IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1071/2/1/06

Victoria House
Bloomsbury Place
London WC1A.2EB

14 November 2006

Before:
MARION SIMMONS QC
(Chairman)

PROFESSOR PETER GRINYER
DAVID SUMMERS

Sitting as a Tribunal in England and Wales

BETWEEN:

CITYHOOK LIMITED Applicant

and

OFFICE OF FAIR TRADING Respondent

supported by

ALCATEL SUBMARINE NETWORKS LIMITED
BRITISH TELECOMMUNICATIONS PLC
CABLE & WIRELESS PLC
GC PAN EUROPEAN CROSSING UK LIMITED
GLOBAL CROSSING EUROPE LIMITED
GLOBAL MARINE SYSTEMS LIMITED
NTL GROUP LIMITED
TYCO TELECOMMUNICATIONS (US) INC Interveners

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DIRECTIONS HEARING

APPEARANCES

Mr. Ben Rayment (instructed by Edwin Coe) appeared for the Applicant.

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

Mr. Jon Turner QC and Mr. Meredith Pickford (instructed by Blake Lapthorne Linnell, Charles Russell, Bridgehouse Partners and Beachcroft Stanley) appeared for the Interveners: Alcatel Submarine Networks Limited, Cable & Wireless PLC, Global Marine Systems Limited and Tyco Telecommunications (US) Inc.

Mr. Fergus Randolph (instructed by Eversheds) appeared for the Intervener, NTL Group Limited.

Mr. Daniel Jowell (instructed by BT Legal) appeared for the Intervener, British Telecommunications PLC

Miss Frances Murphy (of Mayer Brown Rowe & Maw) appeared for the Interveners, Global Crossing Europe Limited and GC Pan European Crossing UK Limited.

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THE CHAIRMAN: Good morning.

MR. RAYMENT: May it please you, madam, members of the Tribunal, I appear on behalf of the Appellant, Cityhook in this matter. My learned friend, Mr. Hoskins, appears on behalf of the Office of Fair Trading. Mr. Fergus Randolph appears on behalf of NTL. Miss Frances Murphy appears on behalf of Global Crossing and Mr. Turner with Mr. Pickford appear on behalf of Alcatel and the other Joint Interveners. I hope that gives the record a sufficient flavour of who is here.

THE CHAIRMAN: May I thank you all for your very complete and well researched submissions. We appreciate the team work that was involved between the Interveners. We have read the written submissions and we do not think that it is necessary today to repeat those submissions in full orally, and we would invite you to keep your submissions today to emphasising the essential points that you wish to make, but not to go into the great details that are in the submissions – if that is of assistance.

MR. RAYMENT: Yes, I am sure that is of assistance to everybody, madam, thank you very much. Can I just say also for the record that Mr. Jowell is here on behalf of BT.

Can I just mention brief housekeeping matters. You should have three files of authorities, the first is what I think people will refer to as the Case Management Conference bundle.

THE CHAIRMAN: We have three files of authorities, but for our purposes they are 13, 15 and 16.

MR. RAYMENT: The first one, as I say, was the bundle that was filed by the Office of Fair Trading for the first case management conference which mainly contains the Tribunal's own Judgments on admissibility. Then there is a second file by the OFT in support of its submissions and then there is a third bundle which contains the authorities filed on behalf of the Interveners. As far as Cityhook is concerned, we have not filed any authorities, but we have this morning produced copies for the Tribunal of two documents, one is the Commission Guidelines on the Application of Article 81(3) of the Treaty which we say is helpful background to the object question in particular. There is a further document which is an extract from **Van Bael & Bellis**, the fifth edition, which is referred to in my skeleton argument and for completeness you should have.

THE CHAIRMAN: Thank you very much.

MR. RAYMENT: Madam, you are aware of the background of this case and we say that the background to this case is very important by way of context of the issues that you have to decide both today and in due course on the question of admissibility. Cityhook is, of course, a small British Company with a good idea which tried to get into the market for laying undersea cables and contracts were in place, and things were at a very advanced stage, but then there

was a problem, and as far as Cityhook was concerned, players involved in the markets that would be affected by Cityhook's technology would not do business with it.

