
33 available it would be more convenient for the Tribunal to do it on a Monday and Tuesday than  
34 a Thursday and Friday for other reasons.

35 MR. WARD: Well that is a separate matter then.

1 THE CHAIRMAN: It may be that we now have to overcome those reasons. That is the way our  
2 minds, as you can see, are working. I think that is where we were last time, and it is really  
3 only repeating it in slightly more words. It may be that two and a half weeks before the end of  
4 Term the Court of Appeal might give an indication as to whether or not they were going to be  
5 able to do this or not. If we did do it on the Thursday and Friday, as long as the Court of  
6 Appeal decision was out by Monday that would be sufficient.

7 MR. WARD: I would expect so, given that in truth it is unlikely to have a radical effect on the issues  
8 in this case.

9 THE CHAIRMAN: Yes, we all know it is not going to be that difficult to deal with it I would not  
10 have thought.

11 MR. WARD: I hope not. I will do my best to speak to Mr. Robertson before 2.30.

12 THE CHAIRMAN: And Mr. Rayment you can convey that back – I do not know if you are coming  
13 back at 2.30?

14 MR. RAYMENT: I am not quite sure myself.

15 THE CHAIRMAN: Well either you, or Mr. Bowsher.

16 MR. RAYMENT: Yes, thank you.

17 THE CHAIRMAN: If you could convey that and see whether that can all be put together. I hope  
18 that was helpful.

19 MR. RAYMENT: I am grateful.

20 THE CHAIRMAN: Thank you. 2.30.

21 (The hearing adjourned at 11.25 a.m)  
22  
23