IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1301/6/12/18

Victoria House,
Bloomsbury Place,
London WC1A 2EB

6 February 2019

Before:

THE HONOURABLE MR JUSTICE MORRIS
(Chairman)
MICHAEL CUTTING
PAUL DOLLMAN

(Sitting as a Tribunal in England and Wales)

BETWEEN:

B&M EUROPEAN VALUE RETAIL SA Appellant/Claimant

- and -

COMPETITION AND MARKETS AUTHORITY Respondent

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Mr Richard Moules (instructed by Gordons LLP) appeared on behalf of the Appellant.

Mr Robert Palmer and Mr Ben Lask (instructed by CMA Legal) appeared on behalf of the Respondent.

HEARING

THE CHAIRMAN: Good morning, Mr Moules. Can I, first of all, thank the parties for their full submissions, which we have read. The way we are going to approach it is, we are going to hear the argument on jurisdiction, and then we will retire to consider the position. Then we will proceed from there.

MR MOULES: I am grateful for that indication. Sir, I appear on behalf of the appellant/claimant, B&M, and representing the CMA are Mr Palmer and Mr Lask.

Firstly, thank you for accommodating this dual hearing and for listing it so quickly. A couple of housekeeping matters: you should have received the appeal bundle, which is in three volumes.

THE CHAIRMAN: Yes.

MR MOULES: There should be an additional supplementary bundle for this hearing. There is a two volume bundle of authorities, and I am afraid there need to be a few additions and substitutions to that. First, could I hand up copies of *Napp Pharmaceuticals*, and ask you to replace the contents of your tab 26. (Same handed)

THE CHAIRMAN: I was wondering whether it was the wrong version. We do not need the big version?

MR MOULES: No, Sir, I apologise for that. The second of four alterations is tab 30 in volume 2 replacing the *Microsoft* case. Thirdly, in volume 1, tab 1, the addition at the front of the tab of section 120 of the Enterprise Act, which you will have seen is "Perception". It is referred to in a number of the authorities.

THE CHAIRMAN: Thank you.

MR MOULES: Finally, tab 2 in volume 1, section 47A of the Competition Act 1998.

THE CHAIRMAN: Thank you.

MR MOULES: Turning to jurisdiction, I should say at the outset that my client, B&M, is not opposed to this case being heard in the Tribunal. It is cautious though as to whether the Tribunal has jurisdiction, which is why proceedings have been issued both in this Tribunal and in the High Court. This is certainly not a forum shop. I make that clear at the outset.

THE CHAIRMAN: Yes.

MR MOULES: In my skeleton argument I have suggested a pragmatic solution, which is that the claim proceed by way of judicial review because the High Court undoubtedly does have jurisdiction, and there is no obvious prejudice to either party taking that route.

THE CHAIRMAN: I just want to open your skeleton.

MR MOULES: It is paragraph 28 of my skeleton.

THE CHAIRMAN: Yes, I am just trying to make sure I have got the right document. Yes.

MR MOULES: The points I make at 28 are that the High Court undoubtedly does have jurisdiction. Questions of competition law experience can be dealt with by listing before a judge who is either a Tribunal Chairman, or at least has sufficient competition law experience. There is no obvious prejudice to either party. The standard of judicial review is identical, whether it is a review under section 179 or a challenge in the High Court. Section 179(4) makes that clear. There is apparently a benefit to the CMA of proceeding by way of judicial review because it takes the benefit of the Commission requirement. You will have seen its submissions on the interim relief application that the merits of the case are unarguable and without substance. Were this to proceed by way of judicial review that would be tested at an early stage, and if the CMA does have a knock-out blow that would be the time to make it. That is my pragmatic solution.

I understand the Tribunal may be anxious to consider the scope of its jurisdiction under section 179, and if it would assist I can develop my submissions on that issue now.

THE CHAIRMAN: I think we do need to know whether this Tribunal has jurisdiction before we consider anything else, and I think I would like to hear your submissions as to why the Tribunal does not have jurisdiction, if that is your submission.

MR MOULES: Certainly. Tab 1, internal page 264, if you could turn up section 179. As far as the parties are aware, this is the first case in which the scope of section 179 has been construed, or has fallen to be construed. The CMA has referred to a number of authorities in its submissions on jurisdiction, which, in my submission, do not assist, because they either concern section 120 and/or the decisions under challenge plainly did fall within the Tribunal's jurisdiction.

Could I ask you to have section 120 at hand?

THE CHAIRMAN: I am just marking - so 179 in connection with?

MR MOULES: That is right, and if it is possible to have the wording of 179 and 120 side by side.

Both sections are dealing with conferring jurisdiction on this Tribunal to review, on judicial review principles, certain decisions. Section 120 headed "Review of decisions under Part 3" provides that:

> "(1) Any person aggrieved by a decision of the CMA , Ofcom or the Secretary of State under this Part …"

and I emphasise "under this Part"

> "… in connection with a reference or possible reference …"

So there is a qualifier to the type of decisions that may be reviewed before one gets to "in connection with". There is the qualification that the decision must arise under the Part, that is Part 3 of the 2002 Act.

There is a slightly different verbal formula used in section 179. The heading of the section is "Review of decisions under Part 4", which suggests again a qualifier, the decision must be one under Part 4 of the Act before one goes on to consider a connection. Then the words are inverted in section 179(1):

> "Any person aggrieved by a decision of the CMA, the appropriate Minister or the Secretary of State …"

and then we get "in connection with a reference or possible reference", and then we get the qualifier "under this part." So do the words "under this Part" qualify the type of reference or possible reference, or, as in section 120, are they qualifying the type of decision? In my submission, the title of the section indicates the same approach as section 120, that it must be a decision under Part 4.

THE CHAIRMAN: Yes, can you just pause a moment. (After a pause) Yes.

MR MOULES: And that reading has the benefit of reining in the wide scope of "in connection with". One then is looking at the possible decisions under Part 4, and asking the relatively straightforward question: are they connected with a reference or possible reference?

THE CHAIRMAN: Can I just digest that for a moment. (After a pause) Okay.

MR MOULES: My submission is that where one is dealing with a provision conferring jurisdiction on a Tribunal, Parliament might be thought to have approached the matter intending there to be a clearly defined cut-off, or rule to avoid precisely the sort of situation we find ourselves in here. Jurisdictional certainty is an important public interest, and that is best served by reading section 179 as concerned with decisions under Part 4. Of course, the decision under challenge in this case is a decision made in exercise of the discretion in Article 4 of the Order. It is not a decision under Part 4. It is true that the Order owes its *vires* to Part 4, but the actual decision is made in exercise of a power under Part 4.

THE CHAIRMAN: Can you just repeat that submission for me?

MR MOULES: Certainly, Sir, yes: it is true that the Order owes its *vires* to the 2002 Act, Part 4, but the actual decision was made pursuant to a power in delegated legislation, namely the 2009 Order.

MR CUTTING: Can I ask a question there? I can see what you are saying in relation to the decision to designate, but your notice of appeal also challenges an alleged decision not to

de-designate, which may also be a decision not to review, suspend or vary, which would be a decision under section 161, which would be under Part 4.

MR MOULES: That is correct.

MR CUTTING: So the logic of your position means that we would have no jurisdiction over one of the decisions, but we would have jurisdiction over the other one. Is that what you are saying?

MR MOULES: That is correct, in so far as there has been a decision not to de-designate, but obviously the CMA's case is that there has been no such request and they have made no such decision.

MR CUTTING: I am just testing the logic of your submission.

MR MOULES: Indeed, on that hypothesis, yes, the answer would be you would have jurisdiction over some of the decisions but not others, to which my submission would be that that is not an insuperable problem because the High Court would have jurisdiction over both. It would apply the same principles of review.

That leads on to a second factor which I submit is of critical importance, which is that it is important to look at what the jurisdiction is, and, as I have said, it is jurisdiction under 179(4) to determine an application applying the same principles as would be applied by a court on an application for judicial review. Whereas in some contexts the alternative remedy might be an appeal on the merits, it might apply some different standards of principles, that is not the case here. The concurrent jurisdiction, if there is concurrent jurisdiction, would be on identical terms. So there is no policy reason, in my submission, to read section 179 expansively. There is no *lacuna* in protection.

THE CHAIRMAN: There is no policy reason to read section 179, what did you say?

MR MOULES: Expansively, Sir, so as to encompass decisions after the determination of a reference, and which are not made under Part 4.

THE CHAIRMAN: Yes.

MR MOULES: A point is taken by the CMA that this Tribunal brings particular specialism and expertise to its decision making, and the CMA relies on the *BSkyB* case, which is at tab 12 in volume 1. Could I just ask you, please, to turn that up, and within it turn to paragraph 30. The CMA relies on what is said at paragraph 37, but it is important to look earlier at 30 and 31 to see the context in which those remarks were made. As you can see from paragraph 30, the Tribunal there is discussing cases in which a greater intensity of judicial review might apply, and the submission made by Mr Beloff was that a review under 120 is, because of the specialist nature of the Tribunal, it warrants a greater intensity of judicial review. It

is in the course of rejecting that submission at paragraph 37 that the Tribunal says it will apply its own specialised knowledge.

THE CHAIRMAN: Can I just read 37. (After a pause) There are two separate things, are there not? One is the nature of the review, which this says is the same?

MR MOULES: Exactly.

THE CHAIRMAN: But the other is the specialist knowledge enables it to perform its task with a better understanding and more efficiently.

MR MOULES: Precisely, and that specialist knowledge, in my submission, is available to the High Court by listing in front of a judge with competition experience of which there are----

THE CHAIRMAN: There are not many.

MR MOULES: Of which there are some.

THE CHAIRMAN: They are now depleted by two as a result of recent elevations.

MR MOULES: Indeed.

THE CHAIRMAN: You say the specialist knowledge and experience can be met. Yes.

MR MOULES: Related to that one also has to look at the nature of the issues that the claim gives rise to, and in my submission here they are pure points of public law, albeit in a competition law context. The principal issue between the parties is the proper construction of Article 4 and what the CMA's discretion requires it to do when assessing the nature of a potential designee's business. That is a simple matter if it is pure matter of statutory construction. Whether it is simple or not is another matter. It is a question of statutory construction which is the bread and butter of the Administrative Court.

THE CHAIRMAN: Right.

MR MOULES: The other matter I rely on is section 183(4) of the 2002 Act.

THE CHAIRMAN: Which is the end of the reference point, is it?

MR MOULES: That is correct, yes. It is inside tab 1 of volume 1, and section 183 begins at 267.

THE CHAIRMAN: It is a very long section, is it not? It is (c), is it not?

MR MOULES: It is (c), exactly, Sir, the reference is determined by making the Order. Again, in my submission, that is an interpretation section which applies to the whole of Part 4, including section 179. Sir, we know a reference is something that terminates, or is determined upon making the Order, which helps to give context to the degree of connection one requires under section 179. Again, it is providing a defined cut-off point. The difficulty is that, once one moves away from the determination of the reference or a decision only under Part 4, does it beg the question of where should the line be drawn in any case?

THE CHAIRMAN: Just pause for a moment. So the Order, an Order made under section 161 is on the right side of the line?

MR MOULES: It is because it is the remedy, it is the product of the reference.

THE CHAIRMAN: At the time that the Order is made, according to you, the reference is determined?

MR MOULES: The act of making the Order determines the reference. I would say that is the final step, the shutter goes down.

THE CHAIRMAN: But if you are challenging the Order, that is okay because you are challenging something before the shutter comes down?

MR MOULES: Exactly, the final act, as it were.

THE CHAIRMAN: I have got that, but what about the case of a variation or a revocation?

MR MOULES: That then is a decision under Part 4. I am not saying that determination of the reference is, itself, an absolute cut-off. One has to read the section as a whole. If one is looking at decisions under Part 4, variation or revocation is a decision under Part 4. The connection is----

THE CHAIRMAN: That is technically a decision made after the reference has been determined?

MR MOULES: It is. I do not say that there is a bright line after that.

THE CHAIRMAN: No, so your determination point does not necessarily----

MR MOULES: It is not a complete answer, it is a factor that goes into the mix. Where one is dealing with a situation where the decision is not under Part 4, the reference is determined some nine years before, it is the combination of those factors that, in my submission, makes the connection to promote.

A number of cases have been referred to by the CMA in its submissions. I can go through those in turn if it would assist the Tribunal, but the headline point essentially is that they all deal with situations that clearly did fall within the jurisdiction of the Tribunal. A number of them concern decisions about whether to make a reference or fund a reference, all of which clearly are in connection with a possible reference, which is one of the triggers for review under section 120. I do not think it will assist the Tribunal to----

THE CHAIRMAN: No. I just want to find the CMA's submissions on jurisdiction now. I am not sure I have them relatively close to hand.

MR MOULES: Sir, it starts really at paragraph----

THE CHAIRMAN: Sorry, just bear with me. The cases I have marked as being closer in time were *Morrison* and *Stericyle*. Is that right? By way of illustration, paragraph 18 - maybe it

was *Tesco* and *HCA*, the ones that are later in time were the ones - it might have been *Morrison* as well.

MR PALMER: Paragraph 25 of our skeleton argument as well cites *Stericyle*----

THE CHAIRMAN: Directions made under an interim order.

MR PALMER: Decisions made under an order specifically.

MR MOULES: *Morrison*, I accept is the most closely analogous. That is tab 14. Could I ask you to turn up *Morrison* at tab 14. What you can see from paragraphs 2 and 3 is that the challenge was under section 120, and it was the challenge involving an order which gave effect to a remedy adopted by the Competition Commission following a merger reference. The Order required a three step process to identify the purchaser of a site that Tesco should divest itself of. The challenge was to the process under that Order. So that is the most closely analogous in the sense of its decisions taken under an order. The difficulty with the *Morrison* decision is that the question of jurisdiction was not addressed anywhere in the decision, so it is at most an instance of where the Tribunal has assumed jurisdiction in this type of scenario.

THE CHAIRMAN: Your analysis of the relevant provisions under section 120, would you say that in that case there was not jurisdiction?

MR MOULES: I would say that, particularly because the wording of section 120 most clearly requires the decision "under this Part", namely Part 3, and a decision under the Order would not have been a decision under Part 3.

THE CHAIRMAN: Yes, all right.

MR MOULES: Then *Stericycle* at tab 13.

MR CUTTING: Can I just ask a question: you press upon moving the reading of the phrase "under this Part" in 179 to match 120 to deny jurisdiction. Does *Morrison* suggest that actually if you move the location of "under this Part" in 120 to where it is in 179, jurisdiction was found in that case and was fine? I just wondered whether it is an equal hinge.

MR MOULES: The difficulty with switching and converting the words in that way is the title of both sections. It is a review of decisions "under this Part", and so the title of the section is a relevant aid to construction of the provision.

THE CHAIRMAN: One minute. (After a pause) I just wanted to digest Mr Cutting's point. So in 120 you move "under this Part" to after the word "reference" as it is to mirror 179 in the body, and that would have solved the *Morrison* problem that you see?

MR MOULES: Exactly, but there would still have been a question of whether a decision under the Order is sufficiently connected.

THE CHAIRMAN: Yes, but it would not have been as strong?

MR MOULES: No.

THE CHAIRMAN: You do not suggest any intended difference between the difference of the Order of the wordings in section 120 and section 179?

MR MOULES: Quite the opposite, the heading of section 179, "Review of decisions under Part 4"----

THE CHAIRMAN: Leaving the heading to one side for the moment, in terms of----

MR MOULES: I do not suggest any intended difference between the two provisions. It is difficult to see what the intended difference could be.

THE CHAIRMAN: That is the first point. The second point I have for you, because I am not sure we have seen this particular point about the heading, is: is there any learning to assist us on the relationship between a heading and the substance in the statute - I am sure there is?

MR MOULES: There is quite copious authority, I think, on that point. I would not want to mislead the Tribunal, but from recollection - and this is only recollection----

THE CHAIRMAN: It is an aid at most.

MR MOULES: It is an aid at most, exactly. But primacy must be given to the words in their context as a whole.

THE CHAIRMAN: And I suspect your argument is, looking at 179 as a whole and then giving primacy to the words, you are on weaker ground that then we have to resolve the conundrum of the difference between 179 and 120, and if you put the headings of both, plus 120 together, that reverses the balance?

MR MOULES: With the added factor that we are dealing with a jurisdictional clause where Parliament might have been intended to have clear, certain ascertainable lines.

THE CHAIRMAN: Thank you.

MR MOULES: And the background factor that there is the High Court with the same jurisdiction in any event. So the policy reasons for reading section 179 differently - I cannot think of what they would be.

Perhaps just to conclude my submissions on jurisdiction I should deal with *Stericycle*. Sir, *Stericycle* is at tab 13, and from paragraph 1 we can see that it was a challenge under section 120 to an interim order made under section 81(2) of the Enterprise Act. If we move forward to paragraph 15 of the decision, section 81 is there set out. Section 81(1) is crucial.

81(2) and (3), and it is (2) under which the Order was made, apply where a reference has been made under section 22 or section 33, but is not finally determined. So *Stericycle* was concerned with an ongoing reference and decisions made under the relevant part of the statute. So that does not meet the concerns that I have outlined.

Sir, just to conclude, those are the reasons essentially why B&M submits that there is real doubt as to the jurisdiction of the Tribunal and why, on balance, B&M considers the Tribunal does not have jurisdiction. I emphasise that B&M is content for the matter to be heard in the forum if the Tribunal is satisfied that it has jurisdiction.

THE CHAIRMAN: Yes,

MR MOULES: Unless I can assist you further.

THE CHAIRMAN: No, that has been very helpful, thank you very much. Yes, Mr Palmer?

MR PALMER: Sir, I am grateful. The position of the CMA is that this is as clear as could be a case where the Tribunal does have jurisdiction, that section 179 is phrased to be deliberately broad, in particular through the use of the words "in connection with", to which I will come briefly in a moment, but also in relation to the new argument made this morning about a decision under Part 4. It is said to be a distinction, as I understand the case now being made, between a decision under Part 4 and a decision made under an Order made under Part 4. We say that a decision made under an Order under Part 4 is still a decision under Part 4, and in particular a decision under Part 4 "in connection with" a reference.

THE CHAIRMAN: Can I just pull up 179 again so that I have it in front of me. I am not taking you to it, I just want to make sure I have got it.

MR PALMER: Sir, we concur with the view expressed that there is no relevant difference between section 120 and section 179 in this respect. We say both have the same wide meaning, which is why, in *Morrison*, a decision made under an Order under Part 3 was treated without question as being a decision under Part 3 in connection with a reference under that Part.

