IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1110/6/8/09

Victoria House
Bloomsbury Place
London WC1A.2EB

Tuesday 20 October 2009

Before:

THE HON. MR. JUSTICE GERALD BARLING
(President)
LORD CARLILE OF BERRIEW Q.C.
SHEILA HEWITT

Sitting as a Tribunal in England and Wales

BETWEEN:

BAA LIMITED

Applicant

-v-

COMPETITION COMMISSION

Respondent

- supported by -

RYANAIR LIMITED

Intervener

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HEARING – DAY TWO

APPEARANCES

Mr. Nicholas Green Q.C. and Mr. Mark Hoskins Q.C. (instructed by Herbert Smith LLP and Freshfield Bruckhaus Deringer LLP) appeared on behalf of the Applicant.

Mr. John Swift Q.C., Mr. Paul Harris, Mr. Ben Rayment and Mr. Ewan West (instructed by the Treasury Solicitor) appeared on behalf of the Respondent.

Mr. Daniel Jowell and Miss Sarah Love (instructed by Nabarro LLP) appeared on behalf of the Intervener.

THE PRESIDENT: Good morning.

MR. GREEN: This morning I want to deal with proportionality. This is an important, although relatively narrow, issue. I intend to break down my submissions into six sections. For your note, they are as follows: first of all, I am going to identify the issue; secondly, I am going to identify the extent of the common ground between the parties; thirdly, I am going to take you to the report to show you what the Competition Commission took into consideration and what it ignored; fourthly, I am going to deal with a specific point raised by the Competition Commission concerning risk assumption; fifthly, I am going to deal with the Competition Commission's suggestion that BAA never raised the issue; and, sixthly, I am going to provide you with some conclusions.

I start by identifying the issue. In its notice of application BAA made clear that the failure to take account of the cost to BAA of divestiture was essentially a function of time - that is to say, time over which the remedy was to take effect. If I can, I am just going to give you a series of references to paragraph numbers in each of these pleadings so that if it is suggested that has never been our case, or in some way has changed, you will be able to see that that is not the case. Notice of application - paras. 87, 89(a), 89(c), 89(d), 92, 93(a), (b), and (c), 97 and 98. In our reply, BAA has also made it clear that the point is a temporal one, but BAA submitted that the scope of any remedy should be determined in the light of the Tribunal's substantive judgment - reply paras. 71 and 78. In our skeleton again we have explained that the substance in point concerns the temporal aspects of the remedy. For your note - paras. 116(a), 120, 122, and 132. I hope the Tribunal has the confidential version of the decision, Section 10. We did provide an additional bundle, Bundle 16. It is our Bundle 7. Your Bundle 16 will have Chapter 10 of the report, and confidential material is marked in blue. The relevant paragraphs which set out the details of the Competition Commission's decision on this point, in formal terms, are paras. 10.182 through to 10.184. The decision of the Competition Commission was in the following terms so far as timing was concerned:

> "10.182. As noted elsewhere, the sale of Gatwick is under way. We consider that Stansted Airport should be divested before Edinburgh or Glasgow, due to its relative scale and importance in addressing the AECs and detriments we have found, and in the interests of resolving uncertainty with respect to the SG2 planning inquiry so as to facilitate the development of new capacity as soon as it may be required.
>
> 10.183. Therefore, after taking account of the various factors considered above, we have decided that:

(a) the sale of Gatwick should be completed X after BAA's announcement on 17th September, 2008;

(b) the sale of Stansted should be completed X after acceptance of undertakings or X after publication of this report, whichever is earlier;

(c) the sale of Glasgow or Edinburgh should be initiated no later than X prior to the end of the permitted period for the divestiture of Stansted; and

(d) the sale of Glasgow or Edinburgh should be completed no later than X after the completion of the sale of Stansted.

10.184. The above requirements would imply, in the absence of any permitted delays that the sale of Gatwick should be followed by that of Stansted; and that BAA should complete the sale of Gatwick no later than X; Stansted no later than X and either Edinburgh or Glasgow no later than X. So as to not prejudice an effective sales process, these dates are not being published, but the end date is less than two years from the date of this report. This would mean that each of Gatwick, Stansted and either Edinburgh or Glasgow would have been divested and be under separate ownership from BAA's other airports within X months from the date of this report and X months from the date when BAA announced the sale of Gatwick. This timetable may be subject to revision by the Competition Commission should a material change in circumstance make it appropriate".

That is the decision in relation to timing. There is a certain amount of common ground between BAA and the Competition Commission. That helps us identify with a degree of precision what the issue really is between us. We set out in comprehensive terms in our pleadings the paragraphs we rely upon to show the common ground - that it is common ground that the costs to BAA are a relevant matter to be taken into account when the Competition Commission considers proportionality, cost here being the loss of value of the assets of a forced sale. It is also common ground that cost is relevant to the issue of how much time BAA should be given in order to divest itself of the three airports. It is also common ground that the Competition Commission did not address the issue of cost to BAA in terms of loss of value. If I could, I would like to take you to the Competition Commission's skeleton at para.30 so that you see what they say, where our starting point for the analysis is. Paragraph 30 says:

"BAA's reliance upon paragraph 139 of the *Tesco* judgment is misplaced. In determining what factors are important the Commission will carry out an investigation. Where the investigation must as a matter of necessity be an inquiry

made of the party on whom it is proposed that a remedy should fall the Commission is obviously dependent in large measure on material submitted by the party. At no stage in the Inquiry did BAA suggest or volunteer a quantitative assessment of how disposal proceeds might vary on different assumptions of timing or sequence of divestiture. This omission is not surprising because, given market uncertainties and limitations of empirical evidence with regard to such circumstances, such an analysis would be highly speculative and unreliable. In the light of BAA's conduct and these circumstances, the Commission was perfectly entitled not to examine whether the timing of the three divestments would lead to loss of value to BAA in the manner that BAA now alleges, far less that it should carry out a quantitative assessment of that supposed loss. The fact that BAA never raised the issue strongly suggests that quantitative assessment was not an issue for BAA at the time and that it is an after-the-event construct for the purposes of the current challenge."

What do we deduce from this? We deduce that the Competition Commission's position is that it did not have to conduct an analysis of whether the timing of the divestments would lead to loss of value, and that is irrespective of the issue of quantitative assessment, because that part of the sentence says, "far less that it should carry out a quantitative assessment". So it accepts that it did not do it. Its position is that it was justified in not doing it, and the reasons why it says it was justified are set out in the last sentence, "BAA never raised the issue". Well, I will demonstrate that we did. In fact, I will demonstrate that the report recognises that we did, and I will demonstrate that the Commission itself recognised that the impact of timing was a very important issue. I do accept the "BAA never put forward a quantitative analysis", we did not. I do not accept that it was not a major issue on the table between the parties. I do submit that it was capable of analysis. I submit further that a quantitative analysis could have been carried out, and it would have been within a reasonable degree of exactitude, it is not absolute, but it would have given the Competition Commission a handle on the analysis. More importantly, the parameters of the issue are "elephant in the room" parameters, they are obvious. They were on the table and they were discussed between the parties and everybody understood what those parameters were.

THE PRESIDENT: By the "parameters" do you mean the range, the order of magnitude of the loss of value or ----

MR. GREEN: The loss of value as a function of time. What is clear, and indeed it is clear from an analysis of the report itself, is that the Competition Commission accepted that the

divestiture period that it imposed upon BAA was going to lead to loss of value. That is clear from the reading of the report. That is accepted. Having acknowledged that there was a real issue, they did not go on to ask themselves in particular whether, had they given BAA extra time, that would have impacted in any way upon the achievement of the benefits of the remedy. It was a question which they asked in relation to other costs, what they describe as a "netting effect", balancing A against B, but from that particular equation they simply omitted any consideration of whether giving us, let us say, an extra 12 months or 24 months or whatever it may be, would have caused any material detriment to the realisation of the benefits which they were seeking from imposing divestment.

THE PRESIDENT: That was not your complaint, was it?

MR. GREEN: Our complaint was that we needed extra time in order to alleviate the loss.

THE PRESIDENT: Yes. Your complaint is not that they did not look into the benefits of doing that. Is it simply that you say there was no loss of benefit and therefore you needed to look into ----

MR. GREEN: I think the correct analysis is to put it this way: one says what questions should they have addressed their mind to? We can actually see that from the Competition Commission's report itself. It is clear what questions they addressed. If you hypothesise as to the exercise they might have undertaken and you say, "If we had been extra time how would this have played out?" you get a feel for what the answers might be. That is not an exercise they undertook, it is an exercise they might have undertaken but it is useful to carry it out because it highlights that, in fact, this was not a complex exercise. It was not a complex exercise, and we can see that.

This issue then boils down to something relatively narrow: what were the reasons for the Competition Commission not conducting the exercise and are they good reasons? If they are good reasons, well, they win; and if they are not, they do not. This is not a margin of appreciation point, this is finding out why they did not do something and whether they were justified for that approach.

LORD CARLILE: Can I just be absolutely clear: this is an issue about timing, not sequence – is that right?

MR. GREEN: It is essentially an issue about timing, yes. In terms of a sequence of which ----

LORD CARLILE: Yes.

MR. GREEN: If the matter was now looked at they may have to balance timing against a range of factors. When you look at the question of timing it is interconnected with sequence and a variety of other factors, but the complaint we make is that they gave insufficient time for

divestitures, and indeed we submit, although it is not necessary for this analysis, that had they given extra time there is no suggestion in the report that they would have caused any material detriment to the coming forth of the benefits of the divestiture remedy. An extra 12 or 24 months, or whatever period one picks, would not, according to their own logic, have been a real problem for them.

THE PRESIDENT: And you say that it is accepted by them that the timing would affect the value?

MR. GREEN: Yes. I will take you to their defence and in due course I will show you one or two of the documents which just highlight the nature of the dispute between the parties during the currency of the investigation.

If we go to the Competition Commission's defence there are a series of paragraphs, many of which I have to say we do not demur from, they are perfectly uncontroversial and we agree with them, but there are some paragraphs which we take objection to. It is the Competition Commission's defence. I am going to essentially be analysing paras.88 to 95 and then one or two additional paragraphs.

This is under the heading, "The Commission's general approach to timing of remedies", and in their defence the Commission accepts that the time frame for remedies is a relevant consideration. You can read this leisure at your leisure and if Mr. Swift thinks I have mischaracterised any part then he can correct me, but I am going to summarise the position in order to save time. In paras.88 and 89 the Commission reminds itself that under s.138 of the Enterprise Act they must consider the adverse effects of a remedy. We agree with that.

In para.90 they state that the statute does not explicitly refer to timescales, but these fall to the Commission to consider as part of its broad assessment of proportionality and in particular the requirement that the remedy should be neither unreasonable nor disproportionate. We agree with that. In para. 91 they refer to their own guidelines, CC3, and they accept the time scale is relevant in this manner, and their own guidelines confirm it; again we agree.

In para. 92 the Commission points out that it has a preference for remedies that can be quickly implemented in relative terms. Speedy remedies are normally an important component of comprehensiveness. In principle, there is nothing objectionable about that, it all depends on the facts, but as a general proposition – as a starting point for the consideration it is not something which one would object to.

The defence paras. 94 and 95 – a proposed remedies timetable can be modified if there is a material change of circumstances under s.138(3), we agree this is what the Statute says.

THE PRESIDENT: Sorry, which paragraph?

MR. GREEN: 95:

> "In other words, a proposed remedies timetable can also be adjusted where there is a '*material change of circumstances'* or there is otherwise *a special reason'*. It follows that the remedies timetable is never cast in stone and can continue to be adjusted until any particular remedy has been implemented provided that such change can be justified within the terms of s.138(3).

Then para. 141, the Commission refers quite specifically to the issue of market conditions and they say:

> "In summary, Mr. Falkner himself accepts that his point about market movements is normally '*irrelevant'*. The Commission agrees. Where market conditions may become relevant is in relation to determining the period over which divestiture may take place, but this is a matter the Commission did take, and continues to take fully into account: see paragraphs 110 to 115 of this Defence."

You will there is – at least in our view – an inconsistency between that and para. 30 of the skeleton.

Then defence para. 155 under the heading of "Quantification of credit crunch loss was not a submission made at the time.", para. 155:

> "The obvious inference to be drawn is that, at that time, BAA did not regard quantification of impact to be relevant or meaningful. Instead BAA pressed the Commission to take account of market conditions in setting divestiture timescales and as we have seen in paras 95 to 115 of this Defence, the Commission took full account of this factor."

Again, inconsistent with para. 30 of the skeleton and indeed internally inconsistent. If what they are saying is: "We did not consider quantification to be relevant", that is incorrect, we did not put quantitative evidence to them, that is correct, but it is acknowledged that we "pressed" – that is their verb – "pressed" the Commission to take account of market conditions in setting divestiture timetables, and they did take full account of the factor, and I will not take you back to para. 30 to show you the inconsistency.

So I turn now to the next heading in my submissions, the third heading, "What did the Commission take into consideration and what did it ignore?" There are two sections of the report to consider – and I think we can probably best do this from the confidential version of the report – the first I am going to take you to are paras. 10.88 through to 10.97, under

heading “Cost of remedies”; and secondly 10.156 through to 10.184 in relation to considerations on timing.

Starting with cost of remedies, and starting at 10.88: the Competition Commission does not suggest in this section, where the cost of the remedies are considered, that it has in fact assessed the cost to BAA of being required to divest three airports within the stipulated timescale. In this section all one finds is that the Competition Commission addresses and quantifies what it calls “separation costs”, these are burdens to BAA, they are another category of costs similar to loss of value, but they fall under four headings, and the four headings which are analysed here are, first: “IT” – information technology implementation costs, pension costs, design costs and general costs. They have a detailed appendix at 10.3 where it arrives at a quantification of these losses to BAA at £63 million. You will see that from 10.95 of the report.

Quite a lot of work was done by the Competition Commission to calculate the cost to BAA of the remedy, there was a dispute as to the figures, BAA does not challenge in this application those figures.

The Competition Commission accepts that these are not the only costs to BAA, for example, 10.117.

> “We recognise that the divestiture of three airports constitutes a major intervention in this market and will have a significant impact on BAA’s business and that the scale and timing of benefits are necessarily uncertain. However the detrimental effects we have identified are longstanding problems which go to the heart of the structure of this market and therefore require a structural remedy. Moreover, we are confident that the market characteristics which underpin the AECs and detrimental effects would be unlikely to change absent our remedy due to the absolute nature of common ownership and particularly high barriers to entry. Similarly we have little reason to believe that Government policy, which has been consistently supportive of the continued growth of aviation and the provision of airport capacity to support this growth since the privatisation of BAA will change so radically in the foreseeable future as to invalidate the effectiveness of our remedy.”

So they accept that their remedy is a major intervention in the market and they accept that it will have a “significant” impact on BAA’s business. To arrive at the word “significant” they did not quantify it, but it was a blindingly obvious proposition it was going to cause significant, i.e. more than *de minimis*, i.e. relevant and material, loss to BAA.

There is no analysis in that section that I have just referred you to of the costs of a very rapid series of forced sales, or fire sales as the Press accounted them in the summer of 2008. Recognising the existence of cost is not the same as analysing it quantitatively or qualitatively. It is plain they recognised there was an issue but it is clear that they did not analyse it.

If one stands back from this issue you could ask a question which is what would one have expected to see in the report if the Competition Commission had actually analysed this question? You start with the assumption that a forced sale gives rise to a significant loss and one would then simply ask yourself if it gave them a significantly additional period, and I am plucking figures out of the air, 12 months, 24 months – or something of that order – would that actually cause any downside to the benefits of the divestiture remedy that we are seeking to bring about in the market place.

One can get a handle on what the Commission should have asked themselves from the answers they would have come up with by examining their actual reasoning. If one now turns to para. 10.156 there is a heading 'Considerations on timing'. You will see that it does not say 'of timing' - it is 'on timing'. The Competition Commission in this section of the report identify a series of principles which they then apply. It is therefore easy to ask yourself, "Could the Competition Commission have asked itself (which it did not do) how these principles would have applied to the giving of extra time?" The first point that the Competition Commission identify is what it describes as 'asset degradation'. This is referred to in 10.157 and 10.158. There is a little bit of confidential material at the bottom, but I am going to read paras. 157 and 158.

> "BAA, in responding to our Remedies Notice and provisional decision on remedies, considered that it should be allowed to take longer than the standard period of six months to complete the divestiture process as, among other factors, separating airports from group linkage would take time and there was no need to stipulate a short divestiture period to mitigate the risk of degradation to assets. BAA noted that 'specifying a shorter divestiture period than twelve months at the outset, or requiring the divestments to be carried out concurrently, would create risks for the divestment process that could have a significant impact on the value achieved from the disposals' --"

You will see a very explicit recognition of the issue, but you see no analysis of it that follows.

"-- although it acknowledged that divestment could be achieved on a more rapid timescale. In fact, BAA had itself decided to accelerate the divestiture of Gatwick so that it would take seven months to agree a sale if this went according to plan, although prospective purchasers thought that this was unrealistic. BAA indicted to us that this had been prompted by ---"

Then there is a confidential piece of text. "10.158 The CAA did not comment specifically on divestiture periods other than to note that there were some significant limits to the extent that airports were likely to degrade during a divestiture period, given the nature of airports and their main operating assets, together with the CAA's regime of safety regulation".