In 2002 they complained about the problem to the Office of Fair Trading who agreed that there did seem to be a problem and spent the next four years investigating that problem, and it is really in the context of all of that that Cityhook is still not clear, it says, as to exactly how it is at the end of that lengthy period of time the Office of Fair Trading says that it is not in a position to decide one way or another on the question of whether there has been an infringement here such that Cityhook can bring an appeal before this specialist Tribunal.

On the question of disclosure, which is where I would like to start, madam, it is not clear at the moment just how far apart the parties are on this, or perhaps I ought to subdivide that; it seems at least as far as Cityhook is concerned, the Office of Fair Trading is concerned, and the Joint Interveners there may actually be relatively little between us. Our submissions on this issue are at paras. 9 to 13 of our skeleton argument.

We really say that the issue is a pretty straightforward one to state in principle, albeit that issues may arise in practice as to how to apply it. We say that you do not need to go any further than the Tribunal's own – for want of a better word – leading authority on this issue, which is to be found in *Claymore v OFT (Recovery and Inspection)* [2004] CAT 16 at para.113. There the Tribunal explain that any application for disclosure under Rule 19(2)(K) will only be granted if the disclosure sought is necessary relevant and proportionate to the issue that the Tribunal must decide. I should also preface that with the fact that that means disclosure in the Tribunal is not automatic. We say that that short statement by the Tribunal actually encapsulates all the principles, and all the various angles of this problem that the various submissions that you have received address. Perhaps I should make that submission good by looking just briefly at the Office of Fair Trading's submissions on this in their skeleton at paras. 27 to 28. There in those paragraphs, having conducted an extensive review of the Tribunal's authorities and the authorities emanating from the Administrative Court, and also a review of various pieces of legislation both domestic and EC, OFT summarises in these two paragraphs what they draw from all of that. I just focus on these to almost, as it were, check to ensure that there is no major dispute between us. Paragraph 27(a) seems to agree with what we are saying. Paragraph 27(b) says that we have to show that Smith 1 or 2 are either inaccurate or incomplete. We would also submit that alternatively we would only need to show that they are inadequate for the purposes of the issue that the Tribunal has to decide, and the joint interveners agree with us on that point.

THE CHAIRMAN: Not inaccurate or incomplete.

MR. RAYMENT: Well, inaccurate or incomplete are certainly two bases on which disclosure may be called for in order to clarify what is in the evidence, but we also say that if it is inadequate for the purposes of the issue that the Tribunal has to decide, then it may be warranted to inspect documents that may clarify that. These are all shades of meaning, but they capture the point, we submit, that there has to be a genuine issue. We accept that we have to show there are genuine issues before the Tribunal starts to get ----

THE CHAIRMAN: If they are adequate, then they would not meet the other tests, would they?

MR. RAYMENT: That is absolutely right, and that brings me on to the point ----

THE CHAIRMAN: It would not be necessary and relevant.

MR. RAYMENT: Exactly. This is my point - that in fact the Tribunal's formulation does sort of cover all angles. Looking at para. 28 of the OFT's skeleton argument it says, after a review of all the various legislation that enshrines the principle that internal public documents should not be ordered unless there is a strong countervailing ---- or, the public interest is outweighed, the rather meek conclusion that is come to at the end of that paragraph is that therefore disclosure should not be ordered of an internal document which is peripheral to the preliminary issue to be decided by the Tribunal. But, elsewhere in the skeleton, the OFT talks about an exceptional circumstances test on the basis of all this legislation. But, if all they are saying is that peripheral documents should not be disclosed, then we think that that is completely covered by the Tribunal's test.

So, as we say, we really focus on the Tribunal's test which we say only if there is a problem with the adequacy of the evidence in terms of the issue that the Tribunal has to decide ---- Of course, the context of the issue is extremely crucial because you have been cited cases which relates to quite a wide variety of different situations. None of them is the issue that you have to confront - either in this particular statutory context or on these particular facts. We invite the Tribunal to bear that in mind, respectfully, when they are considering those matters.

Having said that I do not think there is that much between us, I am just slightly worried about the way that the OFT skeleton is drafted on various points. For example, in para. 16 of the OFT's skeleton, referring to the *Claymore* case, the OFT quotes the Tribunal saying,

> "It should not, at least ordinarily, be necessary to go in great depth into the underlying documents in order to establish whether the decision under appeal is soundly based".