Sir, we say the order of words is a red herring, and it would be contrary to the intention of Parliament to construe those words narrowly to reach the bizarre - we would say perverse - result that an appeal against a decision to make an order falls within the jurisdiction of the Tribunal, but an appeal against a decision made under such an order does not and an appeal against a decision to revoke or vary the order does .

We say that is an odd, anomalous position for which no discernible rationale can be detected. It is contrary to the clear purpose of Parliament that decisions of the CMA in its specialist jurisdiction should be appealed to a Tribunal with specialist jurisdiction and

specialist expertise available to it, not only in competition law, but in all related disciplines of economics and finance, and so forth, which may be material.

We also say, to give you my final headline before I just unpack this in a little more detail, that the date on which a reference terminates is entirely irrelevant to the question of whether a decision is made in connection with a reference.

THE CHAIRMAN: It is "reference or possible reference", so that is certainly something before the reference. If a reference has terminated, is there any reference in existence to which the decision is in connection with?

MR PALMER: Yes, the historical fact of the reference, which is why, with respect, my learned friend got in some difficulty when the excellent question was put to him, "What do you say about revocation of an order?" That, he accepted, would be still a decision made under Part 4, but he would have to be then constrained to accept it was a decision made under Part 4 "in connection with a reference". What reference? The answer was the original reference.

THE CHAIRMAN: Which has terminated.

MR PALMER: Which has terminated and which led to that Order. It is a completely unsustainable distinction to make.

THE CHAIRMAN: So the revocation point, you say, deals with the termination point?

MR PALMER: Yes. When such a case did arise, the *Morrison* case, again I accept that the point was not contested, it was assumed, and it was clearly right to be assumed, it was a section 120 case - but we are both agreed that nothing in fact turns on that, and although my learned friend introduced the cases by saying they are all cases which clearly fell within the jurisdiction of the Tribunal - when he came to that case he had to admit that the Tribunal was, in fact, wrong to have made that assumption.

THE CHAIRMAN: Thank you.

MR PALMER: Sir, what I will do is to unpack those in a little bit more detail. The first point I made is about the deliberately broad use of language in section 179, and in particular by the use of the phrase "in connection with".

Sir, I am conscious we had a communication from the Tribunal about the various authorities. In the event, my learned friend has not made submissions which seek to restrict the words "in connection with" to some sort of narrow meaning, but in the light of that communication we thought it helpful to point the Tribunal to a Court of Appeal decision last year.

THE CHAIRMAN: I should tell you that those decisions we drew to your attention we have considered, not in full detail but we know the relevant passages and the general thrust. You, I think have put the Court of Appeal decision in one of those - you have added that.

MR PALMER: We have added that, *KMR, Khanty-Mansiysk*. It is tab 22, the last tab in volume 1. This is the most recent. It was February last year, the Court of Appeal. The leading judgment was given by Lord Justice Lewison, and the relevant passage is from paragraph 35. This case, Sir, you will have seen, concerned the construction of a settlement agreement, and it purported to settle claims, including those you see at paragraph 5, "arising out of or in connection with" the disputed invoice. At 36 the judge said this:

> "The judge went on to consider whether the claim now sought to be advanced was a claim 'in connection with' either the compromised action or the invoice."

I would just ask you to read the rest of that paragraph.

THE CHAIRMAN: Yes, and then he refers back to *Barclays Bank*.

MR PALMER: It does, yes. What I draw from that is the protean nature of the phrase with a mutable meaning, and dependent heavily on context and taking its meaning from the context in which it is used.

Barclays Bank is at tab 18. I am conscious that you have already looked at this, so I will not dwell on it.

THE CHAIRMAN: Just remind me of the paragraphs?

MR PALMER: It is tab 18, and paragraphs 18 and 19 for the statutory context. So this is a statute which is being construed here. It is the Income and Corporation Taxes Act. You can see "in connection with" is being construed, and the key passage is at 30. Again, having recited previous authority about the protean nature of the phrase, and again emphasising it is context driven:

> "It may then be able to form a view as to the purpose of the provision in question and that knowledge may inform its thinking as to the choice of meaning to be offered where choices are available."

So, just pausing there, that is a broad principle of statutory construction which would go to the words "under Part 4" as much as to the words "in connection with".

Then, six lines up from the bottom of that paragraph:

> "Parliament has used a broad expression, namely the expression 'in connection with'. Having cast the net widely …"

Then there are other words in the statute which narrowed it again, or drew that net in again, but those words, "in connection with", are broad and designed to cast the net widely.

That was *Barclays Bank*.

Then in tab 19 you have the *Tower Hamlets v Bromley* case. This was a fight between two London boroughs over a Henry Moore sculpture. The statutory context is at paragraphs 21 to 22. It is the London Government Act 1963, and you see in paragraph 22 at the top of the next page:

> "… references to 'land'
>
> '… shall be construed as including reference to any other property held in connection therewith'."

The argument was whether the sculpture was held in connection with the particular land in question.

At paragraph 30, after recalling *Barclays Bank* in the previous paragraph:

> "Before being beguiled by the breadth of a term such as 'in connection with' it is in my view necessary to pay close attention to the context in which in it occurs."

There, to cut a long story short, the context being "a connection with land" and the functions for which the land was held. A narrower interpretation was adopted there in that particular statutory context, but it is very difficult to draw any broader principle out of that case than that.

THE CHAIRMAN: I do not know whether you were going to take us to the *Hockin* case.

MR PALMER: *Hockin* is at tab 20, Sir. This is particularly helpful because it includes at 21 - this is concerning a phrase "connected with breaches concerning a Swap", and 21 considers the authorities, and in particular, citing from the first instance decision in *KMR*:

> "… it is often unhelpful and dangerous to rely upon earlier authorities as to the meaning of a particular word, with which I agree. [He said] 'in connection with' was clearly wider than 'arising out of' …"

THE CHAIRMAN: A conclusion with which I also agree.

MR PALMER: I also agree, so again emphasising its breadth, but dependent on context, and in that context, final sentence:

> "… it did not matter whether the connection was direct or indirect."

THE CHAIRMAN: It was also the sentence in 20 in *Barclays* that a connection may be indirect. That is also obviously context, but then she does cite the "direct or indirect" context.

MR PALMER: Also, for completeness, over the page at paragraphs 29 to 30, just drawing out the same points, but again saying they all point to the breadth of the phrase "in connection with". Again, that is really the point that survives.

Sir, you see here, in my submission, a deliberate choice by the legislature to take a very broad phrase, broader than "arising out of", and in particular you see a choice to take a different approach to that which Parliament took in the Competition Act 1998, which you have at tab 2, section 47A, where Parliament in this context, dealing with claims for damages for infringements of competition law, spelt out the particular decisions against which a right of appeal would lie. That is also true in relation to the proceedings section, which you should have at the beginning of that tab, section 46.

THE CHAIRMAN: Just a minute, so it is the decisions under section 47A(2), is it? Yes. You said the specified decisions are 47A(2), are they?

MR PALMER: You see in (1) "a claim to which this section applies", and then the section applies to, and you have specific claims there. All the more so though in the preceding section 46, which was in your original tab 2, and I hope you did not discard it, which is "Appealable decisions":

> "(1) Any party to an agreement in respect of which the CMA has made a decision may appeal to the Tribunal …
>
> (2) Any person in respect of whose conduct the CMA has made a decision may appeal to the Tribunal against, or with respect to, the decision."

Then "decision" is defined in (3), with the enumerated list of specific statutory provisions or specific breaches.

So that is another way in which Parliament routinely sets out a right of appeal against a decision, and you will be familiar with many other contexts under the Immigration Act, and so forth, where you have a specific list of decisions against which a right of appeal lies.

In the Enterprise Act, whether we are talking about section 120 or section 179, Parliament has simply taken the broadest approach to say "any decision under this Part in connection with a reference".

THE CHAIRMAN: Yes.

MR PALMER: Sir, in my submission, Parliament's clear intention is to catch all such decisions, rather than to distinguish finely in the way that my learned friend's submissions do.

Sir, we say that rights to appeal these decisions can be made before, during or after a reference, and they may also specifically include decisions taken under the Order. We have referred in our skeleton to Schedule 8 of the Act, which sets out the provisions that may be contained in a final order, an enforcement order. Schedule 8 begins in tab 1 at page 428. This is the sorts of matters which can be contained in an order under section 161, and it includes at paragraph 21, page 440----

THE CHAIRMAN: Sub-paragraph (3)?

MR PALMER: Sub-paragraph (3), yes:

"An Order may make provision for matters to be determined under the Order."

So this is not some separate delegated legislation which is being applied, as might have been understood from what Mr Moules was saying earlier. This is a specific statutory authorisation under Part 4, incorporating Schedule 8, which says that the Order which is made under section 161 may make provision for matters to be determined under the Order, so to be left to be determined. We say when a matter is so determined, that matter is still being determined under Part 4. My learned friend concedes the Order owes its *vires* to Part 4. So you have a wholly artificial isolation of the Order, as if it were some form of separate legislation rather than a continuing act, an act which continues to be, or a decision which continues to be made under Part 4 and the powers which arise thereunder.

We gave some illustrations of the breadth of the approach of the Tribunal in its previous decisions, so unless you would think it helpful I do not propose to go through them all. We listed them at paragraph 18.

THE CHAIRMAN: No, I do not think so. I do not think we need to be taken through those, thank you.

MR PALMER: I will not take you through the authorities, but may I just highlight one or two points though without going to the authorities. The first is in relation to the first one at 18(a), which is *Association of Convenience Stores*. My learned friend of course accepts that the specific words of the statute envisage "in connection with a reference or possible reference", but this was a decision not to devote resources to address whether to make a reference. It was not even a decision not to make a reference. It was at an earlier stage about whether the OFT, as it then was, would investigate further in order to make a decision. So it was that far removed from a possible reference, and it was still assumed to be caught.

The next case was *John Lewis*, which was a decision to accept undertakings in lieu of a reference. So it is specifically rejecting, not going down the reference route, and accepting undertakings in lieu, and that was within the jurisdiction of the Tribunal.

THE CHAIRMAN: Yes, thank you.

MR PALMER: The third and more conventional case was a decision under reference that there was not an AEC, and that was obviously within the jurisdiction. Then (d) a decision following a reference as to the remedy that should be adopted to address an AEC, including

Tesco, which was under the same Groceries Report, and of course that was directly concerned with remedy.

Then, when you take that on to the next stage - and I will not take you back, because you have seen them, *Stericycle* and *Morrison* - you use the clear assumption that decisions made under orders fall within the jurisdiction of the Tribunal.

I will say a word on *Stericycle* though because, as I understand my learned friend's submission, he said that was a case which was concerned with an ongoing reference, which is, of course, correct as far as it goes. It was concerned with an interim order to prevent merger parties from frustrating the point of the reference.

THE CHAIRMAN: Yes.

MR PALMER: That is obviously right, and if his point was that there was a distinction before and after the final determination of a reference was a good one then that might be material. But for the reasons I have already given to you, that is not an important distinction. The live question in *Stericycle*, if we are looking at it through this lens, would not be whether it was concerned with an ongoing reference, but whether it concerned a decision under Part 3. On my learned friend's logic, directions issued under an order would not have been a decision under Part 3, no matter whether the reference was ongoing or not.

THE CHAIRMAN: Directions made under an order - yes?

MR PALMER: Sir, if we just go for a moment----

THE CHAIRMAN: No, it is all right, I just want to make a note, "under an order would not be under Part 3" - yes?

MR PALMER: If his logic was right. The point that it was an ongoing reference does not assist him.

THE CHAIRMAN: I understand, the ongoing point goes to the determination point, and you have already made your submission that the determination point does not help.

MR PALMER: It does not help.

THE CHAIRMAN: And you say it does help - the assumption of jurisdiction helps in rebutting the suggestion that directions under an order cannot be under the Part.

MR PALMER: Exactly so. For your note, it is paragraphs 44 and 50 which show what was in issue there was the issue of directions under----

THE CHAIRMAN: Can you remind me which tab it is in?

MR PALMER: Sorry, it is tab 13.

THE CHAIRMAN: I just want to mark it, and you were taking me to 44 and 50?

MR PALMER: 44, just for the factual position as to what was in issue. You will see that at paragraph 44 the Tribunal records that the CC issued directions - that is the 18 July directions - under paragraph 7 of the Order, and it is the Order that was made under section 81 that my learned friend took you to earlier.

Then at 50 there is a further set of directions issued, which are called the 25 August directions, and it is those directions which are then challenged to the Tribunal.

MR CUTTING: I just wonder if you could help me - forgive me for not being entirely on top of all of this, but in *ACS, John Lewis* and *Tesco*, was the jurisdictional question explicitly argued or was it assumed?

MR PALMER: None of these has even been thought to challenge the jurisdiction question. If the Tribunal had had concerns it would have been expected to say so. This is, as my learned friend said, the first time that there has been an explicit challenge to the scope. I just wanted to check what his submission entailed and if the Tribunal had been proceeding under a misapprehension all this time as to the scope of its powers, and I say it has not been.

THE CHAIRMAN: You say that if the appellants are correct on their construction, the Tribunal would not have had jurisdiction in *Stericycle*?

MR PALMER: That is right.

MR CUTTING: Can I take you back to the point you made about section 46 of the Competition Act?

MR PALMER: Yes, indeed, Sir.

MR CUTTING: Just looking there, the appealable decisions, the tail of sub-section (3) includes within appealable decisions a direction under the relevant orders. Does that help or hinder in terms of thinking about equivalence for the purpose of sections 120 and 179?

MR PALMER: The point I make about section 46 is how specific it is.

MR CUTTING: I get that. I am asking a different question, which is whether there is something to be read into the fact that the specificity in that case includes follow on decisions, or supplementary submissions. Is that something that helps or hinders you? Does it help or hinder you that they are explicit about it here?

MR PALMER: It helps me to the extent that if, despite using the broadest of language in the Enterprise Act, Parliament actually intended to exclude this tiny category of cases - directions or decisions made under an order - then you would have expected them specifically to say so, just as when adopting the other drafting approach of positively identifying all types of decision they specifically identified that type of direction in this case.

My main submission is that it is the breadth, it must be taken to be deliberately broad, and not to lead to nit-picking distinctions with no obvious rationale supporting the making of such distinctions.

THE CHAIRMAN: So it helps you to the extent that section 179 did not positively exclude decisions under that?

MR PALMER: Yes.

THE CHAIRMAN: Whereas in another situation they positively included them?

MR PALMER: Yes, you have got two different drafting approaches there, one intended to be all inclusive, the other intending to be exhaustive of rights of appeal.

THE CHAIRMAN: Okay.

MR PALMER: So just as to the rationale, because my learned friend laid some considerable stress on the proposition that really there is no difficulty here because the Administrative Court may be able to lay hands on a judge with competition law experience, but that, in my submission, does not pay sufficient regard to----

THE CHAIRMAN: The people on my left and right.

MR PALMER: It effectively assumes that the additional expertise which this Tribunal can call upon is dispensable and it does not really matter whether you have it or not. That is clearly not the intention of Parliament, which wanted a cross-discipline and specialist and experienced Tribunal to determine this type of appeal.

THE CHAIRMAN: Yes.

MR PALMER: That is the short answer to that point.

The last point, Sir, to deal with on this is just to make the point that the passage of time does not in any way alter that analysis, just as, we say, a decision to identify and list the ten original retailers in Schedule 2 of the Order was a decision under Part 4 of the Act, so is a decision to add two more, Ocado and the applicant B&M here. The fact that it is many years later is of no consequence. There is no time limit.

THE CHAIRMAN: There is a difference because the first lot were designated by the Order, whereas this is being designated by a direction under the Order or a decision under the Order. That is the distinction, but presumably you would say there is no distinction between B&M being added now, or being added a year after, or six months after?

MR PALMER: Or a day after. That is the point I make now. I have made my submissions on the relevance or otherwise of the distinction, Sir, that you have just identified. I simply say that timing, the passage of time, is irrelevant.

Lastly, I also point out - I shall not take over them, because I appreciate they will be familiar authorities - that we do point out in our submissions on jurisdiction that where there is concurrent jurisdiction - this is from paragraph 30 of our submissions on jurisdiction----

THE CHAIRMAN: I think that is a point that comes later, does it not, logically? Make the submission in the sentence: "Where there is concurrent jurisdiction"?

MR PALMER: I was just responding to my learned friend's submission that we might as well have it in the High Court because that is safe.

THE CHAIRMAN: I think at the moment I say, let us decide the issue of whether we have jurisdiction. It was the first point he made about which would be better. You are going to your bit in your submission, at the end, were you not? I think that comes at a different stage.

MR PALMER: Sir, those are my submissions unless I can assist you further?

THE CHAIRMAN: No, thank you, that is very helpful. Mr Moules, if you would like to reply?

MR MOULES: Thank you, just very briefly. I do not intend to repeat what I have already said.

THE CHAIRMAN: That would be helpful.

MR MOULES: The authorities that the Tribunal helpfully sent to the parties and which Mr Palmer has addressed you on, they do show that the words "in connection with" are a protean phrase. They fall to be construed according to their context. *Prima facie*, the net is cast wide. My submission is that the net is drawn back by the context here, the context being a decision under Part 4, and the fact a reference determines upon making the Order, and the important public policy of clarity in jurisdictional matters.

THE CHAIRMAN: Yes, thank you.

MR MOULES: The second of the three points I wish to make, it was said that a decision under the Order is still a decision under Part 4 of the 2002 Act. In my submission, that is incorrect. The Order of course owes its *vires* to the 2002 Act, but the particular power is the power contained in the Order. The decision is wholly referable to Article 4.

MR CUTTING: I am sorry, can I ask you a question? Your submission there is that the decision under the Order is wholly referable to the Order?

MR MOULES: Yes.

MR CUTTING: One of the interesting, if I may say so, points about both your case and the CMA's case is that both of you quote a lot of the original Grocery Report. So an inference of that is that it is in connection with the Grocery Report, because both of you refer to the content and the policy of the Grocery Report, which, by any stretch, is in connection with the reference. So when you say the Order making power is wholly referable to the Order, if

you are right as a matter of collateral language, because it may be wholly referable in terms of pure *vires*, but it cannot be interpreted without harking back and constantly thinking about the reference in the report. Can you help me with that, please?

MR MOULES: Indeed. Certainly there is undoubtedly a connection between the power in Article 4 and the underlying reference which gave rise to the Order, because the Order is the remedy at the end of the reference?

MR CUTTING: It goes further than that, does it not, because it is also about the exercise of the discretion under the Order? Both parties keep referring to what the CC said in that report.

