IN THE COMPETITION APPEAL TRIBUNAL

Case No. : 1345/4/12/20

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP
(Remote Hearing)

Tuesday 24 November– Thursday 26 November 2020

Before:
The Honourable Mr Justice Morris
Michael Cutting
Professor Robin Mason
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Sabre Corporation

-v-

Competition and Markets Authority

_____

A P P E A R AN C E S

Mr Tim Ward QC, Ms Alison Berridge and Mr Nikolaus Grubeck (On behalf of Sabre)
Mr Rob Williams QC, Mr Tristan Jones and Mr Conor McCarthy (On behalf of CMA)

Digital Transcription by Epiq Europe Ltd
Lower Ground 20 Furnival Street London EC4A 1JS
Tel No: 020 7404 1400 Fax No: 020 7404 1424
Email: ukclient@epigglobal.co.uk

Thursday, 26 November 2020

(12.05 pm) **Open Session**

Submissions by Mr Williams (continued)

MR JUSTICE MORRIS: I am just waiting for the livestream.

MR WILLIAMS: I understand, sir.

MR JUSTICE MORRIS: I can see it up on the screen now. That's fine. I think we are ready to resume.

Can I just make clear that we are now in open session with livestream operating and the warning I gave at the start of each session about the prohibition on recording still applies. I think, subject to that, we are ready to continue.

Can we just say this in relation to timing. We take the view that it would be a good idea to have 45 minutes at lunch rather than 1 hour and we will take that 45 minutes from whenever is a convenient moment for you to stop. That will just give us a little bit more leeway, nor do we rule out running past 4.30 for a while, but we would rather minimise any overrun at the end of the day.

MR WILLIAMS: I am very grateful sir.

Moving on to ground 3, this is a challenge to the quantitative aspect of the share of supply test. Mr Ward focused on the increment on Farelogix side and I am going to do the same thing. There are two main issues.

The first is whether the increment is hypothetical based on the value receivable analysis.

The second is whether CMA has treated revenue in the US as revenue in the UK, on the value received analysis.

I am going to deal with those points in turn.

If I can just start with this point, it's important to separate this complaint from ground 2. Ground 2 is: is there a supply by Farelogix in the UK? If ground 3 is a

separate complaint, and Mr Ward I think clarified towards the end of his submissions that each ground assumes the grounds before have failed, then my answer to you is that there is supply by Farelogix in the UK. The question under ground 3 is: does that supply have any value at all?

The thrust of the complaint is that there was a supply with no value to (inaudible), and we say that is an extreme and an unlikely conclusion in a regime with no de minimis test and it's one which Sabre fails to make good.

The CMA looked at value in the two ways I have described, value receivable and value received. Either one on its own suffices to establish the increment. It's important to be clear about what Sabre means when it says the increment is hypothetical, because it's common ground there's no minimum increment, there's no de minimis test. The CMA found Sabre has a substantial presence in the UK, over the 25 per cent threshold and so any increment at all will suffice. Any supply of any value.

That's why, in our submission, Sabre faces an uphill battle on this ground. It has struggled at times to stop ground 3 blurring into a de minimis complaint. For example I won't ask you to take it out notice of application paragraph 5(c) says that the increment is vanishingly small. That is a de minimis complaint.

To avoid that problem it settled on the complaint that the increment is theoretical and based on hypothetical revenue. That isn't a valid criticism of the approach the CMA took in my submission. You've seen section 23.5, I won't go back to it now. The CMA has a discretion to choose the criteria it uses to measure the share of supply and obviously that discretion has to be exercised on the facts and in the circumstances of a given case. The CMA has to be able to adapt its approach to those circumstances.

It chose the criterion of value and there is then a question of how you measure

value. So that is a further layer of discretion, how do you measure value?

Finally, there's the appraisal of the facts.

There are multiple layers of discretion here, all of which go to the question of whether a service has value and that is another example of a point which engages the expert judgment of the CMA, going back to our discussions yesterday. It's not a question of law in any sense really, in any meaningful sense. It's a matter of judgment which has to be assessed on the rationality test.

The CMA's approach can be seen from a number of paragraphs of the report, starting at 5.63 which one finds on page 82 of the bundle. If you are there, sir, at 5.63, it's the criterion of value.

MR JUSTICE MORRIS: Yes.

MR WILLIAMS: 5.63 goes on to explain the context for the assessment of value, which is the commercial relationship with British Airways. Then halfway down that paragraph it says:

"Farelogix is entitled to receive a fee."

It then goes on to make a broader point:

"In our view there is value to Farelogix in the enhanced functionality created by the BA agreement more generally, because it improves the utility and scope of application of the FLX services. This enhanced functionality is likely to lead to increased revenues in the form of sales using the FLX services which couldn't otherwise be realised. We take this broader commercial context into account."

That goes more to the second issue, but it's convenient to pick it up now.

5.65 identifies revenues received and receivable or provided. There is a point here, value receivable only applied to Farelogix, but the CMA made a finding, it

didn't apply the methodology inconsistently, it just applied the value receivable to the suppliers for whom it was relevant I am sorry BA, I said Farelogix. Value receivable only applied to the supply by Farelogix to BA and a criticism is made that the CMA has applied the criteria inconsistently. The answer to that is that it applied value receivable where it arose and there was no evidence that for any other supplier value receivable needed to be taken into account.

5.66 says that the CMA finds that the share of supply test is satisfied by annual revenue received and receivable. You get more detail as to how this was applied a few paragraphs on at 5.80 and 5.82, which starts at paragraph 89. At 5.80 is the fee which Farelogix is entitled to charge BA.

You have the parties' submissions at 5.81, the key point is in 5.82(a).

MR JUSTICE MORRIS: One moment. Okay.

MR WILLIAMS: The CMA relied on the agreed contractual value of the BA agreement as of the fee payable under the BA agreement as a measure of value and characterised that as revenue receivable. It's not referring to "value receivable" in an accounting sense, it's a common sense point that a service is worth what someone is willing to pay for it. That's a valid way to look at value and it's not irrational. Obviously in most cases value receivable will translate into value received, but that's not this case for reasons we are going to look at.

I do stress that this is, as you have seen in 5.80, a per ticket fee. So Farelogix is entitled to be paid every time BA uses the platform to secure a booking and that is an indication that there is a continuing supply and that on each occasion the service is used it has value. The whole point of this measure is that it's not a measure of actual revenues received, for the reasons I have just given. It's a measure based on what the parties have agreed the value is. So

by definition it's not effective criticism to say, "This was never received, so it's hypothetical". The whole manner of assessing the value is not based on whether it was received or not, and

MR JUSTICE MORRIS: One minute, please.

Okay, thank you.

MR WILLIAMS: The CMA's position is that the supply does have value, the supply by Farelogix to BA does have value. It's just that the value in pounds and pence or dollars and cents is low, and it is so low that Farelogix hasn't enforced it. But low value is not the same as no value. Low value is sufficient to establish an increment. The parties' response is in footnote 210 if I could just ask you to read that.

MR JUSTICE MORRIS: Yes.

MR WILLIAMS: In my respectful submission that is a de minimis argument. When Mr Ward says there's no value to Farelogix if the costs of collection outweigh the sums receivable, he is asking the wrong question. This is not about whether there is a net benefit to Farelogix and whether it breaks even. It's about whether there is a supply of value. If BA has agreed to pay for the service, that is an indication that it's a supply of value, albeit that the sums in issue in the end are small, too small to merit collection.

To the extent that Mr Ward relies on a point relating to accounting treatment, which I won't go into in open session, we say that's another de minimis point if it's anything. It's another way of saying that the sum doesn't register. It does not mean the supply has no value. In any event, you have seen the CMA when it talked about value receivable, it wasn't focused on that technical accounting issue.

The final point made under this heading is that this is the value of a messaging

service, not the provision of the RDS. Obviously this is to a significant extent a reframing of ground 2 expressed in the language of ground 3. Our case under ground 2 is that the messaging service, the value of the service to BA is that it enables the use of the platform to make the sale. That's what BA wanted to achieve. That's why it's agreed to pay for the service and it's significant that the payment is due consequential on the booking, as you have seen, not on the sending of a message per se.

We do say that if we succeed on ground 2 it will be a nonsense to say that there is a supply as found under ground 2, but for sums under the BA agreement only concern a messaging service and that the delivery and the relevant description of services has no value.

MR CUTTING: Can I ask a question?

MR WILLIAMS: Yes, sir.

MR CUTTING: When you and the CMA talk about value in that context, does it make a difference whether there might be a difference in value to the supplier, Farelogix, or BA? The reason why I ask that question is that were the revenue to be revenue receivable, it seems to me that's one thing. If the sums have actually been written off in an accounting sense, then they would have probably zero value to Farelogix, which would raise the value question slightly more starkly I think. But you might say, well they still had a value to BA because it's providing incremental bookings and revenue. But I am not sure that's value in the context of the share of supply test.

I know we might hear from Mr Ward about revenue receivable and write offs and where that line gets drawn, but it's potentially a relevant point in other cases under the legislation. I just wondered whether there is anything more to be said about that.

MR WILLIAMS: It's a very good question, sir, and it's one that certainly we have been giving consideration to. The focus is on the value of the supply and the supply is made to BA and the focus of the test, as we've identified, is on the impact sorry, I am going to come to this a bit later on, but the jurisdiction test is identifying a connecting factor with the UK.

Under the share of supply test, that connecting factor is a supply in the UK. Ultimately the focus is on the supply to BA, but what we are using here as a metric of measuring that is the other side of the equation. It's a supplier sided measure.

MR JUSTICE MORRIS: You are saying ultimately it's value to the recipient of the service is what you are saying, is it?

MR WILLIAMS: These sums would be paid by BA or are payable by BA. So if you are asking what is it worth, BA has decided that the service is worth what it is prepared to pay. In that sense it's value to BA, but the way one measures that is by looking at the supplier side of the equation.

MR JUSTICE MORRIS: We'll have to link this back right back to the point which is finding a measure of the share of supply.

MR WILLIAMS: Yes.

MR JUSTICE MORRIS: That's what this is all about.

MR WILLIAMS: That's right. If one looks at the different criteria in section 23.5.

MR JUSTICE MORRIS: Yes, that's what I was where is that most readily available?

MR WILLIAMS: That's bundle A1.

MR JUSTICE MORRIS: I am going to try and find it in the book, just looking at the other measures.

MR WILLIAMS: Some of them are clearly supplier sided. You have numbers of

workers employed, for example, capacity. In that sense, one is looking at the supplier side of the equation and if one is trying to assess whether there is a concentration you are trying to measure the suppliers' share.

MR JUSTICE MORRIS: Yes, that's yes.

MR WILLIAMS: But I think I mean the answer to your question, Mr Cutting, is that when we talk about value you are talking about the value to BA, but you are measuring it as with all of these criteria, or with a number of these criteria, you are measuring

MR CUTTING: I follow what you've said. That counts as an answer for me. Thanks.

MR WILLIAMS: Just standing back on this argument, the question really comes to this: was it irrational for the CMA to focus on value receivable in the sense that the CMA defined that as a means of measuring value in a case where the payments made were too small to merit collection? We say that's not irrational, it's actually a logical way, a very logical way of looking at the value where you are dealing with small sums. If there is a supply, there is an onus on the CMA to find a way of measuring the value of that supply so as to ensure that a concentration of supply in the UK does not escape scrutiny if scrutiny is merited.

This is criticised as a sort of hypothetical construct, but there are sound reasons why the CMA should find a way of capturing the value using such criteria as are appropriate. If the tribunal accepts that argument, then that's enough to establish an increment.

The CMA did however assess the value of the supply to Farelogix in a second way, which is value received by Farelogix. I want to be clear what I mean by that. The logic of this approach is that Farelogix generates value when sales are

made through its platform and the supply to BA means that additional sales can be made through its platform, but I am not talking here about additional fees per booking, I am talking about additional volume.

Sabre stresses that American Airlines was keen for BA to sign up to the Farelogix platform and the reason for that is that it facilitates incremental sales of AA tickets. It allows flights to be sold because the customer wants the BA segment. That's also in BA's interests, as we've seen, and it's also in Farelogix's interests. This is the point we picked up in 5.64. There's additional value to Farelogix where a flight is sold which can only be sold because BA has taken up the use of the platform. Farelogix can make additional sales, generate additional revenues.

Sabre says, well, the CMA does not know whether there really were incremental sales. It's true that the CMA didn't examine the specific sales made through the platform, the BA interline segments, and reached a view on whether any such sale would or would not have been made at the level of the consumer in the counter factual. It's not clear to me that it could ever have done that analysis. If one asks the question in public law terms: was it irrational not to look into that? In my respectful submission it was not irrational, it was a rabbit hole with no end. But it's clear that the tickets which were sold are tickets which could not have been offered through the Farelogix platform absent the BA agreement. That's why the arrangement works for all concerned and so there is a strong basis for inferring that these are incremental sales and in any event, and this is the point, this is actually only really a proxy for the additional value to Farelogix in any event. It's not set up as a measure. It's a proxy.

On the basis that there is incremental value to Farelogix in taking up the use of platform and making additional sales, the question is again how to measure

that value. Farelogix is remunerated through the direct connect services agreement, and I don't want to read any of this out but if we could just go back to 5.77, page 88. The words I emphasise are the confidential words towards the end of that paragraph.

MR JUSTICE MORRIS: Of (b)?

MR WILLIAMS: Of (b) I am sorry, yes.

MR JUSTICE MORRIS: Yes.

MR WILLIAMS: It's also important to look at 5.78, which explains the cost sharing arrangement under the AJB(?) agreement and the conclusion at the end of that paragraph.

I am not saying that that is a payment by BA to AA, I am not putting it that high. I am just making the point that this consistent with the substance of the position that there is the transfer of value between BA and Farelogix for services go in one direction and payments go into the other direction, albeit indirectly.

So the sale of the services to BA generates incremental sales, for which Farelogix actually receives revenue. Then we get to the point really, which is Sabre says this US revenue not UK revenue. That is, with respect, not the point of this analysis. This is not about who make the payment. It's about the value of the service and whether there is incremental value to Farelogix which is referable to its supply to BA in the UK, as distinct from its relationship with American Airlines alone.

The question of territoriality is concerned with where the service is provided, not with where the sum is transferred. If we have shown under ground 2 there is a supply in the UK, then we are in the right jurisdiction and this is a way of measuring the value of that supply.

MR JUSTICE MORRIS: Okay.

MR WILLIAMS: The CMA didn't compute the value under this heading as such, because as long as the increment was above zero, the test was met but it did explain the methodology one might use in 5.85. If you see in the second half of that paragraph:

"Other possible approaches would also fall within a range."

This is another aspect of the case where the CMA has looked at the economic substance not the formal position. The alternative is to conclude the supply from Farelogix to BA has absolutely no value, even though it results in additional sales by Farelogix, additional revenues to Farelogix and indeed additional sales by BA. We say that's a counter intuitive conclusion. It's certainly not the only rational conclusion open to the CMA on the evidence and it's ultimately a de minimis complaint.

On either of those bases there is a proper basis for finding an increment, even if the tribunal was against the CMA on the use of even if you were against on value receivable there is a proper basis on value received, but either is sufficient to establish the increment.

MR JUSTICE MORRIS: Are you about to leave ground 3?

MR WILLIAMS: That's all I wanted to say on that.

MR JUSTICE MORRIS: Can I just clarify something my mind. Again it's probably a basic question.

I think there was a suggestion that you have mixed and matched between received and receivable.

MR WILLIAMS: Yes.

MR JUSTICE MORRIS: The Sabre share or the Sabre valuation of their share is done on "received"; is that right?

MR WILLIAMS: Yes, that's right.

MR JUSTICE MORRIS: Whereas certainly in respect of the first part of the Farelogix it's done as "receivable".

Is it your case that the measure is for both in principle received and receivable? Okay. That we know that as far as Farelogix concerned the figure for received is zero and the figure for receivable is greater than zero and that in any event even if there's no receivable figure for Sabre it does not matter, because it would be additional to received and they would be over the figure anyway, is that

MR WILLIAMS: Yes, it's a combination of those points. This is isn't the point Mr Ward developed yesterday, so if I give you the references to our skeleton, it's paragraphs 94 to 96.

MR JUSTICE MORRIS: Okay, I don't want to take up more time on it particularly. Let me just mark those paragraphs.

MR WILLIAMS: Yes. We make the point you have just made at 95, sir, or one of the points you've just made. Which is that we have used the same measure for both.

MR JUSTICE MORRIS: Right.

MR WILLIAMS: But the application varied according to the circumstances of each undertaking, which I think is the way you articulated the point. Then we do make this additional point in 96, which is that there will be cases potentially in which the mixing and matching complaint will matter, because if you

MR JUSTICE MORRIS: I will read it. Unless you I don't want

MR WILLIAMS: The point we make is this is not a case where the mixing and matching point matters, because Sabre is over the 25.

MR JUSTICE MORRIS: That was my point really. Okay.

Thank you.

PROFESSOR MASON: Could I check one thing?

MR WILLIAMS: Yes, sir, of course.

PROFESSOR MASON: Thanks. I think this is part just to check my own understanding and part to check a point with you. Primarily interested, if I understood you correctly, in the value of supply in the UK to BA, just checking that you are comfortable with that statement?

MR WILLIAMS: Yes. Albeit subject to my exchanges with Mr Cutting on that question.

PROFESSOR MASON: One assessment of that value is to take the payments that would be due under the BA agreement, whether they were made or not?

MR WILLIAMS: Yes.

PROFESSOR MASON: Here is the point to just check with you, that may have been the assessment of the value of the arrangement to BA in 2011, but things may have evolved over time so that subsequently actually the value to BA was zero, potential evidence for that is the fact that BA employees had no knowledge of the arrangement. But that would only ever have been verified the first time that BA was required to make a payment, at which point it would have said, "Well, hang on a second we are being required to make a payment for something that we don't value".

The fact that they were never asked to pay unfortunately doesn't flush out the fact that the value is zero. Is there something faulty in that logic?

I know it's asking you a counter factual, because that is not what happened, but I am just trying to sort of test the nature of the evidence on payments that would be due under a contract in 2011 when we know that there was some change in the view of that agreement over time by BA.

MR WILLIAMS: I mean, I think we are now in open session of course and I think we

might be talking about the confidentiality ring material now. We don't unfortunately have a precisely redacted version of those notes.

I think the first point to make really is the submission I have already made about the perception of those employees and the fact that their perception is a function of the fact that this agreement operates at a very low level. The fact that it isn't on their radar because it operates at a very low level should not in my submission be treated as a suggestion that the agreement has no value to BA as a corporation.

The question is the value of the service and the service is as defined in the agreement and there is a price attached to that service. Of course we are not suggesting that the agreement has greater commercial significance to BA in the big picture. BA is a huge business and one does not measure its turnover in dollars and cents, but nevertheless one is looking at the value of the service and it's important not to treat that kind of very big picture assessment of materiality to a global business with the value of the service. Those are two separate questions.

In terms of your question, it's true that had there been countervailing evidence because something along the lines that you described to me had happened, sir, to indicate that one had a different perspective on the points I have just made to you about why there is a continuing service which has continuing value, then the CMA would have had to take that into account. All one has in the end is the agreement and the fee payable and it's rational in the absence of countervailing evidence in my submission to say well the parties have put a value on that service and because it operates at a low level people aren't really thinking about this, but that is still the value that was put on the service.

PROFESSOR MASON: That, for the point I asked, is sufficient as a response.

Thanks.

MR WILLIAMS: Just to continue my exchanges with Professor Mason, before I get to ground 4 I want to come back to a point Professor Mason raised with me about the language of IT solution. I responded by saying it was uncontroversial standard terminology to describe an IT application and that the controversy was really about whether it was given sufficient precision in the rest of the relevant description of services. I want to just give you a flavour of the material before the CMA just to really support that submission.

If you could take out the merger notice, which is 6D, tab 9. This is a long document. It's starts at 368. If you turn through to 385, you have a section called "Introduction to the airline ticket distribution industry". The term "solutions" is used throughout this document to describe IT products or applications. You can see the heading 3.3 it's "PSS solutions".

In 3.9, the second line says:

"Sabre's PSS dependent airline IT solutions are not those requiring direct access."

3.13 has a heading "Distribution solutions" and then goes on to discuss distribution solutions.

This is the last reference of this nature I am going to give you. 3.38 talks about NDC direct connect solutions, 3.38.1.

The phrase "IT solutions" is itself used on quite a few occasions, I will give you just a couple more references.

3.60 talks about a particular person within the Sabre organisation being primarily responsible for developments for airline IT solutions.

MR JUSTICE MORRIS: Sorry, page 360?

MR WILLIAMS: I am so sorry

MR JUSTICE MORRIS: No you have confused me, 3.60.

MR WILLIAMS: I was not very helpful there. 399, paragraph 3.60, airline IT solutions running on to page 400.

MR JUSTICE MORRIS: Yes.

MR WILLIAMS: Then much further into the document at page 504 there's a discussion of whether Sabre would use market power to impose a suboptimal IT solution.

MR JUSTICE MORRIS: Which paragraph is that, please?

MR WILLIAMS: 20.35.

And page 516, 24.36, talks, about two thirds of the way down, about suppliers with this is the market more generally now a proven track record in providing IT solutions to airlines.

The word "solutions" is used possibly as many as 200 times in this document, and you can see the way it's used. It's used to refer to particular products or applications and then more generally the phrase "IT solutions" is used generically, so it's a word that's naturally used to describe the applications or products in this sector at least, if not more generally. We make the point although Mr Ward complains about various things under ground 4, it does not seem to us any difficulty stems from the phrase "IT solutions". There's no dispute that the parties supply IT solutions, as we've just seen, and the debate is really about it whether that brings in IT cables and monitors and we discussed that yesterday.

Mr Ward developed two main aspects of ground 4

MR JUSTICE MORRIS: We are now on ground 4, or we were anyway presumably effectively?

MR WILLIAMS: We were sort of halfway between

MR JUSTICE MORRIS: Ground 3.5 or yes, all right.

MR WILLIAMS: Mr Ward complained about the treatment of four particular suppliers who were excluded from the RDS. The chairman has asked me to deal with a fifth, which is suppliers of airline websites.

MR JUSTICE MORRIS: Sorry, I am just distracted. I am getting some for

MR WILLIAMS: I will deal with the four suppliers Mr Ward focused on and you asked me to look at, chairman. That's the first aspect.

Then the second aspect is the failure to investigate, which is largely based on footnote 135 and the questionnaire issue.

Sabre calls it the survey point, but we've stressed it is not a survey.

If I can start with what the CMA included in the RDS. The focus of the RDS is on the services which actually make the connection between the travel agent and the airline, create the channel for communication. I'll come to explain the point, but that's not the sole purpose, but that's certainly what characterises Farelogix and Sabre's solutions. It's what they had in common. That core function, that core functionality, is very different from all of other quite different thing which Sabre says should fall within the RDS, which are different products with a different focal purpose and which in some instances are not even supplied to airlines, they are supplied to or directed at different customers.

This does depend to some degree of an assessment of the purpose of the product and the way it's marketed. Sabre says if you have done your job under ground 1 properly this should be an easy question largely and sometimes it is easy. Until yesterday certainly we were arguing about Openreach, which is a point which Sabre's appears to have let go quietly. We say if it has let it go, it's let it go for good reason. Internet infrastructure is not a product supplied for the purposes of the RDS and the purposes specified in the RDS, however

one looks at it. We don't say everything is a Jaffa Cake and in fact we say no one would mistake Openreach for either a cake or a biscuit, it's in a completely different food group.

Some cases are less stark than Openreach, because the product may be used for more than one purpose and it may have elements in common with the RDS and the question will arise in those cases: is this a product which falls within the RDS or does it really do something else?

I will come back to an example or two of that. Sometimes there won't be a right answer or least a clear cut answer. There are bound to be questions of fact and degree and appraisal. Mr Ward accepted there will be examples of that discretion, he says at the margins, we say well it may not be just at the margins. But there's no disagreement really about the principle, it's a question of application.

I said a few moments ago that the core feature which the GDS and the API have in common is that they create that connection between the airline and the travel agent. It is true that the CMA didn't treat that as a definitive criterion, because there was at least one marginal case where the CMA treated them as part of the relevant description of services even though the solution does not provide that direct connection. Sabre has used that point to try and unravel the CMA's findings by comparing other things to non GDS aggregators rather than to the relevant description of services. It says, "Well, if you've included non GDS aggregators, why have you not included these other things?" That is not a legitimate line of attack when one looks at the way the CMA treated non GDS aggregators.

If I can just start with what they do, I think it's helpful to give you some real world examples. If we go to the Final Report, volume 4, tab A, bundle page 137.

842 and 843 are examples of non GDS aggregators. Travelfusion tends to be the main one that's referred to, if you just want to read that.

(Pause)

MR JUSTICE MORRIS: Yes.

MR WILLIAMS: The point I want to emphasise is that these suppliers are supplying to airlines. They are aggregators and they supply to airlines.

That's hopefully helpful colour. If we go back to the jurisdiction section, I'm afraid we are going to jump back and then jump again to the appendix, but I'm afraid that's the way these reports work on some of this issues. If we go back to page 64, I'm afraid this is a bit repetitive but I think it's important I give you the references.

MR JUSTICE MORRIS: Yes.

MR WILLIAMS: The first one is 118, which you saw yesterday. It says in the last line:

"Non GDS aggregators cannot distribute content without the support of direct connects and therefore we consider inclusion of non GDS aggregators to be conservative."

So it's a marginal case.

What do we mean by "conservative"? What we mean is it potentially understates the parties' shares of supply, so it's giving the parties the benefit of the doubt.

122, Mr Ward has shown you this and emphasised it:

"We included them on a conservative basis, they are providers of IT solutions for aggregate content from multiple airlines and transfer it to a travel agent. In that sense their functions are very similar to a GDS and therefore we consider it appropriate to include them in the RDS. We do not think that the fact they necessarily connect directly to an airline affects our view as they are still a

necessarily important component to the transfer of airline ..."

That's not introducing a new test of necessary and important component, it's just a factual appraisal of the non GDS aggregators. The points that are emphasised are they are functionally similar to a GDS. Again, it says it's a conservative decision.

This isn't saying the test is now any important component, that's really the wrong way to read this.

The position is really this: this is a service that has the different elements of the RDS but it doesn't do the very thing that the GDS and the API do, which is make that direct connection. That's why it's the marginal case. But it has been included.

MR CUTTING: Can I ask a question there. What is the nature of the supply by the non GDS aggregator to airlines?

MR WILLIAMS: That's a good question, sir. I can't answer it immediately.

The reason I showed you 842 and 843 was to make good the proposition that there are real world relationships, as supported by that. I am going to show you that there is real world revenue as well in a moment, but I actually don't have a more practical answer as to what that actually looks like. I will show you the revenue and then perhaps I can get some more insight into that over the short adjournment.

MR CUTTING: Yes, please.

MR JUSTICE MORRIS: It has to be an IT solution presumably

MR WILLIAMS: Yes.

MR JUSTICE MORRIS: of some sort?

MR WILLIAMS: Yes.

That is the finding. Of course it isn't actually challenged, there's no challenge to the

proposition that non GDS aggregators supply to airlines. There's no specific challenge to it. That's not itself a sort of ground of challenge. What Mr Ward does is he banks non GDS aggregators

MR JUSTICE MORRIS: There's no difference with the others or anyway.

MR WILLIAMS: Our submission is that there is a difference

MR JUSTICE MORRIS: Okay.

MR WILLIAMS: because of the supply to airlines, but that I guess comes back to Mr Cutting's point.

MR JUSTICE MORRIS: Yes.

MR WILLIAMS: Just to give you the rest of the references here. 5.36(a) distinguishes between metasearch and non GDS aggregators, because one involve a supply to airlines, the other doesn't. That's not the only difference, but that is a difference. There's another difference which is metasearch does not enable a booking at the travel agent end, you have to click through.

Then there's 5.68(d). This is about revenues and this is a partial answer to Mr Cutting's question, which is that there are revenues generated by non GDS aggregators from airlines. That is what is included in the share of supply calculations here, so there is a relationship at least to the extent there's actually payment.

PROFESSOR MASON: Sorry, it just took me a little bit of time to look up what I wanted to look up before asking you about your comment about metasearch engines.

MR WILLIAMS: Yes.

PROFESSOR MASON: Where I think I heard you say they don't allow the travel agent to make a booking without a click through?

MR WILLIAMS: I did say that.

PROFESSOR MASON: But of course that's not a condition that's in the RDS?

MR WILLIAMS: No, but the condition in the RDS service is provided sorry, sir.

MR JUSTICE MORRIS: I think there's an echo and I am wondering whether if Professor Mason probably has already muted whilst Mr Williams could you repeat the answer perhaps?

MR WILLIAMS: Yes. That's not part of the RDS, but the RDS specifies that the service must be provided for the purpose in the end of enabling travel agents to make bookings. There is a question of degree then about the extent to which the service performs that function and the fact that you can't actually make the booking through that application is something which is considered as part of that limb of the RDS.

PROFESSOR MASON: All right, you may say that but I don't see that explicitly in the RDS?

MR WILLIAMS: No, I was going to deal with metasearch separately. I was just picking up that point as we went through. That was not the totality of my commissions on metasearch, perhaps we'll come back to that.

PROFESSOR MASON: Let's return to it then, please.

MR WILLIAMS: Then if we turn to appendix B and in particular ... sorry, I have two different versions of the report with different numbering, I have not updated this reference.

Sorry, it's paragraph 7 on page 459. This really makes good the point that the focus here as far as non GDS aggregators are concerned is on airline revenue, revenue generated from UK airlines.

Again, one sees in paragraph 8 the fact that this is a marginal case, could be considered to fall outside ... then it says, "Doesn't affect our calculations".

While we are here if you could just look at paragraph 9, which says:

"The parties identified a large number of other suppliers which could potentially supply APIs, aggregation services ...(Reading to the words)... revenue."

I will pick that up a bit later on when we come to deal with failure to investigate materiality.

Just to finish this topic off before we break. You can see what has happened, the CMA has taken an approach which gives the parties the benefit of the doubt by including non GDS aggregators in the share of supply calculation, to make sure that their shares of supply are not overstated. Even on that basis Sabre exceeds the relevant share of supply and Sabre is now using that as a lever for trying to unwind the whole approach. The right way to look at non GDS aggregators is that they are a marginal case in which the CMA gave Sabre the benefit of the doubt, because applying the RDS the elements are there, even though they don't do the same thing as the GDS and the API. But they certainly are not the yardstick by which to judge other things. Quite the opposite.

That is the introduction submissions I am going to make on the specific services to which Mr Ward addressed yesterday. I am pleased to say I have sped up quite a lot since our last break, so I am making good progress now.

MR JUSTICE MORRIS: Good. If that's a convenient moment for you

MR WILLIAMS: It is sir.

MR JUSTICE MORRIS: we'll break and we will start again let's try and make it quarter to in any event, which should give you a reasonable chance of finishing by 4.30, but as I said before I think we are not keen, which is an understatement, on going over until tomorrow.

MR WILLIAMS: I don't think I will go past 3 o'clock now, sir.

MR JUSTICE MORRIS: Okay. Very good. Thank you very much.

MR WILLIAMS: Thank you.

(1.03 pm)

(The luncheon adjournment)

(1.45 pm)

MR JUSTICE MORRIS: Yes, Mr Williams. We are ready at our end. Just to remind myself we are still in open session; is that right?

MR WILLIAMS: We are in open session, yes.

MR JUSTICE MORRIS: I think I may need to wait for the livestream. (Pause)

Yes, I think we are there, aren't we?

Yes, thank you, Mr Williams.

MR WILLIAMS: Thank you sir.

Just to answer the questions that were asked not long before lunch.

Professor Mason's question in relation to the bullet point in the notes of the discussion with BA, the answer is this is the information we've gathered over lunch, I think it's the most up to date position. If it turns out it's not we will update the tribunal. That there have just been exchanges with American Airlines, just before this discussion, about the operation of the platform and the operation of the connection to interline partners. So the CMA had an up to date position from American and this was an attempt to get BA's perspective, they already had AA's perspective. We don't think at the moment they acted on that suggestion, because there had already been that up to date dialogue with American.

Coming back to Mr Cutting's question, I am sorry I was snow blind when you asked that question but there is a clear answer to it. We saw in footnote 122 that the reason the non GDS aggregators are included in the relevant description of services is their functional similarity to GDSs, and of course that functional

similarity is the aggregation, so that's the IT solution that is relied on here.

The important point to make is that non GDS aggregators, they are travel agent facing they are not consumer facing platforms. They aggregate together information from airlines and as I said the IT solutions for those purposes is the aggregation function and they will have agreements with specific airlines to enable them to collect that information, for example, through an API or a GDS.

Having obtained that information, it's then made available through the aggregator to the travel agent, which is other end of the connection, to enable the travel agent to make the booking. The similarity of the function is the aggregation function and that's the way it works. So the revenues that I was talking about before lunch are revenues generated on the basis of that relationship. I hope that helps.

Sir, you are very quiet.

MR CUTTING: Sorry, can you hear me now? Is that better?

MR WILLIAMS: Yes.

MR CUTTING: I suppose I am still struggling from the formulation of the answer you have just given us to understand where the solution to the IT solution provided to airlines for the purpose of enabling airlines to communicate travel services information, so it's that first part of the formulation is the context in which it's an IT solution provided to airlines?

MR WILLIAMS: Yes, sir. But in a way what you are playing back to me is the reason why this was a marginal case, because what I have just been describing is the similarity to the functionality of the GDS. There is at least in certain circumstances a relationship with the airline which gives rise to the generation of those revenues, the reason this was a marginal case and it was

only included on a conservative basis was precisely that the non GDS aggregator does not make that connection to the airline.

MR CUTTING: I understand that, but then if it is not a solution provided to airlines but it has that other functionality that follows that part of the RDS, it at least raises a question about any other product that has the same functionality that's not provided to airlines and the way in which you apply the criteria. That's partly about whether we say it's still a question of how section 23.5 works and that if you say that to airline is a part of the RDS criteria that we can be flexible about, do we have to consider the rationality of applying the definition flexibly in some cases but not others? If you see what I mean.

MR WILLIAMS: Yes, I see what you mean, sir.

I come back to the point that the fact that the CMA has treated one particular supplier on a conservative basis does not become the yardstick. What the point you make, which I accept, is that the CMA then needs to have if you like cogent reasons for

MR CUTTING: Distinguish.

MR WILLIAMS: treating other suppliers in a different way. I accept that, and I think this point relates mainly to metasearch, because they are the other aggregator.

The key distinction as far as metasearch is concerned, and I will deal with this now and perhaps I won't need to come back to it. Is the non GDS aggregator, as I said a few moments ago, makes the connection through to travel agents. Non GDS aggregators, as per the finding in 5.36(a), are essentially consumer facing sites.

MR JUSTICE MORRIS: You meant metasearch.

MR WILLIAMS: I beg your pardon, metasearch are consumer facing sites. That's

not to say that one can never connect through to a travel agent through metasearch. But this comes back to the question of fact and degree that I was talking about in opening, which is to say that the purpose for assessing metasearch in the context of the relevant description of services, do they provide an IT solution to airlines? I will look past those words for the minute, because I understand the point you put to me about that. For the purpose of airlines providing travel service information to travel agents or for travel agent bookings, it would not be right and it certainly wasn't irrational to view metasearch as falling within that definition.

That's not to say that the platform and the connection is never used and can never be used in order to make a connection through to a travel agent, but one has to look at whether particular products and services fall within that focal definition. In our submission they don't.

That is the central distinction between non GDS aggregators and metasearch, which is that the non GDS aggregator, its purpose ... it exists to enable to facilitate the provision of information through to the travel agent, which is obviously a central component of the RDS. That is not the purpose of a metasearch. It's one thing that it can be used for, but that's not its central purpose. It does not capture the essence of the product.

That's why we say that there are questions of fact and degree. Non GDS aggregators are there to make that connection through to the travel agent, which is the main focus of it.

To revert on a point that I mentioned and Professor Mason picked me up on about the clicking through, I am afraid misspoke when I said that. That is a point of fact, but I don't rely on that in the context of 5.36(a). 5.36(a) is clear that the distinction between metasearch or the point of distinction between

metasearch and non GDS aggregators is that the non GDS aggregator is directed at the travel agent, whereas the metasearch is directed at the consumer.

Hopefully that

MR JUSTICE MORRIS: You emphasise in relation to metasearch that it's consumer facing rather than travel agent facing?

MR WILLIAMS: Yes.

MR JUSTICE MORRIS: Do you still also say that it's not an IT solution provided to airlines? Because I think that's a separate Mr Ward identified two reasons effectively, the last sentence of 5.36(a), not an IT solution provided to airlines.

MR WILLIAMS: I think in the course of his submissions yesterday Mr Ward said, well, in that situation the metasearch engine is paid for by the travel agent and he said but nothing turns on that. The point I have been emphasising in relation to non GDS aggregators is that they've been included to the extent that they generate revenue on the airline side. We don't agree that nothing turns on that.

I'm afraid I don't have at my fingertips an explanation as to whether the relationship between the metasearch engine and the airline is materially different in the respects that Mr Cutting was raising a few moments ago, I will see whether I can get an answer to that question

MR JUSTICE MORRIS: But you are relying now mainly on consumer facing?

MR WILLIAMS: Yes. You can see yes, exactly.

MR JUSTICE MORRIS: Okay.

MR WILLIAMS: If there's any more to say about that, then I will pick it up in my submissions.

PROFESSOR MASON: Could I ask a follow on therefore on that?

MR WILLIAMS: Yes, sir.

PROFESSOR MASON: There are the various moving parts of the RDS at least for IT solutions provision of travel services information, airlines, travel agents. Non GDS aggregators have been allowed in, you say on a conservative basis, despite a question about whether they supply to airlines.

MR WILLIAMS: Despite the

MR JUSTICE MORRIS: Can I just point out that when Professor Mason is on there is an echo. That's not in any way to invite Professor Mason not to be on, but we may have to mute and unmute and speak sequentially.

PROFESSOR MASON: Thanks for warning me, I don't hear the echo my end, but sorry if you are experiencing it.

But metasearch is ruled out because it's primarily customer facing, consumer facing rather than travel agent facing. So one is in, one is out depending on which side of the platform we are talking about. Does that mean that the CMA placed greater importance on whether something was facing travel agents rather than facing airlines? I am just trying to tease that out.

Does that make sense as a question?

MR WILLIAMS: It does. I don't think it's a matter of greater emphasis. It's just that as I was saying a few moments ago, the non GDS aggregators create a specific link through to the travel agent and the focus here is on that channel of communication. Yes, the purpose of the RDS is to enable the focal purpose under the RDS is to enable travel agents to make bookings, so if that component is not satisfied, then you are outside the RDS.

I don't think it's a question of greater or lesser weight, I think it's that that was a central focus of the RDS.

PROFESSOR MASON: Let me make sure I get the words exactly right, if you are

not supplying an IT solution to airlines, you are also outside of the RDS?

MR WILLIAMS: That's true.

PROFESSOR MASON: But nevertheless one thing that may be outside of the RDS on that basis, that is to say non GDS aggregators, was included, whereas another thing that was outside of the RDS by dint of not providing information to travel agents has been excluded.

I understand you want to say non GDS aggregators are a marginal case and shouldn't provide a yardstick, but I can't quite see through to the end of that argument as to why it isn't the start of the slippery slope for you, to switch analogy. Why isn't it a yardstick once it's allowed?

MR WILLIAMS: The yardstick remains the RDS and the whole focus of the analysis is on this channel of communication from the airline through to the travel agent and so if in this case the non GDS aggregator has that central component and in other respects bears some similarities to the GDS, then one can see why that is treated as a marginal case even though it misses some of the central characteristics of the services. But it doesn't mean that one can then start to relax other limbs of the RDS. The purpose of treating non GDS aggregators on a conservative basis is to give the parties the benefit of the doubt. Having taken that approach, I mean it does not follow that you then climb onto the slippery slope and start to expand the category to include things that are missing central components.

It's just false logic in my submission.

MR JUSTICE MORRIS: Aren't you saying, Mr Williams, that you were satisfied, despite the doubt, that non GDS aggregators satisfied both conditions?

MR WILLIAMS: Yes, we are

MR JUSTICE MORRIS: They supplied the IT solution to the airline, condition 1.

2, the purpose was to enable travel agents to make a booking, because the other end of the pipeline was travel agents.

MR WILLIAMS: Yes, that's right.

MR JUSTICE MORRIS: What you are saying in relation to metasearch is that even if it complied with the first condition query, it certainly did not comply with the second.

MR WILLIAMS: Yes, that's exactly the submission, sir, yes. So, yes, that's right.

The fact that the CMA has exercised discretion and included non GDS aggregators on a conservative basis even though they lack that direct connection.

MR JUSTICE MORRIS: Yes.

MR WILLIAMS: It does not mean as a matter of public law that the CMA then has to start to consider all sorts of other potential relaxations on different issues in favour of different parties, because it's a public law standard.

MR JUSTICE MORRIS: Okay.

Yes, thank you.

MR WILLIAMS: Going back to the beginning of the list, non-VITOs, now non-VITOs you heard yesterday are travel operators that don't themselves offer flights and so they add flights into their package. To that extent they aggregate flights as part of a package which are sold to an end consumer.

Although Mr Ward sort of disparaged consideration of whether these services are comparable. If you stand back this is obviously a different service which is really nothing like what the services is that the parties provide and it's really nothing like what a non GDS aggregator does either, although he said that there's an aggregation function. These companies are broadly speaking selling holidays, they are called tour operators. Mr Ward focused on the aggregation element, but he seemed to say that the CMA accepted it the was

an IT solution provided to airlines, and they didn't accept that.

This is dealt with most fully in annex B, part B. It's on page 456. You saw footnote 28 yesterday. Could you read footnote 29, please. (Pause)

If you have read that, you can see what it says. It says that they are more like a travel agent. They are effectively consumer facing and the customer is not the airline, they are selling holidays. We went through the material yesterday on the nature of the market and competition and the focus on airlines and this is really nothing to do with that. We say that's completely clear and we don't really understand why Sabre has the wrong end of the stick about this. It's nothing like anything in the relevant description of services, other than that there's an aggregation component in the middle of it and so it falls outside the test.

This is another instance where Mr Ward has said you included non GDS aggregators even though they didn't make a direct connection and so you should include these aggregators. But it's very different.

You have seen the materiality analysis on this point.

MR JUSTICE MORRIS: Do the tour operators receive anything from the airlines by way of fee or recompense?

MR WILLIAMS: I will take instructions on that, sir.

MR JUSTICE MORRIS: Okay. It may not matter if the service is not the service, it's not an IT solution.

MR WILLIAMS: I have more or less said what I had to say about metasearch, subject to any further instructions I get.

I will move on then to the next topic, which is airline.com. It's necessary to separate as far as airline.com are concerned, airline.com itself and the people or suppliers that design and build airline.com.

MR JUSTICE MORRIS: Okay.

MR WILLIAMS: Because the first point the point Mr Ward took was subparagraph 1, airline.com. Mr Ward criticised the brief treatment of this in footnote 135 but the reason it's dealt with briefly is that it's a short and straightforward point, which is that an airline's own website is not a service provided to an airline. This is not about distribution channels it's about services provided to airlines. The Competition Appeal Tribunal's website does not provide a service to the Competition Appeal Tribunal.

As the footnote goes on to explain, airline.com doesn't exist for the purpose of the RDS. We are not saying again as on metasearch that the websites are never used by travel agents, but it's not their main purpose. What 135 is saying is that websites are generally used by consumers, so again going back to the purposive aspect of the RDS for the purposes of enabling travel agents to make bookings. That's not the focal purpose of this, it's not really the purpose of the website.

Mr Ward showed you some of the evidence on that yesterday. Can I just give you another reference, largely for colour, which is 10.99.

MR JUSTICE MORRIS: Sorry, is this paragraph 10.99?

MR WILLIAMS: 10.99, page 302 of the report.

You can just see in the middle of that:

"IAG told us there are some products they do not offer on our website but we do offer through the GDS and then the NDC so the website would have only been a small alternative and we don't expect travel agencies to book on the business to consumer website."

Just some colour in relation to that.

It's not a case of never, it's a question of fact and degree.

I think that one can sense check this by going back to the discussion we had yesterday about NDC. The whole point of NDC is that it enables airlines to create the functionality in the indirect channel that they are able to offer in the direct channel. That issue only arises because travel agents tend to use their own distribution channels rather than airline websites.

Airline.com is not an IT solution provided to airlines, nor is it an IT solution provided for the purpose of enabling travel service information to be provided to travel agents so they can make bookings. That's one thing it can be used for at the margins, that last bit, but it's not its purpose.

Of course Sabre may say the GDS has more than one purpose and you've focused on one bit of the GDS, but this is really a matter of judgment about where the boundaries of the RDS lie. It's a central purpose of the GDS to connect airlines through to travel agents, that's the focus of this. That's the raison d'etre of the GDS. There is a clear difference from airline.com and to the extent this is a question of fact and degree, we say there is a rational line to draw between the two and it's a fact for the CMA to judge.

So before I deal with self supply briefly. Sir, you asked me to deal with suppliers of airline websites, which are dealt with briefly at the end of paragraph

MR JUSTICE MORRIS: Oh, yes.

MR WILLIAMS: 5.36(e).

MR JUSTICE MORRIS: The builders.

MR WILLIAMS: The builders of the websites, yes. It's the end of 5.36(e).

MR JUSTICE MORRIS: Yes.

MR WILLIAMS: Looking back at it, the drafting is quite compressed but broadly speaking this is making the point was just making about airline.com, which is ... and it uses the words, "... that enable travel agents to access travel

services information". And there's a footnote 135, in fact footnote 135 contains the point I just made about airline.com, about how they are generally used by consumers. Really if you put the two together, I mean you can see what this is saying. It's saying that the people that build websites again are not building an IT solution the purpose or which is to connect to travel agents. That's not what the airline website is there to do.

It's the same point. It's just that here we are dealing with companies that are providing IT services, IT solutions to websites, but the point still breaks down when you get to applying the rest of the RDS.

MR JUSTICE MORRIS: Can I just read the rest of 5.36(e)?

MR WILLIAMS: Yes.

MR JUSTICE MORRIS: Sorry, the bit, the passage "providers of messaging" oh, providers of messaging technologies is a different point; is that right?

MR WILLIAMS: Yes, it's the very end of 5.36.

MR JUSTICE MORRIS: Ah, okay. Yes, sorry, it's that "do not provide an IT solution to airlines that enable travel agents to access ..."

MR WILLIAMS: Yes.

MR JUSTICE MORRIS: Although it's not emphasised, you are saying that that sentence has within it the point that in fact airline websites do not enable travel agents.

MR WILLIAMS: It's not model drafting because it uses the words "that enable", but the (inaudible) is about the purpose, and I will develop that submission about airline websites.

MR JUSTICE MORRIS: Of your two points that relate to airline.com itself, one is it's not a supply to the airlines and two is it's not for the purpose of bookings by the travel agency. Reason number 2 but not reason number 1 applies to the

website builder.

MR WILLIAMS: That's right, sir, yes.

MR JUSTICE MORRIS: Okay. All right, I have that point.

MR WILLIAMS: It's just important to say I mean, as I say, that drafting is pretty compressed and it's not a point Mr Ward pressed yesterday. It actually wasn't a major point in the enquiry at all. We've looked to find where it was dealt with in the representations and I think if I can just give you two references. One is response to the provisional findings at paragraph 229, which just gives these as an sorry, it's

MR JUSTICE MORRIS: Can you give me the bundle page reference?

MR WILLIAMS: Yes, it's 6H/22, 1163.

MR JUSTICE MORRIS: Yes.

MR WILLIAMS: It just says these could fall within IT solutions is, broadly speaking, what it says, but it does not engage with the rest of the debate.

Then we don't think I mean, I will show you it in a while, but there's annex 4 of the response to the PFs, which is 7B/6243. We don't think that the providers in table 1 in that document contain website builders so it's a point which was a bit of a nothing point in the investigation.

MR JUSTICE MORRIS: Okay.

MR WILLIAMS: And that's relevant to the detail in which it's dealt with in the report.

You saw in the BA case yesterday that the duty to give reasons relates to the principal and important and controversial issues, and this was not one of those.

MR JUSTICE MORRIS: Okay.

MR WILLIAMS: The last category is self supply, and we did cover this yesterday. The RDS is to supply the service to airlines, and as a matter of language

when an airline carries on a function itself it does not provide a service to an airline, but it's not just a matter of language, it's a matter of economic substance. There are obviously differences between supplying on the open market and deciding to self supply a particular function. You can see why that's not part of the analysis of whether there's a relevant concentration of supply, and that's all separate from the question of whether they exert a competitive constraint.

Now Mr Cutting asked some questions about this yesterday, and I just thought it was helpful in that context to go back to the guidance at authorities D6, paragraph 456. It's the first bullet on page 157. Because Mr Cutting said, well, you have not quite broken out self supply in your reasons, and I said, well, that's because we have focused on external supply.

Now the first bullet on 157, it talks about you can aggregate intra group and third party sales, even if this might be treated differently in a substantive assessment, but I wanted to emphasise the word "sales" because there is a difference between an intra group sale and self supply. One is something which looks more like a service provided as between group companies and the other is simply doing something for yourself.

Mr Ward said, well, there is really no difficulty with taking into account self supply, but the focus of that paragraph is on something different. That deals with the four points that Sabre has picked out. In my submission, the CMA's assessment of each of those four categories and the additional category the Chairman raised was on any view rational. We accept that, looking at the matter in the round, there were some

(2.23 pm)

(Break due to technical difficulties)

(2.29 pm)

MR JUSTICE MORRIS: Mr Williams, if you will just give me a moment.

MR WILLIAMS: Yes, sir.

MR JUSTICE MORRIS: I am ready. Thank you, Mr Williams.

MR WILLIAMS: Just to partly answer a question you raised about whether non-VITOs received money from airlines, there is of course the sensitivity on page 458, which you've already seen. But in the short break we've had I have not been able to take instructions on exactly what the basis of that is, so there is a sensitivity based on revenue

MR JUSTICE MORRIS: Yes.

MR WILLIAMS: but a lot of that information came from other parties. If the tribunal would like to know the answer to that question we can

MR JUSTICE MORRIS: Yes.

MR WILLIAMS: But we think the information came predominantly from the parties, so it may be that if we excavate that, we won't be able to say very much more about it.

MR JUSTICE MORRIS: I am not sure it's a central point.

MR WILLIAMS: I don't think so.

MR JUSTICE MORRIS: You have dealt with the four categories, haven't you?

MR WILLIAMS: I have just concluded that.

MR JUSTICE MORRIS: You were going to take us to one more.

MR WILLIAMS: I was about to move on to the failure to investigate.

MR JUSTICE MORRIS: Did you say you were going to take us to a fifth example or not?

MR WILLIAMS: The fifth example was self supply, which I have dealt with.

MR JUSTICE MORRIS: Okay, it does not matter. The enumeration. Fine you've

covered what you want to cover.

MR WILLIAMS: The fifth example was the people that build the websites, which I dealt

MR JUSTICE MORRIS: Yes, fine. Thank you. We are doing the survey evidence point?

MR WILLIAMS: Yes, exactly. Before we get to that there is a general complaint that broadly goes along the lines of look at footnote 135, the points are very brief, this shows that you failed to investigate the market.

In my submission, that does not follow at all. I mean obviously the first thing to say about the failure to investigate is it is another way of expressing the broad complaint that the CMA does not understand the market and has made mistakes and errors in understanding it. We have dealt with four of the specific categories and our pleadings deal with other categories. The headline answer is well the CMA had sufficient and good reasons for making a decision about each of these categories and there was no material gap in its understanding, it was able to take a view about all of them. It's a rational view and it's an evidence based view. Really, the criticism that the CMA failed to investigate this does not really have any life independently of the specific criticisms. If Sabre can't make out the specific criticisms then there's nothing to suggest there was a failure to investigate.

One does have to ask what more is it said that the CMA should have done. I do just want to show you annex 4 to the provisional findings, which is in supplementary bundle 7, B6. The main thing I want to do in relation to this is just to show you the sheer number of parties that Sabre attempted to put in play. We've counted them, we think there are 49. It's obvious that faced with a submission of that nature the CMA has to make a judgment about how

much work it needs to do to deal with these points. Each of them, the tribunal already has a flavour that beyond the more difficult cases than perhaps we've focused on, there was a scattergun aspect to this which dragged in all sorts of services that have nothing common with the RDS.

Sabre criticises the CMA for only having piecemeal and tangential evidence about some of these suppliers, but these are points Sabre pursued to try and drive down its share of the supply. The complaint seems to be well we can put up as many kites as we want and it's up to you to carry on an open ended investigation into every point which we make or half make.

That is not a realistic position for a party to take in relation to a time limited merger control investigation. There's a statutory deadline for these reports. You've seen the size of the report and the amount of work the CMA had to do and this is one strand of the analysis relating to one component of the share of supply test. The CMA had to draw a line in investigating these issues. You've seen that it looked carefully at a very long list of services and reached conclusions on each one, reasoned conclusions, evidence based conclusions on each one. There's nothing to suggest that it drew the line in the wrong place or that it wasn't it a position to answer the statutory question. The fact that some of those conclusions boiled down to a sentence or two in a footnote is not, in my submission, a basis for saying there is a failure to investigate.

There is an issue not just of the nature of the services that are provided, but there's also a question of materiality because many of the additional suppliers the CMA did look at, at the parties' suggestions, had no material UK supply. I showed you one reference in part B of appendix A while we were there, and there are other examples in footnotes 131 and 134. You can go to them if you like.

MR JUSTICE MORRIS: No, I just want to mark them that's all.

MR WILLIAMS: One is not just enquiring as to whether there might be other suppliers. The question is are there other suppliers who have a realistic prospect of disturbing the share of supply calculation? The submission that there may have been a cumulative effect that the CMA has not identified, it's really just piling speculation on speculation in my submission.

That leaves the specific point about reliance on questionnaire responses.

Can I just take instructions, did we provide the questionnaire? No. We picked up that footnote 137 contains the substance of the questionnaire. We didn't know whether the tribunal wanted to actually see the email in the raw. The material content is conveyed by the footnote, but we can make that available just so you can see it separately if that would be helpful.

MR JUSTICE MORRIS: We will give that some thought. My immediate response is I don't think it's necessary, but if it is we'll let you know I think.

MR WILLIAMS: Had we be in person we would simply have handed it up, but the filter is a little bit higher given we have to communicate remotely.

MR JUSTICE MORRIS: Unless there's any specific point you want to make about its layout or structure or

MR WILLIAMS: No.

MR JUSTICE MORRIS: I don't think there's any need for us to see it, is there?

MR WILLIAMS: No, I am grateful. The material content is conveyed by that footnote.

As the footnote shows, the question asked for two types of information, one information about suppliers in various different categories and a general other category.

Secondly, it was asking for effectively volumetric information, booking estimates. In

terms of the reliance that the CMA placed on this, it relied on them in footnotes 131 and 134, which I just mentioned to you in a different context.

Then it's worth looking at 5.37(c). 5.37, which is drawing together the strands of the conclusion on suppliers included within the RDS. At this stage you've seen that there are reasoned findings in relation to all of these different categories and footnote 5.37(c) says:

"We've included all third party services actually used and identified by ...(Reading to the words)... to allow travel agents to access travel services information to make bookings."

Effectively the questionnaire responses are a cross check on the substantive analysis, which is done on the merits for each of these different suppliers.

You can also see from paragraph 5.37 that the other category was used by respondents. They didn't look past it or fail to understand its significance. People did provide information and then the footnote goes on to explain the CMA analysed those responses in a careful way and decided what to do about them.

Effectively the CMA then applied another level of scrutiny to the answers it received there. So what is wrong with that? The first thing that is said is that the CMA didn't put the RDS to airlines and the tribunal is aware as a matter of chronology that the RDS had not been formulated when the questionnaire was issued. You have heard a lot about the relevant description of services, it's an analytical tool for the purposes of analysing the share of supply test and we've been debating how it might be applied to particular categories of supplier. It's not in that sense a tool for gathering information at all and involves questions of fact, degree and appraisal.

We say it's really not necessary in the context of that sort of exercise for the CMA to

put that definition to consultees in order to understand the market. It gathers the primary information and then it analyses it and that's quintessentially a question for the CMA. That's the first point.

The second point is that the CMA's approach is inconsistent with survey guidance, I do stress survey guidance. The survey guidance you saw one part of it yesterday. I think Mr Ward said we conceded it applies, I think that would put it really too high. What we've said is that the tribunal in Tobii said that one can look at whether there is some read across to questionnaires or other enquiries which don't amount to the sort of survey that the guidance focused on.

I won't ask you to turn it up but if you look at the introduction and in particular paragraphs 1.2 sorry, I will give you the reference, it's C7, 317.

MR JUSTICE MORRIS: This is authorities C?

MR WILLIAMS: Authorities C.

MR JUSTICE MORRIS: It's just it's helpful for me in terms of marking, that's all. Authorities C7, 137 did you say?

MR WILLIAMS: 317

MR JUSTICE MORRIS: 317.

MR WILLIAMS: is where the discussion starts.

MR JUSTICE MORRIS: Yes.

MR WILLIAMS: 1.2 says it's general views on good practice and it's primarily directed towards parties and their advisers, I am not suggesting there is a double standard.

1.8 explains that it provides principles and examples for illustration not hard and fast or bright line results.

1.9 says that submissions that follow the principles are more likely to be given

evidential weight in the CMA's investigation. But that's simply a more likely to be given weight, it's a matter going to weight rather than admissibility.

Mr Ward took you to the paragraph which he relies on at 3.11.

MR JUSTICE MORRIS: Yes.

MR WILLIAMS: It's the restrictive bias example.

Of course we don't say that the principles discussed here have no relevance at all, but what we do say is the sensitivity about leading is obviously much more acute in a question like the question in 3.11(b), which is a hypothetical question where you are really trying to see what someone's reaction would have been on a hypothetical basis. There's clearly a sensitivity about leading the respondent to a questionnaire or a survey in that sort of context and that's what that is drawing out.

Here the enquiry was really a backward looking enquiry into the factual position.

MR JUSTICE MORRIS: Yes.

MR WILLIAMS: It was looking for volume of information as well, so that was a reason in order to be a bit more specific rather than completely open.

Then there was another category, which struck a balance between generality and specificity.

Even if one treats the guidance as having some relevance, the question that we are concerned with doesn't really have very much in common with the concern that's identified here. I come back to the point, this is guidance going to weight. There's really nothing to suggest here that it wasn't legitimate for the CMA in the final analysis to cross check its analysis of the individual services against its survey responses and say these all point to the same conclusion.

I do ask rhetorically: what this significance of this? Is it really suggested the CMA has overlooked potential providers? You have seen Sabre's kitchen sink

approach to this issue. I have addressed the specific errors which are supposed to have flowed from the CMA's failure to investigate this market and, as I say, if the tribunal does not think those are errors then the idea that there is some other material supplier that the CMA didn't find out about because of the form of its questionnaire, it's really not a plausible proposition.

Those are my submissions on the grounds, that just leaves my homework.

MR JUSTICE MORRIS: Yes.

MR WILLIAMS: If I can deal with those topics and then perhaps it would be appropriate to well, whether you want to carry on or break.

MR JUSTICE MORRIS: We'll see. We'll see. But, yes.

MR WILLIAMS: Sir, the chairman asked is it possible to have an SLC without jurisdiction? The answer to that question is, yes, it is possible to have an SLC without jurisdiction.

Just to give an example, if one is below the turnover threshold and there is a supply in the UK by one party but not by the other party and therefore there's no increment, one could have a situation where there is a loss of a constraint on a party supplying the UK, but on the part of a party that doesn't supply into the UK and therefore the share supply test is not met. That's just a basic example.

We don't say because there was an SLC there must have been a supply in the UK. We accept they are separate questions.

Then coming to Mr Cutting's questions about lowest common denominator and market definition. The important point to make I will take those questions together if I may and hopefully that will deal with both sides of it. The statutory scheme draws a very clear distinction between the test for jurisdiction and the definition of the share of supply test within that test and

the SLC approach. Because, as the tribunal has seen, the jurisdiction test falls to be applied with reference to services of any description as defined by the CMA under section 23(8), whereas the SLC question is clearly to be decided on the basis of an economic market. We say that significant difference in the statutory language obviously has to be given weight in understanding the way the statutory scheme works.

I will just sort of interject to pick up another question the chairman asked about the purpose of the share of supply test, which we have explored and I will probably be reiterating points I've made. To establish a connecting factor and under the share of supply test the connecting factor is the concentration of UK supplies, so there has to be an increment and the jurisdiction tests on that basis can't be met on the basis of supplies on one side, by supplies of one party.

But

MR JUSTICE MORRIS: Sorry, but concentration is relevant because ... it's obviously the purpose is to identify a concentration, but why is the identification of a concentration relevant to the overall statutory purpose?

MR WILLIAMS: Sorry, so

MR JUSTICE MORRIS: No, the answer is obvious but ...

MR WILLIAMS: Yes, the answer is obviously a concentration of supply has the propensity to lead to a reduction in competition.

MR JUSTICE MORRIS: Or potential, yes. Okay.

MR WILLIAMS: Yes, actual or potential exactly.

MR JUSTICE MORRIS: Okay, yes.

MR WILLIAMS: As I say, it's services of any description and the CMA chooses the criteria. The guidance really builds on that essentially, I am not going to go

back into guidance unless you want me to, but it identifies that there's no requirement to define a market for the purpose and that in my submission is a correct reflection of the statutory test.

Of course jurisdiction is prior to the SLC assessment and as a matter of the logic of the statutory scheme it's cogent to think that Parliament didn't expect the CMA to have to do the analysis it needs to do before subsequent questions, that is to say the SLC assessment, in order to answer earlier questions. Now, of course Mr Cutting will be only too familiar with the fact that in practice the CMA deals with these matters in a sort of overlapping way and investigations are progressed and enquiries are made. But as a matter of the logic of the statutory scheme, one can see why the jurisdictional test doesn't involve the definition of an economic market, because it's really part of an analytically subsequent question.

Of course if the CMA isn't into the competitive effects assessment when answering the jurisdictional question, then it won't fully understand the competitive interaction of different products. That will be a particular issue where products are differentiated, as they are in this case, because the CMA has to decide whether jurisdiction is established when the question of the interaction between different products remains under consideration and those products may have dissimilarities as well as similarities.

Mr Ward pejoratively called this a lowest common denominator approach, but we say it's a matter of identifying a concentration, an area of overlap, before the CMA reaches a point of market definition and understanding and before it reaches a more precise understanding of the competitive interaction of the products. It's appropriate that it's defined on a basis which will capture transactions which will give rise to an overlap and so that the CMA is able to scrutinise

transactions which it has cause to scrutinise.

There are at least two reasons why the approach should be kept quite separate from a market definition approach. The first is if one equated a relevant description of services with market share that would mean that the test of jurisdiction before the CMA can even examine a merger, there would have to be increment over a 25 per cent market share. That, in my submission, would be a high and very restrictive test for jurisdiction. If one thinks about that in the context of SLC, for example, this is a case in which the CMA found an SLC once challenged in the distribution market, where the parties' market shares are well below that because of the particular competitive interaction of the products.

Of course Sabre did challenge that. It no longer challenges it. That's an example of a SLC finding where the merger is of serious competitive concern and if the jurisdictional threshold were to operate on the basis of market shares CMA wouldn't even have jurisdiction to look at it.

I really reiterate the point I made yesterday, that the jurisdictional provision is a gateway for scrutiny it's not a prima facie SLC assessment or competitive effects assessment, it's a threshold for scrutiny.

There is a second point to make, which is that where there is a relevant connecting factor establishing a basis for UK jurisdiction, the CMA's consideration of the merger doesn't then all have to be linked back to that connecting factor. You've seen in this case that the jurisdiction discussion is focused on the distribution market, not the merchandising market which would then treat as part of competitive effects assessment. That's another reason why one doesn't need to see the jurisdictional analysis as sort of logically or analytically linked through to the SLC analysis and market shares. Jurisdiction is not a

sort of roadmap for competitive effects assessment, it's about establishing a sufficient connecting factor.

I hope that's dealt with the two questions, albeit that I've dealt with them together.

MR CUTTING: Thanks.

MR WILLIAMS: Then the final topic which Mr Cutting raised was a general question about what the tribunal might do if it thought the CMA had expressed itself incorrectly, but if it was satisfied that taking the evidence overall there would have been enough for the CMA to reach a lawful finding on the RDS. Then the chairman raised a supplementary question about section 31(2)(a) of the Senior Courts Act.

If I can deal with that latter question about section 31(2)(a). Sir, you didn't actually refer to that section, but that's what we think you meant to

MR JUSTICE MORRIS: I thought it was (c) but anyway.

MR WILLIAMS: It's the one whether the tribunal should find relief if it appears likely the outcome wouldn't have been any different.

MR JUSTICE MORRIS: Yes, sorry. If it's 31(2)(a) I had the letter wrong.

There's two provisions, one deals with this test, the stated permission and the other deals with substantive relief and I can never remember the numbers. If you tell me it's 31(2)(a) it's 31(2)(a), that's fine.

MR WILLIAMS: I hope I am addressing the right point. That provision applies to the High Court

MR JUSTICE MORRIS: Right.

MR WILLIAMS: and it is at the moment an open question whether that provision could be said to apply to the tribunal. I wasn't proposing to make substantive submission on that at this stage.

MR JUSTICE MORRIS: No, that's all right.

MR WILLIAMS: But overnight

MR JUSTICE MORRIS: It's not clearly I do not have the provision in front of me, I threw it out. It's not clear that it applies in these proceedings.

MR WILLIAMS: Yes, it's certainly not established that it applies in these proceedings.

MR JUSTICE MORRIS: Okay.

MR WILLIAMS: I am not submitting at the moment that it does.

MR JUSTICE MORRIS: Okay.

MR WILLIAMS: Is a point the tribunal may have to resolve at some stage or not. But the tribunal obviously has there are provisions in section 120 dealing with the cross application of the judicial review principles and the tribunal has a discretion as to relief and so I suppose there are other sorts of arguments which may be made about the extent to which the tribunal might take an approach modelled on section 31(2)(a) whether or not it's specifically applicable. Because where it applies section 31(2)(a) has mandatory application

MR JUSTICE MORRIS: Yes.

MR WILLIAMS: but one can see arguments that the tribunal may be inspired by it, whether or not it actually applies it.

I don't want to take that any further for today.

MR JUSTICE MORRIS: No that's fine.

MR WILLIAMS: It is possible if the tribunal needed to hear more submissions it could hear more submissions in due course.

Turning on to Mr Cutting's question and leaving that provision to one side. There are various aspects of the public law principles that relate to the materiality of a public law error. In fact in the recent Tobii case the tribunal found that there

was an error in the CMA's decision, but it didn't threaten(?) the material reasoning. That's an example, I was not I don't know if it's in the bundle, I was not even going to go to it, it's paragraphs 380 and 381 of Tobii. There's a much more limited example in the Ecolab case, where the tribunal found that CMA misdirected itself.

There's also other lines of authority about errors of reasoning and whether that will necessarily result in the grant of relief. In order to really apply these provisions one would need to really consider them in a concrete context and consider the point in relation to the reasoning and the overall conclusion. Sometimes when one argues one of these cases materiality of the error is part of the argument and some points about that have been made in ground 4, but otherwise it's not really been part of the argument in this case.

I think the most important point to make about this is that Mr Cutting's example contemplated that the CMA might have expressed itself incorrectly but be satisfied that there was evidence to support the finding overall. In the context of that sort of example, one does need to have in mind the public law test for an error of reasoning which I drew the tribunal's attention to in the BAA case, paragraph 20(8), yesterday. Where it said something must be seriously awry with the CMA's reasoning and the reasoning should be read in a generous and not a restrictive way.

The point I want to make is this, if the tribunal were to find that a sentence, paragraph or a footnote was poorly expressed in some respect, which would be understandable in the context of a report running to hundreds and hundreds of pages, but the report contained enough by way of evidence or analysis to support the conclusion that the tribunal can see through the expression to the substance, then I would suggest that that is not really a

case which is going to fail the duty to give reason test, given the formulation of that case in the authorities.

In other words, if there is a case where the content is there but it's not expressed as the tribunal would wish to see, that's not going to fall foul of the public law test for failure to give reasons. If the tribunal wanted to consider the application of those principles in a specific case, obviously it could hear particular submissions about that at the point where the point was identified, but for the reasons I've just given I would submit at the tribunal is unlikely to reach that point.

MR JUSTICE MORRIS: Thank you.

MR WILLIAMS: I think that concludes my submissions at 15.01.

MR JUSTICE MORRIS: I may have to take you to task about that Mr Williams. Very grateful indeed.

Can I ask Mr Ward how long you are likely to be, I am contemplating whether we should take a break. I think we probably should. Mr Ward, even if it means running over a little bit?

MR WARD: Yes, sir, I would much rather address a tribunal that's had a cup of tea. I cannot see a world where I need all the way to 5 o'clock and I will do my best to be economical so we can finish at 4.30. If I thought that was just clearly not possible I would say so now.

MR JUSTICE MORRIS: Yes. I am sure we are prepared to sit until 5.00. I hear what you say, if we run until quarter to that's also fine. We'll take 15 minutes.

MR WARD: Thank you, sir.

MR JUSTICE MORRIS: Thank you very much.

(3.03 pm)

(A short break)

(3.18 pm)

Submissions by MR WARD

MR JUSTICE MORRIS: Mr Ward.

MR WARD: Thank you, sir.

I am going to start with the law. Then I am going to go through the grounds of challenge briefly in the order they have hitherto been discussed. I will start, if I may, with the approach to construction of section 23.

Our case does not require some especially narrow construction of section 23, as Mr Williams suggested. We simply make the point, as the Court of Appeal said in Akzo that it must be interpreted to give effect to its statutory purposes.

Mr Williams accepts it's a jurisdictional threshold. He called it a positive basis for UK jurisdiction but, positive or not, it is a hurdle that must be crossed before the CMA can take action. We agree with him that the answer to your question yesterday, sir, is that there can indeed be an SLC in the absence of jurisdiction. But looking at this through the lens of the Supreme Court's judgment in SCOP, we have to identify the statutory purposes and we identified three.

It establishes a minimum level of concern, that can justify the use of CMA resources.

It applies the principle of comity by leaving to other international bodies mergers that fall outside its scope.

It provides legal certainty for businesses, like my clients, that need to know whether their conduct will be subject to CMA investigation.

Our argument is simply that section 23 must be interpreted so that its requirements are given substantive effect and not reduced to pure form. Our central complaint is the CMA's approach has emptied it of any real content through a series of artificial constructions.

Turning just to the standard of review, our starting point is an obvious one. A statutory body must confine itself within the statutory powers conferred on it by Parliament. If we need authority for that venerable proposition, our skeleton argument has it at paragraph 21, Anisminic. It's not a matter of discretion on the part of the decision maker how wide those powers are, it is a matter for the court. The correct approach is set out in SCOP, in paragraph 31 that you have looked at many times.

Mr Williams's submissions sought to airbrush out any legal content for the expressions in section 23. He said it was to quote "a section infused with discretion". That was yesterday's transcript, page 76, lines 20 to 21. In our respectful submission, that's a misreading of the section and ignores its role as a jurisdictional threshold. Our grounds 2 and 3 are centrally concerned with matters of construction. Did the CMA err in law in construing supply so as to be satisfied on these facts?

Similarly, in ground 3: did the CMA err in law in construing increment? If you look at our notice of appeal in due course you will see we have itemised a number of different formulations of our challenge, but specifically pleaded errors of law in this regard.

In our submission these issues are akin to the proper construction of enterprise that was considered in SCOP and matters of law are for the tribunal. Yesterday though, sir, the chairman made a comment that we respectfully agree with. If I may read it back:

"It is quite a difficult question ultimately whether something is a pure question of construction or a question of application of facts to meaning."

That was yesterday on page 71, lines 1 to 3.

MR JUSTICE MORRIS: I think it should be application of fact in law and not

application of facts to meaning.

MR WARD: That's probably my typo rather than your expression

MR JUSTICE MORRIS: No, I suspect it's my expression, but go on.

MR WARD: I hope we at least all understand each other.

Of course what you will see when you look that way we've put our pleas is we do have Wednesbury pleas in there, of course out of abundance of caution. We don't want to be told we have no legitimate challenge at all, even if we resist Mr Williams's attempt to reduce everything to rationality.

MR JUSTICE MORRIS: Can I interject there?

MR WARD: Of course, sir.

MR JUSTICE MORRIS: You say the CMA erred in construing supply, what do you say the proper construction as a matter of law of the word supply is and what error did they make?

MR WARD: The error was to conclude that what was in truth a supply by Farelogix to AA was a supply of FLX services to BA. That supply to AA is not capable of being a supply within the meaning of the section.

MR JUSTICE MORRIS: Say that again? You say the supply to AA.

MR WARD: The supply from Farelogix to AA is not capable of amounting to a supply within the section.

MR JUSTICE MORRIS: Because it is not in the UK?

MR WARD: Yes, it's not a supply in the UK.

MR JUSTICE MORRIS: Okay, but that's really I think a dispute as to a finding as to what the supply was, not as to the meaning of what supply is.

MR WARD: Sir, I respectfully adopt what you said yesterday. That that can be a question which is in a sense ... there can be two ways of looking at precisely the same point.

MR JUSTICE MORRIS: Okay, but you would accept that a supply by FLX to BA is capable of being a supply? It's just there wasn't one?

MR WARD: Yes. There wasn't one of the FLX services

MR JUSTICE MORRIS: Yes.

MR WARD: which is the sole basis upon which jurisdiction is asserted. But there was a supply between BA and FLX, but it just Farelogix, it just wasn't a supply of FLX services. Obviously I am going to develop that in a great deal more length when we get to ground 2.

MR JUSTICE MORRIS: Okay.

MR WARD: Now what SCOP tells us is that where particular facts call for economic judgment and expert matters of appraisal, there may be a degree of deference on the court's part, but it also says that outside that expertise the CMA is not clothed with any wider power of any other decision maker to determine the scope of its own jurisdiction.

It's useful to just draw a contrast between this case and the Croydon case, which Mr Williams made an effort without quite saying so to suggest was really the same. Can we please turn that up?

MR JUSTICE MORRIS: Yes, of course.

MR WARD: I don't think it's quite as well worn as SCOP in terms of

MR JUSTICE MORRIS: Can you remind me which volume it is?

MR WARD: Of course. It's in volume G, which is the second hard copy.

MR JUSTICE MORRIS: Yes, I have it.

MR WARD: Under tab 25. It's just useful to remind ourselves of what the section of the Children Act is that was in issue, that's on page 1050. You will see:

"Every local authority shall provide accommodation for a child in need."

Mr Williams basically said it's either a child or it's in need, in our case it's got to be

one or other categories. Is not a child, so everything goes in the in need bucket. I am sorry if I am caricaturing slightly, but that was the gist of it.

May we please now turn on to page 1056. Paragraph 26 is where Baroness Hale explains why the judgment of whether a child is in need is evaluative such as to call for essentially a rationality type assessment.

MR JUSTICE MORRIS: Yes.

MR WARD: "The question whether a child is in need requires a number of different value judgments, what would be a reasonable standard of health or development for this child? How likely is he to achieve it? What services might bring that standard up to a reasonable level? What amounts to a significant impairment of health or development? How likely is that? What services might avoid it? Questions like this are sometimes decided by the courts ..."

Then it says:

"Such evaluative questions are to be determined by the public authority subject to control of ordinary principles of judicial review."

With the greatest respect, we are miles away from those kind of evaluative policy laden questions. What we have, by contrast, is something really rather dry and simple, which is do these contracts, these three contracts, which are not especially complex, amount to a supply of FLX services? Under ground 3: is there really any actual value rather than hypothetical value? In truth those questions are a lot more like the question of: are you a child? Than are you in need?

All of this reveals of course that what we have here is a spectrum of different types of question and judicial review is of course a flexible doctrine. In our respectful submission, we are very far up the scale towards hard edged questions where

particularly in the context of jurisdiction the tribunal should afford a narrow deference, not broad deference to the

MR JUSTICE MORRIS: But still deference?

MR WARD: Well

MR JUSTICE MORRIS: In the sense that it's a review question?

MR WARD: I do submit there is a question of law whether all of this really amounts to a relevant supply. But insofar as there is deference, it can only be narrow. It's not a Wednesbury type of test.

Can I just look at what Mr Williams said, because in our view it's very highly overblown. He said, "The question of whether there was a supply was a question of economic substance". And that was yesterday, page 67. In reality, it's just an assessment of what three simple contracts amount to and there's no economic magic in that. Then again he said:

"Well, isolating one particular item, the question whether BA made a competitive choice was very much the sort of mixed factual and economic question which draws on the CMA's specialist remit."

That was page 67, lines 23 on to the next page. This is, in my respectful submission, a rather grandiose overstatement. All the CMA had to do was actually listen to what BA was telling it about its thinking in entering into the BA agreement. Our submission, as you've heard and I will be coming back to this, is that it basically ignored it. That wasn't really some special expertise. It was just looking at what the evidence actually said.

Having said all of this, I accept that grounds 1 and 4 are different.

Ground 1 is a section it concerns provisions which contain an explicit discretion, as Mr Cutting rightly pointed out in argument. That still needs to be exercised within the parameters of the statute, but I accept that it is ultimately a question

about how that discretion was exercised.

Ground 4 is essentially a complaint about consistency, lack of reasons and lack of investigation. The disputed point about intensity of review is of much more peripheral bearing upon that.

I do also want to respectfully remind the tribunal that Mr Williams kept saying our entire challenge was rationality. Again, when you revisit the pleadings we have been careful to articulate it with more particularity than that, even if we have not as it were taxed the tribunal's patience by going through all of the detail of every single way we formulate the points. What we've tried to do is articulate the gist of our challenge.

Just finally on the law, I think like Mr Williams I would submit we can park all questions of relief for what I hope will be happy day when they fall to be considered. Just to put down a marker in that I am afraid rather wearying phrase, we don't accept that section 31(2)(a) of the Supreme Court Act is applicable. It applies only to the High Court and it is simply inconsistent with section 120 of the Enterprise Act.

MR JUSTICE MORRIS: Okay.

MR WARD: All of that for another day, unless you wanted to hear more about it now.

MR JUSTICE MORRIS: No, that's fine thank you.

MR WARD: Thank you, sir.

On that basis, if I may, I will turn to the grounds. The first one is ground 1, the relevant description of services. Our challenge here, as you know, is that the CMA has not identified or applied any sufficient rationale for the RDS so as to satisfy the requirements of the statute. To be clear, we are not saying that there necessarily has to be a "prior elucidation of criteria" as Mr Williams put

it. We respectfully agree with Mr Williams that it would be sufficient if the RDS, taken with the reasons for it, made clear what that rationale was.

It's not a point of form, it's a point of substance. Our submission is, as you've heard, that it remains arbitrary when one carries out that exercise in certain key respects. We do submit that what has happened here is the CMA has fastened upon a lowest common denominator, which happens to isolate out one element of the complex multifaceted product, which is a GDS.

Picking up Mr Cutting's question about the relationship this has to an economic market, yes, we accept it need not be equivalent, it need not. We don't say you have to do a full market definition exercise in order to identify jurisdiction but what it does have to do is have a rationale that serves the purpose of merger control regime. That applies just as much to what it leaves out as to what it includes. Because, of course, the ultimate purpose is about competition problems arising from concentration and those problems are a function of the wider competition framework.

I also want to just make sure we don't get distracted by an implication that could have arisen from something Mr Williams said, even though he didn't say it expressly. It's true that this is a threshold condition without doubt. It's one that the CMA looks at at both phase 1 at phase 2. Just as happened in this case, it is not bound by its phase 1 analysis when it gets to the end of phase 2.

In fact here there was, as you saw when I opened the case, a lot of shifting sand and what we had at phase 1 had changed dramatically by the time we reached phase 2. So an evolving understanding of the competition landscape through the investigation can in fact colour the approach taken to jurisdiction itself by the time the CMA produces its Final Report.

The emphasis here in Mr Williams's submissions was on the CMA's view that Sabre and Farelogix were competitors. As he explained, in fairness, that was something that was objected to by the parties in the proceedings. Even if you work on the assumption it's correct, it does not serve to justify this particular RDS at all. The reason for this goes back to paragraph 5.29 of the report. If you would bear with me it would be worth just looking at it one more time, although you might immediately say I've shown you this rather a lot.

MR JUSTICE MORRIS: 5.29?

MR WARD: It's page 66. Sorry, sir.

MR JUSTICE MORRIS: No, it's all right. I am just putting files away.

Yes.

MR WARD: This is the section, this is the paragraph which says what it is that's actually in the RDS. As I have said this is where I hope I am not taxing your patience it really is magically and uncannily drawn just to include the products of the parties and other people who do the same thing and then begrudgingly as a conservative basis non GDS aggregators. We will be coming back to them under ground 4.

So we have nothing else and of course the problem is is if this was a category of competing products it would be a lot larger, a lot larger. The most obvious candidate in terms of scale, even if not necessarily in terms of proximity, is airline.com. The reason we say that is because the CMA itself accepts that airline.com poses a competitive constraint here. Just to show you that, if I may, in their defence, it's in bundle 1A, tab 2 at page 181. This is the CMA's defence.

MR JUSTICE MORRIS: Yes.

MR WARD: At paragraph 272, this is a conclusion following a bit of reasoning,

which we are mostly not concerned with.

PROFESSOR MASON: Which page again, please, Mr Ward?

MR WARD: 1A, tab 2, page 181. This all part of the argument on grounds 5 and 6. 272, having recited various bits of evidence, it says:

"The CMA thus concluded that airline.com does compose some competitive constraint on GDSs."

Well, so be it. How important is it then? We can put that away, please we are definitely done with that for now and go back to something have I'm afraid already shown you, which is at page 161 of the report. This is table 8.10. The second column, this is global airline passenger bookings by channel vendor, direct channel is the bottom row and the non confidential number is 4050.

MR JUSTICE MORRIS: Yes.

MR WARD: So it's a big important player in booking channels at least and it's a competitive constraint on GDS, so if we were just concerned about never mind an exact economic market, but if competition between these entities was the real issue here, you would expect them to be in, but actually they are not. Of course we are going to talk about why they are not when we get to ground 4, but the overt reason why they are not is the language of the RDS.

MR JUSTICE MORRIS: Can I just intervene there. Your submission here is that because the purpose of the definition is to capture down the line possible competition concerns and because even putatively you might be able to see that airline.com is a competitive constraint that that should lead to an alteration of the definition effectively.

MR WARD: You are putting my case pretty high. I would be content to put it a bit lower

MR JUSTICE MORRIS: This goes to what the correct definition is, not the question of whether airline.com falls within the definition

MR WARD: Indeed. What I am really suggesting is a lack of rationale based on a lack of rationale for including on the one hand and excluding on the other, because the full thrust of Mr Williams's submissions in this area was, "We put them in together because they are competing entities" and we may not agree with that, but we are here on judicial review so we can't reopen everything, you might think we've had a try, but we can't reopen everything and so fair enough for today's purposes, notwithstanding my client's reservation. But if competing products was the rationale, why would airline.com not be there? The answer, of course, according to the CMA lies in the language which is it has to be a supply, et cetera, et cetera, of information to travel agents, which the CMA says, "Well, there you are that knocks out airline.com".

In our respectful submission that reasoning is actually circular. It's circular because it doesn't justify their exclusion, it merely states their exclusion.

MR JUSTICE MORRIS: Yes.

MR WARD: We can see that very easily from paragraph another one you've seen a lot 5.27(b) on page 65. If you would please turn that up for the umpteenth time. Paragraph (b):

"Farelogix via the FLX services provides an IT solution that enables airlines to connect to a third party, including travel agents, non GDS aggregators ...(Reading to the words)... or their own website."

That raises an immediate question then why you would exclude all of that functionality, even in the case of the GDS, as you've seen from the discussion of non GDS aggregators in footnote 118, a GDS can connect with a non GDS aggregator.

Just for completeness, there is an admittedly rather oblique reference deep in the report to the fact that there are also direct links between GDSs and some large corporates, but it's not easy to follow that and I am not going to put a lot of weight on it. What I am saying though is that the competition rationale that was really advanced in argument doesn't really hold up.

Then again we come to another highly contested element in the definition, which is IT solution to airlines. That's used to exclude all sorts of things, most obviously self supply which again I will come to.

Again, we say well why have you limited it in that way? Because we know that self supply has also been found to provide a competitive constraint. If you like I will just give you the note for that, because I did show you in opening and I don't want to take all afternoon just showing things for the second time. It's Final Report paragraph 11.121, that's at page 369.

That's the principal reply on ground 1.

MR JUSTICE MORRIS: Essentially it's an argument that says the definition was wrong?

MR WARD: Yes, or lacking in rationale. The actual because of course we are not asking you to find what the definition should be. We attack it as lacking in rationale and at ground 4 we attack it as lacking in consistency. We do not ask to you say well actually it should have included this or it should have included that. We don't need to go that far. In fact if I may respectfully say so, the tribunal would be overstepping its function on judicial review if it substituted its own reasoning in that regard.

MR JUSTICE MORRIS: Okay.

MR WARD: I just will touch again briefly on a point that came up in argument in opening which was about what we call the vertical point, that there is a strong

element of verticality in the relationship between these two products. It becomes most obvious in respect of GDS pass through. GDS pass through is where an API is actually used to connect to the GDS. We saw that in opening and for your note again it's paragraph 3.33 of the report on page 43.

More generally there is an element of verticality because a person who buys FLX services essentially has to recreate a whole range of functions of the GDS, offer creation, travel agent distribution, order fulfilment and can only use the FLX services as an input into that self supply.

Mr Cutting asked me, Day 1, page 44:

"Is the implication of what you are saying that whenever a vertically integrated entity acquires a business which supplies one function also supplied by the vertically integrated entity on a bundled basis, the share of supply test can't be met?"

I said, "I am not putting my case that high". Mr Williams said, "Ah, there you are, he can't answer that one". I did have a try at the time and I hope you will indulge me if I have another try, using the same example which was the car and car radio. Allow me to try again. If the vertically integrated company acquires a car manufacturer, the share of supply test would not be met for a merger with a radio manufacturer, because the car may well contain a radio, but it's a peripheral part of the bundle that constitutes the car. That's why it cannot possibly amount to a sensible RDS to say these are both products that involve radios or listening devices to music or something.

In other cases though products may be similar enough, even if they are bundled in different ways, to provide a properly formulated RDS that would give effect to the statute. In our case though, our submission is the problem is we have a lowest common denominator approach and one of the things that wasn't

considered was the question of verticality.

That was all I was going to say on ground 1.

Then if I may I will turn to ground 2. I will start open and then I will need to go closed.

Unlike Mr Williams I would strongly prefer to deal with ground 3 in closed, because of a slight disquiet on my part of exactly what is public domain. It will be short in any event, and of course if afterwards somebody looks at the transcript and thinks it could properly be declassified as open, then no one will be more delighted than me. I just would rather err on the side of caution if the tribunal will allow.

MR JUSTICE MORRIS: Yes.

MR WARD: For now I will start on ground 2 open.

Our essential submission, as you know, is that the CMA erred in concluding that BA received a direct supply of FLX services from Farelogix. Farelogix contracted for and received services under the BA agreement, but these are not FLX services.

It's important to keep in mind something that Mr Williams clarified and was in accordance with our understanding. The CMA's case is the FLX services only arise out of the combination of the three agreements. They do not say that the BA agreement on its own gives rise to FLX services or RDS. One of the many references for that is paragraph 5.50.

It's also common ground that BA never received an API and never received message translation of its own. Our submission is that those FLX services were supplied to AA under a contract with AA. BA benefited from it, but that is not the same thing as actually receiving its own supply.

The CMA's case is that BA receives a partial supply of FLX services when it

interlines. Again, when one looks at what FLX services consist of, it's FLX API and FLX OC. It's in our submission inescapable that neither of those things were provided to BA.

MR JUSTICE MORRIS: Okay.

MR WARD: One of Mr Williams's points was that BA didn't as he put it, BA didn't need to build an API because the relevant services were made through existing connections with BA's interline partners. That's Day 2, page 98, line 12. He said well it didn't require all the commercial terms that would be in a direct connect agreement. In our respectful submission, this submission exposes the fundamental confusion in the CMA's thinking. The API has been sold to AA. AA is the customer for the FLX services. So BA did not need its own FLX services for the purpose of interlining. All it was doing was providing a connection into the FLX services that AA had. It's not receiving part of the API, it's just benefiting from the supply to AA.

We did think there was a striking irony in the way Mr Williams characterised our case, because he said we have pulled out of thin air a fallback case that if BA does obtain a supply of FLX services it was an indirect supply and that was Day 2, page 99, line 43. But our case isn't that. Our case is that any supply of FLX services to BA is divorced from the facts, but if there is one at all it certainly cannot be direct because there's just no getting away from the fact that the direct recipient of these services was AA and not BA.

At this point I would like to look at what the BA agreement actually says. That, I am afraid, inescapably takes us into closed session.

MR JUSTICE MORRIS: Fine. Thank you.

We will rise for a moment and we will be informed again when we go into closed session.

Thank you very much.

MR WARD: Thank you, sir.

(3.47 pm)

(Closed session)

(4.39 pm)

MR JUSTICE MORRIS: Can I just confirm that we are now in open session and the livestream is operating? Yes.

Mr Ward, you are going to address us on ground 4.

MR WARD: I am and I will just recap.

Our essential complaint is lack of consistency in the way the CMA applied the GDS. That is a requirement of public law that was not met. We have some subsidiary complaints as well, but that is at the core. I wanted to make the submission that Mr Williams had in certain respects in our submission embroidered upon the reasons in the report and that that should be the focus of the tribunal.

One thing he repeatedly referred to was purpose or what he called focal purpose of some of the products. But, of course, the purpose of any particular product in any particular context is an objective question and there certainly has been no examination of any subjective purpose. Even the GDS itself has many purposes, as you have heard me say a number of times.

We do respectfully submit say some caution is required in this regard. What really matters is a very simple question, which is whether or not a service falls within the terms of the relevant description of services as the CMA decided them to be.

Starting with the infamous non-VITOs, what he said is that these services were nothing like the services the parties provide. In my submission, that is neither

here nor there. All that matters is whether or not they satisfy the definition in 5.28 of relevant description of services. And there is no proper basis for the CMA to have concluded that they don't.

If we look

MR JUSTICE MORRIS: Can I just pause and look at the definition again?

MR WARD: Yes, page 65.

MR JUSTICE MORRIS: No, I am looking at it.

I cannot remember, but the reason that he says non-VITOs is because the purpose is not to enable travel agents. Is that right?

MR WARD: No, there are two different things.

One is he says it's not like a GDS, and actually as we've seen it's very like a GDS. A non-VITO is of course a tour operator. It gathers information from airlines and offers that information to both end customers and travel agents.

MR JUSTICE MORRIS: Okay.

MR WARD: There's no doubt that travel agents are also the, if you like, end customers of tour operators. One can see at a glance that's highly intuitive that a large tour company like say TUI, I am afraid I don't know if it's vertically integrated, will sell through travel agents as well as directly.

Our respectful submission is it does all of the things that are in the RDS. The two things that are supposed to be, if you like, fatal problems are firstly it's not similar enough to a GDS. We say that's just an irrelevant consideration. It either fits or it doesn't, but the other is the question of whether it's an IT solution to airlines.

MR JUSTICE MORRIS: Yes.

MR WARD: Of course it's a mechanism through which airline tickets are distributed and sold and the critical issue here is that there is no contract with the airline

itself, but the CMA says the lack of contract is not fatal and it need to say that because of the position of non GDS

MR JUSTICE MORRIS: (Inaudible).

MR WARD: Exactly, but it does say that. I showed you this last time around but just to remind you where it is, 4B/2, 456, footnote 28 they say we don't mind the lack of contract, it's the nature of the services.

MR JUSTICE MORRIS: Can you give me that reference again, sorry, 4B?

MR WARD: 4B/2, 456, footnote 28.

MR JUSTICE MORRIS: Yes, it's marked before. Okay.

MR WARD: There's this whole question of is it or is it not legitimate for us to say it matters whether there's a contract. They themselves say that they don't mind the lack of contract here. But a contract is not a requirement of the RDS. I know Mr Williams would like you to say it really does not matter how they treated non GDS aggregators. He says well they were included in a conservative basis, but they are either in the GDS or they are not. The answer sorry RDS, I am so sorry.

The CMA says they are in the RDS. They don't say they are not in the RDS but they will include the revenue anyway as a sensitivity test. They say they are in the RDS. That is why we can say with absolute confidence both of those things, that a contract is not required. It is a more purposive view of what amounts to a supply of IT to airlines. Of course, in respect of ground 2 they are adamant that a purposive approach can be taken to that question.

MR JUSTICE MORRIS: On non-VITO the key point that the CMA says, I think, effectively is that the non-VITO is not supplying the airline with an IT solution. Is that not

MR WARD: Yes, but the reason

MR JUSTICE MORRIS: Does it not boil down to that, footnote 28 on the nature of the services?

MR WARD: That's right, but then the point is there's no point of substance here, because what non-VITOs are doing is supplying airline tickets that are aggregated to travel agents.

MR JUSTICE MORRIS: Yes.

MR WARD: The fact that there is no contract we know is not fatal.

MR JUSTICE MORRIS: No, I am not worried about the no contract point I am not worried, I am asking you about the question that the CMA ... the reason they exclude, if you look at that definition, is they don't qualify as the provision of an IT solution.

MR WARD: Well, in our respectful submission

MR JUSTICE MORRIS: I think that's the point, isn't it?

MR WARD: Yes, but the point we make is that once you concede that there is no need for a contract that becomes an assertion that is just stripped of any content, because they say that simply because they say the services are of a different nature, because if you look back on page 456.

MR JUSTICE MORRIS: Yes.

MR WARD: Page 456, paragraph 2, so the main text says:

"We consider non-VITOs do not provide an IT solution to airlines."

Then the footnote says, well it's not because there's no contract, it's because of the nature of the services provided.

MR JUSTICE MORRIS: Yes.

MR WARD: In my respectful submission, that's just all question begging, because the service provided, the nature of is it is aggregation of airline content and distribution to travel agents. So it requires some extra adumbration to

understand why it is that that is not sufficient, given that it's conceded that the lack of contract is not the answer.

MR JUSTICE MORRIS: Right. Okay.

MR WARD: Then on metasearch, again we know that contract with the airline is not required. I confess, I am not certain whether there is or not. But the other reason is that there is a consumer facing site through which one needs to click through to get to the travel agent. But why is that additional step somehow fatal? Again, why does it matter that the travel agent is only accessed via a consumer facing site?

I mean the purpose, if you look at the purpose again, the ultimate purpose of this obviously is to land bookings. The bookings are landed via travel agents, having clicked through.

MR JUSTICE MORRIS: Okay.

MR WARD: Then finally on airline.com sorry, not finally, I had forgotten there was a little more.

MR JUSTICE MORRIS: Self supply.

MR WARD: We have self supply to come.

Airline.com, either the airline builds the website itself or it gets someone else to do it, but either way it's enjoying an IT solution just as I would respectfully submit, using the example earlier, the CAT is enjoying an IT solution in respect of its own website.

The evidence was a substantial minority of travel agents did use these websites, so even if they were consumer facing, which obviously they are, if you click on the British Airways website it's intended to be used at least inter alia by consumers, but the evidence was travel agents did use this as well. Mr Williams was driven to say well that's somehow not enough the purpose of

this websites. But where is this threshold condition? In our respectful submission it is imaginary.

Then, finally, self supply. Here the question was: is it a supply to airlines? Mr Williams helpfully took you to the relevant piece of guidance, which is in B6, if we could go back to it one more time.

MR JUSTICE MORRIS: Intra group sales.

MR WARD: Intra group sales.

MR JUSTICE MORRIS: Yes.

MR WARD: Yes, exactly, maybe it's not even necessary to turn it up.

MR JUSTICE MORRIS: No.

MR WARD: Let's think about what a large airline such as British Airways or American Airlines really looks like. It is, I think one can take judicial notice of the fact, likely to be a corporate group. It is quite likely that different functions within that corporate group are performed by different part of the corporate group. If it has a unit that builds APIs, it's not like be the same unit as, for example, organises its schedules or decides new logos and uniforms for its cabin staff. I don't have to make a positive submission about primary fact on that, I simply have to say that is something the CMA has not considered at all.

In our respectful submission, it cannot be just simply and breezily dismissed on the basis that self supply cannot be supply to airlines in light of that guidance.

Finally, I was going to just deal with very finally the

MR JUSTICE MORRIS: Can I just make a point about intra group sales?

MR WARD: Yes, sir.

MR JUSTICE MORRIS: Does not strictly intra group sales mean sales within a group of corporations where there is a sale from company A to company B?

MR WARD: Yes.

MR JUSTICE MORRIS: In other words two different legal persons, rather than transfers within the same company but different operating units?

MR WARD: Yes, no, absolutely sir.

MR JUSTICE MORRIS: I think intra group sales is probably a reference to actual supply by two different legal persons.

MR WARD: Yes, and I can accept that. I need not insist that it has a broader meaning, because whichever meaning it bears it has not been considered at all.

MR JUSTICE MORRIS: Okay, fine.

MR WARD: Then the final point I was going to make was on the survey, just two points.

Mr Williams said we didn't put the RDS in the survey because it had not been formulated yet. That may be true, but that's just an explanation of why the survey doesn't ask the right question, it does not absolve the CMA of that problem.

Then as to the survey guidance, while he was a bit cagey about accepting its applicability, he did accept that the restrictive bias issue that we point to has relevance, but for the reasons that I already developed in opening where we sought to anticipate his points, we submit that the CMA has no answer.

Sir, unless I can assist further, with apologies for the fact it's 4.50

MR JUSTICE MORRIS: That's fine.

MR WARD: those are my reply submissions.

MR JUSTICE MORRIS: Thank you very much.

I will ask my fellow tribunal Mr Williams looks as if he may have something to say, but I will ask my fellow tribunal members whether they have any further points they wish to raise?

Not from Mr Cutting.

I think not from Professor Mason?

PROFESSOR MASON: Thank you, no.

MR JUSTICE MORRIS: Mr Williams, did you wish to say anything?

MR WILLIAMS: No.

MR JUSTICE MORRIS: Very good.

I think all that leaves is to bring the hearing to a close. Can I thank everyone for the efficient and courteous manner in which it has been conducted, both the parties and all those assisting with the mechanics of it.

It has been a pleasurable experience and we obviously will reserve our decision and you will hear in due course.

MR WARD: Thank you, sir.

MR WILLIAMS: Thank you, sir.

MR JUSTICE MORRIS: Thank you very much.

(4.50 pm)

(The hearing concluded)