Well, that may have been correct on the facts of that case, but in fact the *Claymore (Recovery and Inspection*) was not an admissibility jurisdictional issue case. It was actually about whether or not the decision was a good one, or not. The issue that was sought to be argued by the Appellants in that case was that there was an error of principle, effectively, and the

Tribunal said that. “In order to determine that issue, we do not need to see some very detailed underlying documents relating to costs and other information of that nature”. So, we say that although the general statement in principle in that case is helpful, other statements like this are not particularly helpful necessarily in this case.

Again, in para. 17 the OFT cites the Tribunal in *Aquavitae*, saying that in many cases - or, at least normally speaking, internal preparatory documents may not be relevant to the issues that it has to decide. But, in fact what is left off this quote here is the fact that in the particular circumstances of this case the Tribunal was assisted by those sorts of documents. In *Aquavitae*, there the complainant had made several complaints about wanting to get into water retailing, and he was refused connection to the network by the incumbent operators. He complained to the Director General of Water Services who, at the end of it, said that he had not ever ruled on that complaint - he was completely agnostic about it; he had reached a view one way or the other.

The Appellant’s case was, “Actually, you say you’re agnostic, but in fact you did have something of a sceptical view about all of this”. On the question of disclosure the Director, in that case at least, accepted that documents were relevant and that some of his internal documents would have assisted the Tribunal.

THE CHAIRMAN: But he produced them voluntarily.

MR. RAYMENT: He did in that case produce them voluntarily.

THE CHAIRMAN: Did he provide the witness statement?

MR. RAYMENT: There was a witness statement, yes.

THE CHAIRMAN: To which those documents referred?

MR. RAYMENT: That is correct.

THE CHAIRMAN: So, he used the documents as, effectively part of his witness statement as part of his disclosure.

MR. RAYMENT: That is true, yes. Mr. Turner will correct me if I am wrong ---

THE CHAIRMAN: He has been nodding.

MR. RAYMENT: -- because he was acting for the Director in that case.

MR. TURNER: I should just say the disclosure was made separately from the witness statement, as I recall. The witness statement followed afterwards and referred to disclosure which had already been made in passing.

THE CHAIRMAN: It was part of the overall disclosure which the Director made in being full and frank.

MR. TURNER: Yes.

THE CHAIRMAN: He chose to do it by giving some documents and a witness statement.

MR. TURNER: Yes. He chose to give the documents because the documents in that particular case included statements from a senior official - not the decision-maker but someone underneath the decision-maker - which suggested ---- might have suggested that a firm decision had been made. Therefore, those documents were produced as part of the duty of full and frank disclosure. They were accompanied by a witness statement from Mr. Saunders, the Deputy Director, and also the decision-maker in that case, explaining precisely his thinking process, which is the analogue to Mr. Smith's statement in this case.

MR. RAYMENT: You do actually have in the third bundle of authorities -- I do not invite you to go to it now -- at Tab 11 the Tribunal's ruling on the question of disclosure. At that stage it left it to the Director. It is not clear whether the Tribunal ---- Well, the Tribunal did make some comments about relevance, but that was for the Director to then consider his position, as it were.

MR. TURNER: No formal order was made, and I believe, Madam, that the Tribunal adopted something of a similar approach in the *Aqua Resources* case.

THE CHAIRMAN: It is right that this Tribunal has never actually ordered disclosure. I am not saying it cannot, but it has never ----

MR. RAYMENT: I do not think it has had to. That is the way I put it so far.

So, that deals wit the points, as far as I am concerned, in the OFT skeleton about the Tribunal's case law. There is then a section on judicial review principles. I do not want to go to all of these cases. There is quite a smattering of them on disclosure in particular cases. As I say, I do not think that any of the contradicts in a major way anything that I have said about the general principle. Looking at para. 18(c) of the OFT's skeleton you do need to look at the actual specifics of each case to see whether the principle given is supported in quite the terms it is submitted there:

> "A respondent public body owes a duty of candour to the court, which his to be fulfilled by means of a witness statement, not the disclosure of documents."