MR MOULES: Indeed, and the reason the report is relevant to the Order is because it is a background document which one can use as an aid to construction of the Order, but that does not detract from the fact that the power in question is a power under the Order, albeit the Order falls to be construed in part by reference to the mischief to which it was directed. Sir, I accept that one is drawn into looking at the 2008 report because, as I say, the Order is the remedy for a mischief identified through the reference, but the actual power can resonate nine years after was made. It is a power arising under the statutory instrument, not under Part 4 of the Act. That perhaps illustrates why this is principally a matter of public law and statutory construction: what does Article 4 of the Order mean, which, in my submission, tells against this being a matter that falls to be decided in this Tribunal as opposed to the High Court. It is a matter of construing Article 4 by reference to the purpose of the Order.

THE CHAIRMAN: All right.

MR MOULES: The question, once one moves away from----

THE CHAIRMAN: Is this still under your second point?

MR MOULES: It is really in answer to the question I have just been asked. Once one moves away from the bright line distinctions and accepts that if there is a connection the matter is rooted in the 2008 Report, where does the line fall to be drawn? If the CMA were to consult before exercising its power under Article 4, and there was a flaw in the consultation, it was unfair, insufficient time was given to respond, would the consultation be a matter that was sufficiently in connection? If the CMA corresponds and deals with the Grocery Code Adjudicator in a way that regulated parties feel is unlawful, that is clearly in connection with the Order. The Order has its roots in the report. Is that enough to bring the matter within?

So once one accepts that the exercise of the discretion under the Order is within scope and decisions do not have to be under Part 4 of the Act, and determination of the reference is not

a relevant factor, any exercise of the CMA's powers touching on the 2008 Act on the logic of my learned friend's submission fall to be decided in this Tribunal.

THE CHAIRMAN: And the exercise of decision making powers - which was the last bit - by the CMA?

MR MOULES: By the CMA in relation to certainly the Order would be within the jurisdiction of the Tribunal, even though they raise what, on any view, would be pure public law matters quite disconnected from either the reference or indeed a discretion under the Order.

Then, finally, *Stericycle*: the point was made against me that that was a challenge both to an order which was part of an ongoing reference and to directions which were not made under Part 3, they were made pursuant to the Order, and I have to accept that if my submission is a good one that a decision must be under Part 3 or Part 4, then the Tribunal would not have had jurisdiction to review the directions in *Stericycle* save to the extent that there was also an attack in that case on the Order under which the directions were made. So, of course, if the attack on the Order succeeded then the directions would fall, together with the Order. The logic of my submission is that there would be no free-standing ability to challenge the directions themselves.

THE CHAIRMAN: So there, there was a challenge to the Order and to the directions under the Order. The challenge to the Order is, on any view, within the jurisdiction?

MR MOULES: Yes.

THE CHAIRMAN: And if that had succeeded there would be no directions and therefore they had jurisdiction?

MR MOULES: Precisely.

THE CHAIRMAN: Right.

MR MOULES: I accept that, on my case, there would be no jurisdiction to say, if you are against me, that the Order is valid, nevertheless the directions should be quashed or varied.

THE CHAIRMAN: All right, thank you.

MR MOULES: Unless I can assist you further, those are my submissions.

THE CHAIRMAN: We will retire and we will consider the position, and we will let you know when we are ready. Thank you very much.

(Short break)

THE CHAIRMAN: In this appeal, the appellant, B&M European Value Retail SA, having commenced in the Tribunal, has raised the issue of whether the Tribunal has jurisdiction to hear the appeal, and has submitted that the Tribunal does not have jurisdiction.

We find that the Tribunal does have jurisdiction to hear this appeal under section 179(1) of the Enterprise Act 2002. We will give our written reasons for that conclusion in due course. That then, I think, takes us to the issue of concurrent jurisdiction, and the way I propose to approach that is by asking, in the light of that decision, Mr Moules, whether you wish to proceed with your application for interim relief before this Tribunal?

MR MOULES: Yes, Sir, I do. The way I think I put it in the skeleton argument was that if this Tribunal was satisfied it had jurisdiction I do not seek to argue that the matter should proceed in the High Court, that there would be an alternative remedy, and ordinarily that would be a reason for not continuing with the judicial review. What I do ask though is that the judicial review be stayed rather than, as my learned friend asks, that the permission be refused, so in effect the judicial review is there in the background should an appeal from the main substance go further and the appellate court take a different view on jurisdiction. Sir, I propose to press my application for interim relief and the proceedings now proceed solely in the Tribunal.

THE CHAIRMAN: Yes. The first issue, I wanted to be clear that you are effectively wanting to proceed with the proceedings in the Tribunal and you have given a clear answer on that. In relation to the Administrative Court proceedings, the position - and I am not sure which hat I am speaking with now - essentially we are currently constituted as a Tribunal and that is not really a matter for the Tribunal. I know you have both raised it, but, given that we only have today for this hearing, and I am now giving you an indication with my other hat on, I think, is that I - and I can give that direction later with my other hat on - am not proposing that I would deal with that issue today at all, but that issue would be dealt with effectively in the normal way, and I will deal with it on paper in due course. Whether that is by way of an acknowledgement of service or by way of written submissions, but that issue - I suspect the issue is as between stay or permission refused - is an issue which I do not think the Tribunal is concerned with and which I think we need to deal with later.

MR MOULES: Indeed, and I am grateful for that indication, and it may be something that the parties can discuss outside this room and perhaps present you with an agreed order.

THE CHAIRMAN: Yes, but that would be with my other hat on.

MR MOULES: Indeed.

THE CHAIRMAN: Very well. That is very clear and very helpful. Can we now, therefore, proceed with the application for interim relief?

MR MOULES: Thank you, Sir. The appellant applies under rule 24(1)(a) of the Tribunal Rules for an order suspending the effect of the designation decision until final determination of

these proceedings. I propose to address you relatively briefly on the test for interim relief, because I think there is a matter between us particularly as to the degree of harm which the appellant must show, and then I will follow the conventional five tests in my submissions if that is convenient.

THE CHAIRMAN: Yes. Proceed in the way you wish to proceed. We have a couple of questions, but I will see where they pop up.

MR MOULES: If I can assist the Tribunal?

THE CHAIRMAN: No, I would rather you proceeded - I do not like taking you out of the way that you have prepared.

MR MOULES: I am grateful, thank you. If I could invite you, please, to turn up tab 24, which is the *Flynn Pharma Limited* decision, which is volume 2 of the authorities, and could you, within that, please, turn to paragraph 29. So the familiar passage that the principal purpose of interim relief in Tribunal proceedings is both to preserve the integrity of the appeal and that of the decision under appeal to ensure that the applicant does not enjoy a pyrrhic victory.

Then the principles to be applied are set out at paragraphs 30 to 31. They are the *Genzyme* questions, but as modified by the Tribunal in *Flynn*, and those questions are set out at paragraph 32. I anticipate that the significant point of difference between the parties will be in relation to question (c) and whether the applicant is likely to suffer significant damage, and quite what is required, both in order to found the Tribunal's jurisdiction and then, as a matter of discretion, to warrant the grant of relief.

THE CHAIRMAN: The difference as to what qualifies as 'significant damage', there may be a difference between the parties, but what about this difference in wording between 'significant damage' and 'serious and irreparable harm', which was the point that Mr Freeman made the distinction of in *Flynn*, and which the CMA say at paragraph - it may be that there is no difference between you, or you both agree that whichever wording it is it has the same effect. It is paragraph 15 of the CMA's skeleton where they say it is the old wording and not the new wording applicable to this application. If you are both agreed that there is no difference between 'serious and irreparable harm', is it, the old phrase?

MR PALMER: It was both 'damage'.

THE CHAIRMAN: Both 'damage' - 'serious and irreparable damage' versus 'significant damage'. If there is no difference between you as to what that means then nothing turns on it, but if there is a difference we would like to know which is the right test for this case.

MR MOULES: Certainly. In my submission, there is no difference between the two expressions. My submission would be that the applicant would qualify for relief under either formulation of the test.

THE CHAIRMAN: Okay. No doubt we will hear from Mr Palmer about whether it makes a difference. Yes?

MR MOULES: So 32 were the five questions to be asked. 33, it is a two stage assessment, one asks questions (a) to (c) in order to determine whether jurisdiction exists. Then one repeats the exercise of asking question (c), adding (d) to (e) to exercise discretion on the merits.

THE CHAIRMAN: Just pause a minute please. (After a pause) Yes, thank you.

MR MOULES: Just picking up the point about test (c), and how that was dealt with on the facts of this case, could I invite you to turn to paragraphs 78 through to 80, please? As *Genzyme*, which I will turn to in a minute, had indicated, 'serious and irreparable harm' was construed by analogy with the Court of First instance approach, and generally irreparable financial loss that did not threaten the survival of the undertaking did not qualify as serious and irreparable damage. The point to note here in *Flynn* is in 78 through to 80, the Tribunal noted that the financial loss that the applicant claimed would not amount to demonstrable threat to the continuation of its business, hence it would not qualify as irreparable applying the standard of the European Court. Nevertheless, we see in paragraph 80 that the Tribunal did not dismiss the significance of the harm altogether, it considered it had a significant core and that was sufficient under (c) to trigger the Tribunal's jurisdiction.

THE CHAIRMAN: It is accepted that non-threatening harm was sufficient for the purposes of (c)?

MR MOULES: Indeed, yes, and we will see why that was if we turn now to *Genzyme*, which is tab 23 in the same bundle. Sir, within *Genzyme,* could I ask you to turn to paragraph 78, which is on page 24. What the Tribunal says in paragraph 78 is that applications for interim relief should be dealt with by analogy with the principles applied by the Court of First instance.

At paragraph 79 on page 26 are the five questions. Then at paragraph 80, the fourth line, we get the point about 'serious and irreparable damage' in the view of the CFI being financial loss which cannot be compensated and threatens the survival of the undertaking in question.

Then, crucially, 81, and I place considerable emphasis on this:

> "[The Tribunal] stress that the principles outlined above do no more than provide a general framework for the exercise of the Tribunal's jurisdiction under Rule 32. [It

is a] jurisdiction must remain flexible, ready to be adapted to the particular circumstances of the case where the interests of justice so require."

That explains no doubt why in *Flynn* the absence of a threat to the life of the undertaking did not preclude a finding of jurisdiction under question (c).

THE CHAIRMAN: Can I ask you this: are paragraphs 80 and 81 expressly referred to in *Flynn* when he looks at the test? Maybe it does not matter.

MR MOULES: Paragraph 79 certainly is, and the five questions at paragraph 30 of *Flynn*. I do not think there is an express reference to 80 and 81.

THE CHAIRMAN: Thank you.

MR MOULES: In my submission, it is clear what the Tribunal does in *Flynn* is absolutely on all fours with the approach in *Genzyme*.

THE CHAIRMAN: You say paragraph 80 of *Flynn*, even if apparently there is a tension between that and what the rule under limb 3 is, is consistent with 81 in *Genzyme*?

MR MOULES: Precisely.

THE CHAIRMAN: Thank you.

MR MOULES: Then in *Genzyme* itself, although the undertaking itself was not threatened on the facts, and we see that at paragraph 89, the last sentence, "In this case *Genzyme*'s survival is not threatened."

At paragraph 90 the Tribunal then went on to consider the CFI's decision in *IMS Health*, where the President in that case had found on the facts that the market changes imposed by the decision, the third line, "would be very difficult, if not impossible, to reverse if an appeal were successful". On the facts of *Genzyme* in 91, implementation of the directions under challenge would not merely involve financial loss but would also require, and I emphasise these words 'a major change' in its business operations. In the middle of the paragraph, "Those changes would amount to a major upheaval in its business, in addition to the loss of revenue". While it is true perhaps they could be unscrambled, there was some doubt about whether that would occur in practice.

Then in addition to a major change in business operations, a major upheaval in business, 92 shows there is another factor which goes to the question of damage, "that in *IMS*, the President also took into account that implementing the contested decision would restrict the applicant's freedom to define its business policy". That was also the case on the facts of *Genzyme* as well.

THE CHAIRMAN: So there are two potential limbs under the damage/harm. One is financial matters which threaten survival----

MR MOULES: Yes.

THE CHAIRMAN: -- but in any event another relevant factor is effectively irreversible or difficult to reverse changes in business practice, freedom to define and difficulty to modify business practice, and that is a separate basis of damage?

MR MOULES: Precisely, and what I will show you in this case is that there are all three. I do rely on upheaval of the business, disruption to business policy and there is also some irreparable financial harm, although I accept that that comes nowhere close to threatening the life of the undertaking, but it is something that weighs in the pot with the other two factors.

THE CHAIRMAN: What was your first point, disruption of business policy, change of business - you gave headlines, I did not hear the first one?

MR MOULES: Business upheaval.

THE CHAIRMAN: Business upheaval, yes, I have got, disruption of business policy and then financial loss.

MR MOULES: Financial loss, which I say is the same significant core that was recognised in *Flynn*, albeit not threatening the life.

THE CHAIRMAN: Yes.

MR MOULES: And what we can see at 93 is that the approach of the Tribunal was to take all those matters into consideration together.

Addressing the five *Flynn* questions, the first is *prima facie* case, and I begin by saying it is a low threshold of whether the argument on the substantive appeal are at least *prima facie* not entirely ungrounded in the sense that they can be dismissed at this stage.

I am in the Tribunal's hands as to how, mindful of the time, much the Tribunal would be assisted by me developing the grounds and explaining why they are founded in law. I have set out in my skeleton----

THE CHAIRMAN: Let me turn up your skeleton. I do think we have a question on this first limb, and it is this: the note, the citation of the *Medical Justice* case, I am not sure who cited it, but it is in the bundle, and we ask the question rhetorically whether there is -

I suppose in order to inform our view about what the test is - any difference between the test as set out in *Flynn* and previous, and the European jurisprudence, and the test for the merits first hurdle in an application for interim relief by way of judicial review? Can you tell me which tab *Medical Justice* is in?

MR MOULES: It is tab 25 in volume 2.

THE CHAIRMAN: I was looking particularly at paragraph 6 and 'real prospect of success' meaning something more than a 'fanciful prospect of success', and our question is: is there any difference between that test and the test of not ungrounded, and what we had in mind was that the judicial review test might be a hurdle that is more than *de minimis*, and if it is, how that fits in?

MR MOULES: Indeed. There is some guidance in *Genzyme*, tab 23, paragraph 87 on page 29. They refer to the threshold, the test there as a 'somewhat low hurdle':

> "It follows in my view that Genzyme has surmounted the somewhat low hurdle of showing that there are issues in the case which require a more detailed examination."

If anything, that is a lower test than that posited at paragraph 6 of *Medical Justice*, 'real prospect of succeeding at trial'.

THE CHAIRMAN: Yes.

MR MOULES: In practice, I suspect the two tests were applied in broadly the same way: essentially, is there an arguable issue to be tried here? Perhaps it is a lower threshold in question (a) because one comes back to the merits again in question (e) anyway, when balancing overall. So (a) is only to give jurisdiction. If the question at (a) is a lower hurdle than perhaps *Medical Justice*, the *Medical Justice* matters come in again under (e), so----

THE CHAIRMAN: That is right, although from my recollection even in - I am not quite sure it is expressly stated, I think it probably is even judicial review, that you do come back to merits in any event at the final stage, even outside this Tribunal.

MR MOULES: Yes.

THE CHAIRMAN: All right. I have your answer to that. I think probably we would like to hear something about the merits because it either comes in now or it comes in at (e) in any event.

MR MOULES: Certainly. In that case, I begin with the preliminary point that this is the first exercise of the power to designate new retailers under Article 4, which means, firstly, there has been no judicial consideration of that, the purpose and scope of that discretion; and secondly, that the point of interpretation at the heart of this appeal is also of public importance.

The Order, as we have heard, came about as a result of the 2000 and then the 2008 reports. It is the remedy for the adverse effect on competition identified in the 2008 report. Could I turn up the Order, which is at tab 3 of the appeal bundle.

THE CHAIRMAN: Are we going to go back to the authorities bundle in the near future or not?

MR MOULES: We are going back to the authorities. It is volume 1, tab 3, it begins at page 1. This is the Order, and what I have done in paragraph 8 of my skeleton argument is summarised the main provisions of the Order. So central to the operation of the Order is the status of designated retailer, and then I have set out the things the Order requires of a designated retailer. Article 5 prohibits entering into or performing supply agreements unless they incorporate the Grocery (Supply Chain Practices) Code of Practice, and the Code of Practice is at Schedule 1 of the Order. There is a requirement in Article 6 to provide suppliers with certain information. Article 7 imposes record and information keeping obligations. Article 7 requires staff to be trained in the Code. Article 9, appointment of an in-house compliance officer, Article 10 delivery of manual compliance report. Then there is arbitration provided for by Article 11 to the Grocery Code adjudicator. The designated retailers at the time of making the order are those listed in Schedule 2 on page 18. You will note that they are all the major supermarkets who are the subject of the 2008 report - so that is Asda, Co-Op, M&S, Morrison, etc.

The particular issue in this case concerns Article 4(1)(b), which you will find on page 5 of this bundle. It is the provision dealing with Designated Retailers. Designated Retailers are those listed in Schedule 2 at the time of designation, but also, 4(1)(b:

> "… any Retailer with a turnover exceeding £1 billion with respect to the retail supply of Groceries in the United Kingdom, and which is designated in writing as a Designated Retailer by the OFT."

now the CMA.

The explanatory note, which is in the next tab, provides some guidance on the exercise of that discretion. It is at paragraph 18 on page 22, so beginning at the end of the sixth line of paragraph 18, the OFT, CMA, has a discretion as to whether to appoint a business meeting the turnover threshold as a designated retailer, based on the nature of the business meeting the turnover threshold and the purposes of the order.

Sir, at this point I need to explain a little bit about the nature of B&M's business, because that is critical to the way in which we say the CMA incorrectly approached its discretion under Article 4.

The explanation is in both of Mr McDonald's witness statements. Could I ask you, please, to turn in volume 1, tab 2, to Mr McDonald's first witness statement, on the first page of his statement, X29, we can see Mr McDonald is the chief financial officer of the claimant. Moving through his statement to paragraph 11 on the next page, what he does is explain how supermarkets trade, and he says they enter into supply agreements with suppliers and

then place the suppliers' products in their stores on an ongoing basis until the supermarket delists - in other words, stops selling - the product.

THE CHAIRMAN: You are looking at paragraph 11?

MR MOULES: That is right, so supermarkets generally enter into supply agreements on an ongoing basis until the product is delisted or stops being sold.

He further expands on that point at paragraph 49, where he says in the second line that, historically, supermarkets enter into supply agreements, list the products, probably for one to five trading years, depending on the product and often the supplier and the supermarket will agree a joint business plan, and they will agree the price, volume discount, etc, marketing contributions. So that is how supermarkets trade.

In contra distinction to that, paragraph 50, he says that is not how B&M trade and they never have done. What he says in paragraph 46 is B&M does not have 'must have' stock items. It generally does not stock an item for any significant period of time. So it does not only review or delist, stop sell something on an annual or five yearly basis.

In paragraph 47 he also explains that, unlike supermarkets, who normally have around 50 per cent of their products being own brand products, B&M has no own branded products.

What he says that these important differences between the way B&M trades and the way in which a supermarket trades mean is that B&M either cannot or is inherently unlikely to do the things that the Code in Schedule 1 of the Order sets out to prevent - in other words, the supply chain practices that were the adverse effect on competition that the 2008 report identified, he sets that out in some detail at paragraph 54. I do not propose to read through 54----

THE CHAIRMAN: The bottom line is that he says that B&M do not, and are unlikely in the future to engage in supply chain practices?

MR MOULES: That is right. To take some of the obvious examples, one of the supply chain practices relates to the way in which a supermarket who has own brand goods, if obtained from a supplier, deals with the supplier in relation to the packing of the good it is producing.

THE CHAIRMAN: Is that listed as one of them? When you go through could you just identify that, or maybe it is not identified specifically by reference to own brand goods.

MR MOULES: He does refer to it. Yes, it is the middle bullet point on X40 under marketing costs.

THE CHAIRMAN: Yes, own branded product, it does not seek - okay.

MR MOULES: So the prohibitions are in relation to charges for things like buyer visits to suppliers - that is when a supermarket visits a prospective supplier to see how it is producing the branded good, artwork for the packaging, market research, etc, and the practices which attach to own branding products.

THE CHAIRMAN: I have got it, okay.

MR MOULES: Then retrospective variations, which is the first bullet point on X39, this is the notion that a supermarket enters into a supply agreement with a supplier for a year or so to purchase a particular product, and then may retrospectively try and vary the terms or impose costs. The point is that B&M does not say, "I am going to stock a particular product" - for example, take cereals, Frosties----

THE CHAIRMAN: That is the point he makes in 46.

MR MOULES: That is right, and that is important because they do not say, "We are going to stock Frosties and we will contract with a supplier for a year to obtain those Frosties", what it says is, "We are going to carry some cereals and those cereals are the ones that we can obtain in the market at a discount, generally with a six week lead-in", and if Frosties are on sale they may buy a consignment of Frosties. Alternatively, it may be Weetabix. So they are not in an ongoing relationship with a supplier for a long period of time with a must stock item.

The point is that that makes it inherently unlikely that they are going to be doing the things which the order seeks to prevent, because there is not that ongoing relationship. They contract at a price for a consignment of goods. That is the deal and they will look in the market place for something similar when they have sold them.

The other important aspect of that is because the way in which B&M trades is to repeatedly contract for whatever is available in the market at a discount price, it enters into many, many more supply contracts, or contracts to purchase supplies, than would a supermarket, and Mr McDonald says that over the course of a year they will enter into some 1,600 contracts with different suppliers. So they are constantly chopping and changing to buy a consignment of particular goods, which is relevant to the disruption to the business. The order envisages a model of a supermarket contracting on a long term basis with a supplier and regulating that long term relationship. It is not apt, in my submission, to be applied to the nature of switching between suppliers on a short term for a particular consignment of a particular product at a particular price; or at least, if it is capable of being applied in that way, that is a relevant matter that the CMA ought to have thought about when assessing whether to exercise its discretion.

THE CHAIRMAN: Can I ask this: are you saying, and this is a matter for evidence, that B&M do not have long term supply agreements?

MR MOULES: They generally do not, yes.

THE CHAIRMAN: So they are buying *ad hoc* consignment by consignment - is that right?

MR MOULES: It is generally *ad hoc* consignment by consignment for very short periods with a six week lead in time, as Mr McDonald says. I think they are referred to as a 'bulk discount', where they buy things in bulk, sell them at a discount and then move on to whatever else can be obtained at a discount price to then sell. As he explains in his statement, I do not think I need to go to it, they are not like a typical supermarket. One could not go in and do one's weekly shop there. Most of their stores - in fact, all of their stores - do not carry a full range of groceries, do not have fresh fruit and vegetables. It is a case of some groceries, which can be obtained cheaply and they fill their shelves with those.

THE CHAIRMAN: Yes, okay.

MR MOULES: Where all this leads really - and it is a matter for the evidence - is the purpose of the order is to remedy the particular adverse effects on competition that were identified in the 2008 Report, namely the supply chain practices that are regulated by the Order. B&M's core submission is that, in deciding whether to designate it as a designated retailer, it was relevant for the CMA to consider the extent to which the nature of B&M's business engaged or was likely to engage the mischief to which the order was addressed.

THE CHAIRMAN: I just want to be clear what precisely - that is an argument about taking account of relevant considerations in a way, and you may be coming to it, but what precisely is the point of construction? What is the misconstruction of what?

MR MOULES: It really is the scope and the nature of the discretion. It is accepted by the CMA that they have a discretion whether to designate, having regard to the nature of the business. The question is, what considerations form part of that nature of the business analysis?

THE CHAIRMAN: I just want to look at your grounds: misinterpretation of the purpose of the order, paragraph 66. Must have regard to the purposes. So it is not the construction of the order. It is a misconstruction of the purposes, is it? In your last set of submissions you said it is a pure point of construction. I just want to pinpoint what you say the misconstruction is.

MR MOULES: The misconstruction is, there is the power to designate in Article 4. It is a discretion, having regard to the nature of the business, properly construed in the light of the purposes of the order, what are relevant considerations?

THE CHAIRMAN: Right, and where do they make a mistake? Did they make a mistake because they misconstrued the words "nature of a business"? Did they make a mistake because they misconstrued the purpose which appears to be the point of 66 of the grounds, because they thought the purpose was merely to prevent the exercise of buyer power, or which? I am just trying to pin this ground one.

MR MOULES: Certainly, it is best expressed in the light of the skeleton argument, paragraph 14 onwards. It really emerges from the way in which Mr Land, who is the witness for the CMA, has explained how he went about assessing the nature of the business. As I set out at paragraph 14, Mr Land, in paragraph 58(iii), explains how he reviewed the nature of B&M's business to determine if it was a business the CMA would be likely to designate. He says he looked at three issues - whether they would be likely to be considered retailers of groceries, whether they are large enough having regard to turnover, and then whether the retailer's business model is suitable for designation, looking at issues such as the extent to which retailers deal directly with suppliers. In my submission, that boils down to saying, "Do you sell groceries, is your turnover £1 billion, and do you buy those groceries from a supplier?" It does not look at the nature of business any more widely than that.

THE CHAIRMAN: Looking at that and putting to one side for the moment the actual grounds of appeal, is it right that the real point is paragraph 16, the last sentence, "the extent to which the Appellant engaged in the practices"?

MR MOULES: Yes, that is right, and you can see from 15 the approach the CMA took was, "That is not material, the order is about future proofing and possible problems so we can designate effectively on a precautionary basis."

THE CHAIRMAN: Can I draw out from you that the last sentence, "duty to consider the extent to which the appellant engaged in", that means engaged in the past, engages now, or will engage in the future?

MR MOULES: In my submission, it is apt to encompass all three.

THE CHAIRMAN: It has to consider all three - yes?

MR MOULES: Yes.

THE CHAIRMAN: Okay.

MR MOULES: I am not for one moment suggesting some large scale investigation into the historic practices of a company. My submission is, where you have a company, the nature of whose business differs significantly from those who were the subject of the report and who are already designated, that is very plainly raising the question: is B&M, of its nature,

able to engage in the sorts of things the order seek to regulate? It is no more complex than the regulator asking itself that.

THE CHAIRMAN: Does it now, has it in the past?

MR MOULES: That is right, and indeed, is it likely to?

THE CHAIRMAN: "Is it likely to", you would say brings in the questions of "does it now" and "has it in the past"?

MR MOULES: Indeed. Looking to the future, there is no suggestion that B&M is going to change the way in which it trades. It is not going to trade like a supermarket. So, in the future, it is likely to carry on as it has historically been trading. It might be a different position if I were a supermarket who said, "We have been good boys in the past, you can trust us to continue", because the nature of the business there is one in which the supply chain practices have been found in the case of other supermarkets to arise. Structurally, the supply chain practices may arise because there are own brand products, there are long term supply agreements, there is a clear----

THE CHAIRMAN: So you say, I think, in relation to that that it has not done it in the past or does not do it now might not be conclusive that it will not happen?

MR MOULES: Yes.

THE CHAIRMAN: Even with somebody who has not done it or there is no evidence they have done it in the past, you have to consider the nature of the business as to future likelihood?

MR MOULES: That is right. The nature of the business here, it goes to the core structure of the way in which B&M trades.

THE CHAIRMAN: I notice the time and we are going to break now. I have got one question for you to consider in that connection over the adjournment, which I will ask now, and I will also ask my Tribunal members whether they have anything. In that connection - and it is a factual question really and it is probably sides - of the, I think, 11 retailers who were designated first time round, was there evidence that each of them had carried out at least some of the relevant practices? More generally, what was the state of the evidence as to what practices those designated had or had not carried out?

MR MOULES: Certainly, we will check that over lunch.

MR DOLLMAN: Part of the report, it obviously refers to the practices themselves, but it also talks about the stake of a business that is over £1 billion and is in groceries, and therefore it could, in the future, have the possibility of abusing that position. Why, in that case, just because their practices are different, could we say with any degree of certainty that they might not in the future abuse that position, merely by their scale?

MR MOULES: I can answer that now, if that is convenient, or return to it. The short answer is the report says it is not bargaining power *per se* and the scale that is the concern, it is when that translates into the supply chain practices. Here the particular nature of B&M's business is that, structurally and in the way it trades, it is not apt to do those things. It is not self-restraint on B&M's part that it is in a position in a long term supply agreement, but it is restraining itself and retrospectively imposing terms. That may be a different kettle of fish. What we are dealing with here is that the structural way in which B&M trades just does not give rise to the issues in relation to own brand products in relation to long term supply agreements. Because there is that structural difference, that is why the CMA can be assured that, for the moment, there is no credible risk that the supply chain practices would be engaged. The CMA has an ongoing duty and power to review, and were B&M to start entering into long term supply agreements, were it to stock lots of own brand products, it may - I say 'may' - be appropriate to take the view that the nature of the business is such that the risk of the supply chain practices is sufficient to designate, but here there is the core structural difference which just makes it impossible, or at least in some cases inherently unlikely, that the things the order seeks to regulate could occur. As I say, it is not self-restraint on the part of the trader, it is just the very nature of their business. It really does go to the essence of what they do and how they do it.

The strong indicator that is the correct approach is when one looks at what the Order requires. For example, if you take the delisting, having to serve a notice on a supplier saying it has got the right to challenge delisting, and then there is a process for doing that, with B&M----

THE CHAIRMAN: You do not list in the first place.

MR MOULES: You purchase some goods, a pallet of 100,000 packets of----

MR DOLLMAN: You delist by stopping buying something?

MR MOULES: You are almost serving a delisting notice as soon as you are entering into the contract, and so again, that is why the nature of business just is not - the Regulation is not apt to apply to the nature of the business.

I only need to put my case on the basis that those are relevant matters that the CMA should have considered. I do not need to succeed in saying that, as a matter of law, B&M could not be designated. This ground succeeds if those aspects of B&M's business were relevant factors to go into the mix. It is clear from Mr Land's evidence, he said, "We are designating on a protective basis, this is not a review of B&M, you are supplying groceries that you buy from someone else and your turnover is £1 billion, so you are in."

Sir, I do not pre-empt what the exercise of the discretion would have been.

THE CHAIRMAN: Yes, all right. That is very helpful. We will start again at 2.05.

(Adjourned for a short time)

THE CHAIRMAN: Yes, Mr Moules?

MR MOULES: Responding first to the question that was posed just before lunch, whether the Competition Commission had evidence in relation to each of the 11 retailers who were subsequently designated, as to whether they engaged in the practices, I have tried to piece the answer to that together as best as possible, and I think the answer lies in volume 2, tab 7, which is the 2008 Report, starting first at page 882. At paragraph 11.411 they are talking about setting the threshold at £1 billion a year and midway through the paragraph:

> "… in setting this threshold, we also took into account the identity of the retailers where particular issues had been brought to our attention during the course of this investigation …"

They thought about, in 412, whether to apply a higher threshold, but they would be concerned that the Code:

> "… would not apply to retailers that we judge clearly have the ability to exercise buyer power, based on evidence of their conduct …"

and then there is a reference back to paragraphs 9.57 to 9.67, which you will find on page 793. At the foot of 793 the evidence in relation to supply chain practices consisted of matters raised during the investigation by individual suppliers and supplier associations, secondly, a supplier survey, and then finally some specific emails between Asda and Tesco and their suppliers.

At 9.59 we can see that there were 380 concerns raised by suppliers, and that the Commission was able to form a general impression regarding the overall prevalence and relative extent of the practices amongst the supermarkets.

Over the page, 9.62, they sought specific views from six retailers regarding practices that had been brought to their attention in relation to that retailer.

I have looked through the appendices. The problem is a large amount of the specific detail is redacted. What is certain from 9.62 is that there were allegations in relation to 6 of the 11. There was a wide range of evidence about the practice of supermarkets, all of whom trade in essentially the same way.

MR CUTTING: The thing that struck me, I suppose, from table 1 in Appendix 9.8, which may not be in the bundle, but it is available on the web - Appendix 9.9 is completely blanked, which actually is a complaint by a supplier - it just lists the fact that actually there are, for

example, only three instances of complaint against Waitrose, five against Marks & Spencer, five against the Co-Op, but nevertheless they are subject to the order. Does that suggest that there is not a completely uniformity? Then at 9.38 of the Report the Commission I think expresses concern about shrinkage as a practice but says there is only one supplier who is guilty of it, and yet all of them become subject to a series of regulations in relation to shrinkage. There is an apparent disconnect that everybody gets regulated for everything regardless of whether there is clear evidence that they are engaged in it.

MR MOULES: Certainly. I do not put the case on the basis that there must be clear evidence that B&M does engage in these practices before it can be designated. My submission is that the assessment of the nature of the business brings into question whether the business is actually capable of carrying out the practices. One can easily distinguish a case where, although there might be a low incidence of complaints against the specific supermarket or supermarkets generally, the way it trades is apt given the bargaining power it has to be abused in the way in which the Order seeks to prevent. Where, for example, in relation to own brand products a retailer simply does not stock them, so therefore, by definition, cannot carry out the prescribed practices.

THE CHAIRMAN: So you say you do not put the case on the basis there must be clear evidence of B&M having engaged, rather whether the nature of the business makes it likely, or even less than that, that they will.

MR MOULES: Exactly, essentially it makes it apt to apply the controls in the order to that business. The nature of the business, in my submission, is a holistic analysis of the way in which the person trades. That does, at its core, find its roots in the principle of proportionality. This is a remedy to address specific adverse effects on competition which manifest themselves by bargaining power being used in a way that gives rise to the supply chain practices. That regulation comes at a cost. If the person you are seeking to regulate cannot do, by definition of the way it trades, the things you are seeking to regulate it is disproportionate to impose those----

THE CHAIRMAN: Right. Thank you.

MR MOULES: As I think I said before lunch, the CMA was required to consider those matters. I do not say as a matter of law it was prohibited from designating B&M, but in considering the nature of B&M's business, what it had to weigh into the balance is whether the way in which it trades is apt to be regulated by this Order given the costs of regulatory compliance.

THE CHAIRMAN: All right, thank you.

MR MOULES: So ground one essentially is that the CMA approached this discretion in an overly narrow way by not looking at the nature of the business in that sense. As I set out in the skeleton, Mr Land simply asked: is the turnover £1 billion, is it in groceries, and are those groceries purchased from somebody?

Ground two is closely related. That is was there sufficient inquiry, and the well established principle of a public body exercising a statutory discretion has to make reasonable inquiries before it exercises that discretion, and here, in my submission, the CMA has failed at first base.

THE CHAIRMAN: Ground two is sufficient inquiry - yes?

MR MOULES: It is in the grounds of appeal, paragraph 69, page X15, of tab 1 of volume 1 of the appeal bundle. The duty is to understand the nature of the power, ask the right question and then take reasonable steps to acquaint itself with the relevant information. The authorities for that are set out in paragraph 70. Here, in my submission, the CMA fails at first base because it does not correctly understand the scope of its discretion to look at the nature of the business, and therefore it does not ask itself the right questions. Relevant matters about the way in which B&M trades and its relationship with its suppliers do not go into the mix.

The final ground is proportionality. Essentially, I have explained that already. It is the question of the extent to which B&M's business is capable of doing the things that the Order seeks to regulate, and then whether the costs that would be imposed on B&M of that Regulation are proportionate to the mischief the designation would seek to address.

A point that is taken against B&M is, "Well, you did not make any submissions at the time. The CMA was corresponding with you but you did not address these matters." There are two answers to that which are set out in the grounds and the skeleton. First of all, that is no answer where the CMA has misinterpreted the scope of its own discretion. If it has not approached the discretion on the basis that the nature of the business brings in the sort of factors I have referred to, by definition it has committed an error of law. The principle that the claimant cannot rely on new material is dealing with the situation where one has a lawful exercise of discretion on the material that is put before the decision maker and the claimant cannot have a second bite of the cherry by bringing along new additional material. In that case, the original exercise of discretion was on the correct legal basis here because of the submissions I make under ground one and ground three. The CMA did not approach its decision correctly under Article 4, so the extent of the material before it is no answer.

Then the second answer we give is that in any event when one reads the correspondence fairly and as a whole, the CMA's letters were concerned with turnover, or at least that is the way in which a reasonable reader would take them. There was a reference to any representations you make, but no indication that the CMA was interested in the nature of B&M's business.

THE CHAIRMAN: Representations confined to anything you want to say about turnover?

MR MOULES: That is the way in which a reader would construe it. The phrase is 'representations', but it is in the context of correspondence which has been solely concerned with turnover.

THE CHAIRMAN: All right. What do you say then about the refusal decision? You are challenging something that you have characterised as 'the refusal'?

MR MOULES: The issue between the parties there is whether or not the CMA has actually made a decision to refuse. The CMA says the pre-action letter was not a specific request for a decision and no decision had yet been made. My submission there is that it is quite plain that the material adduced in Mr McDonald's statement and in the pre-action letter are a request for the designation to be reversed. That is the only fair way of reading them and the material is adduced on its face to demonstrate error of construction in the original decision, but also to say, "Now consider this and de-designate us, please."

THE CHAIRMAN: So you do challenge what you characterise as a refusal to revoke. I think you used the word 'revoke' in the letter?

MR MOULES: Yes.

THE CHAIRMAN: And if that is right on that basis then you would say that the CMA cannot say, "We did not have the material in front of us"?

MR MOULES: Precisely, it is there now, yes. It is fair to say that the material was included partly in anticipation of the argument that would be taken against us. We said, "Well, if you will not take the point that you did not have the material for the designation decision, we are now asking you to revoke, and here is the material, please consider it."

THE CHAIRMAN: All right, thank you.

MR MOULES: Sir, for those reasons, in my submission, the grounds of appeal do raise important issues of public importance and are more than arguable, in my submission, certainly enough to cross the threshold of question (a), and carrying significant weight in the overall balance. Question (b), urgency, and I will wrap up any submissions on significant damage, essentially we are required to comply now, and, as I will demonstrate, the Code Adjudicator has also indicated an urgent need for clarification in the interim.

THE CHAIRMAN: All right.

MR MOULES: Significant damage, question (c), as I have indicated, I rely on a combination of matters, not only the irrecoverable financial loss, which I accept does not threaten the survival of B&M, but also the significant business disruption and the restriction on B&M's business policy. Those matters are explained by Mr McDonald in his two witness statements. The first is volume 1, tab 2, beginning at paragraph 59. Here he is listing the significant work that is required to comply with the order if interim relief is not granted.

THE CHAIRMAN: I am not sure I am in the right document - tab 2, volume 1?

MR MOULES: Tab 2, volume 1, page X42, 59 at the bottom. First of all, he says B&M is required to incorporate the Code into all its supply agreements. 60, appoint Code compliance officers and senior buyers to review delistings. As I have explained delistings occur extremely frequently because of the way B&M trades. 61, train all staff and also new staff within one month in the Code.

Then 62 and 63, prepare notices to send to each of B&M's 1,600 suppliers. I think, before lunch I referred to 1,600 supply contracts. That was a mistake, it is 1,600 suppliers within whom there will be many, many more supply agreements. B&M will contract, for example, with Coca-Cola to purchase a number of things *ad hoc* throughout the year. So it is 1,600 times many more for the number of agreements.

64, put in procedures and IT systems to keep the records and demonstrate compliance. 65, an annual compliance report, 67, all of this is done on pain of a sanction which can be 1 per cent of B&M's turnover. 71 makes the point that suppliers are going to be confused by notices being issued and then, if the appeal succeeds, withdrawn.

He elaborates on those matters in the second witness statement, which is in the supplementary bundle, tab 2, paragraph 5, page 12. Mr McDonald gives further evidence in relation to costs, but also he expands on why the cost of compliance is not the only issue that should be considered when determining if the decision is suspended.

At paragraph 13, over the page, he accepts that it is not easy to estimate the costs of compliance. At 15 he lists the steps that have to be taken in order to comply. Then what he has done at 17 is put estimated cost next to each of those. I do not read all of that out, but by way of illustration at 17, bullet point one, the training in B&M's case will be of 294 members of staff. He gets to a cost of compliance at the end of the table of £431,000 odd. Of course, £200,000 of that is the levy which I accept is refundable. So it is about £250,000 of estimated compliance costs that are not refundable.

THE CHAIRMAN: Yes.

MR MOULES: In my submission, those are significant in absolute terms and going into the mix. Then, crucially, 18 through to 20 he says that, whilst costs of compliance are significant, that is not the only concern. At 19 he says that B&M may have to undo all of the work it has done. Then in 20, if I could ask you to read that, please, he explains what that entails and why.

THE CHAIRMAN: (After a pause) Can I ask whether that figure of £1 million is 431 plus 569, or is it £1 million for the undoing?

MR MOULES: I will just take instructions, if I may, on that.

THE CHAIRMAN: I get the impression that it is a total cost.

MR MOULES: That is my impression as well, Sir. It is a total cost. It is really what is in paragraph 20 that demonstrates the significant business disruption. B&M would be required to amend all its contracts, send notices to suppliers. They could challenge their delisting, which happens frequently on this *ad hoc* basis on which they trade. It would be imposing a whole series of procedural requirements, changing the way in which they trade with suppliers, which would be difficult and confusing to unravel. The point that Mr McDonald is that a lot of the people that B&M trades with have great bargaining power. They are the Coca-Colas, the Mars, the Kellogg's of this world. Once B&M is on the footing of trading with provisions to challenge delisting or other requirements of the Code, it may be difficult to push back and simply reverse those in whole or in part. Fundamentally, it is a very different way of doing business with B&M suppliers. Sir, that disrupts the business, but it also puts a restriction on its business policy, because it is a way of doing business that none of B&M's competitors in the bargain discount market are required to comply with. That is why Mr McDonald says that B&M would most likely reverse the changes if its appeal succeeds because the Order requires a number of things that slow down the pace of business, increase the cost of business, and those are the things B&M's direct competitors do not have to do at the moment.

THE CHAIRMAN: You say you are not engaged in the practices. If you are required to do, it might fundamentally alter the contractual terms that you send out and the notices and the compliance but it would not change the nature of those contractual arrangements.

MR MOULES: It does not change the nature of the goods, the price paid, etc, no.

THE CHAIRMAN: When I say 'arrangements', I do not mean the terms, I mean it might force technical compliance issues upon B&M and it might slow you down, but it would not make your client change its business model? You are not suggesting it would, I do not think.

MR MOULES: I am not suggesting it would, no, but the disruption to the business is by imposing a series of procedural and administrative requirements which (a) are confusing to the suppliers, and (b) serve no useful purpose, given the nature of the business. And by slowing down the business in imposing those costs, that is disrupting the nature of the business, which is to trade on an *ad hoc* basis, fast moving with a number of different suppliers in a number of different commodities.

MR DOLLMAN: All these suppliers must be dealing in exactly this way with all the other suppliers. It cannot be disruptive to the supply base. I get it for your client. It is a new thing for them, but for the supply base I do not see there is a big change for them.

MR MOULES: There they are trading on a much more long term basis, and these issues would not occur with such frequency. There would be a supply agreement. The supply agreement itself would regulate the relationship between them. It would be confusing for the supplier to know how its relationship with B&M was to be regulated in the interim, and these issues would occur much more frequently, the listing and delisting issues.

THE CHAIRMAN: Thank you.

MR MOULES: Sir, as I have indicated, the levy would be repayable in the event of the appeal succeeding, and there are still those irrecoverable costs. In my submission, Mr McDonald's estimate is reasoned and ought to be accepted by the Tribunal. There is no counter estimate. The CMA has not----

THE CHAIRMAN: It is 230 for the pre-undoing.

MR MOULES: That is right.

THE CHAIRMAN: And I think you are saying in total over £1 million, but if you knock the £200,000 off, you are getting to about £800,000.

MR MOULES: About £800,000, yes. As I say, there is no counter-estimate from the CMA, in part because it never addressed the costs of compliance in exercising the discretion. There is also nothing from the Code Adjudicator. As you will have noted, the CMA wrote to the Code Adjudicator to ask the likely costs for B&M for complying, and also for any information about the costs of the existing designated retailers complying, and the GCA was unable to provide an answer on that.

THE CHAIRMAN: All right.

MR MOULES: Turning then to the effect on competition and other third party interests, I have dealt with this at paragraphs 42 to 48 of my skeleton argument. Essentially, the argument is that there would be no real adverse effect on competition if the interim relief were granted. I begin by saying that the CMA has canvassed the views of the Code Adjudicator who

actually deals with the compliance issues, and she has not suggested - she is well placed to understand the effect on competition, and she has not suggested any adverse effect if interim relief were granted. Quite the opposite: in my submission, her letter supports this application. You have that in the supplementary bundle, tab 3, page 30.

THE CHAIRMAN: Can we go to that? Yes, I have it.

MR MOULES: It is her letter of 16 January. It was written in reply to the document that precedes it, which was the CMA's letter of 14 January. The letters on the left hand side of the GCA letter correspond to the questions that were asked. It is question (e) that is important, and you can see on page 29 opposite, question (e) was: "In the event that B&M is found to have been wrongly designated, would sums paid to the GCA be repaid in full?" to which is the answer is, yes. That is the levy point I have already accepted. The GCA goes on to say:

> "There is no provision, however, for the mid-year levy adjustments, so any rebate made mid-year could leave the GCA with a budgetary shortfall. The GCA would, moreover, have effectively spent levy contributed by the other 11 retailers in the 2018/19 year, and potentially 2019/20 corresponding with B&M and the CMA, about the CMA's decision to designate B&M and its consequences for B&M and GCA,
>
> In seeking to regulate in accordance with my established approach, a retailer which was focusing its efforts on challenging whether it should be regulated at all, this could be avoided if designation were to be suspended from 1 November 2018 until final determination of the proceedings."

Then further down in the final paragraph----

THE CHAIRMAN: Just pause a minute and just let me understand that. So they have got their money in for the year, and at the end of the year when the decision is overturned they have to return £200,000 of levy - yes?

MR MOULES: Yes.

THE CHAIRMAN: And any expenditure they have incurred in that year will have to be met by the other 11 retailers, and that spending will have included having to deal with B&M?

MR MOULES: That is right, it is two points really. One is the budget shortfall if, at the end of the year, having spent time and money regulating B&M, the designation is quashed at the end of these proceedings and the £200,000 is refunded. There is a budget shortfall for the GCA which she will have to make up in the future years.

THE CHAIRMAN: Yes, from the others.

MR MOULES: And then there is the fairness point, exactly, that it comes from the others. Should they be effectively paying for what would be found to be the unlawful regulation of B&M?

THE CHAIRMAN: For temporary regulation of B&M.

MR MOULES: That is right, yes.

THE CHAIRMAN: So that is (e).

MR MOULES: Then in the final paragraph of that letter she goes on to say that although she has got no interest in the substantive dispute:

> "… I would like to be clear about which retailers I am regulating and which I am not, so I may do so consistently and effectively. This is not something I can decide …"

and then crucially -

> "… nor should it properly wait until final determination of the proceedings between B&M and the CMA."

In my submission, significant weight in the balance should be given to the view of the adjudicator that she should have certainty in the interim, which, on any fair reading of that letter, must mean grant of interim relief. That is the only way that the matter cannot wait the determination of these proceedings.

THE CHAIRMAN: Apart from this budgetary problem, she does not spell out what the problems are. "I would like to know who I am regulating", but if no interim relief was in place she would know who she is regulating.

MR MOULES: I think the point is if no interim relief is----

THE CHAIRMAN: And in the end it is quashed.

MR MOULES: I think it is the point that she is spending time and money at risk, as it were, regulating B&M. It is not just that there is the budgetary shortfall point. She has a limited amount of time and resources and is not doing her job effectively if she is spreading her time and effort on a designated retailer whose designation is, as I say, at risk. Looking at the general public interest in preventing anti-competitive action, the public interest would be best served by allowing the GCA to concentrate her time and effort in the interim on those designated retailers who manifestly are within the order, and whom she has been writing, as Mr Land says, annual reports saying they are currently still subject to issues.

THE CHAIRMAN: She does not necessarily know at any one time who may or may not be regulated in that year, does she?

MR MOULES: What would happen is, if somebody new is added then they would be liable to the levy on a pro rata basis. So to the extent there is somebody new added to the cohort, she does not have to make that good from her levy recovered from those designated at the outset of the financial year, which is why the levy that B&M will have to pay this year is £83,000, which is the pro rata proportion of the £200,000 which is the annual levy for a new designee.

THE CHAIRMAN: All right, thank you.

MR MOULES: The rest of those sections, paragraphs 42 to 48 of the skeleton, I have explained why the CMA's concerns about the effect on competition are hypothetical and speculative given that B&M cannot engage in the sort of practices the Code seeks to regulate, and also because B&M is not a direct competitor, a point acknowledged in the 2008 report and in the CMA's own documents of the supermarkets.

THE CHAIRMAN: Does that include Aldi and Lidl?

MR MOULES: Yes, that is right. In the skeleton I have referred to the Kantar market report of the groceries market, which does not include B&M in the same bracket.

THE CHAIRMAN: Can you just remind me of which paragraph you are there referring to? Are you looking at 44?

MR MOULES: I am looking at 44, correct, yes.

THE CHAIRMAN: Can I just ask you this question: Aldi and Lidl were regulated by the original designation. Is it known what their contractual practices were at the time, and on what basis the Competition Commission found that they were to be designated - in other words, did they have long term supply contracts, or is that not factually known?

MR MOULES: If I can take instructions on that.

THE CHAIRMAN: You can probably come back on that.

MR MOULES: I am instructed that they do trade in that way like a supermarket.

THE CHAIRMAN: No.

MR MOULES: As I understand it, they have not changed their trading practices. That is how they trade now.

THE CHAIRMAN: No doubt somebody will tell me. Thank you.

MR MOULES: Then, finally, turning to the balance, damages are not an adequate remedy here, and in my submission the balance of convenience favours the grant of interim relief, given the adverse consequences I have identified for B&M in terms of business disruption, restriction on business policy and the irrecoverable financial loss, the lack of any strong countervailing considerations in terms of the impact on competition, the strength of the case

on the merits and the third party interests of the GCA and the other designated retailers who risk having effectively to subsidise the Regulation in the interim of B&M.

THE CHAIRMAN: To the extent of less than £20,000 each?

MR MOULES: Yes.

THE CHAIRMAN: £19,000 each.

MR MOULES: For this financial year, and it would potentially carry on depending on how long the proceedings took finally to determine. I make that point. It may seem a drop in the ocean but the point taken against me is that there needs to be a level playing field and it is an adverse impact on those 11 designated retailers not to maintain the designation of B&M in the interim. My submission is, no, B&M is not a direct competitor and, if anything, the point goes the other way because----

THE CHAIRMAN: The £19,000 makes a difference on the level of the playing field, does it?

MR MOULES: The playing field may not tip particularly far but it tips.

MR CUTTING: (Without microphone) It is only (inaudible) if they increase their cost base by the £200,000 of the extra level that they are receiving. It is probably less than that.

MR MOULES: The point simply is that if the playing field is tilted, then it is tilted one way rather than the other.

THE CHAIRMAN: Okay.

MR MOULES: Thank you. Those are my submissions.

THE CHAIRMAN: Thank you very much. Yes, Mr Palmer?

MR PALMER: Thank you. Sir, before making some brief submissions on the legal tests to be applied by a staged approach, which I will deal with in a moment, and then applying each of the five stages in the same way as my learned friend did, I would like to provide some context about the nature of this challenge, and in particular the decisions under the challenge. In my submission, as I will outline, what is being done here, or attempted to be done by the appellant, does give rise to an important point of principle for the CMA. What this amounts to is a rearguard action designed to shift the blame for B&M's own failure to engage with the CMA at the appropriate time on to the CMA who are said to have erred on a ground which engages judicial review principles. In reality, what this is is a dressed up merits challenge relying on points which have only been raised too late in the day.

Can I ask, throughout my submissions, the Tribunal to hold in mind - I know the Tribunal does, in fact, have it in mind - that on the face of the notice of appeal is a challenge to two decisions, or purported decisions, the notification decision and what is referred to as the refusal decision. It will be my submission that different matters are relevant to each when it

comes to this application for interim relief. It is one thing to say, "I want interim relief because we should never have been designated, the designation decision was unlawful", it is another to say as your fall-back, "Even if the designation decision was lawful, a subsequent decision some months later not to de-designate was unlawful, and I want interim relief in respect of that alleged unlawfulness."

THE CHAIRMAN: Just pause a moment, please. "I want interim relief to", how did you put the last sentence, sorry, "Subsequent decision not to de-designate, it is another thing to say subsequent decision not to de-designate is unlawful and I want interim relief"----

MR PALMER: "In respect of that refusal."

THE CHAIRMAN: Yes, analytically that is different because you are almost asking for a mandatory order.

MR PALMER: You are, that is exactly it. In my submission, there is a difference of principle between saying this was unlawful *ab initio*, it should never have been, the decision to designate itself was unlawful, and that is their primary case. Their fall-back case is only engaged if they are wrong about that, and my submission will be that, in fact, most of what you have heard relates to what they call the 'refusal decision', rather than to the initial decision. I will, of course, develop that. I would ask the Tribunal to hold that distinction in mind, recalling, it need hardly be said, that in relation to each decision or alleged decision the test would be whether the CMA erred in law or otherwise proceeded in a way which can be impugned on judicial review principles. This is not a re-hearing of the merits.

I would like at this stage just to go into the documents in volume 3, just to show the Tribunal how those decisions, in fact, emerged.

THE CHAIRMAN: Yes, let me find volume 3, I am a bit behind.

MR PALMER: At volume 3, tab 10, is the first letter in a run of correspondence between the CMA and Mr McDonald of B&M. This is going back to March last year. This was the first letter, and you can see from the first paragraph that it raises Article 4.1(b). There referring to the test in 4.1(b), it is a turnover exceeding £1 billion, and which is designated in writing as a designated retailer, and it is common ground that that is two stage test. It is explained what all that means, and then over the page B&M are asked to confirm whether they consider their turnover exceeds £1 billion and, if not, to provide further details about turnover - that is the bullet points. Then, under that, "Following receipt and consideration of this information", which is explicitly on turnover, "the CMA will write to you with its provisional decision as to whether it intends to designate B&M, and we will consider any

response you choose to make, and then we will proceed to a final decision in the light of that response."

That is the first letter, and then at tab 11, there is an email back on 4 May, so five or six weeks later. It refers to some considerations and at the end of the second paragraph he says, "We should be regarded as having hit the £1 billion of grocery revenues", and he says, "your letter details the next steps." That was six weeks to come back with that.

Then at tab 14 is the second main letter from the CMA. This is 6 July. The CMA says that they have considered the information provided, third paragraph, and as a result is minded to designate:

> "… but before reaching a final decision on the designation of B&M, we would like to offer you an opportunity to make any representations in relation to this potential designation."

I would just ask you to recall that this is in a context of what we all agree is a two stage process, and B&M have themselves expressly said that they have hit the £1 billion turnover threshold. That was in their email in May.

> "We will take account of any representations received when reaching a final decision on designation in the event we decide to continue to designate. We set out those details below."

Then there are further details as to what would happen next if they did decide to designate. It is clear no decision there has been reached, it is clear that the mere fact that they have hit £1 billion is not being viewed as an open and shut case, that is the end of the story. It is clear that further representations are being sought. It is correct that it does not say here, "We would in particular welcome your representations on X, Y, Z", that is a matter for B&M to identify what they consider to be relevant to this proposed decision to make such admissions as they wish.

Then at tab 14, you can see from the middle of that page - if you go to the bottom of the page first, from the CMA to Mr McDonald, that is the email attaching the letter you have seen.

THE CHAIRMAN: That is tab 13.

MR PALMER: The previous letter we have just seen. You can see it was sent at 16.06 on 6 July.

Within 15 minutes comes the response from Mr McDonald in the middle of the page:

> "Thanks for this. How long will we have until the likely designation date."

Then the second paragraph:

"Given our method of trading and non-complex business model, net pricing, paying suppliers on time, etc, then I am anticipating that we will already be largely compliant."

So there, express, albeit brief, reference to their business model, their way of trading, their relationships with their suppliers:

"However, what I wanted to check is how much notice will be given after 20 July regarding your final decision and the designation date being reported, just so that we can ensure we can fulfil those obligations at the designation date."

THE CHAIRMAN: So he is not saying, "Given our business model there is no need for us to do these things"; nor is he saying, "Given our business model it will be difficult for us to do them".

MR PALMER: No, neither of those things. You can see that there is an email at the top of the page:

"Our plan is giving you a month, would that be reasonable? If you think you need you need longer, can you suggest a time, not today, once you have had a chance to consider?"

Then Mr McDonald comes back at tab 15, four days later saying, "We may need to take longer than a month", and referring to the holiday season. Then the second paragraph says this:

"We are working our way through the Code and doing an assessment, so it does become a bit difficult to say precisely how long this is going to take to complete until we have completed that exercise, because we do need to cover both B&M and Heron …"

a separate business which they have acquired -

"Presumably you are going to announce a number of retailers at the time. When are you realistically targeting this."

So he has got his business model and practices in mind, and he is working through, or he and his colleagues are working their way through the Code and they are asking how long they have got.

That is the end of that chain of correspondence. There are no further representations from B&M.

THE CHAIRMAN: Right.

MR PALMER: At tab 16 there is a further query, which is answered, on the turnover, just to clarify that, on October. That leads on to tab 18, which is the decision of 10 October,

advising B&M that they have decided to designate them and it will take effect from 1 November. So they are given three weeks' notice at that point.

THE CHAIRMAN: From 1 November?

MR PALMER: 1 November is when it is going to come in, and then you get the formal decision at tab 20 under cover of email which is at tab 19. The formal notice is at tab 20, which the Tribunal may have seen. In particular, paragraph 7 recognises that the CMA has a discretion over whether to designate the retailers in the order, refers to the explanatory note showing what it has in mind, the nature of the business, meeting the turnover threshold, the purposes of the order. As to the purposes of the order, that is set out at paragraph 8.

THE CHAIRMAN: Just pause for a moment, please? (After a pause) Those two sentences in the explanatory note are slightly at odds, are they not?

MR PALMER: Sorry, slightly?

THE CHAIRMAN: Paragraph 7, the explanatory note, the first sentence says, "We will designate as soon as we obtain evidence", and then it goes on to say, "We have got a discretion once we have evidence". There is a slight tension there.

MR PALMER: There is a slight tension, but the tension is resolved by saying----

THE CHAIRMAN: "Based on the nature of the business and purposes of your"----

MR PALMER: Yes, as soon as they obtain evidence that meets the £1 billion - what that really means is, "We are not going to delay consideration once someone does meet the threshold, obviously we are not going to designate anyone who has not met the threshold", then explicitly saying that they have a discretion as to whether to appoint a business.

THE CHAIRMAN: You were going to go to paragraph 8.

MR PALMER: Then 8:

> "The purposes of the Order include the prevention of the exercise of buyer power over suppliers by large grocery retailers …"

and demonstrates by citing from the CC's report, and in the first paragraph explicitly referring to the fact of "exercise of buyer power through the adoption of supply chain practices". That is obviously clearly understood. It is difficult to read the CC's report without understanding that, but it is clearly in mind and referred to expressly there.

Then the decision over the page turns to the particular position of B&M in so far as they have made any representations, saying, first of all, they have established that the £1 billion threshold is met. Secondly, at paragraph 10, saying, "We gave consideration of whether or not to designate it, having regard to representations made, the nature of this business and the

purposes of the order". Then 11, "B&M noted that its recent acquisition meant that it accepted designation under the order", which is a fair reflection of their responses.

But it does not just stop there, it goes on and says that it:

> "… notes that B&M undertakes retail sales in the UK of a range of grocery products with a focus on low prices and fast moving consumer goods with its products being sourced from a range of suppliers. [It] considers that these arrangements, together with the scale of grocery retailing activities undertaken by B&M means that they may be expected to have the ability to exert buyer power over at least some of its suppliers. In light of this assessment, the CMA considers it would be appropriate to exercise its discretion to designate B&M as this would be consistent with the purposes of the order."

As at that point, in my submission, that plainly and fully takes into account everything relevant to the point which has been put forward, which was nothing beyond saying "just tell us when so that we can be compliant".

THE CHAIRMAN: Do you say that that analysis in paragraph 12, "mean that it may be expected to have the ability to exert buyer power over at least some of its suppliers through the adoption of supply chain practices that transfer excessive risk", etc. You say those words have to be read in there, do you?

MR PALMER: Yes, that is right.

THE CHAIRMAN: Having stressed the purpose in 8, you say that must be read as including, "through the adopted practices"?

MR PALMER: Yes. You cannot reach any other view, having read the----

THE CHAIRMAN: "It has the ability"?

MR PALMER: Yes, certainly the ability.

MR CUTTING: Can I ask a couple questions?

MR PALMER: Certainly, sir.

MR CUTTING: Are you going to cover now or later the question of whether the email from B&M about this business model, how that fits with the duty of further investigation that the appellant points to as a matter of public law?

MR PALMER: Yes, I certainly am going to deal with that in the context of ground two.

MR CUTTING: Okay, and then the second thing: I have just noticed this now, and I do not know whether there is anything in it, at 11 of the designation it says "B&M noted its acquisitions meant an accepted designation under the Order." There is nothing explicitly

that says it accepted designation. It accepted that it was over £1 billion, but is there something where it accepts designation explicitly in terms?

MR PALMER: Yes, indeed. If you go back to the emails I showed you, you have the letter at tab 13, which is now seeking representations on whether they should be designated at all. Then at tab 14, the email in the centre of the page:

> "How long will we have? Given your request to provide you with a notice of how compliant we are and a timetable to ensure that we become compliant if there are some areas that we need to address. We anticipate that we are already largely compliant. However, what I wanted to check is how much notice will be given regarding your final decision and designation date being reported, just so that we can ensure we can fulfil those obligations at the designation date."

MR CUTTING: As you pointed out, that was sent 14 minutes after they got the provisional designation inviting further representations.

MR PALMER: Yes.

MR CUTTING: So that letter is equally consistent with him saying, "We are over a billion, how long would it take were we to be designated after we make representations at some later point." In the designation order you are taking it as if it is a positive signing up to the designation order.

MR PALMER: They are not contesting it at all, and that is confirmed at tab 5.

MR CUTTING: At the point of that letter they had only been invited to make representations 14 minutes before.

MR PALMER: Yes. Sir, my point is they had decided not to make any representations.

MR CUTTING: You do not know that, because only 14 minutes had gone by. They were only invited to make representations 14 minutes before.

MR PALMER: That was their first response, and then their second response four days later at tab 15 confirmed that they are working their way through the Code and doing an assessment. The assumption is that they are going to be designated. At no point do they say, "Thank you for your letter of 6 July asking us for our representations on whether we should be designated, we do not think we should be designated". These emails came quickly. They could have sent their further----

MR CUTTING: They did not say they accepted it. The question is: is there an error on the face of the designation decision; and does that make a difference?

MR PALMER: The answer is, no, sir, for the following reasons: firstly, they have had this decision. This was their formal decision in which it was stated that they accepted

designation. At no point during any of the subsequent correspondence from their lawyers or in their grounds for this Tribunal have they suggested that that is in error. It has not been contested and, more to the point, at no stage have they said, "We should not be designated". There is a tacit acceptance. I accept it was tacit. There was a tacit or implied acceptance that they were to be designated, and at no point did they choose to put in representations saying that they should not be.

THE CHAIRMAN: What did Mr McDonald say, if anything, about that in his first witness statement?

MR PALMER: Nothing of significance.

THE CHAIRMAN: He did say what it was that made him think again, did he not?

MR PALMER: I am going to come to what happened----

THE CHAIRMAN: If you are going to that anyway, that is fine.

MR PALMER: I am going to come to what happened next in a moment. Mr McDonald recites that correspondence from paragraph 19 of his witness statement, page 33.

THE CHAIRMAN: Where he says the whole correspondence was included in a notice, at paragraph 28, "I was under the impression that if we were over £1 billion we would be designated".

MR PALMER: He says, "The CMA gave me that impression". I have shown you the letters. The first one in March dealt with turnover and made clear from the second page that they needed to decide to designate them. Once they had accepted that they did exceed the £1 billion, they then wrote to them, "Can we have your representations as to whether you should be designated", which is completely inconsistent with a suggestion that if you are over £1 billion you get designated and that is the end of it.

There is a further point, which is that at no stage until after this point did B&M choose to take any legal advice. It is when they did at some point afterwards, tab 21, you get an initial letter putting the CMA on notice on 20 November 2018 asserting that the decision was unlawful "and we are going to write to you saying that you should quash or revoke it". That letter is at tab 22. On 27 November, this is a judicial review pre-action protocol letter before action, and you can see if you turn to paragraph 1.31, which recites correctly the test in the Order, including the two stages of the test, and then correctly says at 1.32, "the explanatory note to the order confirms that the CMA has a discretion and will take into account" - those familiar points. So as soon as they sought legal advice it was clearly evident that their legal adviser or anybody could say, "Well, if you have been previously under a misapprehension that it is just a question of turnover and nothing else, you are

wrong, if you look at this there are other matters: you can look at the purpose of the order, and the nature of the business may be relevant as to whether you are designated as well". It was immediately apparent to legal advisers----

THE CHAIRMAN: That there was a two stage process.

MR PALMER: There was a two stage process. There is contrary to that that the CMA have said. The reality of this situation, Sir, is that B&M left it months until after the decision was taken before they took legal advice on it, and as soon as they took legal advice they were rightly told, "It is not just a question of turnover, as the CMA said, the test is, first, turnover, secondly, whether you are designated, and there is a discretion as to designation".

This is the first engagement with that point that you get. You can see, if you turn back to the top of the second page of the letter, page 1111E, you can see that the decision, which it is intended to be challenged, is the decision of 1 November designating them. So this is a letter in respect of that decision on the basis that that decision is said to have been unlawful. It is not an application for an existing designation to be modified or revoked in the light of a change of circumstances or otherwise. It is correct, if you go to the last but one page of the letter at section G----

THE CHAIRMAN: Yes, it is the last sentence?

MR PALMER: Just under G, the first paragraph there, "Please note that within 14 days of this letter", that is the standard pre-action protocol time:

> "… the CMA is requested to confirm that it will consent to the decision being quashed, or that the designation of B&M is revoked with immediate effect."

That is on the basis that it is said that the original decision was unlawful, so either consent to a quashing order or revoke it is what is being asked, "and if you do not agree we will apply for an order in those terms".

THE CHAIRMAN: It does not say expressly, "Please quash it because it is unlawful, and in any event now that we have provided you with this further information, please revisit and revoke" - it does not say that.

MR PALMER: It does not, and importantly, I emphasise those words "within 14 days". In the context of a judicial review pre-action protocol letter that is the standard period. No complaint about being asked to respond to an allegation of existing unlawfulness within 14 days so that they can consider whether to bring an appeal to the Tribunal or an application to the High Court, as they had in mind, in time. There was no difficulty with that.

In so far as this was intended or is now said to have been a letter applying in the alternative for a revocation of an existing order on the merits, based on a change of circumstances or otherwise, they have absolutely no business to say, "Do that within 14 days or we will apply for an order". They have literally had months to make representations of that kind, and had they been made at the appropriate time the CMA would have considered its decision over a period of months and, if necessary, sought further information, interrogated what was being said, saying, "Can you provide evidence in support of X, Y or Z", in the normal way as part of an administrative decision making process conducted by a body such as the CMA. B&M have absolutely no right to demand a revocation in that second sense within 14 days "or else we are off to the Tribunal to demand it". Sir, this letter was written on the basis that it was directed at the existing decision and the response which came, which you will note is at tab 31, on 11 December responded to it on that basis within the constraints of the pre-action protocol.

THE CHAIRMAN: Yes. That is at tab 24, is it?

MR PALMER: Tab 31, I need not go through it.

THE CHAIRMAN: No, do not, I have marked the last sentence.

MR PALMER: Even bearing in mind and taking B&M's case at its highest as to how this decision emerged, what is said to be a refusal decision, when you go back to the pre-action protocol letter at tab 22, you do get some of the points which we have heard about this morning, in particular at paragraph 6.7, where it is said now for the first time, "We would not engage in this kind of activity", and gives some reasons in respect of some of the provisions of the Code, what you do not find here is anything about the costs of compliance. You do not find here any allegation that it would be disproportionate to include them as a designated retailer because the costs are £1 million or £800,000 or whatever they are now said to be. There is no allegation of that at all, nothing for the CMA to take into account at this stage of that kind.

THE CHAIRMAN: That would not go to interim relief, that would go to the proportionality argument?

MR PALMER: It is. It is relevant to both, but it is now advanced----

THE CHAIRMAN: It is relevant - failure to mention costs is now relevant to our decision about testing, I suppose, the weight to be attached to this significant damage argument, but it is also relevant to the underlying merits about proportionality?

MR PALMER: Yes, and ground three has two limbs, and the second limb, it is said, "You did not take into account the costs to us". Even at this stage they are not saying anything about that,

so there is nothing to take into account but I will come back to that in a moment, but since we have it open that is that point.

THE CHAIRMAN: Although they do ask, interestingly, about suspension in the last paragraph.

MR PALMER: Indeed.

THE CHAIRMAN: So you might say that the failure to mention costs there goes to costs in the context of this application for relief. They might have said, "Please suspend in the meantime because we are going to incur a lot of - if you do not suspend in the meantime whilst this is resolved, we are going to suffer significant damage"?

MR PALMER: I am going to make some points about that when we get to that point. We will be referring to the fact that it is incumbent upon any applicant for interim relief to do so promptly, even before bringing a notice of appeal, and now here we are some time----

THE CHAIRMAN: Take that point when you get to it. I am conscious of time. I am not pressing you but I want you to get through----

MR PALMER: I am grateful for that, I will try and get through.

THE CHAIRMAN: No, I am saying that to cause me not to interrupt too much, rather than to hurry you up.

MR PALMER: I am very grateful. The point of importance to the CMA is that we do emphasise that there is a clear public interest in large companies, such as B&M, groceries turnover over £1 billion, but overall turnover round about £3 billion, these are not, and cannot be expected to respond as a consumer might. They can be expected to take their advice at the right time and to make such representations and submissions as they think appropriate at the right time.

Sir, there is a clear public interest in large companies such as them engaging with public authorities, such as the CMA, at the correct point in the process, rather than seeking to do so for the first time only through the courts after the event, giving rise to considerable public expense. That is why I do say that this claim is a rearguard action seeking to shift the blame in effect for their own failure to act as a large company can be expected to on the basis of legal advice.

There are points which B&M would now have wished the CMA to have taken into account at an earlier stage, had they thought to take legal advice at that earlier stage, but there is a strikingly slim basis upon which they are seeking to ask this Tribunal to exercise its discretion to intervene by way of a grant of interim relief - I will turn to the merits in a moment - but the more so, I say at this stage, when, in reality, the merits are so thin and are now directed in large part in support of the alleged refusal decision. All the points which

were raised either in the pre-action protocol letter or indeed have been raised subsequently about costs are, in reality, directed at a continuing failure to revoke. That is the important point of context.

I am going to turn next to the legal framework. I can do that quite quickly because the Tribunal has already seen the main authorities and is familiar with the five stage approach.

THE CHAIRMAN: Yes.

MR PALMER: What I emphasise, if I can take *Genzyme* out first, which is the second volume of authorities at tab 23. These points are mainly going to be relevant against any point of dispute on the test to the point about whether it is necessary to show significant damage or serious and irreparable damage. We agree with what was said, that they amount to the same thing in this context at least.

THE CHAIRMAN: So we do not need to address----

MR PALMER: It would be more application of it, because when we say they are the same thing----

THE CHAIRMAN: No, we do not need to address the wrinkle about rule 24(1), (2) and (3)?

MR PALMER: We say no because we say what 'significant' means in any event is the same, i.e. the same high threshold, which may be a point of difference between us because I did not understand Mr Moules to accept that the threshold was high.

THE CHAIRMAN: Yes.

MR PALMER: Indeed, he made a point to which I will come in a moment about the approach in *Flynn*. Can I just take from paragraph 78, that consistent across both decisions, *Genzyme* and *Flynn*, is this desire to apply by analogy the principles applied by European Union courts - you see that in the introduction. Then you see the extensive citation from *Napp*. We do have *Napp* in the bundle, but the relevant part of it in here is reproduced in full.

I invite your attention to that. In particular at paragraph 39 of *Napp*, as cited here, you see the Tribunal saying that this is not the same context or the same principles which are normally applied in applications for interim injunctions on the basis of *American Cyanamid*. There is a real reason of principle as to why that is so. It is not just the interests of consistency with the EU courts and their approach. One can see that the CMA follows a neutral, independent, administrative process with no skin in the game of their own, no interests or policy interests beyond upholding the efficient working of markets and the interests of consumers. When it makes a decision it makes a decision on an informed independent basis, which means that if that decision is going to be overturned by way of an interim injunction, the threshold in practice will be much higher than it will in a case where

someone decides to start playing next to my greenhouse or lets a pollutant out on the streets, and so forth, where quite a low test is applied by the courts, because you can hold the position as it is then, undertakings as to damages, arguable claim, balance of convenience, in that quite even-handed way between two private individuals in a dispute.

Here you have a process in which a commercial party has been invited to engage, an independent decision made by an independent body, and the test is one of judicial review of that decision. It is wholly unsurprising that one should expect a high threshold to be reached before a Tribunal will intervene by way of interim relief pending resolution of that appeal. There is an analogy to be drawn, which we draw in our skeleton argument, with the approach not only that the EU courts will take - for your note, I will not take time up now, there is *Microsoft* at tab 30 of the bundle, paragraph 240, which encapsulates the approach well.

THE CHAIRMAN: Let me just get your skeleton out.

MR PALMER: It is in the skeleton argument. In our skeleton argument it is referred to at footnote 3 to paragraph 13.

THE CHAIRMAN: Sorry, you were saying there is a high threshold to be reached before the Tribunal will intervene, *Microsoft* analogy. Are you now specifically dealing with the damage criterion?

MR PALMER: Yes.

THE CHAIRMAN: Sorry, when you talk about 'high threshold', you are talking about high threshold damage?

MR PALMER: Yes, I am. That is the only potential point of difference between us on the five step approach. We are agreed it is the same approach whether it is significant or serious and irreparable. We say that means something which is high. You see that from, for example, *Microsoft*, which for your note is tab 30.

MR CUTTING: Before you come to *Microsoft*, you prayed in aid *Genzyme* and *Napp*, good reason for the higher threshold, CMA public interest. Maybe I am just being slow, but Freeman in *Genzyme*----

MR PALMER: In *Flynn*.

MR CUTTING: In *Flynn*, 92, 93, says, "not entirely sure the fact that you are public body gives you that extra weight", or is he not saying that at 92, 93. I am just wondering whether your submissions that you have just made about the special position of the CMA are submissions that have been considered previously.

MR PALMER: What is said there, if you look at *Flynn*, tab 24, paragraph 93, in response to a similar submission is:

> "I agree with the CMA that it does indeed take decisions in the public interest, to which competition law and policy contribute. However, I do not think this requires the Tribunal to adopt an approach that is different from the *Genzyme* test to which I have already referred."

THE CHAIRMAN: By the *Genzyme* test, you mean - which *Genzyme* test for which - all five or for damage?

MR PALMER: I understand that to mean all five.

THE CHAIRMAN: Right. I think where I have got a bit confused, this submission about, well, it is not *American Cyanamid*, it is different, which came from the paragraph in *Napp* that is cited. I, at that stage, took you to be talking about, generally, the five stage test in this case being different from the *American Cyanamid* approach. That then, I think in your argument, morphed into taking us straight to the damage in limb three.

MR PALMER: Let me explain, perhaps I am falling into the trap of trying to speed up and I will just take it slightly slower. In a typical *American Cyanamid* case, provided there is an arguable case and suitable cross-undertakings as to damages, the matter will be decided simply on the balance of convenience, end of the matter. No particular threshold of damage is required. It is just balancing the interests of either party provided those two thresholds are met. I say there is a higher test overall, which is the five stage *Genzyme* test laid out by the Tribunal, in the context with which we are concerned, which is not *American Cyanamid*, but in particular imports in the interests of consistency with EU law, but also in recognising that a claimant or an appellant has the benefit of an independent decision by a neutral decision maker, which it is seeking to challenge on judicial review, in that context there is a further hurdle which is the serious and irreparable damage hurdle which you will not find in *American Cyanamid*. It is something above and beyond that.

THE CHAIRMAN: All right. So this submission is directed to what I call limb (c) specifically?

MR PALMER: Yes.

THE CHAIRMAN: In *American Cyanamid* there is an element of that because you have to decide what damage the claimant will suffer and whether damages would be an adequate remedy?

MR PALMER: Yes.

THE CHAIRMAN: And if damages are not an adequate remedy, you are then into irreparable harm. But, and you may well in an *American Cyanamid* situation have a claimant who will

not be able to be compensated, 'uncompensateable' harm, and that would be a very relevant factor. Where *American Cyanamid* does not go is to say, "and it has got to be harm which will drive you out of business".

MR PALMER: Exactly so, i.e. it does not impose that high threshold.

THE CHAIRMAN: So you are talking about a high threshold at limb (c)?

MR PALMER: Exactly so, however you phrase it, whether as 'significant damage' or 'serious and irreparable damage', that is what in substance you are talking about.

THE CHAIRMAN: All right.

MR PALMER: And I am going to draw on two sources in support of that. The first I have given you, which is *Microsoft*, tab 30, paragraph 240; and the second, also appearing at our paragraph 13 of our skeleton argument, is the principles applied where interim relief is sought from the Court of Appeal. There are two references there. The first is to *Novartis,* the second to *DEFRA v Downs*. They appear in your bundle at tabs 28 and 29 respectively. Tab 28, *Novartis*, paragraph 30. Again it is phrased in terms of 'irreparable harm' pending appeal.

At tab 29 you have *DEFRA v Downs*, and it is paragraph 9 - perhaps read paragraph 8 for context. Again it is expressed in terms of 'irremediable damage' or 'irremediable harm'. That of course says that, although an appellant may ultimately succeed on appeal and show that the original judgment of the court below, they still have had the benefit of that independent judgment they are seeking to show is wrong, which means the court will not intervene to provide interim relief before any finding on the lawfulness of the judgment appeal unless that high threshold of harm is going to be reached. We say that is the analogy which entirely coincides with the European approach to challenges to competition regulation.

THE CHAIRMAN: Because the analogy is between a decision by a regulator, independent, and a decision by a first instance judge?

MR PALMER: That is right. I appreciate that it is administrative rather than judicial, but it has that quality of independence. It is not the same as any two warring parties turning up in the list in Court 30, or whatever it is now.

THE CHAIRMAN: All right.

MR PALMER: That is what I say about the test. Perhaps I can just go back to *Flynn*, because it was said there, paragraphs 78, 79 and 80, that significant damage can still fall short of a business not being able to continue, or a demonstrable threat to the continuation of the business. It was in the sense that the significance of the harm claimed by *Flynn* in that case

was deemed to be significant at least to get over the jurisdictional hurdle of (c), but not significant enough when it came to the balance for interim relief to be ordered.

I would simply ask you to turn back to the nature of the significant damage which was claimed in that case. The context is that it was a case of excessive pricing, and if you look at paragraph 63 you can see the judge's acceptance that the possible harm is likely to be significant, both in absolute terms, amounting to at least several million pounds per annum and relative to the applicant's annual turnover of circa £51 million.

THE CHAIRMAN: Yes, and then it says that at the hearing counsel did not contest this aspect of the jurisdictional test.

MR PALMER: No.

THE CHAIRMAN: Just so I understand it, you have got 'significant harm', several million by reference to £51 million, held not a demonstrable threat, but sufficient to get over the jurisdictional hurdle?

MR PALMER: Yes, but significant to get over that jurisdictional hurdle, then not enough to tip the balance in Flynn's favour when it came to the actual balancing.

I would just ask to compare that sort of assessment of significance of several million a year in the context of a turnover of £51 million, with a couple of hundred thousand in the context of a turnover of £3 billion.

THE CHAIRMAN: And you, therefore, say that is not significant for the jurisdictional hurdle?

MR PALMER: Yes.

THE CHAIRMAN: And even if the jurisdictional hurdle does not require a threat, an existential threat, query, query, in the light of the case law, this is not significant?

MR PALMER: It is nowhere close. I will come back to the point about business disruption, but the short point about that will be that it is just a simple compliance issue which needs to be dealt with. It is not business disruption as faced by *Flynn*, for example, or *Genzyme*, having to re-price their goods to a lower price, which will in turn have a knock-on effect on their competitors lowering their prices and difficult to reverse. This is a worse case for them, where they ultimately succeed on this appeal, a short term compliance hiccup.

THE CHAIRMAN: All right.

MR PALMER: That takes me then to the application of the test, for which I hope I have largely laid the ground. On the merits, ground one, as pleaded in tab 1 of bundle 1, paragraph 66, Sir, you pressed my learned friend Mr Moules on this, and in particular you pressed him to identify the misconstruction of the order. What he told you is, in effect, what appears in ground three at paragraph 77. That is the answer he gave you. He said it was relevant for

the CMA to consider the extent to which the appellant's business was likely to give rise to the non-compliances that the order was enacted to remedy, there is no evidence that they did. As actually drafted - I will deal with that point in the context of ground three in a moment, but looking at ground one, what is actually said here is that the CMA - it is paragraph 66 - wrongly interpreted the purposes of the order as including the prevention of the exercise of buyer power when, in fact, it was made clear that the exercise of the buyer power does not necessarily of itself constitute an AEC, and that takes you on to the point about particular relationships with suppliers. I have showed you in the decision itself, and citing from the CC report, it manifestly took account of that----

THE CHAIRMAN: In the quote at paragraph 8.

MR PALMER: You have it, Sir, that is the point. It is a manifestly bad point. That is now reshaped entirely in a form which does not appear here to the effect that the CMA is said to have taken too narrow an approach for its discretion. That is really, on analysis, no different from saying what appears at paragraph 77, which is you did not take account of the following facts, which I will come to.

Then there is ground two, which is the duty of sufficient inquiry, and I have shown you the correspondence on that and the inquiries that were made. Having satisfied themselves, or B&M having volunteered, that they did exceed £1 billion, they were asked to provide representations, and they did so in an open way in the context of which they can, if they choose, be expected to take legal advice and to respond fully. They chose not to do so. The threshold which B&M will have to cross if they are to succeed on ground two is that which appears at their paragraph 71, it is the *Khatun* test, and where you see in paragraph 71 the word 'unreasonable', in this context that means *Wednesbury* unreasonable, in other words 'irrational'. They will have to show that it was irrational of the CMA not to go back to them - I take the point that was raised by the Tribunal earlier - in the light of what they said about being largely compliant, and to say, "Oh, well, in that case can you please make submissions as to whether you consider that this Code has any purchase at all?" That is a very high threshold and, in my submission, there is no prospect of it being met because, contrary to what you heard from Mr Moules, there are, in fact, provisions of the Code which are relevant to B&M's business, even if there are other provisions of the Code which are not relevant to their business. Principal among those and at the heart of the remedy is the requirement for fair dealing, which appears at paragraph 2 of the Code - you can see that in bundle 1, tab 3, page 12. It is the very first principle under the Code after all the definitions.

It is at the core. It is a principle which none of the evidence which you have been told about, and Mr McDonald refers to, engages.

Then in the Order itself, if you turn back to within the Order, at section 6 of the Order, page 6, the duty----

THE CHAIRMAN: Remind me of the tab?

MR PALMER: It is within the same tab at page 6. It is in the body of the order rather than in the Code of Practice, which is attached. 6, that is the duty to provide information to suppliers. "The terms be recorded in writing", that was presented to you as something incredibly onerous. Of course they can be communicated by email. They do not have to be recorded in a deed and signed in triplicate, it can be just, "Here are the terms, part of the original arrangements", and an attachment to an email can be provided recording the terms so that if there is any dispute or any disagreement later on they can be referred to. There is no reason why, in the context of the duty for fair dealing, that should not be applicable to this business.

To take another one, paragraph 11 of the Order, page 9, you have then the dispute resolution scheme, allowing not only, first of all, a duty of negotiation in good faith, but also, as you can see over the page, after contact between the supplier and the code compliance officer, the ability for disputes to be resolved in that structured and fair manner, with the intervention of the, it says here, the Ombudsman, but of course that became the Adjudicator. So you have those structures. There is no reason why they should not be applicable to a business of this kind.

There are many other of the more detailed provisions which may or may not be relevant at the moment to the way in which B&M trades, but may easily become so. You asked about long term contracts, and the answer you were given was careful by Mr Moules, and he gave it twice. He said, "B&M generally does not enter into long term contracts". He said that twice, no doubt advisedly.

There is a provision which says no delay in payments under the Code. Of course, there is an incentive on all retailers to delay payments to suppliers. All you have in respect of that is, you are told, well, B&M does not delay payments. That is good news for their suppliers, and they would, therefore, be compliant with that aspect of the Code as long as they continue. That is no reason not to be subject to such an obligation.

It may well be that, as a consequence of their business model, some of these are unlikely to be relevant at present, but we bear in mind of course that this is a rapidly growing business,

rapidly acquiring more and more buyer power and therefore more incentive to enter into the sorts of arrangements which the Code is designed to protect suppliers against.

THE CHAIRMAN: Yes, thank you. You are under ground two at the moment.

MR PALMER: That is under ground two, about the duty of sufficient inquiry. The simple point I make here is that it is simply not the case, and this now merges into ground three, that it is irrational not to inquire further just because you are told, "We have got a slightly different model, so we think we are already largely in compliance". The key there is 'largely'. There are points which they said they, themselves, were going through the text of their own compliance to see what they needed to do to be compliant by the deadline. They have not said, of course, none of this applies or could apply or is inapt, and on analysis there are not such things. So you cannot say there is a reasonable prospect. We say it has not been established that it is irrational not to ask for further details about that.

Then on ground three where it is said, "Well, you did not take any of this into account", the core point is in relation to the original designation decision they did not put it forward, and so there was no obligation to take it into account. Although that is now put forward, it is only in the context of this alleged application for de-designation, which we dispute is actually made or should have been treated as such, and can still be considered in the future should a proper application for de-designation be made.

THE CHAIRMAN: The meat now on the way you put it of ground three is a failure to take into account the business model being such as to make it unlikely that they will engage in the practices?

MR PALMER: Yes.

THE CHAIRMAN: That is now the meat of the case, I think.

MR PALMER: That is what is now the meat of the case. I have given you my high level answers to that point saying they remain part of the Code which does bind, which are relevant to them, but in any event, and specifically the way it is put in ground three, I say if these were points which you wished the CMA to take into account it was incumbent upon you to put them forward as you now have, but you did so five months later.

THE CHAIRMAN: I think, just to summarise, ground three fails in relation to the decision.

MR PALMER: The original decision.

THE CHAIRMAN: Yes, the decision, because the points were not put forward, and having satisfied ourselves, you say there is no duty to inquire, and in relation to ground three and the refusal, you say effectively it is not a proper application to revoke?

MR PALMER: It was not. Alternatively, even if it had been, these are points which have now been taken into account, at least on a preliminary basis. Even, in that context, if the Tribunal were to conclude it was a proper application for de-designation, even though contained in a pre-action protocol letter, and these points were advanced and need to be considered at that stage, or at some future stage, as an application for de-designation, this does not touch, as I opened on, the lawfulness of the original decision to designate.

THE CHAIRMAN: That I understand.

MR PALMER: That is the point I come back to: even on that worst case for me, this is now them making a claim to de-designate in circumstances where they were, *ex hypothesi*, lawfully designated in the first place, and there is no basis for interim relief.

The second limb to the merits of ground three was a failure to take into account the costs to them of compliance. The simple point to that is that that was never advanced. It was advanced for the first time in the witness statements accompanying this application to this Tribunal, Mr McDonald's witness statements. I will come back to what those demonstrate, as it were, when I come to the damage limb.

That is the merits. We say it is essentially very weak, and certainly in respect of the designation decision does not pass the threshold of a real prospect of success, an arguable claim, or however one wants to cut it.

THE CHAIRMAN: All right.

MR PALMER: Then in relation to----

MR CUTTING: I am sorry to be slow here. I completely understand what you are saying.

I think I have got it in my head in relation to the original designation, but I kind of feel as though I still have not got clear in my mind what you are saying about the alleged refusal to de-designate, or the decision not to revoke, or the decision not to engage in a process to revoke, the first of your case is you do not accept that such a request can or was properly made in the context of the pre-action letter?

MR PALMER: Yes.

MR CUTTING: But then we might take a different view, in which case there is clearly an indication, albeit also in a pre-action letter, saying, "No, we are not going to quash, or revoke or engage in a 162 process", or whatever you call it. What then is the position in relation to the merits? Is it that you say that by then you have done the inquiry and you have considered all the relevant factors and so the no is the no, or is your case that there may be a case but it does not pass the interim relief test?

MR PALMER: It is both. The first point is the merits of that challenge to the refusal decision, it is bad on the merits because there was no proper application to de-designate and there was no proper decision refusing to de-designate. When you look at the pre-action----

MR CUTTING: So it is some kind of partial informal exchange?

MR PALMER: No, it was not that, it was not informal. It was a formal exchange of correspondence under the pre-action protocol.

MR CUTTING: But it was not a formal revocation request?

MR PALMER: No, and certainly not consideration under 162. There was no case put forward about change of circumstances, there was no consideration by the CMA of that nature. If it is now to be said, as it appears to be said, "We want you to treat what we said in the pre-action protocol letter as a request to de-designate", then what our witness, Mr Land, has said is, "We have not made a decision about that yet, but on the face of it there is little that I have seen so far which would lead me to alter our original decision to designate", but I stress, under that administrative process, rather than this proxy by litigation process, it remains open to the CMA to engage with a party and say, "Well, okay, give us the evidence, you have said X, we want to know Y, we would like to see to what extent groceries fall …" We do not have any of that evidence so far. We have got a series of solicitors' correspondence, and on the back of that witness statements which we have not been able to interrogate. That is because it is all being done through this Tribunal rather than through the administrative process.

THE CHAIRMAN: Leaving to one side that you say, "We may or may not be saying we will look at it again if you do it properly", let us look at the case that we have been presented. The case that we have been presented with is that the pre-action protocol letter is a request to revoke?

MR PALMER: Yes.

THE CHAIRMAN: You say, number one, it is not.

MR PALMER: Yes.

THE CHAIRMAN: Let us assume that we are not with you on that at this stage on interim relief. Fourteen days later or whatever, you refuse to revoke, and that is the refusal decision which is challenged. On this application for interim relief at stage A, apart from your case that it was not a proper request to revoke, what is your case on the merits of that alleged refusal? Are you going to say it might pass the hurdle, but when we get later on down the road you are not going to make mandatory relief, or are you saying it does not pass the hurdle?

MR PALMER: Both of those in the alternative. First of all, it does not pass the hurdle, and my reason for that is because it is plainly insufficient to say these provisions of the Code do not apply to our existing business model, when (a) other provisions of the Code and the Order do; and (b), the business may develop such as to engage other obligations under the Order. We make no apology for saying that part of the purpose of the Order is preventative, as the statute itself provides, that a remedial order may not only remedy or mitigate an AEC, but may also prevent. So it has that preventative purpose as well.

THE CHAIRMAN: All right.

MR PALMER: When you step back and look at that, you are left with a very weak claim. Thirdly, if I am wrong about all of that, then you have my point about the mandatory order and the point about----

THE CHAIRMAN: We will come to that, that is later. Basically, you are saying that the ground as against refusal is not arguable because there is an overriding objective of preventative measures and (a) the fact that in the past they have not done it; and (b) the fact that at present they are not doing it; and (c) the fact that their current business model may be such as to make it unlikely that they will do it - disregard all those, there is still the possibility in the future that the business may develop, the model may change, etc?

MR PALMER: And that is consistent with the way that the matter was approached right from the outset, where the CC did not establish present or past roots on behalf of every single one of the retailers.

THE CHAIRMAN: All right, so that is----

MR PALMER: So (a) is the merits. Then you have the point about urgency. There is no case for urgency. If there were one could have expected an application for interim relief to have been brought back in November. It can be brought before a notice of appeal. They have not pressed that the hearing happen before now.

Of particular concern is the fact that so far as the CMA can tell, B&M have done nothing to comply with the designation and the obligations that apply so far. They have refused a meeting with the GCA, they have not paid their contribution, and they have not engaged with the substance of the obligations on them. That is our understanding. They have certainly not said that they have done any of that. The point about engagement with GCA emerges from correspondence with the Adjudicator in which they refused to attend a meeting to have the Code explained to them. They have not paid the levy. In terms of other obligations, they are simply saying, “We do not accept them”, and that is why on the

schedule of costs which you have been given as to what they think it will cost them, you have no actual costs at all, because they have done nothing.

This is in a context where, as the statute provides, the effect of an appeal is not suspensive without an application on the basis of evidence and with justification to this Tribunal to suspend the effect of the Order. They have effectively treated their appeal as suspensive by declining to do anything at all, and cannot now come to the Tribunal over three months after this Order took effect and say it is urgent that you now provide interim relief. It plainly is not. What is said in support of that is that the GCA, the Adjudicator herself, would wish that the matter be resolved, in particular to clarify her budget for the year.

THE CHAIRMAN: Are you going to deal with that point now?

MR PALMER: Yes, I am going to deal with that now.

THE CHAIRMAN: I would like to hear you on that point. Their submission is that the GCA supports interim relief.

MR PALMER: Sir, you have the letter. I am not going to argue about what it means. I am going to make two points in response to it. The first is that it is very difficult to understand what the point is about the existing contribution to the existing financial year. The GCA has already said that if the appeal were to succeed she would refund that. If the appeal succeeds, whether or not there is an interim order, that money will be returned. So if that creates a gap in this year's budget, and to the extent that it does and therefore there is a bit more to be recouped in the sum of about £6,000 a head in next year's budget, that is going to happen as a consequence of the appeal being allowed, and not as a consequence of whether the money is now paid and returned or not.

In terms of setting next year's budget, it is perfectly open to the Adjudicator to allow a contingency if and to the extent that this Tribunal is unable to resolve the appeal before the next financial year. If there is any urgency, it is not in support of an application for interim relief, it is in support of determining this appeal on the merits as soon as the Tribunal is able to.

On the second point that the Adjudicator made, again with respect to her, we find it difficult to understand - we understand that she would like to be in a position of clarity as to whether B&M are a regulated entity or not, but that clarity can be brought by refusal of an interim order, which leaves the position as it is, and as it has been since 1 November, that they are a designated entity and therefore are subject to the requirements of the Code. I appreciate that if subsequently the appeal were to be allowed and she were no longer to be regulating them, then she would have taken some time engaged in those activities in accordance with her

statutory duty and functions which in the end she may need not have done had they never been designated. But the fact is that they have been designated and countervailing that administrative inconvenience is the rights and position of the suppliers who, in the meantime, have a right, should they want to, to invoke an arbitration procedure, have the right to invoke negotiation, to be dealt with fairly, be paid promptly, and so forth.

That has to enter the equation as well, none of which, on the premise of my learned friend's argument, he allowed for at all.

So we say there is more urgency in the interests of having this appeal determined one way or the other as soon as the Tribunal is able to accommodate a substantive hearing.

Then we come to the point of serious and irreparable damage. Again, I have made my point about the scale of these charges. Can I just take up Mr McDonald's second witness statement for a moment. The first witness statement was made on the basis of a misapprehension taking the £1 million figure which applied to all 11. The Tribunal has that. The revised approach is the table at paragraph 17 of the second witness statement, which is at tab 2 of the supplementary bundle. That gives rise to what is now accepted, given that the levy can be refunded, to be £230,000. At paragraph 20 it is then said, "If the designation is reversed, we would have to spend more money and more time reversing what we have done, and probably have spent well over £1 million". That is moderated to £800,000. That is almost three or four times as much in total as the sum it is said it will cost to put these arrangements in place. It is very difficult to understand how on earth that could be so given that, when you go back to the items - you were taken to the example of item 1, training sessions, half a day training. That has either been done or it has not been done, it is not been something which will have to be undone at further expense.

Various IT solutions or online training products may have been developed. Again, these are things which do not have to be undone. Item 7 is a substantial one at £35,000 for worker hours. That is just the opportunity costs of having workers spend half a day at their training session. Again, that is not something which will re-occur or have to be done.

So, contrary to what Mr Moules has said, you do not have a fully worked out justified basis for saying this is going to cost £800,000. You have a figure plucked out of thin air.

THE CHAIRMAN: What you are saying, assuming the difference between 230 and 800, no explanation about how you get the extra £600,000 from more money and more time reversing what we had done.

MR PALMER: No.

THE CHAIRMAN: There is a reference to computer - the new policy procedures, stuck with software which may have been bought: 'stuck with' means it is the first cost?

MR PALMER: Yes. What I say we are dealing with - that again is based on high assumptions as to what the costs could be, and not on the basis of any real life experience.

Then you have the point of a major upheaval. When you compare, for example, the sense in which a 'major upheaval' is used in the case law - take *Flynn*, take *Genzyme* - they really were major upheavals, a complete reinvention of their pricing policies, a devaluation of the value of their products on the market, nothing of that kind, costing in Flynn's case millions of pounds a year, a substantial part of their overall turnover, nothing of that kind here.

There are some compliance costs which will be incurred, which at the worst case may prove unnecessary. This is not that sort of major upheaval, or anything equivalent to, or coming close to, threatening the future of the business or requiring it to reinvent its business plan.

Sir, when you take those three points together, the weakness of the merits, the absence of urgency, the absence of any significant or serious and irreparable damage, we say we do not even get off the ground with this application, we do not pass the jurisdictional hurdle.

It is only if you are against me on some or all of that that you come to the conclusion that, with all that in mind on each of those three points, the hurdle is passed do you have to consider the balance. Again, the starting point is you weigh in the balance those weak merits, you weigh in the balance that lack of substantial harm. You take into account at that point the effect on competition and third parties. You have our submissions at section D of our skeleton, page 12, paragraph 41 onwards.

I think, given the time, I will simply invite the Tribunal to remind itself of those points. Again, I have foreshadowed many of them, in particular there are points which it appears it is unclear whether it complies with. They have only ever said that they largely comply, and there remains the interests of those suppliers who could be affected in the meantime.

So if you take all those points and you weigh them in the balance, and on the basis that a high threshold has to be passed and the basis that overall the strong case for saying that the initial decision to designate was lawful, we say the balance of interest plainly falls in the interests of upholding the decision of a public authority such as the CMA.

I have been brief on those points, but my brevity on them should not be taken as lack of emphasis.

THE CHAIRMAN: I am grateful. Can I just ask this: presumably when it comes to interim relief in relation to the refusal, we have not gone into the case law about interim mandatory orders, and I am not suggesting we should, but my recollection is that the law is that there is

an even further test to make an interim mandatory injunction, which is what we would be doing in respect of that, would we not, because we would be making an order that for the time being it should be revoked?

MR PALMER: Yes, even if temporarily they say you must revoke. They want it retrospectively to cover that they have not been complying with it from 1 November. They want it not only to be revoked, or suspended, or revoked temporarily pending this hearing, they want it to be backdated to 1 November, the justification for which we are at a loss to understand.

THE CHAIRMAN: What is the relief asked for? This is an application for a suspension, is it?

MR PALMER: Yes.

THE CHAIRMAN: So, on its face, the suspension would only be from now - on its face?

MR PALMER: On its face.

THE CHAIRMAN: The order sought is - where is the interim relief order sought? It must be in tab 1 somewhere.

MR PALMER: It is a separate document. I have it at the front of tab 1.

THE CHAIRMAN: Application for interim relief, there is an order, it is suspended until further order - the effect of the decision is suspended?

MR PALMER: Yes.

THE CHAIRMAN: Are you saying that is effectively backdated?

MR PALMER: As it has been developed in submissions, that is what they are asking for. They will correct me if they are not asking for that, but that is my understanding.

THE CHAIRMAN: It must be, because otherwise it would have been in force between November and now. Unless they comply with it they would be in breach.

MR PALMER: They are seeking to cover the fact that they have failed to comply with it all this time or engaged with it, or take steps by seeking to make an application some three months later to excuse them from any consequences which may flow.

THE CHAIRMAN: Thank you.

MR PALMER: Just one reference to give you for your note, I will not take further time over it now: I refer to the fact that the original designations were made without reference to whether the particular retailers had or had not engaged in any particular practices. Can I give you some references to that?

THE CHAIRMAN: In answer to the lunchtime question, some of them?

MR PALMER: Yes.

THE CHAIRMAN: All right.

MR PALMER: The references are 11.280 to 282, and 11.445. I am very grateful to Mr Lask.

THE CHAIRMAN: Thank you. Yes, Mr Moules?

MR MOULES: Thank you, Sir, I am not going to revisit every point in reply. You have our submissions.

THE CHAIRMAN: No, I am looking at the clock.

MR MOULES: I am going to be selective, but that does not mean I accept what has been said against me.

THE CHAIRMAN: Yes, I understand.

MR MOULES: The first point in relation to the different approach to the designation decision as opposed to the revocation decision, I fully accept that if you are against me in relation to the designation decision there is a higher threshold for interim relief when seeking effectively a mandatory order. The primary basis on which I put the case is that the designation decision made on 1 November was unlawful, and it is that which should be the subject of the suspensive relief.

In terms of the merits, I do not accept that the thrust of the submissions have been directed at the de-designation decision. The central point of what the nature of the business means goes right to the heart of ground one and ground three in relation to the 1 November designation decision.

THE CHAIRMAN: Sorry, the nature of the business argument goes to ground one, ground three re designation?

MR MOULES: Re designation, but the point is, did the CMA, when approaching the exercise of discretion under Article 4 properly apply its mind to the scope of its discretion when making the 1 November decision, and the points I make go directly to that 1 November decision. I say they wrongly put out of their mind the way in which B&M trades. They focus on, as the references I have set out in the skeleton from Mr Land's evidence explain, "Is the turnover over £1 billion, do you sell groceries and do you buy them from somebody?" That was the top and bottom of their assessment, and I say that was a straightforward misreading of the discretion under Article 4.

THE CHAIRMAN: Yes.

MR MOULES: There was a lengthy attempt to portray this as a case of a rearguard action where B&M have not made these points upfront, and that was said to plug into particularly ground one and ground two. The short answer to that is the CMA, if it has approached the scope of its discretion unlawfully, it does not matter what material was put before it. As I have set out in the grounds of appeal, the duty of reasonable inquiry is not just subject to the *Wednesbury* threshold. It is paragraph 70 of the grounds, the duty of reasonable inquiry

comprises three steps: understand the nature of the power, ask the right question, and then take reasonable steps to acquaint oneself with the relevant information, which is part of the submission I made before lunch, the CMA fails at the first hurdle here. By overly narrowly construing its discretion, it does not understand the nature of its power, it does not ask itself the right question. Therefore, by definition, it has taken an unreasonable approach.

THE CHAIRMAN: All right.

MR MOULES: A question was raised in relation to the terms of the designation decision itself. You have that in volume 3, page 1108. This is paragraph 11 point.

THE CHAIRMAN: This is the accepting designation.

MR MOULES: Accepting designation. In fairness, I should begin by saying that we, on this side of the court, had construed paragraph 11 benevolently to the CMA, and had taken it to be a rather clumsy reference to B&M in the correspondence accepting it met the £1 billion threshold. Acquisitions and recent growth, that is clearly a reference to the acquisition of Heron Foods. Sir, at that stage, that is why there was no pleaded ground saying there is an error on the face of the decision that you treated us as having acquiesced. I am concerned that the answer that was given in relation to that question, because the submission was made that, properly construed, the documents from B&M did amount to an acquiescence.

THE CHAIRMAN: Tacit acceptance.

MR MOULES: Tacit acceptance, and so paragraph 11, in answer to the question, what was being put forward as a legitimate consideration that B&M had tacitly accepted its designation, which, in my submission, is not a fair reading of those letters. I do not want to seem to be grasping at a point thrown at me by the Tribunal, but that is a fair explanation as to why it was not pleaded in the first place, but in the light of the answer that has been given I feel I must say I do rely on that now as an error on the face of the decision.

In terms of the threshold for significant harm, significant damage, without repeating what I said this morning, I rely on paragraph 81 of *Genzyme*, that it is flexible jurisdiction. I do not put the case solely on the basis of financial loss, so comparison with the financial losses in *Flynn* does not take the matter any further forward. I rely on the combination of business disruption, effect on business policy and the, albeit in relative terms, small financial loss.

THE CHAIRMAN: Yes, thank you.

MR MOULES: The GCA point, the submission was it was difficult to understand what her concern was about the lack of clarity. With respect, she plainly is concerned, which is why she has written the letter. Secondly, it does not just go to the levy and her budget. If she

starts dealing with arbitrations - suppliers are entitled to refer matters to her, disputes to her - she could be engaged in arbitrations during the currency of these proceedings.

THE CHAIRMAN: With your client?

MR MOULES: With my client, indeed if she has jurisdiction to do that there are further costs of the arbitration which ordinarily would be recovered. There are regulatory actions that she may be required to take in the future in relation to these proceedings, and she clearly is concerned about doing those on risk.

THE CHAIRMAN: Thank you.

MR MOULES: Finally, a point was taken that there was nothing in the material in the pre-action letter to set out the costs that B&M would be exposed to by complying. That is not an answer, firstly, because the levy is publicly known. The GCA publishes in advance what her charges are. In any event, the Competition Commission report in 2008 did set out indicative costs of annual compliance - I forget the precise figure, £100,000 or £200,000. There are patently costs associated with compliance. The 2008 report indicates what they are. The CMA clearly in approaching its discretion should have asked itself, 'what are the likely costs and is it proportionate for the mischief? If it needed more precise figures it could have asked for an estimate. It does not absolve itself of the duty to think about the question.

Sir, without going over ground that I have already covered, unless there are any questions I can assist you with, I will conclude my submissions.

THE CHAIRMAN: That was very succinctly dealt with, if I may say so.

MR MOULES: Thank you.

THE CHAIRMAN: I do not think I have any further questions. I look to my left and my right - no. What we will do is we will rise for a while. Do not go away. We will come back, I would have thought in any event by 4.45, maybe sooner, to just discuss where we are going from here.

Thank you very much.

(Short break)

THE CHAIRMAN: We have before us an application by B&M European Value Retail SA for interim relief for an order that the effect of the decision of the CMA of 1 November 2018, taken pursuant to Article 4 of the Groceries (Supply Chain Practices) Market Investigation Order 2009 is suspended until further order. We have heard and considered the careful arguments of both B&M, the appellant, and the Competition and Markets Authority, the

respondent. We have decided that the case for interim relief made under Rule 24 of the Rules of the Competition Appeal Tribunal is not made out and the application is dismissed. We will give our reasons at a later date in a written judgment. That judgment will also cover the jurisdiction issue which we determined earlier today.

That is our decision.

We raise two further matters by way of housekeeping. One is the further conduct of these proceedings. We do not consider that now is the time for making directions for the further conduct of the appeal, but we invite the parties to consider where we go from here and perhaps to put their heads together and to place proposals before the Tribunal.

We believe, and Mr Collyer will correct me if I am wrong, that at the moment there is no defence from the Competition and Markets Authority. Time was, I think, extended if need be. That, I believe, is the next stage, but we would ask the parties to put their heads together as to all the further stages.

The appeal itself will be published under the Rules shortly. No publication took place pending the decision on jurisdiction, but now there will be publication and of course there may be time allowed for intervention. We will also, depending partly on what you tell us about how you see it going forward in terms of timetable, give consideration in relation to the time limits for intervention.

We, as a Tribunal, will be available to hear the final matter, and indeed if there is any CMC needed before. We will be in difficulties hearing anything before the middle of March in terms of any CMC. Thereafter, we should be able to find availability.

That deals with this case, and unless either of you have any observations to make which we are willing to receive, we are happy to leave it that way. We would urge you to put your heads together soon. There was reference to the matter being brought on speedily, and we can see no reason for that not to occur, in the sense that there is no reason to delay.

That deals with that. In relation to the Administrative Court, I am not acting with my Administrative Court hat on, I think I would invite - I know I have seen what you have said - written submissions to be filed and served with the Administrative Court as to what each of you say should happen to those proceedings. Again, you may be able to put your heads together.

I cannot remember what order I made in the Administrative Court about the acknowledgement of service. Did I extend time generally, I cannot remember? I did.

MR MOULES: That is what I would invite you to do. We have not acknowledged service.

THE CHAIRMAN: Now, whether you go down the acknowledgement of service route and do it formally that way or not, I do not really mind. I think the compass of dispute is rather narrow, and I am happy to receive whatever you decide. I will have to consider it on paper, because I am sitting elsewhere, but I leave that with you. You may say, we want to put in a formal acknowledgement of service and deal with the merits. You may say no, but we say permission should be refused on the basis of alternative remedy, you will stay instead.

I leave that up to you. I am not going to make an order now for time, but that should be also attended to. I think probably what I will say is - and I will tell the Admin Court - can I say within 14 days of today you write to say how you propose to deal with the issue? In other words, "We are going to deal with it by written submissions alone, we waive our right for a formal acknowledgement of service, and these submissions will be given in the following order", or you say it is going to be dealt with in a different way. I will inform the Administrative Court that I have made that informal direction.

MR MOULES: I am grateful, thank you. Can I ask for that to be 14 days after the publication of the judgment dealing with jurisdiction, because it may be there is an alternative permutation, which is a discontinuance notice of judicial review, and I think the steps that B&M would ask be taken in relation to the judicial review will somewhat depend upon the reasoning in the jurisdiction judgment. I anticipate that the parties may be able to----

THE CHAIRMAN: That may not be a problem. It may put things back because I am not giving you an indication as to when the judgment will be ready, but I am not sure that should cause any problem.

MR MOULES: (Without microphone) Can I ask that the matter remain stayed until such time as judgment on jurisdiction is given, following which we could liaise and advise within 14 days of that date as to how we propose matters should be dealt with?

THE CHAIRMAN: Yes. I have made a note, and I will, I think, get a formal order sent out in those proceedings to the effect that the Administrative Court proceedings are stayed until 14 days after the handing down of the reasons for the decision on jurisdiction in the Competition Appeal Tribunal and within 14 days of that event the parties are to notify the Administrative Court Office with their proposals or suggestions as to how the Administrative Court proceedings should proceed. I will get an order to that effect sent out. I know we have had no Associate here, but I am sure that does not matter. I have dealt with it informally in that way.

Thank you all very much.