Now, the Competition Commission did not ask itself - and I am using a hypothetical twelve or twenty-four months which, for the sake of convenience I will just call the incremental period - whether giving an incremental period would alter this conclusion. Would giving the incremental period lead to a degradation of assets? The answer appears to be, no, it would not. They recognise there is a problem. They do not go on and say, "How can we alleviate that burden to BAA? Would it hinder the objectives we are seeking to achieve?"

The same analysis applies to the emergence of the benefits from the remedy. One can see their analysis here. I am going to back-track a little bit to 10.113 under the heading 'The timing of the benefits of competition'. This is a statement of general principle in the following terms:

"In considering the effectiveness and proportionality of requiring the divestiture of three BAA airports, we have given particular attention to the period within which the effects of the remedy can be expected to occur. In general, the Competition Commission will tend to favour a remedy that can be expected to show result in a relatively short period. However, in making its assessment, the Competition Commission will have due regard to the particular circumstances of each case".

I think that is an unobjectionable statement of principle.

They then go on to say that the benefits of the divestiture remedy would be very long-term and they would not accrue before 2017 at the earliest.

MR. JOWELL: Could you read 10.114?

MR. GREEN: Of course.

"In this case, the divestiture of Glasgow or Edinburgh can be expected to result in benefits to customers within a relatively short period".

The basic remedy so far as the south-east was concerned you will see at the bottom of 10.115, which is said to be not before 2017 at the earliest.

Now, taking this in stages -- I am sure Mr. Jowell would like you to read the whole of para. 10.115.

THE PRESIDENT: We will read that. (Pause):

MR. GREEN: In this context I am going to take both long-term benefits and short-term benefits and deal with them separately - that is, benefits of the remedy. In the context of long-term benefits you will see that there is no addressing of the issue, whether giving an incremental period would have any impact on the coming to fruition of long-term benefits. Indeed, in relation to long-term benefits, as the Competition Commission itself recognises, the situation is complex because of the current system of regulation, planning and aspects of government policy. Indeed, the ability of the new owner of any of these assets to bring around benefits is not in its own hands. It is dependent upon third party decisions - governmental decisions. Now, who knows what the answer would have been if they had addressed their minds to it? They might have said, "Giving an extra X period would actually constitute a detriment or a delaying or a deferral of these long-term benefits". But, they did not ask themselves the question. It is not for the Tribunal to guess what the answer might be. You get a hint of what the answer might be from the report. In practical terms it is unlikely that it would have made any great effect. You would have alleviated BAA's loss by a substantial amount - not wiped it out, but alleviated it, without any great downside. Who knows what the answer would be?

THE PRESIDENT: You say, as it were, the benefit of the doubt should be in BAA's favour on that point - in other words, the Tribunal should assume there, because they did not analyse it, that there would not be any countervailing reduction in benefit, and therefore ----

MR. GREEN: I do not think you have to go that far.

THE PRESIDENT: You would not?

MR. GREEN: I do not think you have to go that far. You simply ask yourself, "Is there a relevant question which they have not addressed?" It is helpful to go on and ask, "What might have been its implications?" had they asked it, because it tells you that it is a material issue.

THE PRESIDENT: I thought the point that you were relying upon as being the relevant consideration that was not properly analysed was the fact that the timing that they adopted would result in significant impact on BAA in terms of loss of value of the assets sold.

MR. GREEN: Yes, that is right.

THE PRESIDENT: I did not know that you were also relying upon - and this may be my fault - them having failed to consider whether adjusting in that way would reduce the benefit of the divestment remedy? Or are they the same thing?

MR. GREEN: Those are really simply consequences, I think, of the starting point. If BAA's concern is that imposing the timetable that you have seen in paras. 10.183 and 10.184 there was a significant loss, then BAA said during the course of submissions - and it is recorded here - "We want a longer period". They said they wanted twelve months, twelve months, twelve months - in other words, thirty-six months. They said that would begin to alleviate their loss. So, you do actually have two timeframes. That was the position put forward in 2008. So, one is asking in one sense, "What should the Commission have deduced from that?" They should have said, "Is there any downside in public interest terms to us giving extra time?" So, it really follows from Proposition 1 that that is the question they should have asked themselves. All I am pointing out to you now - and I emphasise that it is not something that you have to decide because it is plainly not something you can decide - that it appears from the reasoning in the report that had they asked those questions there is a realistic -- a real chance that they would have given extra time. They did not ask the right questions. The questions were fairly obvious. Given an incremental period - let us call it two years, whatever - would that have caused asset degradation, which was one of their concerns? Answer: No. Would it have created a deferment to the long-term benefits of a divestiture remedy? On their reasoning, it does not seem to.

So, you start with simply what questions should they have asked and I think one just naturally leads on to questions which would follow from that which enable you to get a handle on that question.

THE PRESIDENT: Is there not a prior question? It is not worth looking at that question unless you take the view that the time that they have adopted will create a loss of value that would not be created by a longer divestiture period.

MR. GREEN: That goes to materiality, I think. If we had, *ex hypothesi*, been given an extra 24 months we would still have suffered exactly the same loss.

THE PRESIDENT: If that is the case there is no point worrying about the degradation of assets by a longer time period, and so on, is there?

MR. GREEN: There was never any issue, as I will show you, that timescale was causative of loss of value. That was clear. We put forward Mr. Falkner's report, based on publicly available material, which seeks to put a figure on the downside. If the loss of value to the assets were exactly the same on the Competition Commission's remedy and an extended divestiture

period then there would be nothing in the point. That is very difficult for the Tribunal to assess because it is a factual issue. We say they did not address their mind to that issue and we have got plenty of evidence to demonstrate that had they done so it would have been a material consideration. I will show you some of that shortly.

THE PRESIDENT: Yes.

MR. GREEN: That is the long term benefits. Mr. Jowell has emphasised by a great deal of squirming that there are short term benefits. These are unspecific benefits but one gets an idea of where the Competition Commission was coming from by looking at para.10.64, which is the Competition Commission's analysis. What they were trying to bring about was a state of dynamic competition. They say:

> "Our assessment reflects our view that the main benefits from the divestitures will result from the dynamic aspects of competition. As we explain in Section 5, competition is a dynamic process which drives prices and costs down, and increases innovation and productivity so increasing the quality and, more generally, the diversity of choice available to customers. Markets that are competitive generate feedback from customers to firms which, in consequence, direct their resources to customers' priorities. In addition, firms are encouraged to meet the existing and future needs of customers as effectively and efficiently as possible. We consider that there is scope for competition to improve the way in which the London airports deliver capacity in terms of its timeliness, design and cost-effectiveness as well as its allocation to users. There may also be an opportunity for competition to limit distortions relating to the location of capacity."

That applies both to the short term and the long term benefits of the divestiture remedy. In each case the Competition Commission would ask itself whether delaying the onset of this dynamic process would be causative by giving a bit of extra time. Spreading divestiture over a lengthier period does not, as a matter of common sense and logic, necessarily mean that the process of sale would be delayed in any substantially material way. You may find there are earlier sales. The extra period is just a long stop.

Importantly, given the uncertain nature of the benefits, there are additional questions which the Competition Commission should have asked about short term public interest losses. In relation to these, the Competition Commission assessed the question of so-called interim arrangements to cover the short term. Let us assume there are some short term benefits which they hoped would come about. They needed to ask themselves whether or not giving extra time would, on the one hand, therefore, create a boon to BAA; would it then create a

problem for the short term benefits, given that they could impose interim arrangements? They set out an analysis of interim arrangements at 10.220 through to 10.351. There is a long section on interim arrangements. I will not take you through this, it is over 100 paragraphs long. They examine a whole range of potential undertakings and regulatory reforms which could protect the market whilst the benefits came to fruition through this dynamic process.

One of the matters that they addressed were undertakings from BAA. Again, let us assume for the sake of argument that there are shorter term benefits – "shorter" here meaning shorter than 2017. Let us again take any entirely hypothetical example, benefits which might accrue in five years. I am plucking a figure out of the air. Assume that is the case and assume giving an extra two years would constitute a financial boon to BAA. What they should have then said is, "Can we balance the two by requiring BAA to give undertakings, for example as to quality, or cost, or price, and so on and so forth?" That would then ensure that there was a fair balance struck and the benefits would still come about. BAA would be constrained the interim while it had this extra longer period of time to sell off its assets. They just did not address that. It is not as if there were not palliatives for short term problems, there were plenty of them and they gave great consideration to them.

What does one draw from the analysis of the report itself? We say, on a fair reading of the report, the Competition Commission recognises that its divestiture timetable will risk causing significant losses to BAA. The report demonstrates that the Competition Commission did not analyse whether giving BAA the incremental period would cause any downside to the benefits which it was seeking through the divestiture remedy. The Competition Commission does, on the other hand, undoubtedly acknowledge that that balancing exercise is the right way to go about things because you can see that that is exactly what they did do under the heading "Cost of Remedies". That is para.10.89 onwards. If you go back to that section you will see that they did conduct a netting off exercise because in 10.111 they say precisely that:

> "These examples support our view that the net incremental benefits of competition are likely to be substantial and to exceed considerably the relevant net costs of divestiture for each of Gatwick, Stansted and Glasgow or Edinburgh."

We simply say that into that netting off equation needed to be inserted the loss of value which would accrue to BAA as a result of not being given a relatively modest extra period of time for divestiture.

THE PRESIDENT: That is what I had understood to be your point.

MR. GREEN: The other points I have made really follow on from that, but that is really the way in which it is crystallised. Everything else is really proof of that. You ask what questions should they have asked themselves in order to look at the report and see whether those questions were asked. That is what we say the lacuna is in the thinking.

THE PRESIDENT: As I understand it, you do not say they had to do a quantitative assessment such as that carried out by Mr. Falkner?

MR. GREEN: No.

THE PRESIDENT: You say they could have done a qualitative one?

MR. GREEN: Yes. We put in Mr. Falkner's report simply to show that it was possible. If they had addressed their mind to the issue and said, "We think a quantitative exercise is really unrealistic, but here is our qualitative analysis", then we might have been on shakier ground although it would be a rum thing to say, since they were analysing almost those same factors during the quinquennial review which was going on at the same time. They actually make the point in relation to Stansted, that the market is in crisis and one can expect the market to improve over time and this will have an impact on values. There is no great mystery about that point, as I shall you in a moment.

That is really identifying the gap. That is what the Competition Commission, we say did and did not do.

What I would like to just do now is to take you to those limited paragraphs of the report that in their defence, but not the skeleton, the Competition Commission rely upon as evidencing the qualitative analysis. I pointed out to you that, at least in our submission, there is a distinction and a difference between their skeleton and their defence. If one takes their defence they identify the following paragraphs and I am going to go through them – there are not many of them – as, they say, reflective of a qualitative analysis. I am going to take them in sequence, one by one, and you will be able to see that each of these paragraphs do not reflect a qualitative analysis of the issue that I have identified. The first para. that the Competition Commission refer to is para. 10.157, which I have read out, under the heading: "Considerations on timing". In this paragraph they identify the issue but they do not go on then to analyse it.

THE PRESIDENT: They say it could have a "significant impact".

MR. GREEN: They accept therefore it could, yes, quantum is accepted.

THE PRESIDENT: On the value?

MR. GREEN: Yes, but there is no taking of that into account, and all they are doing in 10.157 is recording BAA's submission, there is no analysis of it, it is simply a record of our submission, it is not analysis by the Competition Commission.

The next paragraph they refer to is 10.160 where they say:

> "We accept the view that airports are unlikely to degrade as fast as other businesses over a divestiture period. We also accept hat the persistence of adverse conditions in financial markets will entail a degree of difficulty for financing airport acquisitions."

That, I guess, is what they are relying upon: "that the persistence of adverse conditions will entail a degree of difficulty for financing airport acquisitions". That is identification of an issue but I will show you shortly that a huge range of other factors, other than just access to capital are relevant and, indeed, there is no analysis of that or a degree – high, medium, low – no analysis of that at all. We rely upon that to show that they identified the issue but they never grappled with it. They then say:

> "We consider that the divestiture of Gatwick, as the first of the three airports to be divested by BAA, may be expected to take longer than the rest as BAA needs to establish a sale process and appropriate separation of the airport from BAA, particularly of its IT systems."

So that "we consider" has nothing to do with the point which is in the prior sentence, which starts: "We accept", they accept the issue but that is not a consideration thereof. There are many factors which also impact upon sale value over time. Mr. Falkner sets them out, and I will show you those in a few moments, but for illustration three sales of airports is virtually unprecedented. There may be no demand for three airports – it is not just a matter of getting access to capital, the market may be sated by the time you have sold two, there are not that many potential buyers around – you saw that from looking at the Press coverage in 2008, those that came to the top of the froth are pretty limited in number. There is also the ability of buyers to game, a well known phenomena – buyers who know that the vendor is up against a strict forced timescale just simply keep on saying "no", "no", "no", "no, I don't accept that price", until the 11th hour arises when the vendor is forced to sell and the only price around is the purchaser who has been "gaming" away for the last X months.

Another factor which is highly relevant to loss of value unrelated to the availability of capital.

The other paragraph relied upon, 10.162. you will see it has some material in it, if you could just read it to yourself, you will see it is a conclusion it is not an analysis – it tells us

the factors the Competition Commission took into account are those above i.e. 10.156 to 10.161, so it does not add anything.

The Competition Commission refer also to 10.178 and 10.179 under the heading "Simultaneous sale of BAA airports". This concerns the implications of simultaneous marketing, but it does not address the question of the incremental period and you will see a reflection of yesterday. You will see that there is a comparison between MAG's position, who wanted a fire sale, and BAA's position who did not, but that does not go to the analysis of the incremental period, it is simultaneity.

Then there are three other paragraphs 10.180:

> "While maximising proceeds may be the principal objective of BAA, our objective is to achieve a comprehensive remedy to the AECs we have found, while having regard to the principle of proportionality."

You might want to just put by the side of that "Tesco-isation" – I will explain what I mean by that in a little while; that is just a statement, it has no analysis in it. It recognises an objective, it does not say how you reconcile A against B or C, it is not an analysis, it is boiler plate language designed to prevent a matter being judicially reviewed.

10.183 is just a statement of the decision, as is 10.184. Those are the paragraphs referred to in the Competition Commission's defence as involving an analysis, qualitatively, of the issue.

I said to put against 10.180 "Tesco-isation" and let me just tell you what I mean by that. As the Tribunal knows the judgment in *Tesco* was handed down on 4th March 2009, the Competition Commission's report came out 15 days later on the 19th. The Competition Commission considered the *Tesco* judgment on the 4th and the lawyers told the Competition Commission that they would provide advice available on the 9th – the reference for your note is respondent's bundle tab 4, p.72.

On 10th March, just literally days before the report was published, in view of the paper presented the Competition Commission recognised that "some adjustment might be needed to take account of the decision" – respondent's bundle tab 4, p.76. Mr. Christopher Clarke, the chairman, was given delegated authority to approve significant changes to the draft (p.77). Then in the report itself, at p.223, footnote 2 (bundle 2, tab 1, p.223) "We have adopted these principles in our assessment of proportionality remedies." So at the eleventh and three quarters hour *Tesco* came out, they recognised some changes were needed, they went away to redraft, the chairman had delegated authority to approve. What does this show? Well the clear impression is that there was a little bit of window dressing required in

the last few moments before the report came out and we simply ask you to do this: we invite you to focus on substance and not form. I am bound to say that 10.180 is form not substance.

THE PRESIDENT: Just going back to the previous paragraph 10.179, I just want to make sure one sees what they are saying there. They recognise that simultaneous marketing in the current climate could restrict the proceeds, in other words reduce the value of the sale?

MR. GREEN: Yes, forcing two sales at once, let us say for the sake of again hypothetical argument: "You must sell Stansted and Gatwick in the first 12 months".

THE PRESIDENT: Yes, so they are not, strictly speaking, looking at the length of the sale period, they are looking at selling two or more at the same time?

MR. GREEN: Yes, that is right.

THE PRESIDENT: Then "… we consider that the marketing of one airport can overlap with preliminary preparations to the sale of another without impacting the pool …." But there would not be that effect simply because there was an overlap in that sense?

MR. GREEN: Yes.

THE PRESIDENT: So 10.179 does not appear to be dealing with the length of the sale period, does it?

MR. GREEN: No, and it is not the point we are really making. The incremental period necessarily involves them addressing what is the downside, and I have made my submission as to what the downside is. It would have been for them to have formed a view, a judgment on the downside, if any, and how it netted off. But that is not the issue which is being addressed here.

THE PRESIDENT: At some point it would be helpful to know how you put your case on what the qualitative analysis might look like – only in very general terms?

MR. GREEN: The qualitative analysis is -- Let us assume that the Competition Commission addresses itself to -- and, again, I am picking a figure out of the air - two years extra, they would then ask themselves, "Will this give rise to asset degradation?" No. "Will this impact upon the realisation of the dynamic benefits which we have identified will flow out of the divestiture remedy?" Answer 'Yes' or 'No' as the case may be. "Is there an impact on the short-term benefits we have identified, particularly taking account of the availability of interim undertakings and other remedies?" answer 'Yes' or 'No'. That is the qualitative analysis they should have taken account of, starting with the proposition that giving us extra time would alleviate to some degree - we do not say 100 percent - the losses which BAA was going to sustain otherwise. That is essentially the point which was put to the

Competition Commission during the inquiry. That is the process which they applied to other factors and there is no reason why they should not have applied that thought process to this particular factor. As you have seen from Mr. Falkner's report, potentially it made a lot of money.

I want to pick up two other points which I think, in a sense, underpin that point. I am going to deal very briefly - and this is really my fourth heading - with the argument that Ferrovial accepted the risk. I am going to deal with this very briefly because we have dealt with it thoroughly in our written submissions, and it is not clear to what extent it really remains as an issue in the light of the Competition Commission's skeleton. It is suggested in some way that BAA accepted the risk of loss when it was purchased by Ferrovial. With respect, this is an incomprehensible point. BAA is not Ferrovial. It accepted no risk at all. Ferrovial, for its part, might have accepted a risk that BAA would be subject to regulatory intervention because any purchaser of any asset in a regulated market accepts that risk - that it would be subject to regulation. It does not accept that it would be subject to *ex hypothesi* unlawful regulation. There is a huge difference between accepting the risk of regulation and accepting the risk that regulation would be done unlawfully, which is the hypothesis upon which we are addressing this point. If, of course, we are wrong that it was unlawful regulation, the point falls away anyway. So, one starts *ex hypothesi* with the assumption that it was unlawful regulation, and to suggest that in some way, shape or form any investor which bought into that risk and accepted it was thereby *volenti* is really a nonsense.

That is all I propose to say about that. It seems to us that it is the short answer. There are various other answers which we have set out in our written documents.

The last matter I wish address before turning to conclusions is that BAA never raised the issue. There are many answers to this. First, the Competition Commission says itself in its defence in the paragraph I referred you to that BAA pressed - that is their verb - the Commission on this. You have seen that the report recognises that BAA have made this argument in a variety of paragraphs. So, there is nothing in the point that we did not raise it. But, let me give you an illustration. There are a couple of illustrations of how it arose. The first is in the respondent's bundle at Tab 2, p. 21C. This is a record of a hearing between the Competition Commission and BAA on 20th January, 2009. It was one of the very last hearings. It was almost the last hoorah. There are a number of jokes about it almost being the last hoorah in the transcript. Representing BAA at this meeting, amongst others, was Mr. Colin Matthews, the Chief Executive Officer of BAA. At the end of the hearing he was

asked to sum up his main six points. You will see at p.122 of the internal numbering of the transcript (21C of the bundle), at the top of the page,

> "To summarise in six points, and it will not take very long, the ones we have mentioned today that matter most to me --"

Then he goes through them. I am told that this is confidential. Can I ask you just to read p.124? It is the sixth point. (Pause): You will see that that was the final shot. This was the end of a long period, essentially intended to be the final point, the last point being made by the Chief Executive, linking speed and value.

THE PRESIDENT: In which he gives a time period.

MR. GREEN: That is shorthand for what is reported in the report, which I think is non-confidential, which is twelve plus twelve, plus twelve. That is shorthand. For each. After all this time, they all know each other so well that they were reducing a lot to shorthand. Just to give you another illustration - and again this is confidential material which I will ask you to read to yourselves - going back a month or so into November -- Bundle 6, Tab 25. This is a note of a hearing with BAA on 18th November, 2008. It is all marked as confidential. It is referred to in our non-confidential chronology. It is a meeting concerned with Gatwick and, amongst other things, the timing of the sale. I would like to ask you to turn to p.3 of the transcript. At line 19, p.3, the question posed by the Competition Commission -- This is a meeting with the staff. You will see the question. You will see the implications that one deduces from the question which is that it was extremely clear in the Competition Commission's thought processes that there was a very powerful link between timing and value. You see the word 'accelerate' in line 3. Then there is an explanation by BAA which finds its way into a confidential part of the report, which gives the reasons why BAA thought that doing what they were doing would actually, in effect, give them greater time to minimise loss. You will need to read - and I suggest you do it at leisure - the whole of pp. 4 and 5 down to, really, line 20 on p.5.

THE PRESIDENT: yes.

MR. GREEN: It was plainly an issue - what one can see in a particular context here - and quite an important issue. Was it an "elephant in the room"? The press obviously thought so because the whole question of a fire sale was the sort of language which the press were using just a month or so earlier than this in June, July, August 2008. Everybody realised that the sale of three assets of this scale in a short timetable was unprecedented and would cause loss. No one was in a position to put an exact figure on it, because at the time we are talking about now nobody knew what the Competition Commission's ultimate decision would be – for

example, as to which airports, in which sequence, over what period of time, whether concurrent or consecutive, and all of those things would be ultimately determinative of the scope of the loss.

Another benchmark against the wish to measure the size of this "elephant in the room" is Professor Moizer involvement in "fleet of foot". Here you have a very well established pension fund that is, itself, queuing up to benefit from purchases of an unusual sort, of a long term nature, in distressed assets. That was the market reality at the time. That is a useful benchmark.

Then we have Mr. Falkner, and I would like to just pick up one or two paragraphs in his report at bundle 5. I want to make a series of short points about this. His starting point you will find on p.5 of his report, s.2 "Background". He starts by drawing a distinction between, on the one hand, the Competition Commission acknowledging the problem and then its analysis. So he points out three things under s.2 "Background". He takes three paragraphs of the report and he says that the Competition Commission acknowledged that its remedy was a major intervention, causative of the significant impact to BAA. He points out that the Competition Commission also acknowledged that persistence of adverse conditions will entail a degree of difficulty for financing, and he points out that the Competition Commission accepts that its remedy will limit the ability to sell to a suitable purchaser. He concludes that the Competition Commission knew about the issue, recognised it was relevant, but he goes on to say that it does not refer to any analysis of the impact of current financial market conditions on BAA's prospective sale proceeds relevant to those that BAA could expect to receive if the assets were sold under stable financial market conditions; or refer to any quantitative or qualitative analysis, but of course it is a matter for them which of those they choose and which is appropriate:

> "... a qualitative discussion of the increase in costs likely to be suffered as a result of the higher cost of capital ..."

Pausing there, you can forget anything to do with cost of capital. It was originally raised as a point. You will have seen the defence of the Competition Commission where it spent a great deal of time addressing it. We decided that it was prudent simply to drop the point, not because we thought it was bad but it was simply an irrelevance and a distraction. So you do not need to address anything which goes to cost of capital.

You will see a summary of his conclusions, that:

> "... if forced to proceed with sale of three airports within [the period] under current market conditions, BAA faces a material loss value relative to the alternative of completing the required divestitures in an orderly fashion ..."

and he then gives an assessment, which is a confidential figure.

He then goes on to explain and to analyse, on the basis of the available information in the public domain and available to the Competition Commission at the time what the impact on BAA might have been. You will see his summary figure, and he goes on to quantify that in some detail.

If you look at 4.6 of his report on p.25 he identifies factors which would have been relevant. All of these are "elephant in the room" type factors, there is nothing complicated about them. The factors he refers to are fewer bidders, less capital availability, bidders seeking higher returns on scarce capital, bidders less inclined to compete away returns due to a significant number of alternative investment opportunities, including the remaining BAA airports, IPO market effectively closed as a potential alternative source of capital, scale of proposed divestiture programme relative to level of historic investment in the airport sector. He then sets out his conclusion and you will see there is, in fact, a confidential figure in that.

You will also see, if you turn over, s.4.9. He points out that market conditions are expected to ease over time and he points out that the Competition Commission fully understood this and he refers to their quinquennial review in the second paragraph of 4.9. He then goes on to explain how he came to his figure for loss. He was not asked to go beyond that.

All this demonstrates is that there were some pretty factors out there, what I have described as "elephant in the room" factors. No one ever doubted that there was a loss attributable to accelerated timetable.

If one wants to really get a handle on why this is an "elephant in the room" there is a very, very recent analogue that I can refer to. We have the statement by the Prime Minister just a few days ago that he intends to sell off various assets, "more Crown jewels, more of the family silver", and this elicited a variety of responses in the press as to the wisdom of selling off assets in the present climate. Can I hand up one or two references from the press. (Same handed) They make entertaining reading. There is no great relevance to them. It is a sort of sanity test really, but The Times just a few days ago on the 13th reported Prime Minister Brown's "£16 billion asset sale fraught with difficulties, critics warn".

The Liberal Democrats' Vincent Cable, "Attempts to sell off large amounts of Government land into a very depressed market such as we have now would be frankly barmy, these asset sales should be based on a financial calculation not a political one".

Then when it was suggested to Lord Mandelson that certain local authority assets, including Birmingham Airport, should be sold off, if you turn to the article which starts, "David Cameron dismisses Government plans to sell off £16 billion of assets", and turn to the second page of that, about half way down,. "David Cameron refers to the errors of the prior sale of gold reserves, and then one has Lord Mandelson, as ever,

> "In a separate interview, Lord Mandelson, the Business Secretary, ridiculed the suggestion that the government would sell assets when prices were low.
>
> 'Of course we're not going to sell at the bottom of the market when selling the assets is going to barely realise any of the value of them, of course we're not going to do that; we're not idiots', he said".

That is why this is "an elephant in the room" to cause someone in the present market to flog off three giant assets of the value of the three airports in question in a constrained timetable you are going to lose money – shedloads of it. If you give people extra time you may not alleviate all the loss but you have a really significant chance of alleviating some of the loss because you get an orderly sale. Everybody understood that, you do not need a lot of maths to come to that conclusion. The Press was able to put a capital value on the three assets together – I think The Guardian did it in November, they roughly came to a figure for the three assets of approximately £5 billion. If you assume a discount for accelerated sale of 5, 10, 20 per cent you come to a figure; it does not take rocket science to be able to do a quick and dirty "back of a fag packet" calculation to understand the point has legs, accelerated sale in this market of assets of this scale all of the same type is going to cause loss.

So the question is: why did they not just take that on board without necessarily having to quantify it and simply say if we give them extra time what is it going to cost us in terms of public interest, and that is the long and short of it.

THE PRESIDENT: And you say that exercise was not carried out?

MR. GREEN: It was not carried out. So in conclusion the Competition Commission did not do a quantitative or a qualitative analysis, it failed to address a key consideration, namely the impact on BAA, and the value of the divested assets in an accelerated forced sale. It therefore did not take account of that issue as part of the balancing exercise, and frankly it is common ground that they did not do this and it was a relevant factor.

Going one step further the reasoning in the report suggests that had they carried out this exercise there was no great and obvious downside to giving a certain amount of extra time, but whether they should have given extra time was not an issue they addressed themselves to, they did not come to a judgment about that, and therefore the exercise they did conduct was, we submit, deficient.

I am conscious of time, there are a number of other points which the Competition Commission raised, what we have done overnight is to put them on a bit of paper, I am not going to deal with what we view as even more spurious arguments raised by the Competition Commission. I have dealt with I think the vast majority of them, but if we could simply hand up a short note.

THE PRESIDENT: We thought we would have a short break.

MR. GREEN: Yes, and it will give Mr. Swift chance to just skim through – I am finished now.

THE PRESIDENT: Yes, do you want us to take it with us?

MR. GREEN: Yes, please. We are going to hand up a confidential version, so it will need to go only to those within the confidentiality ring. We do have non-confidential versions available. We are going to hand out the confidential versions.

LORD CARLILE: Mr. Green, just on your last point, can I ask you a question which may be a silly one and please say if it is. If somebody described what the Prime Minister said as something like "selling off the assets when the bailiffs are already at the door" – I recall that comment.

MR. GREEN: Yes.

LORD CARLILE: Does it really make much difference whether the period of time is – to pluck figures out of the air – 18 months or three years, if the potential buyers know in any event that the bailiffs are already at the door, because the Competition Commission is the bailiff in a sense?

MR. GREEN: That is a factor which, on any forced sale, will have an impact upon value, I do not think there is any doubt about that, although the economists and the academicians refer to "gaming", if you are forced to sell within even five years the buyers will then decide at what point in time they come into the game and try and squeeze the pips out of you.

LORD CARLILE: It is like an auction sale, is it not?

MR. GREEN: It is like an auction sale, there are constraints, but that is one factor which would be relevant, but of course the longer you have the greater the ability to mitigate the effects of that, yes. So yes, that is a factor, but it is simply one factor amongst others, and it cannot

seriously be suggested that by giving an extra incremental period it would not have alleviated some of the loss.

I suppose it is also true to say, and I am being reminded of this, that the Competition Commission did not spell out the time frame for the simple reason they wished to avoid the risk of gaming in that manner, which is why those figures and the parameters are, in fact, confidential. So they would know there was some constraint, but they would not know the exact figures. Can I hand this up? [Document handed to the Tribunal]

THE PRESIDENT: Mr. Green, we will say 15 minutes.

(Short break)

MR. SWIFT: Good morning, Sir, Members of the Tribunal.

THE PRESIDENT: Good morning, Mr. Swift. Mr. Swift, just so you know, there is a possibility of a bit of time on Thursday if we need it; that is not as an encouragement to people, but there is that possibility.

MR. SWIFT: I am grateful. I would be very surprised if I was responsible for putting the case over until Thursday.

May I start with proportionality? To a large extent I believe I am going to be replying to the points made by Mr. Green this morning, which will be fresh in the minds of the Tribunal.

As a starting point I have to submit that the case that the BAA has put forward on proportionality has not been constant throughout the pleadings, starting with the notice of application then on to the reply and then the skeleton. I am not sure that anything turns on the point, save that if I can look ahead to the issue of the assumption of regulatory risk, it was at least arguable on a proper reading of the notice of appeal that what the BAA was objecting to was not the timing of the divestment of the two South East airports and the Scottish airports, it was the divestment package; it was, in other words, the extent of the divestment, and you, Sir, Members of the Tribunal, will find references in the pleadings to the "extent", and the only sensible construction of the word "extent" is that it went to the divestment of more than one London South East airport.

That is important because when considering aspects of regulatory risk it appeared that the main concern of the BAA was that it was being required to divest the two London airports, and one of the Scottish airports and that this was truly the draconian remedy that the Competition Commission was imposing on the BAA. The nuancing of the arguments on proportionality is therefore of some considerable significance – the case has developed.

Another aspect of the development of the case has been the deliberate withdrawal of any suggestion that either the extent of the divestments or their timing raises the cost of capital

at the BAA airports generally, and at the airports to be divested and, as a result, airlines and consumers might, in due course, have to pay more for airport services than they do under the common ownership of the BAA. That, in our submission, was an argument destined to fail, but it appeared to have along with it a kind of *Fedesa* mark four signal – that is terribly shorthand, but looking at the principles in *Fedesa* that have been gone through by this Tribunal now on several occasions, one will remember, and it is said in *Tesco* Ground 1, that the adverse effects of any remedy have to be analysed and brought into the balance before a proper proportionality test can be applied. Of course, as in the Tesco case, the adverse effects there were not the adverse effects on the company who brought the application. The adverse effects were on local societies as a result of a possibility of a failed prohibited investment not being replaced by other investments of similar quality and value within the same timescale. But, those are issues very familiar to you, sir, and to other members of the Tribunal.

One can see that that was the way that the cost of capital line of argument was going because of the adverse effects here on those other than BAA. That has all gone. So, what we have now got is the cost to BAA of the divestments, and that cost is now analysed in terms of a hypothetical test of some reduction in value attributable to an abridged timetable, the comparator being, as I understand it, the twelve plus twelve, plus twelve that Mr. Green has suggested.

Pausing here, this is, of course, an application for judicial review in which the decision-maker has a margin of appreciation having regard to the evidence put forward. My submission is, generally, that the timetable that you have seen in the report in Section 10, with its appropriate redactions, falls well within that margin of appreciation. More than that, it is not, of course, an abridged timetable. It is only abridged by reference to the extremely long twelve plus twelve plus twelve that the BAA was originally proposing. It is, of course, an extended timetable in relation to the Commission's guidelines. That extension has been considered and taken into account in the decision-making process precisely so as to avoid the kind of damage that Mr. Green is alleging is going to be caused to his clients. We had some hyperbole yesterday, but this morning we are into elephants in a room; shed loads of money and not a single attempt by BAA to quantify what the materiality of this alleged loss is going to be. This Tribunal should not, and will not, be in any way diverted by such hyperbole when in the course of the entire inquiry BAA was not able to put to the Commission any form of quantification of what it said would be a loss attributable to a decision on one timetable as against another.

So, there is a lack of credibility associated with this case on proportionality. Never put in proper terms at the time. Then, found in a witness statement from an expert brought in after the event who - and this was brought to your attention just before the adjournment - taking into account a number of factors in temporary conditions, comes upon a figure of £X. That is supposed to be 'elephant in the room' figures and not unreasonable compared with figures that were bandied around by the press. That is not evidential material to which this Tribunal should attach weight.

Having said all that, there is an element of unreality about the way this case is being presented because it does not reflect either what BAA has done or what is being done at the moment or the machinery that is in place for which provision is there in the statute in order for the divestiture to take place under the close monitoring by the Competition Commission.

May I ask you, sir, members of the Tribunal, to take up the Commission's defence in the core bundle at Tab 2 ---

MR. GREEN: I am sorry to interrupt. My friend referred to a confidential figure which is causing a bit of consternation.

THE PRESIDENT: I was trying not to draw attention to it.

MR. GREEN: It may be that the Tribunal would direct that any journalist or other persons in the room are not entitled to take account of that figure? I know the cat is now slightly out of the bag, but not has not necessarily escaped the room.

MR. SWIFT: My apologies.

MR. JOWELL: It just strikes me that it might be easier for Mr. Swift and I to give our submissions on the proportionality point in private so that we can make submissions more freely. Of course, then, a redacted transcript could then be made available to the public on the Commission's website. It just might be more convenient and to avoid any further slips.

MR. SWIFT: I would certainly appreciate that. Indeed, I was going to come to that point at the next stage.

THE PRESIDENT: If you think there is a significant danger that confidential material is going to be revealed, then we reluctantly would probably do that. Mr. Green has managed it by just asking us to read things. But, if it is going to at all affect the free-flow and the freedom to make submissions, then it may be we should. We are reluctant to do it.

MR. SWIFT: We can have a go. The fact that I have made it appear incoherent and have been unable to finish sentences is probably no surprise anyway. (Laughter) We will see how far we get. I understand that it is important ----

THE PRESIDENT: Incoherence is not a characteristic we associate you with, Mr. Swift, at all. Shall we see how we get on? If you are finding it difficult, as it were, then we can look at it again.

Can I just say for the record that Mr. Swift mentioned a figure a moment ago when he was making submissions. That figure is confidential. We therefore make a direction that it be not reported or repeated to anyone who has not heard it in court today. Thank you.

MR. SWIFT: I am grateful for my learned friend, Mr. Green drawing that to my attention. I hope I do not slip up again.

The defence, at Tab 2, para. 141, p.47 of the core bundle. Of course, the defence is plainly not to be read like a statute. It is like the report is not to be read like a statute. But, there is a point at which when the Tribunal goes to the report in Section 10 it is, in my submission, extremely important that the Tribunal reads through from the beginning to the end. I understand why Mr. Green was going to one section and then another, but there were, as you will have appreciated, several omissions, and my recommendation is to see where it starts, where it finishes, and then you will see the flow from which, in my submission, there is only one proper inference - that is, that these factors were taken into account to the extent that it was possible and practicable to do so.

THE PRESIDENT: Speaking for myself, I have read it at least once from beginning to end. I expect the same applies to my colleagues. We will, though, be doing it again.

MR. SWIFT: I am grateful. This is not redacted. Paragraph 141 is the end paragraph in a sub-section in which we said that the fundamental premise of the Falkner report is not accepted. Paragraph 141 says,

> "In summary, Mr. Falkner himself accepts that his point about market movements is normally '*irrelevant*'. The Commission agrees. Where market conditions may become relevant is in relation to determining the period over which divestiture may take place, but this is a matter the Commission did take, and continues to take fully into account".

That is where Mr. Green stopped. He did not take you to paras.110 to 115 of the defence. May we now turn to those. Again, it may be helpful to start at the earlier heading at the top of para.88, "*The Commission's general approach to timing of remedies*". Mr. Green took you, Sir, to paras.88 to 90. These are important considerations because we are dealing with the statute and Mr. Green said he had no difficulty with accepting what is stated in para.90. Then it is worth reading again what is in the guidelines at para.91:

"*A third consideration is the timescale within which the effects of any remedial action will occur. Some remedies will have a more or less immediate effect while the effects of others will be delayed ...*"

Then emphasis added:

"... *The Commission will tend to favour a remedy that can be expected to show results in a relatively short time period – so long as it is satisfied that the remedy is both reasonable and practicable and has no adverse long-run consequences.*"

"Reasonable" is an expression that covers a wide variety of factors and this must take into account "reasonable" having regard to, among other things, the position of the person whose airports are to be divested.

Then we go on at para.92:

"The Commission's preference for remedies that can be implemented relatively quickly reflects its duty to have regard to the need to provide as comprehensive a solution to the AEC as is reasonable and practicable. Speedy remedies are generally an important component of comprehensiveness."

At this stage, as the Tribunal will be aware, the Commission is drawing the connection between its guidelines on the one hand and its statutory duties on the other. Where we have an AEC then by definition there was an adverse effect on competition; and where remedies are required to bring to an end that adverse effect on competition then plainly, to be effective, one would expect them to be implemented as soon as reasonably practicable.

It goes on:

"The Commission's normal approach is thus to ensure that there is nothing inherently unreasonable or impracticable about the proposed timetable for implementation of a remedy when finalising the report it is required to prepare pursuant to s.136(1). If there is a potential problem with proposed timing and that is brought to the attention of the Commission, then the timing can be adjusted so as to alleviate the problem, provided that the remedy remains reasonable and practicable."

Let us assume here that the problem relates to a possible reduction in asset value, maybe below RAB, or whatever the appropriate test may be.

Then they go on at 93:

"Notably, the actual obligation relating to the timetable for implementation of a remedy does not crystallise until final undertakings are agreed pursuant to s.159 or

a final order is imposed pursuant to s.161, neither of which has yet taken place in this Market Investigation."

Now surprisingly, there is an appeal before the Tribunal.

"Further", and then we quote s.138(3):

"... specifically provides that the actions taken by the Commission under s.159 and 161 '*shall be consistent with its decisions as included in its report by virtue of section 134(4) unless there has been a material change of circumstances since the preparation of the report or the Commission otherwise has a special reason for deciding differently.*'"

So that is imposing a duty on the Commission to take an action consistent with its decisions, as included in the report, and then an important proviso, "unless there has been a material change in circumstances".

So it follows, as we say in para.95:

"... that the remedies timetable is never cast in stone and can continue to be adjusted until any particular remedy has been implemented provided that such change can be justified within the terms of s.138(3)."

That is how the statutory scheme works.

That is the general approach in paras.88 to 95 which, in my submission, should be accepted by the Tribunal. I do not think they are in any way controversial.

Then at paras.96 onwards, the Commission shows how it assessed the timing in this case and, in our submission, did so in a reasonable and practicable manner.

LORD CARLILE: Mr. Swift, just in case it matters, can I just ask if "reasonable and practicable" are tortology in this context?

MR. SWIFT: No, they are not tortology. They are found in the section, I think it is s.138, that provides that "a remedy shall be as comprehensive a solution as is reasonable and practicable". There is no tortology. The two, in a sense, fit together. The test of what is "reasonable" and what is "practicable" are different. There may be some remedies that are reasonable.

THE PRESIDENT: So "timetable" may go to the practicability, for example?

MR. SWIFT: Yes, indeed. Looking ahead, whether one could look at practicability on its own or to go with "reasonable", there appears to be a consensus as between BAA on the one hand as the seller of the assets and Manchester Airport Group in that paragraph identified by Mr. Green, that there should not be concurrent sales because that would have a market effect on the ability of the bidders to obtain the appropriate finance. It would go both to

reasonableness and practicability. They are not tortologous, they do fit together as part of the statutory scheme.

Sir, para.97, the Commission then referred to a full section in the report at paras.10.156 to 10.184:

> "... a full and careful consideration of the issue on the timing of the divestments, taking into account the representations made by BAA. In general terms, the Commission weighed the advantages of remedying more quickly the substantial AECs that it had identified against the potential disadvantages of imposing a demanding timetable."

That is the paragraph reference, 97, where I suggested respectfully to the Tribunal that that is where one should be reading a good chunk of the report as a whole, 156 to 184.

Then at para.98, and I cannot believe that this is in issue:

> "Key to this process was the consideration of BAA's submissions in response to the NPR and PDR."

The NPR is the "Notice of Provisional Remedies", and the PDR is the "Provisional Decision on Remedies". Again, these are not redacted, and those submissions were, in summary:

> "(i) that separating the airports from group linkages would take a long time;
>
> (ii) that there was no reason to stipulate a short divestiture period to mitigate the risk of degradation of assets;
>
> (iii) that a period of shorter than 12 months or requiring concurrent divestment would create risks that could have a significant impact on the value achieved through the disposals;"

So here we have a reference to the value.

> "(iv) the divestment could, however, be achieved more quickly than this (Report, para.10.157)."

Then it is worthwhile also reading what is at para.99:

> "BAA also submitted ... that:
>
> '*Uncertainty around market conditions indicates that the Commission should take a flexible approach to extending the divestment period if this becomes necessary.*'"

"If this becomes necessary" –

> "'*BAA would expect the Commission's decision on such issues to be informed by advice from the monitoring trustee concerning BAA's conduct of the sales process. BAA would expect the Commission to exercise such powers to extend the first*

divestment period where the sale process had been run efficiently but had been slowed down by external factors such as economic conditions, rather than factors under BAA's reasonable control.'"

That was their submission and that might seem a rather sensible and constructive submission. Then the Commission goes on saying that:

"… Weighing these various matters in accordance with its statutory duties the Commission accept that time would be needed for the separation of the facilities shared by the airports, and it accordingly granted longer for the first sale (i.e. Gatwick) to allow time to separate the airport from shared facilities, especially the IT systems. The Commission also accepted BAA's submission that are unlikely to degrade in value as other business assets, and that the persistence of adverse conditions in the financial markets will entail a degree of difficulty for financing airport acquisitions, both of which were considerations to be weighed in favour of an extended divestiture timescale."

You will recall in opening I was saying that the reality of this is that we have an extended divestiture timescale, not an abridged timescale, and not a concurrent divestment timescale. Now we are getting into mines around the place!

"Consequently the Commission decided that a stand-alone period of X longer than the period of six months normally granted by the Commission when ordering a divestiture remedy for each airport was appropriate, with X further months afforded to BAA in respect of the sale of Gatwick and, in relation to Stansted …"

- and the rest is confidential.

If you just read para. 102?

THE PRESIDENT: Yes.

MR. SWIFT: (After a pause) And 103 I can say that the Commission accepted that the simultaneous marketing of BAA airports might constrain the opportunity to sell to a suitable purchaser and restrict prospective proceeds, but that an overalp in the marketing of one airport with preliminary preparations for the sale of another airport would be unproblematic in that respect.

Then at 104 – quite heavily redacted ----

THE PRESIDENT: Shall we read that?

MR. SWIFT: I would ask you to read that, Sir, yes. This is a very important paragraph.

THE PRESIDENT: Right. (After a pause) Yes.

MR. SWIFT: I should say, since we are in Judicial Review territory that in my submission those conclusions are amply justified having regard to the evidence that was before the Commission. May I move to 105?

THE PRESIDENT: Yes.

MR. SWIFT: A short paragraph:

> "In accordance with these considerations, the Commission decided upon the sequential sale of the airports, with the X overlap described above."

Then:

> "106 It is also relevant to note that the total divestiture period permitted is X months from the date when BAA initiated the process with its announcement that it was putting Gatwick airport up for sale."

This, as you will recall is September 2008. That certainly is in the public domain.

> "This is the relevant period to consider for divestment, not the period of X months that is repeatedly referred to by BAA in its Notice of Application and which runs only from the publication of the Report."

Then an important paragraph at 107:

> "In summary, therefore, the Commission acted reasonably by inviting BAA's representations on timing, considering them, and taking them fully into account in the decisions it took pursuant to s.134(4) for the purposes of the report it had to prepare under s.136(1)."

Now, pausing here, let us look at this sentence:

> "In that regard it is, however, self-evident that there is a limit to how long the divestiture timetable can be drawn out. If there is no reasonable limit to the divestiture period, the decision taken by the Commission under s.134(4) would not produce a remedy which was effective and thus enable the Commission to discharge its statutory duty, or act in accordance with its guidance."
>
> Although the Commission did not, and does not, accept that it should subordinate the objective of achieving a comprehensive remedy … to BAA's interest in maximising sale proceeds, it had clear regard in reaching its timing decision to the principles of reasonableness, practicability and proportionality …"

- and another reference to the report. This is not a re-writing of the report; a proper reasoned analysis of the report will say that the defence is not over-egging it or otherwise mis-stating what is in the report. That assessment we say falls well within the Commission's margin of appreciation and, insofar as it is challenged, that challenge should

be rejected. When we wrote that we were not quite sure what was being challenged by BAA, whether it was the extent of the divestment or the timing or both.

Now, we get on to the material changes in circumstances – I am now at para. 109 – having set out the projected timescale for divestiture of the three airports the report states:

> "*This timetable maybe subject to revision by the CC should a material change in circumstances make it appropriate.*"

Thus, we say, the Commission adopted precisely the flexible approach advocated by the BAA, referred to in para. 99, where we quoted from BAA's evidence in its response to the provisional decision on remedies.

I am now getting into a section which is heavily redacted.

THE PRESIDENT: Yes, this is about the material change in circumstances.

MR. SWIFT: This is what is happening.

THE PRESIDENT: What I wondered about this, just to question is in Mr. Green's speaking note which we had an opportunity just to glance at, para. 39 of that, it contains the suggestion that this is now a non-issue on the basis that the Commission does not dispute that the proportionality of the remedy has to be assessed at the time the report is adopted, and he refers to the Commission's skeleton para. 33. You are shaking your head, Mr. Swift?

MR. SWIFT: Oh dear! I did not mean to be shaking my head, if I was shaking my head it was to say "at least it is only a very short paragraph.

What is happening today is a highly material event, precisely because of what I said before, there is a continuum of activity being undertaken by the Competition Commission in its role in securing the divestment of these airports. These are no longer the days, before the Enterprise Act 2002 when the Competition Commission, or its predecessor, could say to the Government, or the OFT "It's now over to you, you secure the undertakings, you handle the divestment process." This, as the Tribunal well knows, stays within the Competition Commission until those undertakings have been achieved, until the final orders have been made, and it is seized of it throughout.

The relevance of this is that this Tribunal is being asked to reach a conclusion on the basis of the material which is included in those sections of the report, while at the same time being told that that timetable may be flexed if there were a material change of circumstances.

THE PRESIDENT: Yes.

MR. SWIFT: So it is rather important to know whether, in the Commission's view a material change in circumstance has occurred, in which case the timetable may be changed.

THE PRESIDENT: So is your position this that it does not matter what the position was at the time of the report, and what the original divestiture periods were and whether they, in effect, were lawful or otherwise, because you do not stop then, you carry on and look and see what developed afterwards?

MR. SWIFT: You do both. I am not suggesting that in some way you can remedy something which is unreasonable and impractical by what happens afterwards; no, we say on the facts as they stood, that the evaluation that the Commission undertook, and which is summarised in the section "The Timing of Divestments" was absolutely within the margin of appreciation, it was reasonable, it was not irrational, it is lawful. When the process of divestment occurs then certain factors come into play - for example, the fact that one is dealing with airports that are currently under single ownership -----

THE PRESIDENT: I understand that things can develop and change, yes.

MR. SWIFT: Things can develop.

THE PRESIDENT: All I am really trying to get at is to what extent that is relevant to the issue -- as I understand it, Mr. Green's and BAA's argument is purely related to the lawfulness or otherwise of the divestiture periods at the time the report was published. There is no criticism, as it were - at any rate, not as far as I know - of anything that is happening since then. So, I just wonder to what extent we really need to look at what is happening since then.

MR. SWIFT: Let me take you to the next step which is your remedy.

THE PRESIDENT: It might have a bearing, of course, on relief.

MR. SWIFT: Absolutely. Absolutely. It does.

THE PRESIDENT: So, this really goes to the question of relief - on the assumption that one were to find that the original periods were unsustainable.

MR. SWIFT: Indeed. As a memorable adjective used by you, sir, in another decision, it would be otiose to make a reference back ----

THE PRESIDENT: I understand that. I understand if it goes to the question of relief.

MR. SWIFT: Now that the appeal is before the Tribunal, it is highly relevant for the Tribunal to know what is going on.

THE PRESIDENT: Yes. Yes. Yes.

MR. SWIFT: That is really including information in relation to the sale of Gatwick about which, as you know, there are rumours in the press as to what is happening.

THE PRESIDENT: So what would you like us to look at on this? It is heavily redacted, is it not?

MR. SWIFT: Heavily redacted. All I would say is that I would like you to read paras. 110 through to 115.

THE PRESIDENT: (Pause): Thank you, Mr. Swift. We have read those paragraphs.

MR. SWIFT: I am grateful, sir. Also in terms of confidential material relevant to those paragraphs in the defence, may I refer the Tribunal to -- It is headed 'Defence Confidential' at Tab 2, p.34.

THE PRESIDENT: Those are the paragraphs which I think you have referred us to - para. 88 through to para. 95, and then on.

MR. SWIFT: For some reason there has been a mis-placing. There was a letter from the Competition Commission, dated 15th May which is in response to the BAA letter of 8th May. That has been put at p.47 of Tab 2. In the chronology it should come just after -- If you were looking and wondering why the 15th May letter came after 27th -- That is what I might call the evidential material on which those submissions were made in the defence.

THE PRESIDENT: I am not sure I have got that last reference. Did you say p.47 of the defence?

MR. SWIFT: I am in Tab 2 of the bundle, sir. It has 'Confidential' written underneath it.

THE PRESIDENT: I am looking at the core bundle - the defence in the core bundle.

MR. SWIFT: Tab 2 is where it is for reading. (After a pause): Sir, I am just reminded by Mr. West that in that same bundle, at Tab 2, if you would look with particular care at para. 4 under the heading 'Reasoning' which is found at p.48 --

I do not have really much more to say on this issue. In my submission the applicant has failed to make out his case that there has been a material failure in the Commission's reasoning in respect of what it has recognised to be a very important part of its considerations in achieving a remedy which is reasonable and practicable within the statutory scheme and also looking at any adverse effects. No attempt has been made to quantify, I would say, for very good reasons - because one would be seeking to quantify the effect of an auction process at some time in the future, in uncertain market conditions and where - and I do not believe that I am trespassing on confidential areas now -- supply and demand conditions for airports is an international marketplace. Therefore, one is not concerned solely with the so-called credit crunch within the United Kingdom; one is concerned with global markets in which the owners of airports. That, I believe, is a matter of which judicial notice can be taken. How does one try and work out the proceeds of an auction? That is why when the government puts spectrum out for sale it does so through auction. It is usually uncertain what the price is going to be. There is no certainty, by making it a requirement that an airport should be sold, that the proceeds are some form of

fire sale. It depends entirely upon the conditions of supply and demand. All one needs is two or more buyers and that will produce a market price. What the market price will be the value that the bidder puts on in terms of an NPV, the expected earnings that he expected to get from that asset through standard financial calculations.

The idea in some sort of binary way that once a divestment has been put in place the sale proceeds must necessarily be at a loss compared with what would be arrived under what are called "normal market conditions" does not hold. It does not hold. It depends entirely upon the nature of supply and demand. At the moment, as we know, the BAA is going through a process for the sale of Gatwick. In due course, if the sale goes through, we will find out what the sale proceeds are.

Can I just turn to this question of cost on the company whose assets are divested?

THE PRESIDENT: Loss of value type of cost or ----

MR. SWIFT: Not so much loss of value, the cost in the loss of competitors, and that is as a result of some decision taken by an external regulator it finds itself hypothetically without the resources it was expecting to fund capital or operating expenditure across a range of assets. Let us assume for the moment, probably wrongly, that that BAA could cross-subsidise as between Heathrow, Gatwick and Stansted, rather than treat them as separately regulated assets. One could understand in those circumstances a regulator would be very concerned about imposing a cost on a company whose assets required to be divested which had the effect of making that company less competitive. This applies in particular when you have competition as between airports within the London and the South-East structure. It is not in the interests of the Competition Commission to penalise the very airport which is continuing to own London Heathrow, the "Jewel in the Crown", that airport where the Competition Commission said, "No, we are not going to require you to divest of Heathrow; Gatwick and Stansted, yes, Heathrow, no". It is plainly contrary to the effective functioning of an airport market if the Competition Commission were to impose such a cost on the BAA that Heathrow became less competitive than Stansted and Gatwick. That is all part of what I would call the "balancing process" that the Competition Commission must undertake. In essence it is qualitative, it is an evaluation of how fitting a timescale balances the important benefits of bringing competition into the market against the possible detriments of forcing a sale too quickly so as to disable one of the remaining contestants from competing with those companies to acquire the assets. That is the exercise that you will see, on a proper reading of the report, is being carried through.

THE PRESIDENT: I think, just to be clear about it, as I understand it, and I may have an imperfect understanding, the case that is being put is that the Competition Commission accepted that there would be financial implications in terms of loss of cost value realised, proceeds of sale, whatever one wants to say, dependent on the timeframe; or at least the timeframe could have a significant impact on the proceeds realised. That seems to be common ground. I think there is a paragraph in the report that says so. The case that is put is that there is no follow-through that. One never sees that factor either quantified or weighed in the balance or assessed somehow as to what effect it might have on the proportionality as against the AEC or a delay in obtaining the benefits of the divestiture.

MR. SWIFT: If we leave aside quantification, and we said in para.30 of the skeleton that it would be such an imprecise exercise that would tell one nothing, if we look at the qualitative analysis, there is, in my submission, that analysis. The analysis is ultimately a judgment call on where you put the period of divestment, recognising that you want to bring competition into the market for the public interest as soon as it is practicable, but you do not want to impose some form of a penalty or cost. In terms of the balance, the public interest is the overriding. It is the effectiveness of the remedies. Really what BAA is saying is, "We were not able to quantify what the effect would be on us in terms of a reduction in value on two bases, your timetable and our timetable, the Commission do it". To my mind, the burden is still on BAA to establish why that would have been a material consideration, why the Commission would, in a sense, not have a sound basis in relation to the effectiveness of the divestments having gone for the 12 + 12 + 12. In my submission, that is precisely what you leave to the judgment of the Commission and the reasoning is there in the report.

LORD CARLILE: So it is a judicial review approach really, is it not? What you are saying is that the Commission could be wrong in the final analysis, with hindsight they might be proved wrong, but provided they have done the broad exercise and have done it conscientiously and reasonably that is enough?

MR. SWIFT: Yes, on a judicial review approach, it is not the purpose of the Tribunal to substitute its judgment for that other decision maker – that is absolutely clear – but to interfere only on the established judicial review grounds. The only ground relied on by Mr. Green is not one based on lack of evidence, it is based on the failure to take into account some material consideration. My suggestion is, looking at the context, that consideration has been fully taken into account. Looking at all the evidence the Commission has considered what the risk would be of abridging the timetable, and the risk

has got to be, even if it is not spelled out, in terms of some material, the unjustified loss of value to BAA. It does not make any sense unless one assesses risk in those terms. The Commission has concluded, "No, with this timetable that risk can be managed without any damage to the competitive process, without any damage to the BAA, subject to the big proviso on material change of circumstance if there are objective considerations which cause us to revise that timetable". In my submission, that is a more than adequate compliance with the principles which this Tribunal under standard judicial review.

THE PRESIDENT: Another possibility emerges, sparked off by what you have just said. Do you postpone the need to look at those factors, such as the quantum of any loss? Do you postpone that legitimately by an indication which was in the report that you can always revisit the period? The problem with that is that you only revisit the period primarily in the light of a material change in circumstances, which they begs the question of whether the initial period has been properly assessed in the light of ----

MR. SWIFT: The additional period is a reopener, a sensible statutory reopener, but only if certain circumstances are established, and that is our case. We are not resiling from the fact that the reasonableness, let us call it that, of the period, the timing, has to be judged by reference to the evidence that was before the Commission at the time when it signed its report.

THE PRESIDENT: Yes, that was a flight of fancy and you have happily disposed of it!

MR. SWIFT: (After a pause) If I may be permitted – it is not a flight of fancy, just a postscript – to take you back into the confidential bundle at tab 2, p.28. These are notes of a hearing with the BAA held on 13th May 2009. At line 9 the Chairman asks a question.

THE PRESIDENT: Yes.

MR. SWIFT: The first section is really the point I was making about the international movement in supply and demand for airports, but then I would like you to read to yourselves from line 18 to line 24.

THE PRESIDENT: Okay, we will read that paragraph. We are reading from line 9 basically, through to the bottom of the page.

MR. SWIFT: Yes, and if you would turn over – I am being nudged from left and right now – if you turn over to p.30, and look at the question that starts at line 18, which is a supplementary, and going on to p 31, reading down the page down to line 12 – that shows the nature of the debate that has been going on.

THE PRESIDENT: I am just wondering if we should not read all of 28, 29 and 30, it is all part of this, is it not?

MR. SWIFT: Yes, certainly.

LORD CARLILE: (After a pause) I have missing from p.18 in the upper numbering to p. 22 inclusive, 19 to 22 inclusive.

THE PRESIDENT: It may be those were not regarded by anybody as relevant.

MR. SWIFT: That is the reason, Sir. It is very tricky reading through all these, you suddenly realise one has lost 100 pages.

THE PRESIDENT: (After a pause) Yes, we have read that.

MR. SWIFT: One further point, which is a process point, I will just take you to our defence, this is the core bundle, tab 2, para. 152. I think this was Mr. Green's last issue about the matter not having been raised by the BAA in their evidence to the Commission. I simply wanted to put on record what is at p.153 of the defence:

> "The Tribunal is asked to note … the repeated requests by the Commission for BAA to provide further detail, evidence and argument on the costs to BAA of divestiture and the benefits of common ownership."

You recall, Sir, in section 10, as one would expect to find in a remedies chapter there is a section relating to relevant customer benefits and that is where the Commission concluded that they did not apply in the case of common ownership – a critically important finding. Then the arguments relied on by ourselves are found at paras. 76 to 78 and I simply ask you to note those, but you will see that they are questions which have arisen both through written questions to the BAA and oral questions arising at the hearings.

So on the proportionality ground, my submission is that there is no case for that part of the decision on timing to be quashed, there is no case for a remittal, and those are my submissions.

May I leave a final comment, in the short adjournment I did not have time myself to read through the BAA note. If we do have any further thoughts may be we can put them back to you in writing.

Apparent bias. The adjectives certainly flew yesterday and quite a few of them got into the national Press I saw this morning, that is no criticism of my learned friend's day of advocacy. I have some introductory remarks before we get into the cases and the facts. The BAA case now in its skeleton and as developed by Mr. Green yesterday is that right from the outset of the inquiry, from day one, there was a real possibility of bias. It appears to be that the predisposition of Professor Moizer is due to at least the possible interest of the Manchester Airports Group acquiring a BAA airport. That is the possibility. That must mean that there is a real possibility that Professor Moizer, as an external advisor to (I will call it) the fund, rather than GMPF, would have been pre-disposed and prejudiced against

the BAA's case, whatever the case may be, but let us assume all aspects of the BAA's case irrespective of the merits.

Just pausing there - and we will look at the case law about the context in which this fiction of the fair-minded and informed observer has to be examined - this, of course, is a market investigation. It is not a lease *inter partes*. It is a market investigation that covers a vast area of factual evidence, economic analysis, judgment -- It was not suggesting in any way that those conducting a market investigation as decision-makers were not subject to the appropriate rules in respect of conflict. That is absolutely clear from the Commission's own guidelines and its own rules on conflict. But, it would be wrong to consider the Competition Commission's market investigation on the common ownership of airport starting on Day One as some kind of a lease *inter partes* as it has been essentially portrayed by my learned friend, Mr. Green - this rather evocative expression (I think he said) of BAA against the world.

On Day One of a market investigation the members of the Commission panel start with a blank sheet of paper. It does not matter what is in the report from the OFT that may have sparked off a reference. On Day One the Commission goes out and collects the evidence. In my submission, from Day One through to the end of the inquiry, subject to the matters that we will deal with about the quarantining of Professor Moizer, the Commission behaves impartially and, as one would expect, throughout the inquiry, comes to very serious conclusions as to what needed to be done in this marketplace.

The other matter that I want to raise at the outset is that this report that we have been looking at is not tainted by actual bias. No suggestion has been made that any of the signatories to the report, or Professor Moizer, was affected by actual bias. This is a report which, as it stands at present, has legal effect unless or until such time as this Tribunal decides to quash or remit, or whatever. It is a very, very important decision in the area of airport competition, airline competition, and consumer welfare in this country. My submission is that that report was produced on the basis of the most extensive inquiry which is not tainted by bias and should survive. That, sir, is an opening comment.

As you will recall from the notice of application, the BAA never put its case on the ground that there was an acute conflict of interest from Day One. They started it from October 2007, after the first meetings between MAG and the Competition Commission. That was how they put it. Mr. Green has not explained why they revised their case so as to start with an acute conflict of interest on Day One, but that at least is how the case has been put to you.

May I say just a few things before we break for the adjournment? When approaching the issue of pre-disposition against a person or corporation which is not based on the merits, it is possible to consider bias, in that sense, against the individual. It could be a personal experience that whatever that person does one would have a pre-disposition to find against what he says. Market investigations are more complex. Here it is not clear whether it is being said that Professor Moizer's pre-disposition to find against the BAA from the beginning moved him and, by infection, the rest of his colleagues to a finding, for example, that the common ownership of BAA's airports in the London and the south-east gave rise to an adverse effect on competition, or whether that pre-disposition caused Professor Moizer, after that, to move inexorably to a view that in that event there had to be divestment not of one airport but of two airports, and then further down the line whether Professor Moizer had a pre-disposition to find in favour of a bid in which the GMPF was involved as a bidder alongside the BAA and Borealis. These are separate issues, but very important issues. What I would like to leave you with before the adjournment is this: when you go from the beginning towards the end of the inquiry - that is, in January, after it has become known to the Commission that the fund had submitted an indicative bid, and that at that stage information was provided first by the Commission to the BAA, and not the other way around - what was the concern? What was the concern expressed by the BAA at that time? It had nothing to do with a finding that the common ownership of the airports gave rise to AEC. It had nothing at all to do with a divestment process in which Gatwick would be sold as well as Stansted because by that stage the Gatwick sales process had already been initiated. What it had to do with - and what it only had to do with - was whether there might be some compromising of the process for the sale of Gatwick as a result of Professor Moizer being an external advisor to the fund when the fund was itself involved. That is what it was all about. That was the concern they had. That was the concern which Professor Moizer had realised when he put the 'phone down on Mr. Taylor on 2nd December. He conflicted himself out on that. He was conflicted out on the other. This issue is within a very small compass, as perceived by the BAA and the Competition Commission at that time in January and February 2009. That issue has now been blown up out of all proportion after the event so as to provide a spurious ground for quashing this report. I will go on to develop those reasons.

THE PRESIDENT: Is that a convenient moment?

MR. SWIFT: It is, sir. Thank you.

(Adjourned for a short time)

THE PRESIDENT: Yes, Mr. Swift?

MR. SWIFT: Good afternoon, Sir, members of the Tribunal. Perhaps it would be helpful if I gave you a little plan as to how I propose to deal with the apparent bias issue. At the moment I am into introductory remarks, in part picking up some of the major points made yesterday so that we can develop them if necessary in questions. Then I want to go some more of the cases in addition to the cases that Mr. Green referred you to yesterday. Then I want to put the structure of my submissions into four areas. The first area, which is really what I am developing now, is BAA's knowledge and concerns in early 2009, which is what we refer to as the "third period" in our skeleton. Then the issue of BAA's knowledge from April 2007, the first and second periods. Third, the nature of the links that are relied on by BAA and why, in our submission, they are not evidence of apparent bias. Then the final issue, which is the hurdle that Mr. Green has identified as my requiring to get over, four House of Lords cases against me, is why, even if there was some element of a predisposition, it made no difference to the results of the inquiry and the report.

I am still on the facts and what was BAA's concern in January and February 2009, bearing in mind this is the period in which information had flowed from Mr. Peel of the Competition Commission to Miss Pengelly about the Moizer issue, and it went through until the final point at which Professor Moizer stood down.

Putting the fair minded and informed observer on one side for the moment, can we just look at the facts to see what happened. The helpful starting point is how BAA reacted when they heard about the information from the Competition Commission about the position of Professor Moizer. This is the letter which BAA wrote to Mr. Banfield, the inquiry director of the Competition Commission, on 6th February 2009. Would you turn that up. I am now looking at the defence bundle, this is the non-confidential bundle, tab 4. The are the exhibits to Professor Moizer's witness statement and the document that I am referring to is at p.7. It is an important letter, so I would like to read it. It is from Mr. Robert Herga on 6th February 2009, by which time we know that the BAA market inquiry team, or some members of the team, when alerted to the position of Professor Moizer had then gone into the Competition Commission's website under the BAA entry and had found the notice of disclosure of June 2002. So they had that information before them when Mr. Herga wrote this letter. It says:

> "We understand you are considering writing to us concerning the position of Professor Moizer as a strategic adviser to [the Fund] and the implications of this role for his position as a member of the panel in this inquiry.

As we understand it, Professor Moizer acts as an adviser to the GMPF (the members of which include employees of local authorities in the Greater Manchester area)."

I just pause here, "including employees of local authorities in the Greater Manchester area".

"His role is to advise the GMPF on investments. On 19th January 2009 BAA received first round bids in relation to the sale of Gatwick. One of the consortia bidding, comprising Borealis and the Manchester Airport Group (MAG) (which is owned by local authorities in the Manchester area), has indicated that GMPF will invest in that consortium. We understand that MAG is also a potential bidder for Stansted and/or a Scottish airport should the Commission require divestment.

BAA does not want to prejudge the situation and therefore we would be grateful if you could address the following matters:

* Whether Professor Moizer continues to act as an adviser to the GMPF, and if so, to set out what are the terms of his retainer. If he no longer advises GMPF when did he cease to do so;
* Whether Professor Moizer has been aware of the GMPF's interest in investing in the MAG bid, and if so when he became aware;
* Whether Professor Moizer has advised GMPF in relation to this investment;
* Identify the panel and staff meetings in which Professor Moizer participated since becoming aware of GMPF's interest in the MAG bid; and
* What steps Professor Moizer and the Commission propose to take in the circumstances.

We would appreciate your urgent attention to this matter."

It would be a fair summary of that letter that the BAA's concern, as expressed in it, did appear to relate to Professor Moizer's position as an adviser to the GMPF, and whether he had knowledge of GMPF's interest in investing in the MAG bid, whether he indeed had advised GMPF in relation to this investment and, in a sense, what steps Professor Moizer and the Commission propose to take in the circumstances, by which time, of course, by 6th February, measures had been taken by the Commission, precautionary measures we say, to avoid the kind of conflict which the BAA is seeking, quite rightly, to identify in this letter of 6th February. That is as far as it went.

There was then, and Mr. Green referred to it yesterday, the meeting between Mr. Jones and Mr. Herga. We can go back to that when I get back to the detail of the events. For present purposes I simply want to suggest that at that stage, even though BAA had then been put on notice of the notice of disclosure and the 2002 inquiry, the only concerns they appeared to have would be in respect of the proper way of their conducting the bidding process, having received indicative bids, to make sure that in no way was the Competition Commission comprised in respect of its consideration of those bids for Gatwick.

In this period of January and February, bearing in mind that at this stage, according to BAA's argument, the fair minded and informed observer has gone beyond the point of care and is verging on despair, at this stage, prompted by that information, nobody within BAA sought to ask, for example, the chairman of the Competition Commission, or the chairman of the panel, did not suggest to them that in some way the entire process had been comprised from the outset. Their concerns did appear to be directed to the GMPF association with the MAG bid for the BAA airport at Gatwick.

THE PRESIDENT: To be fair, they do refer to the fact that they think they understand MAG is a potential bidder for Stansted and a Scottish airport should the Commission require divestment. They refer to Gatwick as well.

MR. SWIFT: They refer to Gatwick. Plainly they would refer to Stansted, because in the event that BAA voluntarily or the Competition Commission put in place a divestment process for Stansted and others then, yes, it is a perfectly legitimate question to ask. In the end it turned out to be not a relevant consideration. It may be, looking ahead, a relevant consideration, I do not know, because, as we know, the timescale for Stansted is as stated.

Whether it is Gatwick alone, or whether it is Stansted and others, the concern appears to be in relation to a transaction to be carried out by the BAA in respect of a divestment process and not all those previous events such as a finding of an AEC and the decision to divest three airports. It is that element of not compromising a transaction in which the BAA was itself voluntarily involved in Gatwick and would compulsorily be involved – of course at this stage the result of the inquiry was not known – in the event that the Competition Commission would also require the divestment of Stansted and/or the Scottish airports.

In my submission, that does raise some credibility at the outset, having regard to BAA's conduct when they knew about the 2002 event, as to why they did not react as they would say a well informed fair-minded observer would have acted and gone almost immediately to the Competition Commission and said: "This is intolerable. This is a man who has been an active member of the panel since April 2007. He has attended these meetings with

Manchester Airport because plainly the BAA knew and had access to all that material that was placed on the Competition Commission's website. There is none of this and one has to ask the question "why?" Using the vernacular of the fair-minded and informed observer, which is not my expression but it is one of the cases, it is because those who were involved thought it was "no big deal". The deal they were concerned about was a fair and effective disposal of Gatwick Airport through a proper, competitive bidding process, and that is where they saw the risk, and that is exactly the same position that the Competition Commission took on that issue.

So, we looked yesterday at some of the law, we have looked at how this legal fiction operated – or might have operated – in the period from April 2007 to February 2009. What we have not really been looking at is the facts in relation to what BAA did when they had actual knowledge of everything. When I say "everything", when they got access to the 2002 disclosure notice, BAA has been advised by prominent firms of lawyers since the outset of this inquiry. They were put on notice in January about this fact, they do not appear to have gone through the enormous exercise in due diligence which now populates bundles 3 to 4 of the papers before the Tribunal, even though that would have been open to them had their clients told them to do it; it appeared they wanted to concentrate on that single issue. That is a matter of some importance when one considers the application of the principles of the fair-minded and informed observer to the allegation of apparent bias. In part it is related to a question, Sir, that you put to Mr. Green yesterday – paraphrasing – "what if they knew about it and did not do anything about it? Can you have a waiver by inactivity? Plainly, in our submission, the conduct of the firm alleging apparent bias, when facts are known to it, is highly relevant, and this is where those facts crystallise, even on BAA's case, and I am assuming for this purpose that BAA is right and that those who are responsible for the market inquiry were ignorant of anything that had happened in 2002 – I will come back to that later, because there is an important point about what is corporate knowledge of facts; it is nothing to do with constructive knowledge, it is what knowledge is to be imputed as a matter of law to a corporation. That is what happened in the first part of 2009. Note: no application made at any stage for Professor Moizer to recuse himself, no application made to the chairman of the panel or to the chairman of the Commission for an urgent reappraisal of how the Commission could expect to conduct the rest of its inquiry having, as Mr. Green put it yesterday from the outset, been "riven" by this acute and irreconcilable conflict. Answer: because it was no big deal for them.

We will come on to the links later ----

THE PRESIDENT: That goes to the question of waiver, that point, does it?

MR. SWIFT: They tend to be rather bound up together. They go to knowledge, disclosure – it is very difficult when one looks through the cases to find a discrete distinction between apparent bias on the one hand and waiver on the other, but yes, it does, it goes essentially to waiver. It goes to those principles of law that are not just on the strict principles of waiver on the bias cases, it goes to the conduct of people when they seek to assert rights, asserting those rights which, if exercised in their favour, would result not in this case the abandonment of an inquiry half way through, but a quashing of a two year report. We also say, yes, it is relevant to the kind of appraisal that the fair-minded and informed observer would take into account because that person – he or she – would also be concerned as to what weight to be attached to these matters in the overall consideration, so it goes to both.

We will go to those cases that talk about the context, and the context of a market investigation is plainly at one end of a spectrum compared with other cases where, as I said, there was a lease *inter partes* and where before the trial is about to start you are dealing with what I would call a complete asymmetry of information as between the judge and one or more of the parties.

Therefore, if the affected party is to know a matter which could be said to affect his case a disclosure by the judge is or may be necessary. One sees this in a case such as *Jones v DAS*, or *Baker v Quantum*, and we will come to those cases, and in a sense there was a read-across to *Medicaments* as well where the information is so private and so confidential that no litigant could possibly be expected to know that in that case Dr. Rowlatt had been applying for a job with Frontier Economics; it is not the kind of thing that would go into either Dr. Rowlatt's website, or the Frontier Economics' website; it would be a highly confidential matter; it is like the matter of Lord Justice Sedley disclosing that he had tinnitus and would that be a problem in the event of litigation pursued on that basis, and we will come and have a look at that case as well – the very interesting observations by Lord Justice Jacob.

One can see that how, in the judicial disclosure cases, the issue as to whether or not waiver can take place turns almost exclusively on the nature of the disclosure that is made because of the asymmetry of information that generally applies. There could well be a very limited opportunity, like at the door of the court, for the litigant to consider it and make their own inquiries.

Going back to the context, in cases where a party - let us say, a corporation - is aware of a large number of facts which are relevant to its commercial position and is involved in

investigations of this kind, the focus becomes less exclusively on disclosure and rather on what the party knew and how they responded in the light of what they knew. This has, sir, in my submission, a particular relevance when you have two things. First of all, you have a competitive market, as with airports; secondly, you have a degree of interest in a market investigation; thirdly, you have the explosive amount of information which is available on the internet and which those managing a corporation may consider it important to search in order to understand their own commercial position, the position of their competitors, and, in particular, the position of all those who may be called upon to decide matters that may affect their future. All these are facts and facts that are in the public domain.

What may have been concerning the Tribunal yesterday - and it is not for me to say what was concerning the Tribunal - is precisely the sheer amount of information in the public domain in relation to the activities of the Greater Manchester Pension Fund. We have photographs of Professor Moizer looking - as Mr. Green said - 'studiously' at the camera. We have the position that he sits in relation to employees. We have available to the world at large full information as to the nature of the GMPF activity. It is there. Professor Moizer is there - and not just Professor Moizer, but the other advisors are there. The activities are there. The governance principles are there, including - and I will just say this for the record while I am on this - the important nature of the fund and those who operate it as trustees. You may have noticed that the expression 'trustees' was not brought to the Tribunal's attention. When you come to look again at that exhibit, it may be worth just reading it through again to get across this notion of trust. But, my general point is that when one is involved in matters of this kind now - whether it is lease inter partes or market investigations, the amount of information which is freely available to parties is enormous and just shows the ease with which such information as has been brought together for the purpose of this case and, may I say it, the ease with which such information could have been brought to the attention of the BAA had they pressed the button in 2007.

THE PRESIDENT: It sounds like a submission - if it is possible to build up the picture from going to the internet and other publicly available sources - that the burden is really on the person to check themselves whether there are any conflicts in whoever is deciding their case.

MR. SWIFT: No. No, I would not say that. I would not say the internet is the panacea. Let me put it the other way: plainly the convention of the Commission is not simply to ensure that members' interests are placed on the file. The convention usually of the Commission is to set out at the commencement of an inquiry details about the members' interests. That they

do. But, I just want to borrow Mr. Jowell's expression of 'spoon feeding' - as if the BAA is suggesting that in some way all the information, all the disclosure should be made by the Commission to BAA. What I am saying is that when BAA is in a situation of this kind one might have expected a degree of due diligence to have been undertaken, which could have been undertaken in 2007 and not simply in 2009. I am not saying that is critical to the argument. What I am saying generally is that the position of the litigant - especially the litigant in person - who goes into a court not knowing about a possible apparent bias in a judge and is told at the door of the court that there is some confidential information that he should know, and then has to take a decision, "Do I waive, or not?", is quite different from the situation in which parties find themselves in a massive market investigation of this kind. That was, in a sense, by way of opening.

THE PRESIDENT: Mr. Swift, can I just ask you if you are saying that BAA should have been able to find out the existence from the website or elsewhere about the special opportunities portfolio and the 'fleet of foot' proposals which arose in late 2008? If so, how would they have found that out? The GMPF created a special opportunities portfolio in 2008 which I think we can see in Tab 11 of our Bundle 6 at p.19, and also the ----

MR. GREEN: Those documents are on the internet.

THE PRESIDENT: They are. That is very helpful.

MR. GREEN: They are on the internet.

THE PRESIDENT: That answers the question. Thank you very much, Mr. Green. Forget the question, Mr. Swift.

MR. SWIFT: I thought it was also directed to another question - plainly, they could not have found that out in 2007 because they worked it out.

THE PRESIDENT: No. Obviously not.

MR. SWIFT: No. No. They are on the internet. It is remarkable as to the degree to which funds of that kind ----

LORD CARLILE: When you say there is a lot of information on the internet ----

MR. SWIFT: A lot of information. A lot of what we regard as highly confidential information that would not otherwise many years ago have been put into the public domain, but that as a result of the Freedom of Information Act or other legislative measures pretty well everything you do is out there in the public domain. So, I am grateful to Mr. Green for clarifying that, but I thought that was the position.

The matters that were not in the public domain are the matters that have been disclosed by the Competition Commission in respect of internal meetings.

THE PRESIDENT: One of the things you are probably coming to is the distinction which is much relied upon by BAA between the 2002 disclosure notice and the 2007 disclosure notice, the one being rather fuller than the other. At some point, for my part, I would be quite interested to know whether that was just because, as it were, the Commission did not refer back either to the 2002 one and just started afresh, or whether there was some reason why -- I do not know.

MR. SWIFT: There is no evidence before the Tribunal as to the circumstances leading to the panel selection in 2007 or why those particular matters were put on the file. Plainly, the view taken by the Commission in 2007 was that this panel could act impartially - all members of it - in respect of the BAA issue - I mean the common ownership issue. The 2002 notice was sent out at a time when the Competition Commission took a precautionary review in respect of one aspect of the development of the BAA inquiry on which Professor Moizer was sitting in which it was suggested that joint groups would meet. We say that that was done for the purpose of that case at that time. There was a precautionary measure. Indeed, in the 2007 inquiry in January and February 2009 the decision was taken first as a precautionary measure to quarantine Professor Moizer, and then - and we will come to this in the evidence of Mr. Saunders - to take the decision that he should stand down.

THE PRESIDENT: The 2002 notice drew the link, did it not, between the Fund and Manchester Airport?

MR. SWIFT: Yes, there are four issues, as it were, the links. There is Professor Moizer himself, then there is the Fund, then there is the position of the local authorities and then there is the position of the Manchester Airport Group. Yes, plainly, that is the notice and it says what it does. Steps can be taken by decision makers for precautionary reasons that could well go far further than are necessary, but that is it, it is part of the record.

THE PRESIDENT: Mr. Swift, do not get taken out of your route by this.

MR. SWIFT: I think I will probably find myself coming back to that some time later on this afternoon. Can we have a look at some law. I would like to start with the *Helow* case, which is authorities bundle 2, tab 24, a decision of the House of Lords.

THE PRESIDENT: That is the Palestinian refugee.

MR. SWIFT: This was the Palestinian refugee living in Lebanon who arrived in the UK in 2001 and obtained asylum on the grounds that she feared that if she were returned to Lebanon she would be attacked by Lebanese and Israeli agents on account of her Palestinian ethnicity and political opinions. It finished up with the Lord Ordinary in Scotland who dismissed the petition and the petition's advisers later discovered that the Lord Ordinary was a

member of the International Association of Jewish Lawyers and Jurists whose magazine, which is circulated to all members, had carried a number of extreme pro-Israeli articles and pronouncements, in particular of the Vice-President. This came before the House of Lords in June 2008. This, I believe, is the most recent, as it were, short authoritative statement of where we are on that. Can I take you to p.2417 of the law report and what Lord Hope of Craighead says. It is a very elegant opening paragraph:

> "My Lords, the fair-minded and informed observer is a relevant newcomer among the select group of personalities who inhabit our legal village and are available to be called upon when a problem arises that needs to be solved objectively. Like the reasonable man whose attributes have been explored so often in the context of the law of negligence, the fair-minded observer is a creature of fiction. Gender-neutral (as this is a case where the complainer and the person complained about are both women, I shall avoid using the word 'he'), she has attributes which many of us might struggle to attain to."

Then he goes on, and it is worth reading through:

> "The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious, as Kirby J. observed in *Johnson v. Johnson* ..."

that is the *Commonwealth* case –

> "Her approach must not be confused with that of the person who has brought the complaint. The 'real possibility' test ensures that there is this measure of detriment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially."

I say "may make it difficult for them to judge the case before them impartially".

> "Then there is the attribute that the observer is 'informed'. It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines.

> She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment."

Then he goes on to say:

> "The extent is crucially important in a case such as this."

He refers to the speech of Lord Mance and the statement that:

> "... the appellant's argument depends entirely on the judgment that the observer would make of the fact that Lady Cosgrove was, at all relevant times, a member of the International Association of Jewish Lawyers and Jurists. As a member of the Association, she must be assumed to have received its quarterly publication, 'Justice', all of whose editions are readily accessible on the Association's website."

There is an interesting attribution there that the fair minded observer must be assumed to have received quarterly publication, not least because they are on the website, and so on and so forth.

Then can we go to the speech of Lord Mance which begins at p.2424, but I would like to start at para.38 on p.2426, which reads:

> "The submission regarding apparent bias and want of objective impartiality on the part of Lady Cosgrove arises from research on the web undertaken by the appellant's legal advisers after Lady Cosgrove's refusal of the petition under section 101(2)."

So this was after her appeal had been rejected. Her advisers then went into the web and researched what they could find in relation to the International Association and her membership of it.

Then Lord Mance spells out in a little bit more detail the basic legal test, and you find that at para.39. It is somewhat different from the formulation of Lord Hope, but I doubt it is a distinction of any substance. He says:

> "The question is whether a fair-minded and informed observer, having considered the relevant facts, would conclude that there existed a real possibility that the judge was biased, by reason in this case of her membership of the Association: *Porter v. Magill* [2002] 2 AC 357."

I was not proposing to refer the Tribunal to that case, but it was *Porter v. Magill* that finally brought the Strasbourg and United Kingdom jurisprudence together with its gloss on the reference to "real danger in the *Medicaments* case". The *Medicaments* case had done the

first step in bringing the Strasbourg jurisprudence and the *R. v. Gough* jurisprudence together. Then there was a doubt expressed in the Commonwealth courts as to whether the *Gough* case was right ...

2.30

… there was a doubt expressed in the Commonwealth courts whether the *Gough* case was right, and then it went through to *Magill* and the House of Lords squared all the circles and produced a single, definitive test which will now apply throughout the United Kingdom and Commonwealth countries and is consistent with Strasbourg; that is by way of a reference back but that is the context of *Porter v Magill*.

He said:

> "The question is one of law, to be answered in the light of the relevant facts, which may include a statement from the judge as to what he or she knew at the time, although the court is not necessarily bound to accept any such statement at face value, there can be no question of cross-examining the judge on it, and no attention will be paid to any statement by the judge as to the impact of any knowledge on his or her mind …"

- and he cites the decision in the Court of Appeal in *Locabail*, a very strong Court of Appeal with Lord Bingham of Cornhill, Lord Woolf and Sir Richard Scott, as he then was.

"A fair-minded and informed observer …" and then he takes the same quotation: "… is neither complacent nor unduly sensitive or suspicious" adopting Mr. Justice Kirby's phrase, which was approved by Lord Hope and Baroness Hale in the *Gillies* case.

Then he goes on to say:

> "The appellant also invokes or seeks assistance from the principle of automatic disqualification applied in the *Pinochet* case. It was there held that a judge was automatically disqualified not merely if he or she had a pecuniary interest in the outcome of the case, but also if his or her decision would lead to the promotion of a cause in which he or she was involved together with one of the parties. In that case, the judge's involvement was as the chairman and director of Amnesty International Charity Ltd, a charity wholly controlled by Amnesty International which had intervened in the case as a party to support the prosecution's application for the extradition of Senator Pinochet to Spain. However, in my opinion the present case is a long way away from *ex parte Pinochet* since the Association was not a party to or in any way concerned with or, so far as appears, even aware of the proceeding involving Miss Helow. Even where proceedings

are brought, for example, by a bar association, mere membership of the association, as opposed to actual involvement in its affairs or in the institution of the proceedings, may not bring the principle in *Pinochet* into play."

- and he cites *Meerabux v Attorney General of Belize* and again citing Lord Hope of Craighead

"I consider, therefore, that it is the principles mentioned in the previous paragraph that govern the present appeal."

- thereby drawing a clear distinction between the automatic disqualification cases such as *Pinochet* and going back into the 19th century *Dimes* and automatic disqualification, and the cases we have been considering here are where we incorporate the fiction of the fair-minded and informed observer. There appeared to be a suggestion by Mr. Green yesterday that his case did not need to depend either one or the other, in some sense he could win on both. Thinking about that, I was speculating maybe this is the reason why for the purpose of the skeleton it is alleged against Professor Moizer that there was a direct and acute conflict from day one, whereas the case had originally been proceeding on the basis that the apparent bias did not surface so far as the fair minded and informed observer was concerned until Professor Moizer had listened to the evidence given by Manchester Airports in the course of 2007. Though as I read it, in order to seek to get the facts within the automatic disqualification principle, BAA has to establish now that right from the outset Professor Moizer had this automatic disqualification.

THE PRESIDENT: Was that in the context of looking at the 2002 notice where, if I remember correctly, the Commission itself had categorised the link with Manchester Airport as giving rise to – I forget what the term was – a financial incentive, or a financial connection?

MR. SWIFT: There was a reference to a financial interest and that is part of the record, but our submission on the facts of this case as is now known, and is well known to the informed observer, that statement does not in any way represent the correct position on the facts. You will recall in the transcript of the hearing yesterday – if I can turn it up – indeed as repeated in the national Press today, at p.17 of transcript yesterday, this is where Mr. Green is dealing with the position of the GMPF, and we have already had the photographs of Professor Moizer and Mr. Bowie and Mr. Hemmingway before the Tribunal. Do you have p.17?

THE PRESIDENT: Yes, we do.

MR. SWIFT: You will recall that episode in Mr. Green's speech very clearly, the visuals as well as the speech. This is part of Mr. Green's case that "He", Professor Moizer, is part of the backbone of the operation. I will read through the transcript:

> "What does one deduce from the bare bones? What would the fair minded observer think about this? We will come back to him because he is going to look at matters in the round, or she will. His links to the Fund through his clients are very strong. His links to MAG are strong. He advises clients who own MAG, MAG's money is under his control and advice."

That is a travesty of the position, and that is one of the headlines that has made the papers today.

> "He has a fee paying, very long standing relationship of trust and confidence. Everybody, but everybody, emphasises that his value to the local authorities is due to the longevity of his relationship and the trust and loyalty that exists between them. You will see in documents later on that the Fund says: 'We would not invest without his advice or his consent, if he disagreed we would not invest'."

I would say there is no problem with that. But to suggest that MAG's money – money, the entire resources available to the Manchester Airport Group – is under his control and advice is absurd. He is an adviser to a pension fund, the pension fund has a relationship of trustee and beneficiary to the beneficiaries of that fund. If any trustee were to be, or seen to be, operating so as to have the money of local authorities, of MAG as a commercial operator under his control, it would almost certainly be a breach of trust.

When one looks at and places the magnifying glass on the 2002 disclosure notice for the purpose of this inquiry one has to place that in context, and consider for the purpose of this inquiry what is the true nature of the link between Professor Moizer, between the Fund, between the Fund of the local authorities and between the local authorities, and the MAG. That was *Helow*.

The next case that I would like to refer you to, sir, is *Flaherty v National Greyhound Racing Club* a decision of the Court of Appeal in 2005, which is Bundle 3 of the authorities. Tab 18. We move from Palestinian refugees to greyhounds. This is a case looking at the judgment of Lord Justice Scott Baker which starts at para. 1. I am more concerned rather than with the facts, with what Lord Justice Scott Baker starts at para. 26 of his judgment. I do not need to read that out. That paragraph is dealing with *Porter v. Magill* and then the history that we have just talked about. At para. 27, "The test for apparent bias involves a

two stage process --" All this is after *Porter v. Magill*. So, the Court of Appeal is absolutely up-to-date in the relevant legal principles.

> "The test for apparent bias involves a two stage process. First the court must ascertain all the circumstances which have a bearing on the suggestion that the tribunal was biased. Secondly it must ask itself whether those circumstances would lead a fair-minded and informed observer to conclude that there 'was a real possibility that the tribunal was biased [citing Lord Phillips in *Re. Medicaments*] ... an allegation of apparent bias must be decided on the facts and circumstances of the individual case including the nature of the issue to be decided [citing *Locabail*]. The relevant circumstances are those apparent to the court upon investigation; they are not restricted to the circumstances available to the hypothetical observer at the original hearing".

Then he sets out the principles set out by Lord Phillips in *Medicaments*. If we just read those through -- (Pause): Then he defines bias as meaning:

> "-- a predisposition or prejudice against one party's case or evidence on an issue for reasons unconnected with the merits of the issue".

He then cites Lord Justice Simon Brown, as he then was, in the *Dallaglio* case in 1994, as,

> "Injustice will have occurred as a result of bias if 'the decision-maker unfairly regarded with disfavour the case of a party to the issue under consideration by him'. I take 'unfairly regarded with disfavour' to mean 'was pre-disposed or prejudiced against' one party's case for reasons unconnected with the merits of the issue".

Then, at para. 29 he says,

> "The proceedings under consideration by the court in the present case are tribunal proceedings and not judicial proceedings. The context is critical".

Then he cites Lord Justice Mance, as he then was, in the *Modahl* case.

> "The principles of natural justice or fairness must adapt to their context and can be approached with a measure of realism and good sense".

Then he goes on to say on those facts,

> "It was both natural and appropriate that the disciplinary committee should have among its members someone with experience of doping control and its procedures. Mr. Guy was chosen for this reason, and because he spoke English and came from a different national athletic federation. There is no reason to think

that he held or would hold any fixed or predetermined ideas on any of the issues being raised by the claimant in her challenge to the Portuguese results".

So, we find that in addition to the elegant legal fiction of the fair-minded and informed observer, we also find that when applying the law to these matters the approach does involve a measure of realism and good sense. That, in my submission, would be a concept that applies universally to this Tribunal doing just this on the facts of this case, approaching all the facts with a measure of realism and good sense.

I should add for the record that Lord Justice Scott Baker then spells out at para. 30 the facts relating to the jurisdiction of the tribunal in the present case involved a contractual relationship between the respondent and the National Greyhound Racing Council. There were special features that the hypothetical observer would have in mind. So, this was, in a sense, an indication of the breadth of the facts which the fair-minded and informed observer would take into account, including the nature, function and composition of the tribunal, the particular character of the tribunal's proceedings, the rules under which the proceedings are regulated, the nature of the inquiry, and the particular subject matter. In this case, of course, the relevant facts relate to the wide-ranging market investigation into a possible AEC and, if so, what kind of AEC, and, if so, what would follow from that.

THE PRESIDENT: The allegation concerned the way in which the veterinary steward conducted himself - in what was effectively an inquisitorial hearing.

MR. SWIFT: Yes.

THE PRESIDENT: He was too aggressive, and so on.

MR. SWIFT: Yes. The link with the greyhound stadium. That is all I wanted to say on that one.

THE PRESIDENT: There is an issue of waiver as well. I do not know whether that is relevant or not. (After a pause): It did not arise. I do not think it arose in view of the findings.

MR. SWIFT: I am relying on *Flaherty*, if emphasis needs to be made about the importance of the context in assessing apparent bias.

If we look at the importance of the context in assessing whether a valid waiver has occurred, this matter was looked at in *Jones v. DAS Legal Expenses*. That is in the second bundle of authorities at Tab 17. This is another post-clarification. This is 2003. It is following *Porter v. Magill* and *Medicaments*, and *Pinochet*. Paragraph 28 – these of course are heavily context based:

"The fact it would have been inconceivable for Mr. Harper (...) to have sat to hear complaints against his [wife] ... does not of itself determine the issue of his wife's impartiality.

She has no direct financial interest in the work he does for DAS. There is no evidence as to how they organise their financial affairs as between themselves. Some indirect benefit to her may be a permissible inference to draw, but no more than that."

Then a rather nice touch at (iv):

"Having some knowledge of the way a barrister earns his living, she would know that just as cases are won and lost, so solicitors come and go."

THE PRESIDENT: All too true, sadly!

MR. SWIFT: Yes.

"The volume of work done by Mr. Harper could fairly be described as 'occasional'. It was certainly not a case where all his eggs were in one basket. There would be no reason to think that the loss of DAS-related work would materially affect either his practice or his income to any substantial extent. It simply released him to do other work for other solicitors."

These are inferences, value judgments, that a court is making about what a fair minded observer would draw from the relevant facts. Then they say:

"If the informed observer is informed enough about modern vernacular, he would conclude that the chairman could fairly think that having DAS as a client was 'no big deal' for her husband."

There are more authorities cited at (vi) that you may wish to review. I was not proposing to refer to them. The point that is raised at (vii) at para.28 – do you have it, Sir, just before you get to para.29?

"Moreover, in this particular case, the charge of impartiality has to lie against the tribunal and this tribunal consisted not only of its chairman but also of two independent wing-members who were equal judges of the facts as the chairman was. Their impartiality is not in question and their decision was unanimous."

Then the court set out at para.35 some guidance as to the steps that may need to be taken to deal with what they call the "problem" or an "embarrassment" of the kind faced by Mrs. Harper in that case. They say at the end of para.35:

"We repeat that this guidance is no more than that: this is not a checklist, still less a definitive checklist for all cases. Sometimes some of these suggestions may be adopted, sometimes none of them may apply. We wish strongly to disabuse any disgruntled litigant of the idea that he may seize upon this judgment and use it as

> the mantra for complaint about ill-treatment. Any attempt to do so will receive short shrift."

Again, looking at the context, we are dealing with those cases where you start with an asymmetry of information, a litigant in person, and the court's guidance is there to try and assist in that process, maybe giving a little bit of delay, so the person is able to make informed choice. It is just a checklist.

Again, there is quite a helpful statement by the Court of Appeal, bearing in mind these and other courts are operating on the basis of the refined principles which we have now seen summarised in the *Helow* case, at 36:

> "As to the second question whether or not he [Mr. Jones] had full knowledge of all the facts relevant to the decision, we have also found this difficult. Waiver would never operate if 'full facts' meant each and every detail of factual information which diligent digging can produce. Full facts relevant to the decision to be taken must be confined to the essential facts. What is important is that the litigant should understand the nature of the case rather than the detail. It is sufficient if there is disclosed to him all he *needs* to know which is invariably different from all he *wants* to know. So in this case and on the particular facts of this case it seems to me to have been sufficient for Mr. Jones to have been told that Mr. Harper was a barrister in chambers which did DAS work and that he himself had done such work. It was not necessary for Mr. Jones to know on how many occasions he had been instructed and how much he had been paid for that work. The information was sufficient for Mr. Jones to know, or at least appreciate the possibility that Mr. Harper was on the appropriate DAS panels since Mr. Jones must be taken to know how the DAS system worked ... In our judgment the disclosure, balanced as it was, was sufficient for its purpose."

Can we now look at this issue about the knowledge which is held by a party in addition to, or even in substitution for that which has been disclosed to him or her by the relevant judge. We see that in *Baker v. Quantum Clothing*, which is in the same bundle of authorities, tab 26. Again, this is following *Helow*. At para.4 Lord Justice Jacob says:

> "One can conveniently take the principles as set out by Lord Hope."

Actually it is Lord Mance citation in para.39. Then it goes on to the history of the main appeal, which was a test case about noise induced deafness in textile industry. While the court was reserving judgment they had received applications from the respondents that the

court should recuse itself on the grounds that Lord Justice Sedley was in an apparent bias and said at para.2:

> "Sedley LJ considered this application and concluded that he did not feel it necessary or appropriate to recuse himself. He told the respondents that, if they wished to persist in their application, it would be considered by Smith LJ and myself. We concluded that this was not a case for recusal and so the main judgment was handed down. At the hand-down it was indicated that the applications would be refused and that our reasons would be given later."

Then they set out at para.5 what the history was:

> "At the outset of hearing Sedley LJ disclosed that he was Hon President of the British Tinnitus Association:
>
> 'LORD JUSTICE SEDLEY: While I remember, before we go any further, it occurred to me at the weekend that I had better declare that I am President of the British Tinnitus Association. Does anybody mind? It is a voluntary self-help organisation that brings clinicians and pts together. It has no axe to grind at all in liability or litigation terms. Is that all right?
>
> MR. OWEN: Certainly, my Lord,.
>
> MR. PURCHAS: I cannot think there is any possible ground –
>
> LORD JUSTICE SEDLEY: If you do think of something make sure I know fairly soon.'
>
> No objection was made by Mr. Stewart."

So they completed the hearing. Seven weeks later the court received a letter from the solicitors, and they set it out in full. Then they say:

> "Since that time further information has come to light which causes our clients and ourselves real concern."

Then they said, just before the first paragraph on the second page of para.8:

> "Conscious of our duty of candour owed to the court we should make it clear that apart from items (iv), (vii) and (viii) these matters were identified before the conclusion of the hearing. The advice Leading Counsel then instructed was that it would not be in our client's interest to raise them in support of an application for recusal. Our clients accepted Leading Counsel's advice."

That was supported by other solicitors and then there were further letters in response to that. Then Lord Justice Sedley made his own written statement at para. 14 explaining why the fact he has mild tinnitus is not a disqualifying factor in the present proceedings

"… any more than if a judge who has back trouble tries a spinal injury case or a judge who is a motorist tries a running down case."

- that is at para 3(d) of his statement. Then at para.16 they refer to the novelty of the application and then at 17 they conclude:

"Sedley LJ made it plain that he had no knowledge of any of the matters on the BTA Website constituting the so-called 'web of links' …"

- which of course we have here as a key issue – what are these links and is there a web?

"In those circumstances, we do not think that any fair-minded reasonable observer would consider that there was any real possibility that he might be biased arising from the so-called 'web of links'. We are surprised that the applications have been pursued thereafter as they have been."

Then after concluding at para. 27:

"… no fair-minded observer would draw an inference of any substantial connection between Wake Smith and the BTA …"

- that is a separate issue. They say at para. 32:

"The upshot of all this is that the 'web of links' is quite without substance. The objection on this basis should never have been made, and once made should have been dropped as soon as Sedley LJ had made his statement.

Then at the end of the judgment they have a little section of three paragraphs under what they call "The Delay". They say:

"Sedley LJ said at the outset that 'if you think of something make sure I know fairly soon.' In those circumstances it is particularly surprising that Weightmans say they only discovered certain of the matters relied upon two weeks after the hearing. We have unchallenged evidence from Mr. Fry of Wake Smith leading to the clear inference that Mr. Byard of Weightmans had visited the BTA website during the hearing. Even accepting that the matters concerned were only found two weeks later, there is no explanation of why they were not found earlier. Further, it is astonishing that, having found the material, the applicants took no action for a further five weeks. We draw the inference from this delay that the matters now relied on were not, at the time of discovery, seen as serious. Finally, we think that this objection simply comes too late. It is not open to a party which thinks it has grounds for asking for recusal to take a leisurely approach to raising the objection. Applications for recusal go to the heart of the administration of justice and must be raised as soon as is practicable."

Sir, I do not know if you were minded, in view of the early start to the day, to take a five minute break mid-afternoon, but if you were that would be a very convenient time.

THE PRESIDENT: Yes, very happy to, yes. We will probably make it 10 minutes.

MR. SWIFT: I would prefer 10, yes.

(Short break)

THE PRESIDENT: We can put away *Baker*, can we now, the last decision? We have finished with the Court of Appeal.

MR. SWIFT: Yes, sir. Authorities Bundle 3, Tab 20. *Smith v. Kvaerner Cementation Foundations Ltd.* (General Council of the Bar intervening). Just to remind the Tribunal where we are -- We are in a proposition from me that the factual basis for a valid waiver does not turn on whether the facts have been disclosed by the judge decision-maker, but on whether the relevant knowledge is in the possession of a party. *Kvaerner* was cited to you, sir, and the Tribunal yesterday, by Mr. Green. If you would go to p.378 of the judgment, at para. 26 -- Paragraph 26 is the summary of the authorities and the principles following a review of the facts at paras. 22 through to 24. So, at para. 26 the Court of Appeal, Lord Phillips, says that,

> "The basic principle is that waiver requires that the person who is said to have waived 'has acted freely and in full knowledge of the facts' [and cites Lord Browne-Wilkinson in *Pinochet*]. In *Locabail* this court commented,
>
> > '-- a party with an irresistible right to object to a judge hearing or continuing to hear a case may ... waive his right to object. It is, however, clear that any waiver must be clear and unequivocal and made with full knowledge of all the facts relevant to the decision whether to waive or not'".

At para. 27 Lord Bingham is cited in the *Millar v. Dickson* case:

"In most litigious situations the expression 'waiver' is used to describe voluntary, informed and unequivocal election by a party not to claim a right or raise an objection which it is open to that party to claim or raise. In the context of entitlement to a fair hearing by an independent and impartial tribunal, such is in my opinion the meaning to be given to the expression".

Then they go to what was then an unreported decision of the Court of Appeal to which I have just referred the Tribunal, which was *Jones v. Das*. There they set out at para. 28 the guidance at (i) through to (iv) on the next page. Then they say,

"This is useful guidance but, as the court made plain, it should not be treated as a set of rules which must be complied with if a waiver is to be valid".

Then, this is the critically important sentence,

"The vital requirements are that the party waiving should be aware of all the material facts, of the consequences of the choice open to him, and given a fair opportunity to reach an unpressured decision".

That appears to be a settled statement of the law.

When Mr. Green referred to *Smith v. Kvaerner* at that paragraph yesterday (transcript p.9 at line 23), he said as follows:

> "Point two, for waiver to exist there are, and I use the Court of Appeal's expression, vital requirements (see Lord Phillips in *Smith v. Kvaerner*, para.29) which must be satisfied, and these are fourfold. Lord Phillips describes them as threefold, but they can be broken down into four. First, there must be full and frank disclosure by the conflicted decision maker; secondly, there must be full awareness of all the material facts by the person affected --"

In my submission, the inference from the *Smith v. Kvaerner* judgment is that it is almost immaterial as to the source of the information so long as the person who may have a grievance has all that information available to him, irrespective of source. Plainly, there will be occasions where the only relevant source of that information is the judge. That is the point I make. It is an obvious point of common-sense or realism: Why should information known to a party which is relevant to the issue of waiver be ignored simply because it has not been disclosed by the judge. The critical question of a waiver is whether the person is in possession of the material facts so that a decision can be made by him.

The Tribunal asked yesterday whether it is open to you to infer waiver from silence. Our answer is, yes, depending on the circumstances, depending on the context. If the circumstances require a response and one is forthcoming, then that can plainly constitute a valid waiver. If there is a choice to be made and a party decides to exercise one element of that choice, but not the other elements, then that is a decision which is attributable to him. It is linked to the point I was making at the outset about apparent bias and the events of early 2009. The decision was taken to seek questions in relation to Professor Moizer and the GMPF and the transaction. That was the extent of the notification back to the Competition Commission.

It is now timely to look at *Locabail*. This is just about the last authority I am going to ask the Tribunal to look at. *Locabail*, of course, precedes *Porter v. Magill*, but it has been cited in *Porter v. Magill* and in *Helow* with approval. As I said before, it is an extremely strong court. That is to be found at bundle of authorities 1, tab 9. *Locabail* covers a large number

of issues. The only paragraph I was proposing to draw to your attention, Sir, is para.40, which is at p.484 of the judgment. That followed the statement made by the then Deputy Judge:

> "'Mr. Mann and Miss Williamson, I had quick flick through Bundle T last night and I discovered on the second page for the first time that the firm of which I am a partner seems to have had something to do with attempting to get a bankruptcy order against Mr. Emmanuel. It is the first time I have heard of it, and I had nothing whatever to do with it.'
>
> 40 Neither Mr. Mann for Locabail nor Miss Williamson for Mrs. Emmanuel made any response to the disclosure made by the deputy judge. Neither asked for time to consider the position more fully. Neither asked for any additional information about the matters the deputy judge had referred to. Each side, of course, had its own copy of the press cutting in Bundle T. Both sides were content for the hearing to continue. It did continue for a further eight days after which, as we have said, judgment was reserved and eventually given on 9 March 1999."

So part of the contest or the legal principles are what does the future claimant or appellant do when information of that kind comes before him or it, in this case a corporation? Does it ask for additional information, does it do its own researches? These are facts which the fair minded and informed observer would naturally consider as part of his or her review. Then of course there is the concluding paragraphs in *Baker v. Quantum Clothing*, to which I have already referred the Tribunal, which referred to the delay and the frosty reception which the Court of Appeal gave to the appellant in that case.

THE PRESIDENT: Are you on any particular bit of this after 40?

MR. SWIFT: I was not proposing to go anything else. It is part of the building blocks of the law relating to apparent bias, but in a sense it is pre-*Porter v. Magill*, but it is an important judgment in the whole of the building blocks in relation to this issue.

Sir, the key issue is whether a person is aware of the consequences of the choice open, and para.29 of the *Kvaerner* judgment, both Mr. Green and I attach considerable significance to that as a guide for this Tribunal. It does not matter how they become aware and parties, it is well known, may become aware of facts relevant to a decision to waiver by using their own initiative and by using due diligence. All these are ----

THE PRESIDENT: Do you go as far as to say that if they can become aware, they should be – in other words, they are to be treated as being in possession of the full facts if, with due diligence, they could have made the investigations; or do you just say, well, if they happen

to be aware then they are stuck with knowledge and a waiver can apply then; or have they got a duty to be proactive in digging around?

MR. SWIFT: It depends on the context. I do not believe it is possible to impose a general rule, but I think one would bring in not just the fair minded and informed observer but also the view of the reasonable person. What would one expect a reasonable person in those circumstances to do when presented with certain information from, let us say, a judge, or someone who may be a judge – in the present circumstances, the position of a tribunal. Here I am looking at the position in 2007. A letter is sent to BAA and it is copied to one of the partners in the solicitors acting for BAA. It contains disclosure of interests of the members, it includes the statement that the Commission does not consider that any of these matters (I am paraphrasing) prevent it from carrying out an impartial inquiry, and these are important statements. They are statements of belief, and genuine belief. This letter – and I cannot remember whether that was the "wretched" letter or not, I think it was the "wretched" letter, but anyway, that does not matter, there were lot of adjectives used – that was the letter sent to the named partner, a very experienced solicitor. According to the fair minded and informed observer in 2007 this is an inquiry that is going to involve BAA against the world. This is an inquiry which is being set up as a direct result of a reference to the Office of Fair Trading. Mr. Green referred to the Office of Fair Trading report and identified competitors and gave the appropriate reference. I do not think we actually went to the report yesterday and I am not proposing to go to it.

Here we have, on the facts as known to BAA, the possibility that some remedial action may be taken against them in the event that they do not persuade the Commission that there is no AEC. You will have seen right to the very last hearings – I think the last throw – Mr. Matthews was still saying as one of his major points, "We still hope you do not find an AEC". As far as they were concerned it was still a live issue.

There is AEC and then there is the argument that, "Even if there is an AEC, there are relevant customer benefits arising from common ownership and therefore you should be careful before there is any divestment", and so on and so forth.

In April 2007 knowing that the inquiries are going to last for two years, but there is a possibility that there may be divestment, what does the BAA corporation in Madrid, let us say, think about this? It has its advisers. Its advisers must be deemed to have discussed with it the possible outcomes of such a case. What do the Spanish owners say – of course I am speculating here, but I would have thought it is a kind of reasonable speculation that when you are in Madrid and you are a Spanish owner you want to know something about

the Tribunal, "Who is going to be judging this? Tell me something about the judges. How does the Competition Commission work? How does it enforce its decisions?" It is just the kind of thing that you would expect any corporation, especially one headquartered outside the United Kingdom, to be asking its professional legal advisers.

Here we have a notice of disclosure that is sent to the solicitors. What happened?

LORD CARLILE: Why should they not take the word for it of the national competition authority of the United Kingdom who have addressed in their letter the issue of conflicts of interest?

MR. SWIFT: They would do that, but I would suggest that a diligent legal adviser would say, for instance, "Why do we not just check the website?" After all, in the case of Mr. Earwaker when a similar disclosure is made, they said: "As soon as we sniffed that we were on the hunt". The fact that the Competition Commission expresses its own subjective view is not biased. It expresses its own subjective view, it is not biased. It may be taken into account by the company, but experience suggests that that is far from complete, that he company has its own view that the presence of a person on a panel or as a member of the officials could prejudice that company then it has ample opportunity to say that. I am putting myself in a hypothetical position of someone coming new to this Commission, new to legislation, wishing to find out more about who was going to decide that case. That was not done.

You, Lord Carlile, may say: "They did not do it, and they were legally entitled to do it". My position is that they could have done that. Indeed, my position is that in the nature of things had the BAA, let us say, chairman, said to his legal advisers: "Is there anything on the Competition Commission website relating to the BAA? Could you find out?" Then all they do is press a button and they find the 2002 notice of disclosure.

Mr. Green puts a lot of emphasis on the limited disclosure in respect of Professor Moizer, and the much more extended disclosure in respect of Mr. Collings' wife; he is perfectly entitled to do that. It is not as if Professor Moizer is a person unknown to BAA. Professor Moizer had sat on the 2002 inquiry into the charges at the BAA airports within London South East, he sat on the Quinquennial Reviews in 2007. My point is a very simple point, that there you have within the public domain, available to the BAA and relevant to the BAA's business and their concerns, the information about Professor Moizer.

THE PRESIDENT: So that is relevant to their knowledge – I am just trying to tease out – are you saying because they could have found that out, the team in question, they could have found that information out therefore that knowledge is imputed to them for the purposes of a waiver of ----

MR. SWIFT: Yes, I am making that point, I am making it for one obvious reason, that it is very much in the interests of good administration that when information is in the public domain and could be considered to be relevant to the fair trial which that company would get then that knowledge is deemed to be within the actual knowledge of that company, and cannot be said to depend upon whether an individual, Mr. Herga or Mr. Hawkins or Mr. Hanks, happened to have spotted that notice. This is not a question of constructive knowledge, it is more a question of ordinary commonsense and realism that a corporation either knows, or should know, of those facts that may either establish a liability against it or, indeed, give it rights itself. It is just unbelievable that this argument is taken, this knowledge about the 2002 notice is known by the man who runs the Costa Coffee Shop at Manchester Airport, is known to the government of this country, is known to the CAA, is known to the people who run WH Smith but somehow is not known as a matter of fact or law to the people who run the BAA.

THE PRESIDENT: Or to the Competition Commission? Is it not equally extraordinary – you may be right in saying it is extraordinary that these links did not come to light sooner than they did, but it is no less extraordinary, is it, that the Competition Commission did not think to point them out?

MR. SWIFT: The Competition Commission formed the view that Professor Moizer would be a valuable member of that inquiry by reason of his expertise in terms of a professor of finance, and that is why he is put on the inquiry.

THE PRESIDENT: They also said, as Lord Carlile has mentioned, that they had formed a view that he would be able to deal perfectly impartially with that inquiry.

MR. SWIFT: Indeed.

THE PRESIDENT: That could be seen as being a sort of disincentive for people to dig around any further?

MR. SWIFT: They could. Ultimately this is where the fair-minded and informed observer, because it is a legal fiction, will do or not do certain things and ultimately these are matters for the Tribunal on this appeal.

THE PRESIDENT: We are on waiver now, are we not?

MR. SWIFT: Yes.

THE PRESIDENT: You are not suggesting a-fair minded observer as it were you look at him in terms of the waiver issue. On the waiver issue, as you have shown us in the case, there has to be full knowledge of the relevant facts which you now say can amount to full

constructive knowledge, in other words you could have found them out easily and they are in the public domain, sitting there waiting to be found out, you are to be treated as knowing ----

MR. SWIFT: In a case such as this where this is said to be the source of the acute conflict from day one, and which has permeated the entire inquiry since then, and is now being used in 2009 as the ground for quashing this, a critically important fact, yes, I would say that Tribunal on a matter like this should be saying: "This is not conduct that this Tribunal would say is that to be expected of a corporation in that position at that time.

THE PRESIDENT: Yes.

MR. SWIFT: I should just add on, if I can call it, the "Earwaker" issue the letter from the Competition Commission to BAA is dated 20th June 2007 and is exhibit RDH, this is Robert Herga's witness statement, and that is bundle 5, tab 82 – perhaps we should just turn this up. (After a pause) Do you have RDH1.

THE PRESIDENT: 20th June.

MR. SWIFT: 20th June 2007, it is from Gail Sugden at the Competition Commission to Louise Comer. This is:

> "Dear Ms. Comer,
>
> I am writing to you regarding interests of an economic consultant whom we are proposing to bring in to assist the staff team in its work on the cost of capital."

Then they give information about John Earwaker. Then at the fourth paragraph:

> "Mr Earwaker and the CC believe that this proposed assignment will not require Mr. Earwaker to consider issues on which he has previously advised the CAA and the CC. Mr. Earwaker does not believe that his previous work at the CAA will prejudice his ability to provide impartial advice to the Group to enable it to discharges its functions in an independent and impartial manner.
>
> In accordance with our normal practice, the substance of this letter will be placed on the CC's website."

That produces the reply on 21st June:

> "Thank you for your letter.
>
> We have some concerns about this appointment we would ask the Commission to reflect upon.
>
> Whilst we do not know the precise work undertaken by John for the CAA, it is our understanding that this included the issue of the acquisition financing. If this is correct then we would be a little surprised that - given the Commission's

questioning on the cost of capital and the link, if any, to the re-financing - that an advisor to the CAA on BAA's acquisition financing can be seen as not being required to consider issues on which he has previously advised the CAA when advising the Competition Commission the cost of capital".

Then they refer to,

"At last week's Competition Commission conference on cost of capital at Exeter, John [Mr. Earwaker] told one of BAA's staff he thought the CAA had 'got it about right' with respect to the costs of capital at Heathrow and he made other comments on the Terminal 5 uplift.

We would suggest the Commission seek clarity on these points from John in order to satisfy itself that this appointment would be appropriate. In this context it would be helpful to us if you could clarify what work John did undertake for the CAA".

This is a response made, as one might expect, by a party. Indeed, the witness statement of Christopher Clarke (defence bundle, Tab 5, para. 18) -- The point I would like to emphasise is at the top of p.7,

"Disclosures are made in the expectation that parties and their advisers will consider them attentively and that, in the event that the matters disclosed give rise to any potential concern, they will raise them at the start of the inquiry. This is what happens on numerous inquiries. A dialogue is then begun, normally resulting in an outcome which satisfied both the parties and the Commission".

Then Mr. Clarke refers to the correspondence relating to Mr. Earwaker which I have just referred you to.

I am not sure whether I can take this point about the source of information much further. It must be plain that the facts are simply not those simply made available by the disclosing Tribunal. There is an issue - and I would say it is an issue that depends very much on the facts of each circumstance as to what other facts are, or should be, in the possession of the individual or the corporation.

There is one final authority that I have taken from Mr. Jowell's list - that is, the *ASM Shipping* case under the Arbitration Act 1996. If I could read a very short section.

THE PRESIDENT: Would you like us to turn it up?

MR. SWIFT: No. It would be invidious since it is Mr. Jowell's authority. Let him turn it up. It is authorities Bundle A at Tab 22. The quotation at para. 50 is as follows:

"If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making either forthwith or within such time as is allowed ... any objection ... he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part, or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection".

It is the reasonable diligence point, I would say. Whether they should is one matter. Whether they could is an entirely different matter.

THE PRESIDENT: It sounds as though it is a quite important authority. We probably ought to look at that at some point. It may be you do not want to look at it now. Maybe tomorrow.

MR. SWIFT: We will do tomorrow. There are, as I have said, other lead authorities, but that, I would have hoped, give a kind of conspectus of where we are in relation to the legal principles. They are simply stated there in Hellow, but there are, as it were, ancillary related decisions that provide some guidance to a court as to the width of the issues, both in relation to the relevant facts for the fair-minded and informed observer ----

THE PRESIDENT: So, that has dealt with your Item 2, case law; would that be right?

MR. SWIFT: Yes. I have probably got about an other hour. I could start at ten tomorrow and finish by eleven.

THE PRESIDENT: We will leave it to you. We can go on certainly for another fifteen minutes if that is of any assistance, but if you feel as though you would rather gather your thoughts ----

MR. SWIFT: Would you mind? I would much rather stop now, if that is not going to inconvenience the Tribunal? If we could start at ten tomorrow. I would be complete within the hour. I am much obliged .

(Adjourned until Wednesday, 21st October, 2009 at 10.00 a.m.)