Well we say it all depends on the circumstances, one cannot make such a bare submission. Again at 18(d) there is a reference to the *Pergal Dam* case, *ex parte World Development Movement*, which is cited by OFT so you cannot go behind the affidavit unless it is established by material outside the statement that it is inaccurate or incomplete in some material respect. We say that that is actually a slightly stronger proposition than the authority actually warrants, and I do not need to take you to it, but if you look at Lord Justice Dillon's speech, which is cited in the pages referred to by OFT , he does refer to the point that I have already made which is that the adequacy of the evidence in terms of what the court has to decide is an important qualification to the general statement.

Again, in relation to *ex parte Huddleston* which is referred to in para. 18(e) of the OFT's skeleton, Lord Justice Parker is cited as saying that an applicant in Judicial Review:

> "… is not entitled to demand from the authority a detailed account of every step in the process of reaching the challenged decision in the hope that something will be revealed which will enable him to advance an argument not previously revealed."

We say we are not doing that in this case, and the more pertinent quote from *Huddleston* is just above what Lord Justice Parker says, which is that whether a respondent's answer is sufficient depends on all the circumstances and it can be left to the court to decide what is required in the circumstances. So again, I do not want to take you to the authority, but I am just highlighting at this point this general theme that we have, which is that really none of these authorities add in any material way to any of the Tribunal's own jurisprudence, and they make it clear that it all depends on the individual circumstances which, of course, includes any evidence that has been filed by a respondent.

I do not intend to take you through the next section of the OFT's skeleton in which they set out quite extensively various pieces of legislation which recognise the need to protect internal documents. It is not clear to us how these various pieces of legislation actually change the principles that are applied in a judicial setting and, as we say, although on the one hand OFT seems to rely on these pieces of legislation for some kind of exceptional circumstances test, which you see at para.19 of their skeleton, actually when you come out at their conclusion at the end of it, what they are saying is that internal documents that are peripheral, this is at para.28, those should not be ordered – well, I think I have covered that point. I do not propose to deal with what the other Interveners have said on this issue, I will let my skeleton deal with that, unless there are any specific questions on that that the Tribunal has.

Moving on then, the submissions on BT, NTL and Global Crossing's points on disclosure are at 17 to 23 of our skeleton. Paragraphs 31 to 32 of our skeleton we outline Cityhook's complaint. Then we deal with restrictions to competition in paras. 33 to 35. We simply set the object issue in context for the Tribunal there by reference to the Commission's guidelines – I do not propose to go into that in any detail, but there it is.

Then we move on to the question of the test for an appealable decision which you find at paras. 24 to 30 of our skeleton – or rather I should say I am moving back, in fact. We say that this is, we hope, a relatively orthodox summary of the principles to be applied and that we are certainly not on this application making any submissions which involve a quantum leap away from the Tribunal's case law on this.

I think that brings me, after that short run up, on to the issues that the Tribunal must decide which is, I hope, getting more succinctly to the heart of the matter. The question is whether, as

a matter of substance, the OFT made an infringement decision when it closed the file on this investigation, and that is at para.37 of our skeleton. As far as the OFT is concerned, they never decided in that way because first, there was evidence of infringement; and secondly, they needed to explore other areas. We say ,yes, of course, at the end of a four year investigation we would hope there was some evidence of infringement at least, but the mere fact that there was some evidence of infringement does not preclude a non-infringement decision. We say that that is supported by what *Claymore* says at para.137.

So far as the Appellant is concerned, the spotlight is on the second point, which is those specific areas which the OFT says prevented it from deciding. We say that is where there are genuine issues that arise in a case which has gone on for four years and, in particular, the issue raised by this application is to understand in what sense further work or investigation that had not been done suggested genuine abstention from deciding on the merits – a genuine abstention being the converse of an appealable decision on the Tribunal's case law. Our position on this is that a lot of work had been done on the areas in question, they were not virgin territory, and although the OFT may not have explored every avenue in a formal sense they must have had a view – at least on the material that we have so far, we think it is reasonable and the background circumstances to the investigation, they must have had a view on whether or not it would be useful to go down those particular avenues that they had identified that they had not gone down. If you study the evidence carefully we say there is no clear view expressed in the evidence on that issue, but that is one of the questions that needs further clarification and investigation, we say. It is all very well to identify avenues to go down, but whether you actually need to go down them formally to get to the end rather depends on whether you think there is anything going to be there when you get there. We suggest that in the circumstances the OFT did at least have an idea of what it was likely to find if it was going to go down those and therefore it could sensibly be said to have ruled them out when it closed the file. But, as we say, we say that without total clarity on the point.

THE CHAIRMAN: But how does that help you, because the question is whether there is a decision and the fact that you identify a whole lot of areas that they thought they might further investigate is not going to assist in showing that they have made a decision of non-infringement – that rather assists them, does it not?

MR. RAYMENT: Well, that is the point that they make. We are, by asking this question, genuinely seeking clarification of the actual decision that has been taken.

THE CHAIRMAN: The question is not whether they have to verify what they say is the decision they took, which is to stop the investigation, the case is whether they had made another decision behind that.

MR. RAYMENT: That is right.

THE CHAIRMAN: And you need something to show that there was a decision. Showing that there are lots of areas that they thought they thought they had ---

MR. RAYMENT: There was clearly ----

THE CHAIRMAN: -- investigation does not assist.

MR. RAYMENT: There was clearly a decision to close the files, the question is on what basis that was taken. The OFT have put forward an account of that, and we simply say "yes", but in all the circumstances of this case we are not quite sure what you really mean by all this work that had to be done, because as far as we had understood it, you had looked at these issues to a greater or lesser extent, of course, we do not have any extensive information about specifically what issues were investigated, and we simply do not know. They close the file where there were other things to do.

THE CHAIRMAN: Is that not in the category of a fishing exercise?

MR. RAYMENT: That all depends on the circumstances of the case. If we can show that there is a genuine issue arising on this then in my respectful submission it would not be. This is why we say that the circumstances of this case are so important and so exceptional. We are not talking about a case that just dropped on the mat yesterday, we are talking about something that was looked at and poured over for four years, and that particular context is extremely important when somebody at the end of that says "I just wasn't in a position to decide on the merits". That does raise questions, we say, "When you closed the decision, what was the actual basis on which you closed it? Was it really referable to the substance properly understood, or was it really because you did not know?" We say that in fact looked at more closely the evidence does reveal suggestions that the OFT, as far as we can tell, was not particularly optimistic that these avenues would lead to anything, in which case one is left with the issues which they were considering – the object issue and the effects' issue. On the object issue all we know at the moment is that after four years they had got an extremely long way into investigating that issue, and they had considered the legal case extensively. Then there was some sort of legal problem at the end of it that could not be resolved.

We say that in the context of a four year investigation that does raise genuine issues about quite what specifically was involved. Yes, of course, we hear that generally speaking there was more work to do, but what does that actually mean in the context of a case that has been going on for four years?

THE CHAIRMAN: Well that is a question that you might ask in Judicial Review, not the question here.

MR. RAYMENT: Well, with respect, we say that it can be relevant to the issue that you have to decide, which is what really was the substance of this decision? Once that is clear then one can go on to decide whether or not it is admissible, but at this stage there is an issue warranting further investigation. The lack of clarity, in our submission, is something of a problem, and it is something of a problem for me addressing you this morning. I do not want to try the Tribunal's patience by going back into the distant archaeology of this case, but it did start in the carboniferous era and going back to that period which is 2002. We then come forward, over a year, to July 2003. We learn from Mr. Smith's first witness statement at para. 26 - perhaps we could just turn that up briefly ---- If we start at para. 24 - and this is where the case is coming up to the higher echelons of the OFT, and its skeleton, setting out the parameters of the case, is sent to Sir John Vickers. He looks at it, and at para. 25 we learn that he identified some unresolved issues. This is back in July 2003 - for example, in connection with market definition and the economic and commercial logic of the collective boycott case. Well, those are clearly, it seems to us, issues that are directly relevant to the key issues that at the end of this investigation the OFT is still saying that it had a problem with. Market definition obviously is relevant to the question of effects, potentially. It is also obviously something which you may have to define, albeit not in an economic sense, but defining the nature of the infringement when you are defining an object infringement. Also, the economic and commercial logic of the collective boycott case. Well, that is clearly central to characterising the nature of the infringement, which is the exercise that you have to carry out when you are considering an object infringement.

So, at a very early stage, as far as we can tell, these issues were being considered quite centrally at the highest level. We then learn that having highlighted those issues - this is at para. 26 - the investigation is then pursued into these areas that have been identified as unresolved at that stage. This is 2003. The investigation then proceeds all the way through towards the end of 2004. We know that the investigation was extremely extensive. Indeed, little bits and pieces are just trickling out as to just how extensive it was - for example, BT, at the last case management conferences, said that it had actually responded to six substantial Section 26 responses. So, here are some unresolved issues which appear to be relevant to the issues in the case, and they were exhaustively investigated, and at the end of it we are told that that was not enough - as if that previous period had almost not existed.

Then we get to October 2004 which seems to be an important point - whether the case should go through the review process. We learn at this stage that Sir John Vickers had some reservations about the case. But, they did not seem, any more, to relate to the previously unresolved issues. Mr. Smith says that he thought there was good evidence on the one hand,

but on the other hand he says (and this is in para. 28) that although there was good evidence, he says that, "Even at that stage, however, I was aware of issues concerning the size of the case and lack of certainty over the facts and the law". As the case has progressed, these issues became more significant.

So, although there has been a view that there was some evidence of infringement, the question has been quite mixed for some time..

It was then authorised that the statement of objection should be drafted. It is not entirely clear, but it seems that some investigation of some sort was still going on in this period from December through to August when the statement is first finalised as a draft.

Then we get at the bottom of p.12 of Mr. Smith's statement at para. 33 the internal review. Again, these issues are considered in detail. The issues of object and effect raise their heads again. Having identified these as problems - obviously the Case Review Panel is the body that can identify these as problems - there was then a further flurry of activity by the case team looking at these specific issues with a view to trying to make out the case for an infringement. That involved, we assume (because we do not know), more legal work on the question of the object issue, and investigation of the question of effects, although again it is difficult to be specific about it - other than effects generally. We know that there were a number of markets that they were looking at ---- or, two principle markets - the market for sub-sea cable laying and the downstream market for the telecommunications market, and what effect there might be as between the two from Cityhook's technology. So, those issues were looked at.

THE CHAIRMAN: The fact that they looked at these issues does not mean they made a decision in relation to them.

MR. RAYMENT: No, we accept that. But, we say, on the other hand that the fact that they did look at them means that when they closed the file it does raise the issue of whether or not that was on the basis of the merits of the case properly understood.

THE CHAIRMAN: But, the fact that people are discussing behind the scenes what their views are; what investigations have taken place, etc. does not get you to a decision being take.

MR. RAYMENT: Not by itself, but it does raise legitimate and genuine issues - not just speculative ones - in this particular context. Lengthy investigation into all these issues, and then it is suddenly said, "Well, there wasn't enough" but we cannot tell because as far as we can see ----

THE CHAIRMAN: What do you think you are going to find in these documents that is going to show that there is a decision? He has said that all this went on. He has been very full and frank about it. We have got that it all went on; that there were all these investigations; that everybody was looking into it; and everything that you are saying. We know that. The detail

of what was going on we possibly do not know, but does it matter what the detail was? We know all that was going on.

MR. RAYMENT: I do not want to speculate. I am trying to state the issue as we see it. Having done that though, on the question of the object issue, it seems to us quite likely that the legal and/or factual problem of definition, or whatever it was that they had - because it seems that the investigation on that aspect of things was complete - brought the case to a close and reflected their view of the law. You cannot say it is not settled on that basis ---- or, you cannot necessarily say it is not settled if, on that basis, they bring to a close a four year investigation into what is potentially grave anti-competitive conduct. So, that is what we think we need to understand, because we do think it is a question that is, on the face of it, relevant.

THE CHAIRMAN: You say, "We think we need to understand". That is not the test. The question is whether it is necessary for us to see all those documents in order to decide ----

MR. RAYMENT: Yes.

THE CHAIRMAN: -- whether there is an infringement, or non-infringement.

MR. RAYMENT: Exactly.

THE CHAIRMAN: The question is whether those documents are going to contain material which will assist in evidencing a non-infringement decision. Now, we are told that all of this was going on, and the fact that people are talking about it, and there is more material, etc., does not necessarily mean that that is going to assist us in determining whether there was a non-infringement decision.

MR. RAYMENT: I have not seen it, but it may assist you once you have looked at it. I mean, why was it at the stage of closing the file that the OFT thought that it had no compelling story of harm? I mean, at first sight that was the view of Mr. Priddis, a very senior and experienced official, which is referred to in para. 51(c) of Mr. Smith's witness statement. That was based on a view of the case, and Mr. Smith says that he took these views into account. So, we say it is difficult to see how it is not going to help the Tribunal's understanding of what the actual decision was. That is the issue that is raised, we say.

Again, we say also in relation to the effects issue we make similar points - which is that these issues were looked at. It is unclear to us what the OFT thought it was going to find. That does, again, raise a question as to what the actual decision was in those circumstances.

We also make the point that although the question of object and the question of effect were seen as separate problems relating to those particular cases, there is also an interplay between these issues If the OFT actually had a negative view of effects, that is likely to have fed into the problem that they ran into on defining the object issue. If that is right, then to all intents

and purposes they could have reached a decision which his appealable, we say, on the substance. May I have one moment?

THE CHAIRMAN: Yes.

MR. RAYMENT: That deals with those issues, and in addition we draw attention to the fact that on one level of course we are in the position that we are in – we are forced to just ask questions, we say, because of the paucity of a genuine explanation, we say. One of the additional points that we do rely on is the position with regard to Ofcom, which we say does raise a question in our minds about exactly what was going on. All we are told is that they did not consider Ofcom at all; they consider Ofcom generally in the sense that when they are considering their priorities as to whether to carry on with this case they thought about Ofcom. I may need to make that submission – do you have the Decision letter of 23rd June? We are into the annex, and it is para.21 of the annex which is the only reference to consideration being given to transferring the matter to Ofcom, well it is not consideration of transferring the matter to Ofcom, it is simply saying that for the OFT a case like this is not necessarily a priority because Ofcom exists, but notwithstanding that no consideration was actually given to transferring the case.

THE CHAIRMAN: This is a different point, is it not?

MR. RAYMENT: No, it is not ----

THE CHAIRMAN: Telecoms is not a priority area ----

MR. RAYMENT: For the OFT.

THE CHAIRMAN: That is just an overriding factor; they did not consider whether, having decided not to continue they ought to have liaised with Ofcom but that again is not a matter for us, that is a matter on a Judicial Review.

MR. RAYMENT: I accept the question of the Decision; I accept that the legal question of whether or not they should have referred the matter to Ofcom is a matter for Judicial Review. The only point that we are making in the skeleton is that it is somewhat bizarre that here is a case which raises important issues, major parties are subject to it, it has been going on for four years, if it is closed it risks wasting years of resources, years of OFT effort – and there is evidence of infringement apparently, and yet not even the slightest bit of consideration is given transferring it to Ofcom, even though as part of the whole prioritisation criteria considering whether another body is best placed to deal with something is part of the process that you go through.

THE CHAIRMAN: How does that help on deciding whether there is non-infringement?

MR. RAYMENT: I do not want to make this point greater than it is, but we simply say it is another factor which, from Cityhook's perspective does not look like that when it came to it the OFT was really interested in pursuing this, that was because it did not see any merit in exploring

these further avenues. As I said, what is not clear is what the OFT really thought the merits were of pursuing these other avenues.

THE CHAIRMAN: They would say they did not think it was going to be a proper use of their resources.

MR. RAYMENT: I accept that but we say the question is raised in all the circumstances, and it is important for the Tribunal to get to the bottom of it in order to determine its jurisdiction. Otherwise it is the OFT that is determining its jurisdiction and not the Tribunal.

THE CHAIRMAN: We have Mr. Smith's two witness statements, and we can look at those and what he says in them, and come to a conclusion whether in fact they made a non-infringement decision and having made a non-infringement decision they decided not to pursue the matter further and therefore closed the file. Why do we need anything else?

MR. RAYMENT: Well I have explained why we say that story is not as simple as that on what we have been told and we are at a disadvantage, obviously, in trying to put the contrary in more detail than I already have, but as we say there is still a genuine ----

THE CHAIRMAN: I think you have the sort of burden of trying to satisfy us that these documents are necessary and it is not just some fishing expedition on something which, in a perfect world, one might see everything. This is not a perfect world, it is going to cause a lot of cost and delay and is it really necessary and proportionate against the cost and delay which would be involved, if we allowed disclosure?

MR. RAYMENT: Well, considering the question of proportionality probably at this stage of a four year investigation I think that is probably an issue that the Tribunal does need to think about quite carefully. We have also flagged up things that we do not understand in relation to the Decision. For example, in para.47 of the skeleton argument we refer there to Mr. