Neutral citation [2013] CAT 5

IN THE COMPETITION APPEAL TRIBUNAL

27 March 2013

Before:

MARCUS SMITH Q.C.
(Chairman)

Sitting as a Tribunal in England and Wales

Case No.: 1197/1/1/12

B E T W E E N :

(1) SOMERFIELD STORES LIMITED
(2) CO-OPERATIVE GROUP FOOD LIMITED

Applicants

- and -

OFFICE OF FAIR TRADING

Respondent

Case No.: 1200/1/1/12

B E T W E E N :

(1) GALLAHER GROUP LIMITED
(2) GALLAHER LIMITED

Applicants

- and -

OFFICE OF FAIR TRADING

Respondent

Heard at Victoria House on 30 November 2012

RULING

APPEARANCES

Mr. Rhodri Thompson Q.C. and Mr. Christopher Brown (instructed by Burges Salmon LLP) appeared for the Applicants in Case Number 1197/1/1/12.

Mr. Jon Turner Q.C. and Mr. Alistair Lindsay (instructed by Slaughter and May) appeared for the Applicants in Case Number 1200/1/1/12.

Mr. Daniel Beard Q.C., Mr. Andrew Henshaw and Mr. Brendan McGurk (instructed by the General Counsel, Office of Fair Trading) appeared for the Respondent in Case Number 1197/1/1/12 and Case Number 1197/1/1/12.

I. INTRODUCTION

1. These are applications by the Applicants for extensions of time in which to lodge appeals against a decision taken by the Office of Fair Trading (the "OFT"). Before coming to the substance of the applications, however, it is necessary to set out a little background.

2. On 15 April 2010, the OFT issued a decision entitled "Case CE/2596-03: Tobacco" (the "Decision"). The Decision was addressed to the following parties (who were identified in paragraph 1.2 of the Decision):

   (1) Imperial Tobacco Group plc and Imperial Tobacco Limited ("Imperial");

   (2) Gallaher Group Limited and Gallaher Limited ("Gallaher");

   (3) Asda Stores Limited, Asda Group Limited, Wal-Mart Stores (UK) Limited and BroadStreet Great Wilson Europe Limited ("Asda");

   (4) The Co-operative Group Limited (the "Co-op");

   (5) First Quench Retailing Limited, Thresher Wines Acquisitions Limited and Thresher Wines Holdings Limited;

   (6) Wm Morrison Supermarkets plc ("Morrisons");

   (7) One Stop Stores Limited;

   (8) Safeway Stores Limited and Safeway Limited ("Safeway");

   (9) Sainsbury's Supermarkets Limited and J Sainsbury plc;

   (10) Shell U.K. Limited, Shell U.K. Oil Products Limited and Shell Holdings (U.K.) Limited ("Shell");

   (11) Somerfield Stores Limited and Somerfield Limited ("Somerfield"); and

   (12) TM Retail Limited and Martin McColl Retail Group Limited.

I shall refer to these parties collectively as the "Addressees". The same paragraph of the Decision also made a distinction between "Manufacturers" and "Retailers". Imperial and Gallaher were each a "Manufacturer" and, together, "Manufacturers"; the other Addressees were each a "Retailer" and, together, "Retailers".

3. The Decision found that the two main manufacturers of tobacco products in the United Kingdom (Imperial and Gallaher) had each entered into a series of bilateral agreements with various retailers relating to the pricing of tobacco products in those retailers' stores. The Decision found that these agreements (referred to in the Decision as "Infringing Agreements") contained certain restrictions in relation to the retail prices that could be charged for competing cigarette brands and had, as their object, the prevention, restriction or distortion of competition in the United Kingdom, and were thus infringements of the prohibition set out in section 2(1) of the Competition Act 1998 (the "1998 Act"). More specifically, to quote from paragraph 1.6 of the Decision, "pursuant to each Infringing Agreement, a Retailer was to price particular brands of the Manufacturer's tobacco products at retail prices which implemented that Manufacturer's desired pricing relativities between its brands and the brands of a competing Manufacturer. Those requirements were commonly referred to by the Parties as the Manufacturer's parity and differential requirements".

4. Some of the Addressees entered into so-called "early resolution agreements" with the OFT. Addressees who did this included Gallaher, Somerfield and Asda. These agreements did not preclude those Addressees who were party to them from appealing. Asda, for example, chose to appeal the Decision, despite having entered into an early resolution agreement with the OFT. But the early resolution agreements in effect provided for a significant discount to the penalties levied by the OFT in the event of the Addressees not appealing. The nature and terms of these early resolution agreements are considered in greater detail later on in this Ruling in Section V. (see paragraph 32 and following).

5. The fact that early resolution agreements were entered into by certain Addressees does not alter the fact that the Decision was (expressly) addressed to all Addressees. The Decision (in particular, Section 6, which provides the

OFT's analysis of the Infringing Agreements) describes the conduct of all Addressees, including Gallaher, Somerfield and Asda, in some considerable detail.

6. What is more, although (as I have noted in paragraph 3 above) the Decision focused on the restrictions contained in a series of bilateral agreements, there was an interplay between these various agreements. The Decision states as follows:

> "1.15 Both Manufacturers communicated parallel and symmetrical parity and differential requirements to the same Retailer and there is evidence that each Manufacturer must have been aware of the other Manufacturer's parallel and symmetrical parity and differential requirements.
>
> 1.16 The fact that each Manufacturer had agreed parallel and symmetrical requirements with the same Retailer provides further support for the OFT's case that the Infringing Agreements gave rise to the observance of parity and fixed differential requirements in relation to competing brands. This is because Retailers could only implement *both* Manufacturers' pricing relativity requirements by adhering to parity or fixed differential pricing. For example, symmetrical agreements that provided in one agreement that brand X must be no more than brand Y, and in the other agreement that brand Y must be no more than brand X, could only be satisfied by pricing brand X and brand Y at the same level.
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> 1.17 The existence of parallel and symmetrical Infringing Agreements is part of the context of each Infringing Agreement and is relevant to how the Manufacturer and the Retailer party to an Infringing Agreement would have viewed the requirements imposed under each Infringing Agreement, since a Retailer was party to a similar Infringing Agreement with each Manufacturer and the Manufacturer was party to a similar Infringing Agreement with each Retailer.
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> 1.18 Further, the long-term implementation of the Manufacturers' parallel and symmetrical parity and differential requirements meant that each Manufacturer could predict with even greater certainty retail price movements in relation to the Manufacturer's own brands and those of the competing Manufacturer. Where a parity requirement existed, for example, each Manufacturer could increase the price of its brand with relative certainty that its competitor (given its equivalent parity and differential requirements) would do likewise via the Retailer to restore its parity and differential requirements.
>
> 1.19 When the Infringing Agreements are viewed in the legal and economic context in which they operated (in particular, that Manufacturers, representing 90 per cent (by volume) of the relevant market at the time, had agreed parallel and symmetrical parity and differential requirements with a number of Retailers), the reduction in uncertainty on the part of each Manufacturer as regards its horizontal competitor's likely market behaviour resulting from the Infringing Agreements enabled the Manufacturers to achieve or maintain a degree of stability in relation to inter-brand competition

> which was similar to that which would have resulted from horizontal price co-ordination between competitors."

7. Thus, although only bilateral arrangements were alleged as between Manufacturers and Retailers, it is plain that the OFT was contending that these bilateral agreements formed a part of a wider network of similar anti-competitive agreements (all bilateral), which together operated to control the whole sector.

8. Six of the Addressees appealed the Decision to (a differently constituted panel of) this Tribunal: Imperial; Asda; the Co-op; Morrisons; Safeway and Shell (collectively, the "Appellants"). Somerfield and Gallaher did not appeal. In each appeal that was brought, the Appellants challenged both the findings of infringement and the penalty. Those appeals were heard by the Tribunal over a number of days in September, October and November 2011. The Tribunal's decision in *Imperial Tobacco Group plc & Ors v Office of Fair Trading* [2011] CAT 41 ("*Tobacco I*") was handed down on 12 December 2011.

9. In the application of competition law, the need to demonstrate a coherent "theory of harm" in relation to agreements having the object or effect of preventing, restricting or distorting competition has long been appreciated by competition authorities. In the Decision, the theory of harm contended for by the OFT related to the nature of the restraints said to be imposed by the Infringing Agreements. The theory of harm put forward by the OFT was – until matters came to a head on Day 26 of the proceedings before the Tribunal in *Tobacco I* – generally accepted as having been articulated (at least in summary form) in paragraph 40 of the OFT's Skeleton to the Tribunal and, for that reason, the restraints in question were referred to in *Tobacco I* as the "paragraph 40 restraints" for short (*Tobacco I* at [28] and [29]). That terminology is adopted here.

10. The OFT did not, however, in the *Tobacco I* proceedings up to Day 26, put the case articulated in the paragraph 40 restraints to the various factual witnesses called by the Appellants and cross-examined by counsel for the OFT (*Tobacco I* at [31]). On Day 26, the OFT accepted that the theory of harm that it had

articulated could not be maintained and, thereafter, it sought to advance an alternative theory of harm, which was referred to by the Tribunal in *Tobacco I* as the OFT's "Refined Case" (*Tobacco I* at [39]). That terminology is again adopted here. For reasons which are explained in detail in the Tribunal's decision in *Tobacco I*, the Tribunal declined to allow the OFT to persist with the Refined Case, and instead set aside the Decision as against the Appellants, and allowed the appeals.

11. Section IV. of this Ruling (paragraph 19 and following) considers in greater detail the conduct and outcome of the *Tobacco I* proceedings. In particular, it considers the relationship between the paragraph 40 restraints and the restraints contained in the Refined Case, and the manner in which one theory of harm came to be abandoned, and another advanced. For the present, however, all that needs to be noted is that the appeals in *Tobacco I* came to an abrupt – and, for the Appellants, extremely successful – end.

12. The Applicants – Gallaher and Somerfield[1] – did not appeal the Decision. They now apply for permission to extend the time to appeal pursuant to Rule 8(2) of the Competition Appeal Tribunal Rules 2003 (S.I. No. 1372 of 2003, the "Tribunal Rules"). Rule 8 of the Tribunal Rules provides (insofar as is material) as follows:

> "(1) An appeal to the Tribunal must be made by sending a notice of appeal to the Registrar so that it is received within two months of the date upon which the appellant was notified of the disputed decision or the date of publication of the decision, whichever is the earlier.
>
> (2) The Tribunal may not extend the time limit provided under paragraph (1) unless it is satisfied that the circumstances are exceptional."

13. Gallaher relies also on Rule 19(2)(i) of the Tribunal Rules, which provides that the Tribunal may give directions "as to the abridgement or extension of any time limits, whether or not expired." Both Applicants accepted that, whichever the applicable rule, in order to succeed, it was incumbent on them to demonstrate the existence of "exceptional circumstances".

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[1] As is noted in paragraph 2(11) above, Somerfield Limited was an addressee of the Decision. On 1 January 2011, all engagements (assets and liabilities) of Somerfield Limited were transferred to Co-operative Group Food Limited. Save where the contrary is stated or the context otherwise requires, all references to "Somerfield" include reference to Co-operative Group Food Limited.

II. THE CONTENTIONS OF GALLAHER AND SOMERFIELD

14. Gallaher and Somerfield each contend that the circumstances in this case are exceptional and that the time limit should be extended so as to enable them to file a notice of appeal with the Registrar. These contentions were set out in considerable detail in writing and expanded upon in oral submissions before me on 30 November 2012. This Section seeks to set out the main points advanced by Gallaher and Somerfield.

15. Gallaher contends that the circumstances are exceptional because:

(1) The terms of the Decision (as drafted by the OFT) were "apt to mislead recipients as to the nature of the case being made against them" (paragraph 6 of Gallaher's 25 July 2012 application). Gallaher suggests that, at the time it received the Decision, it took the view that the Decision contained "something resembling" the Refined Case, which the OFT later sought to advance before the Tribunal. In *Tobacco I*, the Tribunal held to the contrary and found that the theory of harm contained in the Decision was limited to the paragraph 40 restraints, and did not contain the Refined Case. Gallaher's 25 July 2012 application explained the significance of this as follows:

> "7. ...Gallaher concluded that the Decision *did* involve a finding of infringement based on something resembling what are now known as the Refined Case Restraints. It was only as a result of following proceedings in the [Tribunal] and reviewing the Tobacco Judgment that Gallaher was able to appreciate that the Decision was limited to the lockstep theory [i.e. to the paragraph 40 restraints].
>
> 8. The OFT should have drafted the Decision with sufficient clarity for Gallaher to understand, on first receiving it, that it was limited to the [paragraph 40 restraints]. Had the OFT ensured that Gallaher was presented with a Decision that it might reasonably understand, Gallaher would have appealed as it had explained in detail to the OFT during the administrative procedure why [the paragraph 40 restraints were] not sustainable.
>
> 9. Having learnt that the Decision was based solely on the [paragraph 40 restraints] (and that the OFT was not pursuing an investigation against the successful appellants in relation to the Refined Case Restraints), Gallaher contacted the OFT to request it to repay the penalty.

10. Had the OFT / HM Government agreed voluntarily to repay the penalty, the present application would be unnecessary..."

(2) In *Tobacco I*, the OFT ran a case before the Tribunal based on the paragraph 40 restraints, which: *(i)* was not put to witnesses by the OFT; *(ii)* when put to those witnesses by the Appellants, was denied by them; and *(iii)* was abandoned in its entirety, with the OFT then seeking to run a different case – i.e. the Refined Case (paragraph 47.1 to 47.2 of Gallaher's 25 July 2012 application). This is argued in the alternative by Gallaher.

16. Somerfield's contentions are summarised in its 13 July 2012 application:

"2. In summary, this application arises as a result of the extraordinary and unprecedented conduct of the OFT in respect of the earlier appeals against the Decision, as described in particular in [*Tobacco I*].

3. Somerfield contends that this conduct on the part of the OFT has lead to "exceptional circumstances" for the purposes of Rule 8(2) of the [Tribunal] Rules:

(a) The wholesale abandonment of the OFT's theory of harm presented in the Decision was unprecedented and unforeseeable. The OFT's conduct was not the result of an unexpected development in the evidence as it unfolded before the Tribunal. On the contrary, the witness evidence was found by the Tribunal to have remained consistent throughout. The inevitable consequence of the abandonment by the OFT of the core reasoning set out in the Decision was that the Decision was annulled in its entirety in relation to the appellants in the earlier appeal proceedings.

(b) Having recognised that the case in the Decision was unsustainable, the OFT compounded its extraordinary behaviour by seeking to persuade the Tribunal that it should take on the role of primary decision-maker on the basis of an unpleaded "Refined Case" put before the Tribunal in the form of a short note. Again, this conduct was wholly unprecedented and unforeseeable.

(c) The OFT has now indicated, in correspondence with Somerfield, that it does not intend to investigate whether its so-called "Refined Case" does in fact support findings of infringement of the Competition Act 1998... Again, given the length of time that the OFT had investigated this matter, it was unprecedented and unforeseeable for the OFT simply to abandon the case against the appellants to the earlier appeals.

4. So far as Somerfield is concerned, the effect of the OFT's behaviour since November 2011 is that:

(a) Somerfield is now the subject of a Decision that has been annulled as a whole as against the majority of the addressees of the Decision by concession of the OFT that, on the OFT's own evidence, the theory of harm in the Decision cannot be supported.

(b) The OFT has therefore received a very substantial sum of money in respect of Somerfield on the basis of a Decision that the OFT itself now recognises cannot be defended.

(c) The alternative basis on which the OFT sought to defend a finding of infringement, the "Refined Case" raised before the Tribunal, has been ruled to fall outside the scope of the Decision and the jurisdiction of the Tribunal, is not being pursued against the appellants in the earlier proceedings, and has never been advanced against Somerfield.

(d) The OFT has not purported to advance any other new or alternative case against Somerfield on the basis of which it could justify retention of the penalty that it has imposed or the legal findings made against Somerfield.

5. None of this behaviour could reasonably have been anticipated by Somerfield at any time prior to November 2011.

6. Moreover, it is contrary to the principle of legal certainty for the Decision to be annulled in respect of the appellants in the earlier proceedings but to be allowed to stand in respect of Somerfield:

(a) The terms of sections 47A, 47B, 58 and 58A of the Competition Act 1998..., which render findings of infringement and fact binding in subsequent civil proceedings, are completely inconsistent with both the OFT's concession that the case set out in the Decision cannot be supported and the annulment of the entire Decision [as against the Addressees that appealed] by the Tribunal in the Judgment.

(b) A further anomaly, were the Decision to be permitted to stand against Somerfield but not against the appellants in the earlier appeals, would be that Somerfield would not only be statutorily bound by findings that the OFT had recognised to be unsupported and that the Tribunal had annulled, but would also be unable to seek a contribution from [Imperial] as the counterparty to the Imperial/Somerfield agreement, given that the Decision in relation to that very agreement had been annulled as against Imperial."

The "subsequent civil proceedings" referred to by Somerfield in paragraph 6(a) of its contentions was a reference to follow-on damages claims.

17. Somerfield also suggested that the early resolution agreement signed by it supported its case for an extension of time. Paragraph 11 of Somerfield's 13 July 2012 application stated:

> "On 10 July 2008, in response to a letter of 8 July 2008 from the OFT setting out the terms on which the OFT would resolve its investigation into the infringements that it considered had been committed by Somerfield (and which are set out in the Appendix to that letter), Somerfield entered into an Early Resolution Agreement with the OFT ("the Agreement"), a copy of which is appended to the Decision. The Agreement expressly provided that the OFT would adopt a decision that would "as to substance... set out the OFT's findings of the facts which had taken place in materially the same form as set out in the Statement [of Objections]" (paragraph 6.a.i) and, by necessary implication, included an obligation on the part of the OFT to defend that decision: see paragraph 2 of the Agreement."

III. COMMON GROUND

18. For the purposes of these applications, the following points were common ground:

    (1) That the Decision had – as a result of *Tobacco I* – been quashed as against the Appellants, but remained in force as against Gallaher and Somerfield (as well as any other non-appealing Addressee). Indeed, that is made expressly clear by the terms of the decision in *Tobacco I* (which states at [61] and [96] that the Decision was set aside or quashed as against "these appellants") and by the order consequential upon the decision in *Tobacco I* made on 22 December 2011 (which orders that "the Decision [be] quashed in relation to the appellants"). If the Appellants' successful appeal had caused the Decision to cease to have effect against Addressees which had not appealed the Decision, Gallaher and Somerfield would not have needed to make these applications.

    (2) That the passage of time between the handing down of the judgment in *Tobacco I* (on 12 December 2011) and the making of the applications (on 13 July 2012 in the case of Somerfield and 25 July 2012 in the case of Gallaher) was not relevant for the purposes of these applications and the OFT took no point on this. (It goes without saying that the passage of time between the making of the applications, and the hearing of the applications, which occurred in accordance with a timetable put in place by the Tribunal is similarly irrelevant.) It was common ground that the critical period for the purposes of these applications lay between the

expiry of the ordinary period for appealing the Decision[2] and the dates on which, shortly after the decision in *Tobacco I* was handed down, both Somerfield and Gallaher intimated to the OFT a desire that the Decision as against them be quashed or otherwise set aside and that the penalties paid by them to the OFT be returned.

(3) That there was a broad overlap between Gallaher's second (alternative) contention (summarised in paragraph 15(2) above) and Somerfield's contentions (summarised in paragraph 16 above) such that, were Somerfield's contentions to succeed, so too must Gallaher's second (alternative) contention. On the other hand, Gallaher's primary contention (summarised in paragraph 15(1) above) was specific to Gallaher's position and was neither advanced nor adopted by Somerfield.

IV. THE PROCEEDINGS BEFORE THE TRIBUNAL IN *TOBACCO I*

19. The proceedings before the Tribunal in *Tobacco I* were long and complex. The Tribunal noted in *Tobacco I* at [4] that in order "[t]o understand why we are now bringing these appeals to an end without being in a position to decide the many important legal and factual issues they raise, it is necessary to explain in some detail what has happened".

20. It would be wrong, in determining these applications, to re-visit the holdings and findings made by the Tribunal in *Tobacco I*. No doubt everyone has their view as to why the proceedings in *Tobacco I* came to the end that they did, and no doubt many of those views would diverge. Mr Beard Q.C., leading counsel for the OFT, put the matter well at the hearing (see Transcript, page 71), when he said:

> "For the OFT's part, it looks at the decision [of the Tribunal], it does not look at all of it with great warmth. I am sure there are those behind me that disagree quite fundamentally with some parts of what the Tribunal has said in relation to the way in which the OFT presented its case. There are no doubt people not here who consider that the criticisms of the way in which they presented the case are not fair. Those matters, to some extent, have to be left to one side here."

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[2] Rule 8(1) of the Tribunal Rules provides that: "An appeal to the Tribunal must be made by sending a notice of appeal to the Registrar so that it is received within two months of the date upon which the appellant was notified of the disputed decision or the date of publication of the decision, whichever is the earlier."

21. None of the parties suggested that I should seek to re-visit – in the sense of re-opening the issues for fresh determination – why *Tobacco I* came to the end that it did. In this, they were entirely right. It would be both undesirable in principle and impossible in practice for this (differently constituted) Tribunal to seek to re-open the very difficult questions grappled with and determined by the Tribunal in *Tobacco I*.

22. However, on a number of occasions in submissions before me, I was invited to look at material other than the decision in *Tobacco I* and to draw my own conclusions from this material. I have resisted these invitations. It seems to me that an important corollary arises out of the undesirability of re-opening issues already determined by the Tribunal in *Tobacco I*. Whilst, no doubt, all of the parties, and indeed some interested observers of the *Tobacco I* proceedings like Somerfield and Gallaher, might have their own views as to how and why the proceedings in *Tobacco I* came to an end, and could no doubt deploy material in support of such views, the only view that is relevant for the purposes of this application is that of the Tribunal in *Tobacco I*. For this reason, the following description of the *Tobacco I* proceedings, and statement of why those proceedings came to an end, draws on the terms of the judgment in *Tobacco I* itself, and not on other materials.

23. The investigation which led to the Decision began in March 2003. During the course of that investigation, the OFT sent out over 30 notices requesting documents and information. The statement of objections was issued by the OFT in April 2008 (*Tobacco I* at [5]). The Decision itself was adopted on 15 April 2010 (*Tobacco I* at [7]). The early resolution agreements between the OFT and (respectively) Gallaher and Somerfield were signed well before this, on 28 June 2008 (Gallaher) and 10 July 2008 (Somerfield).[3] The OFT's theory of harm, as set out in its skeleton to the Tribunal, and as apparently relied on by the OFT until Day 26 of the *Tobacco I* hearing, was based upon the paragraph 40

[3] Somerfield also benefited from conditional partial leniency (in addition to the discount in the early resolution agreement), which was said to have been granted in connection "with agreements relating to the retail prices to be charged by Somerfield for tobacco and tobacco-related products": Decision, paragraph 2.92 and footnote 25. A copy of this agreement was not before me and I have not taken it account.

restraints (*Tobacco I* at [28] to [29]). However, during the course of the OFT's cross-examination of the witnesses called by the Appellants, the OFT did not put its case to the witnesses on the basis of the paragraph 40 restraints (*Tobacco I* at [31]), but rather appeared to be putting a different case (*Tobacco I* at [32]). This was the subject of adverse and critical comment by the Appellants during the course of the proceedings up to Day 26 (*Tobacco I* at [31] to [33]).

24. Matters came to a head on Day 26 (3 November 2011), when leading counsel for the OFT, Mr Lasok Q.C., in response to a request for clarification from the Tribunal) stated (in what was referred to as the "Day 26 Statement", *Tobacco I* at [35]):

> "...we think, having looked at the evidence in the round as it has come out, that the Decision has, to put it loosely, been cast too narrowly. If you like, it has identified a particular mechanism or method of implementation that gives rise to the anti-competitive harm. But in some of the cases before the Tribunal, it looks as though the same end result, that's to say the same anti-competitive harm, results or may result in a different way, which is not captured sufficiently clearly in the Decision. When I say "sufficiently clearly", one can look at the Decision and seek to read it in different ways, but at the end of the day, you know, a decision has a particular legal meaning, the Tribunal decides what the legal meaning of the Decision is, and it is clearly open to the Tribunal to conclude that on the legal meaning of the Decision, it's too narrow to capture some of the permutations that we have seen in the evidence."

The Tribunal's understanding of the OFT's position is set out in *Tobacco I* at [49].

25. The OFT then outlined two possible ways forward. The Tribunal described these in *Tobacco I* at [36]:

> "Mr Lasok then outlined two possible routes by which the Tribunal could arrive at what he called "the correct result". The first was that the OFT could invite the Tribunal to deal with the appeals in exercise of its powers under paragraph 3(2)(d) and (e) of Schedule 8 to the 1998 Act, "expanding the case in the Decision to the alternatives that arise from the evidence". The second route was for the OFT to amend the Decision by removing the Infringing Agreements currently before the Tribunal and, if it considered appropriate, to issue a new statement of objections seeking to capture all the alternatives that the evidence had thrown up. Mr Lasok acknowledged that going down the Schedule 8 route required serious consideration of the practicalities and procedural consequences. He also recognised that if the OFT decided instead to amend the Decision and issue a new statement of objections, these appeals would now be brought to an end. Mr Lasok indicated that the OFT had not

yet finalised its view as to which of the two courses the OFT would invite the Tribunal to take."

26. It is clear from the Tribunal's description of the OFT's submissions that the OFT was not (at this stage) contending that the proceedings could continue on the basis of the theory of harm so far articulated. Neither of the two possible routes advanced by the OFT suggested the proceedings continuing on the basis of the Decision as it stood. On the contrary, either:

    (1) The Tribunal had to expand the case made by the OFT in the Decision by reference to the alternatives arising from the evidence before the Tribunal, using its powers under Schedule 8 to the 1998 Act; or

    (2) A new statement of objections, seeking to capture all the alternatives that the evidence had thrown up, would have to be issued.

    There was, at this stage, no suggestion that the proceedings could continue on the basis of a theory of harm different from the paragraph 40 restraints but, nevertheless said to be, within the scope of the Decision, such as the Refined Case restraints. It is fair to say that the precise relationship between the Decision, the paragraph 40 restraints and the Refined Case restraints (which emerged subsequently, and which are considered below) was never made particularly clear. What is clear from the decision in *Tobacco I* is that the OFT's position on these difficult questions shifted between 3 November 2011 and 9 November 2011. The Tribunal's understanding, as I have noted, is set out in *Tobacco I* at [49]. In any event, the OFT's contentions as at this date involved an acceptance that the Decision could not be defended on its terms, but required amendment and revision, either pursuant to Schedule 8 or on the back of an entirely new statement of objections.

27. The Tribunal adjourned the hearing and directed the OFT to provide a written statement clarifying its position (*Tobacco I* at [37] to [38]). A statement, which (for the first time) stated the OFT's Refined Case, was provided on 9 November 2011 (*Tobacco I* at [39]). The OFT's primary case was no longer that advanced by it on 3 November 2011. Rather, the OFT contended that "the restraints set

out in paragraph 2(a) and (b) of the Refined Case...'reflected part but not the whole of the Decision'. The appeals could and should proceed on that basis" (*Tobacco I* at [40]).

28. The OFT's alternative position on 9 November 2011 was what had previously been its primary position on 3 November 2011 – namely that the Tribunal should expand the case in the Decision by reference to the alternatives arising from the evidence, using its powers under Schedule 8 to the 1998 Act.

29. It is clear that the Tribunal considered that the OFT's new primary case (i.e. that the Refined Case was in fact contained within the Decision) ran contrary to what the OFT had submitted on 3 November 2011 in its Day 26 Statement:

> "50. The Day 26 Statement was, we assumed, made on instruction in response to the request made three days earlier by the Tribunal seeking clarification of the OFT's case on precisely those issues. The Tribunal and the parties were entitled to treat it as the OFT's considered view. We are satisfied that the OFT did concede that if the case it wished to put forward at that stage went outside the paragraph 40 restraints, that would require the Decision to be set aside. In that event, the only question for the Tribunal would be whether to keep the appeals going in order to exercise its powers under paragraph 3(2)(e) [of Schedule 8] to make a new decision.
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> 51. It was therefore striking that the Refined Case, served a few days later, alleged two restraints which were clearly not the same as any of the paragraph 40 restraints and yet the OFT still maintained that the Refined Case "reflected a part but not the whole of the infringement found in the Decision". The Refined Case made no reference to the concession that had been made on Day 26, either to ask the Tribunal's permission to withdraw that concession or to explain how the Refined Case fitted with the Day 26 Statement or with the paragraph 40 restraints."

30. Despite the concession it found the OFT had made on Day 26, the Tribunal declined to determine matters on the basis of the concession alone. The Tribunal considered the substance of the OFT's submissions – both on the scope of the findings in the Decision and on the question of the possible exercise by the Tribunal of its Schedule 8 powers – and concluded:

    (1) That the Decision did not include findings of infringement by the OFT regarding the Refined Case. Given that the OFT had abandoned its defence of the Decision beyond arguing that the Refined Case was part of

it, the Tribunal concluded that the Decision must be set aside as against the Appellants (*Tobacco I* at [61]); and

(2) That the Tribunal did not have jurisdiction, under Schedule 8, to continue the hearing of the appeals on the basis of the Refined Case (*Tobacco I* at [75]) and that – even if it did – the Tribunal would exercise its discretion against continuing the appeals (*Tobacco I* at [95(c)]).

31. Accordingly, the appeals were allowed, and "the Decision quashed in relation to these [A]ppellants" (*Tobacco I* at [96]).

V. THE EARLY RESOLUTION AGREEMENTS

32. Gallaher and Somerfield did not participate in the *Tobacco I* proceedings. They had entered into early resolution agreements with the OFT and, when the Decision was issued by the OFT, chose not to appeal it (although they could have done, as indeed Asda did). The early resolution agreements were in letter form. In the following sub-paragraphs, quotations are from the agreement that the OFT concluded with Gallaher. But, for present purposes, there is no material distinction between the Gallaher and Somerfield early resolution agreements, and nothing should be read into the fact that I am quoting from one, and not the other. In each case, the early resolution agreements:

(1) Noted that the OFT "proposes to make a decision in terms of the Statement of Objections... (the 'Statement')".

(2) Observed Gallaher's (or Somerfield's) "willingness to admit its involvement in relation to all of the infringements that" were applicable to it. These infringements were set out in an appendix to the early resolution agreement. The letter went on to say that "this letter (the 'Agreement') sets out the terms upon which the OFT would be prepared to resolve its investigation of the infringements…".

(3) These terms included the following:

> "1. Gallaher will, by signing the Agreement, admit its involvement in the infringements on an object...basis.

2. Gallaher will maintain continuous and complete co-operation throughout the investigation and until the conclusion of any action by the OFT arising as a result of the investigation; and reference to such action includes any action taken by the OFT in any proceedings before the Competition Appeal Tribunal (the 'CAT') arising from a decision of the OFT in connection with the infringements.

...

4. The OFT will accept from Gallaher a concise memorandum indicating any material factual inaccuracies in the Statement... Should the memorandum, in the opinion of the OFT, go so far as to contest Gallaher's liability for all or any part of the infringements or represent that the penalty should be other than as set out in the Agreement, or otherwise exceed the scope identified in the previous sentence, the OFT will notify Gallaher of its concerns. Should Gallaher not agree promptly to amend its representations in a manner which satisfies the OFT, the OFT may treat any agreement on the terms set out in the Agreement as ceasing to have effect and shall notify Gallaher accordingly.

...

6. The OFT will adopt a decision in respect of the infringements which will:

   a. as to substance,

      i. set out the OFT's findings of the facts which had taken place in materially the same form as set out in the Statement..., subject to any amendments deemed necessary and appropriate by the OFT as a result of the representations referred to in paragraph 4 or equivalent representations from other recipients of the Statement...;

      ii. note Gallaher's admission as to involvement in the infringements and conclude that such infringements had been committed;

      iii. have a copy of the Agreement annexed to it."

Paragraph 6.b set out the OFT's approach as to remedy. It is not necessary to set out this part of the letter. All that needs to be noted is that the penalties imposed on both Gallaher and Somerfield were substantial, and that "[a] reduction of up to 20 per cent is available for procedural co-operation with the OFT's investigation".

Going back to the terms of the early resolution agreement:

"7. In relation to the infringements, if Gallaher brings appeal proceedings before the CAT in respect of the OFT's decision, the OFT reserves the right to make an application to the CAT:

a. to increase the penalty imposed on Gallaher in relation to the infringements; and

b. to require Gallaher to pay the OFT's full costs of the appeal regardless of the outcome of the appeal.

...

10. In relation to the infringements, in the event that Gallaher wishes to withdraw its admission, seek access to documents on the file other than those relied on in the Statement..., or submit representations that exceed the scope envisaged by paragraph 4 above, Gallaher will notify the OFT that it is terminating the Agreement. All terms of the Agreement, including but not limited to the agreed final penalty and procedural co-operation reduction referred to at paragraph 6 above, will then cease to have effect and the OFT will pursue its investigation in accordance with the normal procedures.

11. The OFT may, subject to the provisions of paragraph 12 below, terminate the Agreement and impose a penalty in accordance with section 36 of the Competition Act 1998 in relation to the infringements if, at any time before the conclusion of the case including any proceedings before the CAT (whether by adopting a decision or otherwise), it determines that the conditions in paragraphs 1 to 8 above have not been complied with.

12. Before terminating the Agreement, the OFT shall serve written notice to Gallaher of the nature of the alleged non-compliance and that the OFT is considering terminating the Agreement with Gallaher. Gallaher will then be given a reasonable opportunity to respond to the notice and to remedy any breach within a reasonable period of time from the service of the notice."

33. There is, unsurprisingly, a close link between the statement of objections, the early resolution agreements and the Decision. The Decision is a decision regarding infringements by <u>all</u> Addressees, including Gallaher and Somerfield, yet the early resolution agreements were concluded <u>between</u> the date of the statement of objections and the date of the Decision, i.e. before the Decision was made, as is plain from the quotation at paragraph 32(1) above.

34. Clearly, it would be invidious for an addressee of a decision to enter into an early resolution agreement and to co-operate with the OFT on the basis of admitting its involvement in certain, defined infringements, only to find that the

decision ultimately adopted found the existence of materially different infringements. Of course, there would be nothing to stop an addressee in those circumstances appealing such a decision but the fact would remain that the addressee's co-operation through the early resolution agreement would have been procured on the basis of a false premise, namely that the decision ultimately adopted would reflect the statement of objections and the admissions made previously.

35. Hence the obligation on the OFT, in paragraph 6.a.i of the early resolution agreements, to adopt a decision setting out the OFT's findings of fact which had taken place "in materially the same form" as set out in the statement of objections.

36. Where certain allegations of infringement contained in the statement of objections, and admitted to by a party entering into an early resolution agreement, are not pursued by the OFT and do not feature in the decision finally made by the OFT, this narrowing of the OFT's allegations is generally reflected in the early resolution agreements, although precisely how this is done appears to vary. Thus, in the case of the OFT's infringement decision entitled "Case CE/3094-03: Dairy retail price initiatives", the early resolution agreements were varied by amendment to reflect the fact that certain allegations in the statement of objections were not pursued in the decision: see *Tesco Stores Limited & Ors v Office of Fair Trading* [2012] CAT 31 at [31(f)] and [96].

37. In this case, the OFT, Gallaher and Somerfield proceeded in a different way. The early resolution agreements were not formally varied by amendment: rather, those parts of the OFT's statement of objections that were not pursued in the Decision were "redacted" from the early resolution agreements appended to the non-confidential version of the Decision: Transcript, pages 37 to 39. Clearly, however, the parties proceeded on the basis that the allegations in the early resolution agreements had been narrowed to the extent of the redactions.[4]

[4] This is clear, for example, from paragraph 12 of Somerfield's application dated 13 July 2012, which states: "The Decision was adopted on 15 April 2010. Although the terms of the Decision were materially narrower than the case advanced in the Statement of Objections..., the findings made against Somerfield in the Decision remained within the scope of that case

VI. EXTENSIONS OF TIME FOR PERMISSION TO APPEAL

(1) Introduction

38. The Tribunal's *Guide to Proceedings* (2005), issued by the President pursuant to Rule 68(2) of the Tribunal Rules, states at paragraph 6.14 that "[t]he possibilities of obtaining an extension of time for appealing are... **extremely limited**" (emphasis as in original). This reflects the test of "exceptional circumstances" contained in Rule 8(2).

39. In this Section:

    (1) The Tribunal's case law on "exceptional circumstances" is considered: Section VI.(2) (paragraphs 40 to 48 below);

    (2) The assistance that can be drawn from other jurisprudence is briefly adverted to: Section VI.(3) (paragraphs 49 to 52 below); and

    (3) The Tribunal's general approach to extending time for appealing is considered: Section VI.(4) (paragraphs 53 and 54 below).

(2) The Tribunal's case law on "exceptional circumstances"

40. The Tribunal has considered the question of what amounts to "exceptional circumstances" under Rule 8(2) of the Tribunal Rules in a number of rulings: *Hasbro UK Limited v Director General of Fair Trading* [2003] CAT 1 ("*Hasbro*"); *Prater Limited v Office of Fair Trading* [2006] CAT 11 ("*Prater*"); *British Sky Broadcasting Group plc v Competition Commission* [2008] CAT 1 ("*BSkyB*"); *Fish Holdings Limited v Office of Fair Trading* [2009] CAT 34 ("*Fish*"); *RG Carter Limited v Office of Fair Trading* [2011] CAT 25 ("*Carter*"); and *British Telecommunications plc v Office of Communications* [2013] CAT 1 ("*BT*"). The ruling in this last case was, I should note, handed down after I heard submissions in respect of these applications, and the parties have not addressed me on it. Had it been necessary, I would have invited further submissions, but in the event I did not consider it necessary to do so.

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and thus within the scope of the Agreement, which was amended to reflect that reduction in scope" (emphasis added).

Hasbro

41. *Hasbro* involved a prospective application for an extension of time (i.e. an application made before the deadline for appealing had expired) by the would-be appellant, Hasbro. The application was made because Hasbro was the subject of what it contended were two linked investigations. The decision in one had been published; the decision in the other was awaited. By its application, Hasbro sought to extend the time to appeal in relation to the first decision, so that both decisions could be appealed at once. The application was opposed by the Director General of Fair Trading, who contended that the investigations were separate, and not linked. The Tribunal, whilst expressing no view on the linked nature of the cases, found that no exceptional circumstances existed. In particular, Hasbro's concerns about the two investigations could adequately be addressed by the Tribunal's other case management powers. The Tribunal noted that "the deadline in commencing proceedings is in many ways, the keystone of the whole procedure" (page 5), a quote repeated in *BT* (at [4]).

Prater

42. The applicant in *Prater* sought to file an appeal at the Tribunal on the last day for lodging the appeal. This meant, according to the Tribunal Rules, that the appeal had to be lodged by 5.00pm on 24 April 2006. For various reasons, the notice of appeal could not be finalised until that day, and the taxi ferrying the notice from Reigate to the Tribunal got caught in traffic. The notice was filed by hand at 5.39pm. However, before this occurred, the appellant's solicitors had sent various communications to the Tribunal Registry, the responses to which may have given the impression that an e-mailed filing with the Registry would be satisfactory. The notice of appeal was e-mailed to the Tribunal at 4.55pm. This was not a valid filing for the purposes of the Tribunal Rules and, in due course, a (retrospective) application for an extension of time was made to the Tribunal.

43. This application was not opposed by the OFT (at [25]), but the agreement of the putative respondent, was not of itself sufficient to satisfy the "exceptional circumstances" test in Rule 8(2). The reason the Tribunal regarded these

circumstances as exceptional was because of the conversation the appellant's solicitors had had with the Registry:

> "33. ...As a result of the conversation with Registry at 4.42pm, Prater e-mailed the signed notice of appeal to the Tribunal rather than using alternative means possibly available to it, such as using [its solicitors'] London office or Prater's counsel to personally serve the notice of appeal on the Tribunal before the 5.00pm deadline. The Tribunal is unable to rule out the possibility that Prater could have effected personal service of the notice of appeal on the Tribunal before 5.00pm if the conversation with the Registry had not taken place.
>
> 34. On these unusual facts, the Tribunal in this case is satisfied that the particular circumstances of the instant case are exceptional and, accordingly, the Tribunal may extend time pursuant to Rule 8(2) of the Tribunal's Rules. Such an extension of time may be granted even after the time limit has expired: Rule 19(2)(i). The Tribunal makes it clear that deadlines under the Rules are to be strictly followed and it is only in what are anticipated to be the unique circumstances of the present case that the Tribunal is prepared to make an order under Rule 8(2). It is unlikely that a similar order would be made in future cases."

BSkyB

44. *BSkyB* was, like, *Hasbro*, a prospective application, where the applicant sought to align the time periods for lodging appeals in respect of two distinct, but related, decisions (at [14]). The application was consented to by the two other known interested parties (at [16]), although notice of the application had not been given to any other potentially interested third party (at [17]).

45. The President found there to exist certain circumstances which, combined, rendered them exceptional so as to be capable of justifying the extension sought (at [28]). These circumstances included the structural linkage between the two decisions that might be appealed (at [32]) and the fact that the main potential respondents to any appeals consented to (and, in one case, actively supported) the application (at [33]).

Fish

46. *Fish* was, like *Prater*, a retrospective application for an extension of time, where the notice of appeal had been filed late with the Tribunal Registry. The causes of this lateness were: leaving the lodging of the notice of appeal until very late in the day; entrusting service to a third party service provider who was not as

quick in delivering the notice as might have been expected; and an administrative error on the part of the appellant's solicitors in sending the notice to the wrong address (the Tribunal's former address, rather than its present address). The President found no exceptional circumstances to exist (at [17] to [20]). The President also stressed the importance of legal finality and certainty (at [21]):

> "As to the argument that there would be no prejudice to the OFT by extending time, I do not agree. Where no challenge to a decision is lodged with the Tribunal within the time allowed for doing so, the OFT and everyone else is entitled to assume that the decision in question is definitive. Where, exceptionally, time is extended that assumption is undermined. It seems to me that there is some inevitable prejudice to legal certainty in that regard, as well as in the effort and expense entailed in defending the decision and in processing the appeal. It is for these reasons that the circumstances must be exceptional before time can be extended."

Carter

47. In *Carter*, the applicants applied for an extension of time to appeal against the fine imposed by the OFT as a result of its infringement decision entitled "Case CE/4327-04: Bid rigging in the construction industry in England", following the Tribunal's various judgments in the appeals which had originally been brought. The majority of the appeals against this decision resulted in substantial reductions in the penalties originally imposed by the OFT. The applicants contended that an extension of time should be granted on the basis that the applicants had been advised not to appeal (*Carter* at [5]). The Tribunal stated:

> "22. In paragraph 4 of the Application, the Applicants stated that they based their decision not to appeal on legal advice to the effect that the OFT should be presumed to have interpreted properly its own Guidance. In the event, the Tribunal found that the OFT had misinterpreted and misapplied its Guidance in a number of respects. Such an outcome, however, could scarcely have been regarded as unforeseeable when the Applicants were considering whether or not to appeal the Decision between September and November 2009. The fact that a decision is successfully challenged on an appeal can scarcely be described as "exceptional": the whole point of the appeal process is to enable decisions to be challenged. A number of other addressees of the Decision (26 in total) decided to appeal the Decision, albeit one (Fish Holdings Ltd) was out of time.
>
> 23. The truth of the matter, in the present case, is that the Applicants, having made an informed decision not to appeal, now regret that decision in the light of the outcomes of the appeals that were made by other addressees of the

> Decision, and now seek to revisit that decision. The exceptional circumstances relied upon by the Applicants amount to nothing more than the normal decision process that any addressee of a decision goes through when deciding whether or not to appeal. It is simply that in this case, with the benefit of hindsight, the Applicants wish to change their decision not to appeal.
>
> 24. I agree with the OFT that a circumstance that applies equally to the 76 other addressees to the Decision who chose not to appeal cannot be considered exceptional. No injustice is caused to the Applicants by my refusal to extend time under Rule 8(2). They enjoyed precisely the same opportunity as every other addressee of the Decision to lodge an appeal in time at the Tribunal, but they chose not to do so."

BT

48. *BT* was, like *Hasbro* and *BSkyB*, an application brought prior to the expiration of the period of appeal for – essentially – case management reasons. Here, the applicant was faced with two decisions that might, to a greater or lesser extent, be related, and the purpose of the application was to harmonise the dates for filing the appeals so that issues and principles said to be common to the decisions could be addressed by BT at the same time. The President concluded that there were no exceptional circumstances in this case.

(3) Analogous cases

49. Although the parties helpfully referred me to jurisprudence from outside the Tribunal's jurisdiction regarding extensions of time, and although I have considered it, at the end of the day this jurisprudence (as the parties frankly recognised) provided little (if any) direct assistance as regards the exercise of the Tribunal's discretion under Rule 8(2) or the meaning of "exceptional circumstances". With one exception, therefore, I do not consider this jurisprudence any further.

50. The exception relates to the decision in *Bayer AG v Commission,* and the concept of "excusable error". In argument before me, Gallaher suggested that some assistance in understanding the "exceptional circumstances" test might be obtained from the concept of an "excusable error" discussed in the case law of the European Courts. Mr. Turner Q.C., leading counsel for Gallaher, relied on the General Court's judgment in Case T-12/90 *Bayer AG v Commission* [1991]

ECR II-219, where the Court held that the concept of excusable error, although to be strictly construed, could extend to exceptional circumstances where "the conduct of the institution has been, either alone or to a decisive extent, such as to give rise to a pardonable confusion in the mind of a party acting in good faith and exercising all the diligence required of a normally experienced trader" (at [29]). He submitted that this approach (and that of the Court of Justice on appeal, Case C-195/91 P *Bayer AG v Commission* [1994] ECR I-5619, in particular at [26]) was illustrative when considering a situation where the conduct of the administration has contributed to confusion such that there is an excusable error on the part of the addressee of a decision.

51. In my view, however, Mr. Beard was correct to highlight the limitations of this concept. First, as is clear from the specific language used by the General Court and Court of Justice in *Bayer* (and in the Court of Justice's judgment in Case 25/68 *Schertzer v Parliament* [1977] ECR 1729, cited by the General Court in *Bayer*), the concept is limited to confusion (for which the administration is responsible) as to the applicable deadline for commencing proceedings, and cannot be said to extend to confusion as to the substantive content of the relevant decision (which was the thrust of Gallaher's primary contentions here). There is no suggestion in the present proceedings that the parties were confused as to the deadline for appealing the Decision. On the contrary, both Applicants accept they specifically chose not to appeal. Secondly, an extension of the "excusable error" concept in the terms advocated by Mr. Turner would, as Mr. Beard correctly pointed out, cut across the tightly circumscribed terms of Article 45 of the Statute of the Court of Justice, where appeals out of time are generally allowed only in the event of "unforeseeable circumstances or of *force majeure*".

52. Accordingly, little, if any, assistance is to be derived from *Bayer* and the concept of "excusable error".

(4) Analysis

53. From the Tribunal Rules, and the case law applying the discretion contained in those rules, the following points can be made:

(1) The "exceptional circumstances" test represents a high standard. The mere fact that the Tribunal might have sympathy with the position of an applicant will not be enough (*Fish*). Nor is it enough that there may be case management advantages in harmonizing deadlines for the filing of notices of appeal (*Hasbro*; *BT*). Nor, even, where an application is not opposed, will the "exceptional circumstances" test necessarily be satisfied, although this is a circumstance that will be taken into account (*Prater*, *BSkyB*).

(2) The "exceptional circumstances" test reflects the importance of the deadlines under the Tribunal Rules (*Prater*) and the importance of legal finality and certainty (*Fish*).

(3) Although the "exceptional circumstances" test is a high one, there is no *numerus clausus*: the list of "exceptional circumstances" is not closed (*Hasbro*, page 5: "It is probably impossible to produce any indicative, let alone comprehensive, definition of what is meant by 'the circumstances are exceptional'...").

(4) In *Hasbro*, the Tribunal noted (at page 5) that "[c]ases that do not involve *force majeure* in the strict sense will...only rarely give rise to exceptional circumstances". See also *BSkyB* at [27]. It may be right to say that circumstances relating to the period after the expiry of the appeal deadline are capable of amounting to "exceptional circumstances", but such cases must – by their very nature – be rare. That is because, if nothing occurs prior to the expiry of the appeal deadline to prevent a party from appealing, then (self-evidently) it is difficult to say that circumstances combined to prevent the appeal from being filed.

(5) The case which shows that events occurring after the appeal deadline has passed may constitute "exceptional circumstances" is *BSkyB*, where the President took into account the anticipated later decision of the Secretary of State (*BSkyB* at [14], [31] and [32]). But it is important not to over-state the significance of this decision. The application to extend time was made prospectively in that case. In other words, the applicant foresaw the

exceptional circumstances before they arose, and before the appeal deadline had expired, and pro-actively addressed the matter. In short, although the Secretary of State's decision lay in the future, after the appeal deadline had expired, the exceptional circumstances (viz, the desire to harmonise the deadlines to appeal the decisions) existed prior to the expiry of the appeal deadline.

(6) There are obvious parallels between the applications by Somerfield and Gallaher, and the application in *Carter*. In each case:

(i) The OFT issued a decision addressed to multiple addressees;

(ii) Each decision contained elements that were common to the legal position of all addressees (in the sense that the same issue arose in multiple cases). Thus, the outcome of an appeal by some addressees might be said to be capable of being "read across" to the cases of non-appealing addressees;

(iii) Some addressees appealed and other addressees did not appeal; and

(iv) The addressees who appealed were sufficiently successful in their appeals so as to render the decision of the non-appealing addressees in hindsight a bad one.

The application in *Carter* failed. Neither Gallaher nor Somerfield sought to persuade me that that decision was wrong. Indeed, it is clear there is nothing exceptional in: *(i)* a decision being overturned on appeal; or *(ii)* a party to a decision wishing to change its mind about appealing with the benefit of hindsight. *Carter* is a good instance demonstrating the importance to be attached to legal finality and certainty.

54. The question is whether – despite the parallels with *Carter* – the differences highlighted by Gallaher and Somerfield are such as to render a different conclusion appropriate in the case of the present applications or whether – as Mr Beard put it – the response to these applications should be "We never, ever, say

never, but here we absolutely say 'No'" (Transcript, page 56). This question is considered in the following Section.

VII. "EXCEPTIONAL CIRCUMSTANCES" IN THE CASE OF THE PRESENT APPLICATIONS

(1) Introduction

55. As I have noted, in these applications, the parallels with *Carter* are striking. What is more, the applications have been opposed by the OFT and that is something to which weight needs to be attached. Furthermore, I have well in mind that the *Tobacco I* proceedings were long and complex – and so particularly expensive. As the President noted in *Fish*, one of the aspects of legal finality and certainty that must be taken into account is the effort and expense entailed in having to defend a decision again.

56. These factors cannot seriously be gainsaid and neither Gallaher nor Somerfield attempted to do so. Rather, it was contended that – for the reasons summarised in Section II. above – the other circumstances in the case of these applications rendered them exceptional.

57. I propose to consider these circumstances under four heads:

(1) Gallaher's contention that the Decision was apt to mislead: Section VII.(2) (paragraphs 58 to 66 below).

(2) Somerfield's contentions in relation to the principle of legal certainty: Section VII.(3) (paragraphs 67 to 72 below).

(3) The contentions of both Somerfield and Gallaher (in the alternative) that the manner in which the appeal unfolded before the Tribunal in *Tobacco I* amounted to exceptional circumstances: Section VII.(4) (paragraphs 73 to 90 below).

(4) Somerfield's contentions regarding the early resolution agreements: Section VII.(5) (paragraphs 91 to 94 below).

(2) Gallaher's contention that the Decision was apt to mislead

58. Gallaher contended that, because the Decision was "apt to mislead" the reader, and did in fact mislead Gallaher, this case was distinguishable from *Carter* because, unlike the applicants in that case, Gallaher could not make an informed decision about whether to appeal. Even assuming – but without deciding – in Gallaher's favour that: *(i)* the Decision could reasonably be read as advancing a theory of harm based upon both the paragraph 40 restraints and the Refined Case restraints; *(ii)* Gallaher read the Decision in this way; *(iii)* Gallaher considered the theory of harm based upon the paragraph 40 restraints to be unarguable, and would have appealed the Decision had it been clear that the findings of infringement in the Decision were limited to the paragraph 40 restraints; and *(iv)* Gallaher indicated that it had been mistaken as soon as the true ambit of the *Tobacco I* decision was clear, these circumstances do not, in my judgement, amount to exceptional circumstances within the meaning of Rule 8(2).

59. *Carter*, it is said in paragraph 35 of Gallaher's 25 July 2012 application:

> "...establishes that an addressee of an OFT decision which makes an informed decision not to appeal cannot show that there are exceptional circumstances merely because other addressees appealed successfully and there is an (arguable) "*read across*" from the judgment on the appeal to the original decision as it applied to the non-appellant. However, in that case, the "*facts were known to all addressees of the Decision*" [a partial quotation from ... *Carter* at [20]] and the applicants had "*made an informed decision not to appeal*" [a partial quotation from *RG Carter* at [23]]. The CAT's emphasis on the question of whether the potential appellant *knew* all the facts and made an *informed* decision whether to appeal implies that a case such as the present – in which Gallaher (acting reasonably) did *not* know the facts about the scope of the Decision and therefore did *not* make an informed decision whether to appeal – is one which *is* capable of involving exceptional circumstances."

60. Paragraphs [22] to [24] of *Carter* are set out in paragraph 47 above, and need to be read in full. Paragraph [20] is also important:

> "The Decision, which (by this application) the Applicants seek permission to appeal, is unusual in its scope: it followed an extensive investigation, which took place over some five and a half years; it runs to nearly 2,000 pages; and it is addressed to some 103 undertakings. These facts were all known to all addressees of the Decision, and it was for them to consider (in the light of their own particular circumstances) how to respond to it. I do not consider that the circumstances in which the Decision was taken should have any bearing on the Tribunal's assessment of whether the test for

> exceptional circumstances for extending time under Rule 8(2) is met. By definition, these are facts and matters that will be known at the time the decision in question is published."

61. These paragraphs apply with equal force to Gallaher's primary case. In the case of the applicants in *Carter* and Gallaher here, the addressee of a decision of the OFT was presented with a decision which was then successfully appealed to the Tribunal by other addressees. In *Carter*, the appeals were allowed because the OFT misinterpreted and misapplied its own Guidance. In the case of Gallaher, it is because the OFT was unable to establish the factual basis for the theory of harm it was contending for, to such an extent that the OFT's defence of the Decision could not proceed to a Tribunal decision on the merits.

62. Just as in *Carter*, when the Decision was published, Gallaher had a two-month period in which to elect whether or not to appeal. In this, but for the early resolution agreements, to which I return below, Gallaher's position was <u>exactly the same</u> as that of the other Addressees. Some Addressees chose to appeal the Decision, some did not. Gallaher chose not to. The fact that the Decision may have been unclear and may (as a matter of fact) have misled Gallaher does not alter this position. It is incumbent upon each addressee of a decision to peruse a decision addressed to it with care and – on the basis of the terms of that decision and the circumstances of the individual addressee (which, of course, will only be known by it) – to reach a view as to whether or not to appeal.

63. Provided an addressee is able to consider the decision in this way, its own decision whether to appeal or not will be an informed one. The two-month appeal period provides enough time to consider whether an appeal is to be mounted or not. The clarity – or lack of it – inherent in a decision, and the addressee's concerns that, on the basis of one theory of harm, it might be exposed, whereas on another theory of harm it might have a good defence, are all factors that the addressee of a decision will weigh in the balance when deciding whether or not to appeal.

64. There would, of course, have been many other considerations weighing on Gallaher: in particular, Gallaher's decision not to appeal was taken in the

context of the early resolution agreement that it entered into with the OFT. Whilst this agreement did not preclude Gallaher appealing, it did (in the event of Gallaher not appealing) provide for a significant discount to what was a very substantial penalty. As I have noted, I return to this aspect of the applications further below.

65. The short point is that having made its decision not to appeal, in circumstances where Gallaher's position was no different from that of the other Addressees (except, perhaps, in how Gallaher and its advisers subjectively evaluated the Decision), the fact that the decision not to appeal has proved, in hindsight, to have been one that Gallaher would like to re-visit can in no way amount to "exceptional circumstances".

66. By way of postscript, there is one more point that ought to be noted. Exploring precisely why an applicant such as Gallaher may have chosen not to appeal inevitably draws the Tribunal into the applicant's decision-making process. This, almost inevitably, will involve questions of legal privilege, since decisions to appeal will rarely not be informed by (privileged) legal advice. In this case – and, for reasons of privilege, the picture that the Tribunal has as to Gallaher's thinking is only a partial one[5] – it would seem to be implicit in Gallaher's submissions that it considered that there was some exposure to it arising out of what came to be known as the Refined Case, for it is Gallaher's contention that it regarded the theory of harm based upon the paragraph 40 restraints as hopeless. The reason – according to Gallaher – why it did not appeal was because "Gallaher concluded that the Decision *did* involve a finding of infringement based on something resembling what are now known as the Refined Case Restraints. It was only as a result of following proceedings in the CAT and reviewing the *Tobacco I* Judgment that Gallaher was able to appreciate that the Decision was limited to the lockstep theory" (paragraph 7 of Gallaher's 25 July 2012 application). For the purposes of this application, I accept this explanation of Gallaher's decision-making process, and it is one that

[5] In paragraph 6 of his statement in support of Gallaher's application, Mr Andrew Bingham (then Company Secretary and a Director of Gallaher) quite properly states that "I do not seek to rely on, refer to or otherwise disclose any legal advice which Gallaher may have received (whether from external legal advisers or myself and its other internal legal advisers). For the avoidance of doubt, Gallaher is not waiving privilege in any such legal advice."

was not factually contested by the OFT. I do not consider, however, that it gives rise to "exceptional circumstances" for the reasons given above. But it is obvious that were an explanation as to why an addressee of a decision did not appeal to be challenged in a future case, an addressee would be placed in the unenviable position of electing either to waive privilege or to put forward a weaker case than it otherwise could. By the same token, the respondent to the application (say, the OFT) would be placed in an equally difficult position if it sought to test the explanation without a waiver on the part of the applicant. Privilege is a right, and it would be difficult for the OFT to test an applicant's explanation without a waiver. This only serves to reinforce my conclusion that the subjective reasons why an addressee of a decision elected not to appeal that decision cannot amount to "exceptional circumstances" within the meaning of Rule 8(2).

(3) Somerfield's contentions in relation to the principle of legal certainty

67. Somerfield contended that it is "contrary to the principle of legal certainty for the Decision to be annulled in respect of the appellants in the earlier proceedings but to be allowed to stand in respect of Somerfield".

68. In essence, Somerfield's point was that it would be wrong for it (and for the other non-appealing Addressees) to be exposed to follow-on proceedings under the 1998 Act, whilst at the same time not to be able to advance claims for contribution as against the Appellants (because the Decision was quashed as against them).

69. All parties accepted that unless set aside on appeal, the Decision continues to bind the non-appealing Addressees. That is clear from the terms of the *Tobacco I* judgment (which states at [62] that "the Decision must be set aside as against these appellants" (emphasis added) and at [96] that "[t]he appeals must therefore be allowed and the Decision quashed in relation to these appellants" (emphasis added)). As I have noted in paragraph 17(1) above, the continuing and binding nature of the Decision on the non-appealing Addressees is the reason for these applications.

70. Given that the Decision remains effective as against the non-appealing Addressees, but is quashed as against the Appellants, there is on the face of it nothing odd about the risk of consequential civil proceedings being brought against some Addressees and not others. That would be a direct consequence of the decision of some Addressees not to appeal the Decision. Equally, the fact that there could be no contribution proceedings against the Appellants based on the Decision is a direct consequence of the decision of the Appellants to appeal the Decision.

71. In short, there is nothing wrong or contrary to the principle of legal certainty in the consequences identified by Somerfield: indeed, these consequences are entirely in accordance with legal certainty, for they track the fact that the Decision is binding against some Addressees (the Addressees who chose not to appeal), but was quashed as against others (the Appellants).

72. Also, it must be noted that there is, in theory at least, no reason why a different appeal brought by Gallaher and Somerfield should necessarily have the same outcome as in *Tobacco I*.

(4) The manner in which the appeal unfolded before the Tribunal in *Tobacco I*

Introduction

73. Somerfield contended that there were exceptional circumstances in the manner in which the appeal of the Decision unfolded before the Tribunal in *Tobacco I*. Somerfield placed great weight on:

(1) The unprecedented and unforeseeable manner in which the appeal before the Tribunal unfolded, with the OFT abandoning its theory of harm (paragraph 3(a) of Somerfield's 13 July 2012 application);

(2) The OFT's conduct in seeking to persuade the Tribunal to determine an "unpleaded" case as the primary decision-maker (paragraph 3(b) of Somerfield's 13 July 2012 application). The "unpleaded" case is, of

course, a reference to the OFT's reliance, after Day 26, on its Refined Case; and

(3) The fact that the OFT has now indicated it does not intend to proceed any further with the case based on its Refined Case (paragraph 3(c) of Somerfield's 13 July 2012 application).

74. Somerfield made the point that none of this behaviour could reasonably have been anticipated by Somerfield at any time prior to November 2011 (paragraph 5 of Somerfield's 13 July 2012 application).

75. All of this was – in point of fact – uncontroversial, and was not controverted by the OFT. The question is whether these facts render the present case sufficiently different from *Carter* such that the circumstances can be said to be exceptional.

76. Gallaher, on its alternative case, made the same point, albeit with a slightly different gloss. According to Gallaher, the Tribunal's decision in *Tobacco I* made clear that the OFT had run a case before the Tribunal based on the paragraph 40 restraints which: *(i)* was not put to witnesses by the OFT; *(ii)* when put to those witnesses by the Appellants, was denied by them; and *(iii)* was abandoned in its entirety, with the OFT then seeking to run a different case – the Refined Case.

77. Gallaher contended that, as a consequence, the Decision was outside the OFT's powers and so *ultra vires*. Thus, paragraph 48 of Gallaher's 25 July 2012 application stated:

> "The litigation at the CAT revealed that the OFT's Decision was not supported by any, or any sufficient, evidence in respect of any of the addressees, including non-appellants. As a result, the Decision was outside the OFT's powers as a matter of public law. It could not be defended and ultimately was not defended."

78. Paragraph 42 of Gallaher's reply, dated 26 September 2012, referred to the OFT's public law duty to ensure that the Decision was supported by adequate evidence. Paragraph 43 went on:

> "It became clear when the Tobacco Judgment was handed down that the OFT had breached this duty: its Decision was in fact not supported by any, or any adequate,

> evidence and was therefore *ultra vires*. The fact that the Decision was exposed as being outside the OFT's powers amounts to exceptional circumstances justifying an appeal out of time."

79. Clearly, there are a number of factors in issue here. It is necessary to disentangle them.

The relevance of the OFT's public law duties

80. The relevance of Gallaher's contention that the OFT had acted outwith its public law duties is not clear. Assuming, for the sake of argument, that, notwithstanding the statutory appeal provided for in section 46 of the 1998 Act, decisions of the OFT could be judicially reviewed (a point on which no submissions were made to me), it is clear that by whichever route a decision of the OFT is challenged, that decision stands unless and until it is set aside by a court of competent jurisdiction.

81. It may be that it could be contended that the OFT's Decision was susceptible of judicial review (although the availability of an appeal under section 46 may well preclude that route) and that such a review might have succeeded: but it is impossible to see what this adds to the "merits" appeal already conducted by the Tribunal in the *Tobacco I* decision, which – as has been made clear – emphatically succeeded as a matter of fact.

82. It is thus not clear where the "counter-factual" scenario of a successful judicial review goes. It may be that Gallaher advanced this point simply to underline the seriousness of the shortcomings in the OFT's defence of its Decision. That is a distinct question, which was made with some force by both Somerfield and Gallaher, and indeed by the Tribunal in *Tobacco I*. Somerfield makes the point in paragraph 3(a) of its 13 July 2012 application that "[t]he wholesale abandonment of the OFT's theory of harm presented in the Decision was unprecedented and unforeseeable". In other words, the OFT did not simply lose an appeal: the Decision was quashed in its entirety after the OFT abandoned its primary defence based on the paragraph 40 restraints, failed to maintain any part of the Refined Case and lost on its Schedule 8 case.

83. Whilst I have found the "counter-factual" scenario of a successful judicial review a not particularly helpful one, there is – allied to the notion of a public law duty on the OFT to ensure that its decisions are supported by adequate evidence – a legitimate expectation on the part of the addressees of OFT decisions that these decisions will be so supported. I return to this further below.

The scale of the OFT's defeat

84. Somerfield and Gallaher described the scale of the OFT's defeat in *Tobacco I* as "unprecedented". The question for me is whether, for the moment assuming this to be the case, the scale of the OFT's failure before the Tribunal is relevant for the purposes of Rule 8(2).

85. I have concluded that the fact that the OFT's defeat in *Tobacco I* was (or may have been) unprecedented does not affect the parallels between this case and *Carter*.

86. The Appellants were sufficiently successful in their appeals so as to render the decision of the non-appealing Addressees in hindsight a bad one. The scale of the Appellants' victory, unprecedented and unforeseeable as it may have been, does not affect the position. The fact that a decision is successfully challenged on an appeal cannot be described as an exceptional circumstance. The fact that the successful challenge occurred in unprecedented or unforeseeable circumstances, or in an unprecedented or unforeseeable way can make no difference. To cite – out of context – the thinking of Lord Reid in *Hughes v Lord Advocate* [1963] A.C. 837 at 845: provided the fact of a successful appeal is foreseeable, it is irrelevant that the extent of that success or its manner was unforeseeable.

The OFT's conduct in seeking to persuade the Tribunal to determine an unpleaded case as the primary decision-maker

87. The mere fact that the OFT sought to persuade the Tribunal to determine an unpleaded case as the primary decision-maker (see paragraph 3(b) of Somerfield's 13 July 2012 application) does not, of itself, render this case an exceptional one. The Tribunal has the powers that are conferred on it by

Schedule 8, and the OFT (in all the circumstances) was perfectly entitled to seek to persuade the Tribunal to exercise those powers. In the event, as I have noted, and for the reasons given in *Tobacco I*, the Tribunal held that it lacked the power to enable the case to continue and that, even if it had such powers, it would not exercise them in that case (see paragraph 30(2) above).

The fact that the OFT has now indicated that it does not intend to proceed with any further investigation

88. Notwithstanding the decision of the Tribunal in *Tobacco I*, and the (new) theory of harm advanced by the OFT as its Refined Case, the OFT has apparently now indicated that it does not intend to proceed with any further investigation, nor will it issue another statement of objections based on the Refined Case. Somerfield contended that this constituted an "exceptional circumstance" (paragraph 3(c) of Somerfield's 13 July 2012 application).

89. Somerfield contended that where the theory of harm advanced by the OFT as the basis of its decision had to be abandoned, the only proper course open to the OFT was to abandon its decision in its entirety as against all addressees and (if appropriate) begin again (a submission based upon *Mastercard UK Members Forum Ltd v Office of Fair Trading* [2006] CAT 14).

90. I am not persuaded that – even where the OFT's theory of harm is fundamentally undermined – this inevitably follows. As has been noted, and as was accepted by all, decisions of the OFT are binding against addressees of those decisions until and unless they are set aside. Where only one addressee seeks to appeal a decision, and is successful, the decision continues to bind the other addressees. The suggestion that where, in the course of an appeal, the OFT accepts that its theory of harm must be corrected, amended or abandoned, that inevitably has an effect as regards non-appealing addressees of that decision runs contrary to the accepted nature of OFT decisions. It would also, as Mr. Beard submitted for the OFT, run counter to EU jurisprudence on the annulment of European Commission decisions on appeal by some of the addressees only (see Case C-310/97 *Commission v AssiDomän Kraft Products AB & Ors* (*Wood*

Pulp II) [1999] ECR I-5363). I do not regard this, therefore, as an "exceptional circumstance".

(5) The early resolution agreements

91. I am not persuaded by Somerfield's contention that the early resolution agreements contained an implied obligation on the part of the OFT to defend the Decision. I do not see the necessity for such a term. It seems to be very difficult to state such a term with sufficient certainty: for instance, would the OFT be obliged to defend its decision "come what may", even – for example – in the circumstances that existed in *Tobacco I*? It seems to me a hopeless contention that the OFT should be required to persist in defending the indefensible because it is under an implied obligation, owed only to those addressees of a decision that entered into early resolution agreements, to do so. Finally, I see real danger in the OFT's public duties being fettered by contract. Accordingly, I reject the implied term argument made in paragraph 11 of Somerfield's 13 July 2012 application.

92. Before me, Mr Thompson Q.C., leading counsel for Somerfield, persuasively referred to the disjunction between the admissions made by Gallaher and Somerfield in the early resolution agreements, and the position arrived at, as regards the Decision, at the conclusion of the *Tobacco I* proceedings. He put the point as follows (Transcript, page 20):

> "The [early resolution agreement] between Somerfield and the OFT was not based on this case [the Refined Case] which was never put to Somerfield and, of course, crucially, no decision was ever taken by the OFT on this basis. Somerfield's fine was not imposed on this basis. Somerfield never had any opportunity to appeal against a decision based on the OFT's refined case. Neither the OFT nor the Tribunal has ever reached any concluded view as to whether or not it forms the credible basis for a finding of infringement or, indeed, for a statement of objections. We submit that this is a truly exceptional state of affairs. Had Somerfield known at the time when it was considering whether or not to appeal that the OFT was advancing the two restrictions described by the OFT as its refined case restraints, rather than the case actually contained in the Decision, and defended on the appeal, it might well have appealed, we cannot know. Somerfield's decision would have been taken on a completely different basis from the decision it in fact took. We think we can put this really quite high. Unless the Tribunal grant permission to bring an appeal out of time Somerfield will have been deprived of essential rights of any party to litigation, never mind a party to criminal regulatory proceedings leading to very heavy fines. First, to know the case that is being advanced against you, secondly, to be able to take an informed decision whether you accept or challenge that case and, thirdly, to make an informed

decision whether or not to appeal against an adverse finding based on a correct understanding of the legal and factual basis on which you have been fined. These were not matters that Somerfield knew, or could have known, until the OFT produced its refined case note on 9th November 2011."

93. Having considered the matter very carefully, I have concluded that this disjunction does render the circumstances of the present applications different from those which pertained in *Carter*. I have further concluded that these circumstances are exceptional within the meaning of the Tribunal Rules. I have reached this conclusion for the following reasons:

(1) Given the terms of the early resolution agreements that the OFT concluded with both Gallaher and Somerfield, the OFT was obliged – by paragraph 6.a.i of those agreements – to adopt a decision in materially the same form as set out in the statement of objections (see paragraphs 32(3), 34 and 35 above). In the case of both Gallaher and Somerfield, the OFT in fact adopted a decision materially different from that in the statement of objections in that parts of the OFT's statement of objections were not pursued in the Decision. (The precise nature of the narrowing of the OFT's case does not matter for present purposes). The early resolution agreements were amended (in the manner described in paragraph 37 above) so as to bring them into line with the Decision. This serves to underline the importance of the relationship between the allegations accepted by Gallaher and Somerfield in the early resolution agreements, and the facts stated in the Decision. There was, in essence, a clearly articulated expectation that the Decision – when adopted – would reflect the admissions made in the early resolution agreements.

(2) I have no doubt that the motivations that Gallaher and Somerfield had in entering into the early resolution agreements were multi-faceted, complex and for the most part privileged (see paragraph 66 above). But I also have no doubt, given the inter-relationship between the early resolution agreements and the Decision that followed these agreements, that there was a legitimate expectation on the part of both Gallaher and Somerfield

that the OFT had the wherewithal to make good the factual basis on which the Decision rested.

(3) In this regard, I have well in mind the fact that – although the anti-competitive agreements relied upon in the Decision were all bilateral – the OFT was contending that these bilateral agreements formed a part of a wider network of similar anti-competitive agreements (all bilateral) which together operated to control the whole sector (see paragraphs 6 and 7 above). This represents a significant difference between the present applications and *Carter*. In *Carter*, there were certainly common elements amongst the various addressees of the decision in the case (see paragraph 53(6)(ii)), in the sense that the same legal issue arose more than once. But apart from this duplication, in *Carter* there was no other inter-relationship. In this case, however, each bilateral agreement was part of a greater whole, and there was, in the manner described by the OFT, a nexus between the bilateral agreements to which Gallaher and Somerfield were a party, and all the other bilateral agreements (including those examined before the Tribunal in *Tobacco I*). Gallaher and Somerfield's admissions in the early resolution agreements cannot be read without taking the Decision into account and must be read in that light. Any admissions would have been on the basis of a legitimate expectation that there was some sustainable factual underpinning of the case not only against them, but against the other industry participants. The OFT conceded – in the manner that I have described – that (as regards the Appellants) this factual underpinning did not exist.

(4) The OFT's concession in *Tobacco I* was made in those proceedings only, and so was limited in effect to the Appellants alone. It did not extend to the non-appealing Addressees of the Decision. The Decision stands as against Gallaher and Somerfield – that is precisely why they are seeking permission to appeal out of time. But it would be entirely wrong to suggest that the concession made by the OFT, or the outcome of the *Tobacco I* proceedings, are irrelevant for this reason. The fact is that this concession, and this outcome, fundamentally undermined the basis upon

which the early resolution agreements were concluded by Gallaher and by Somerfield, and this goes to the question of whether, well out of time, the Applicants should be permitted to appeal.

(5) I do not mean to suggest that either Gallaher or Somerfield had any legitimate expectation that the OFT would – were there to be an appeal – inevitably succeed on every point of fact or law. It is a fact of life – for all administrative and judicial decision-makers – that their decisions get reviewed, and that such reviews can succeed. Certainly, there is nothing that can be said to be "exceptional" in this. Thus, it is to my mind eminently foreseeable that:

(i) An appellate body, such as the Tribunal, might reach a different substantive view on points of law or points of fact to the conclusions of the OFT, and were this to occur (even on a point fundamental to the OFT's decision) I consider that any non-appealing addressee of the decision would fall to be treated as the applicant in *Carter*; and

(ii) During the course of an appeal hearing, the OFT might have to make factual concessions on a variety of points, including material points.

Outcomes arising out of either of these eventualities seem to me to be outcomes that will be – or at least should be – factored in by parties agreeing to early resolution agreements.

(6) However, I do not consider that it would be reasonably foreseeable that the OFT would make the Decision – based upon a stated theory of harm – and then be unable to maintain a case based upon that theory of harm when it came to be tested in the crucible of an appeal. To put the point another way, I consider that Gallaher and Somerfield had a legitimate expectation that the OFT would be able to defend (even if not necessarily successfully) its Decision on the merits.[6] For the OFT to concede, in the

[6] I should stress that I am not suggesting that the OFT was in any way obliged to defend the Decision further than it did, for the reasons given earlier. Plainly, where a decision proves to

middle of the proceedings, that the Decision could no longer be maintained as it stood was a concession that fundamentally undermined not merely the case against the Appellants, but also the basis on which Somerfield and Gallaher entered into the early resolution agreements. I place great weight on the fact that the OFT was not here conceding that its theory of harm could not be made out as regards one particular bilateral arrangement as between (say) Imperial and a retailer other than Somerfield, because, on the facts, that particular arrangement operated differently than it had asserted in the Decision. Rather, the OFT was conceding, much more generally, that the evidence as a whole could not support the theory of harm articulated in the Decision. This, for the reasons given in sub-paragraph (3) above, was a concession that affected not merely the Appellants, but also Gallaher and Somerfield.

(7) Suppose the OFT had reached the conclusion, prior to issuing the Decision, that the theory of harm articulated in the statement of objections could not be justified by the evidence. Not only would the Decision have been fundamentally different, but the early resolution agreements would have had to have been fundamentally amended.

(8) Of course, the OFT did not reach the conclusion that its theory of harm could not be justified before the Decision was issued. Rather, the OFT came to that conclusion later, during the course of proceedings before the Tribunal in *Tobacco I*. In making its concession, the OFT was no doubt acting as a responsible and prudent public authority should: no-one would expect a public authority to continue to defend what it had come to consider as indefensible. But this cannot render irrelevant the fact that, in *Tobacco I,* the Tribunal allowed the appeals and quashed the Decision as against the Appellants "without being in a position to decide the many important legal and factual issues they raise" (*Tobacco I*, [4]).

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have been badly founded before the end of an appeal, a responsible public authority will have regard to this, and take the necessary steps. This the OFT did in *Tobacco I* and, in doing so, it acted as a responsible public authority should. For the reasons given in paragraph 91 above, it would be irresponsible for a public authority to persist in defending the indefensible. But none of this changes the fact that, in this case, given the inter-connected nature of the infringements found by the OFT, Gallaher and Somerfield had a legitimate expectation that the Decision be properly founded.

(9) Although the weaknesses in the OFT's Decision only emerged for all to see after the time to appeal that Decision had passed, this is not a case where the applicants are purely trying to take advantage – after the event – of an outcome that would benefit them. The point is that Gallaher and Somerfield entered into the early resolution agreements on a basis which has now been fundamentally undermined: namely, on the basis of an entirely legitimate expectation that the OFT's Decision was sufficiently robust, if appealed, to proceed to a determination on the merits. As events proved, the Decision was not, and the OFT's case collapsed, on a point fundamental to the case not merely against the Appellants, but also to the case that had been admitted by Gallaher and Somerfield in the early resolution agreements. That fact amounts, to my mind, and very much for the reasons articulated by Mr Thompson and quoted by me in paragraph 92 above, to an exceptional circumstance so as to entitle Gallaher and Somerfield to revisit their decision not to appeal.

(10) I cannot say what Gallaher or Somerfield would have done, had the offer through the early resolution agreements not existed. Maybe they would have appealed; maybe they would not have done. But the fact is that the early resolution agreements must have been material to the decision to appeal and that decision was subverted by the fact that the early resolution agreements were entered into on, as I have said, a basis that has now been fundamentally undermined.

94. It follows that, Somerfield having succeeded, Gallaher's application succeeds also for the reasons set out at paragraph 18(3) above.

VIII. CONCLUSION

95. For the reasons I have given, I am satisfied that the circumstances in the case of both applications are exceptional for the purposes of Rule 8(2) of the Tribunal Rules, and I extend the time limit provided under Rule 8(1) for a period of 28 days from the date on which this Ruling is handed down.

Marcus Smith Q.C.

Charles Dhanowa O.B.E., Q.C.
(Hon)
Registrar

Date: 27 March 2013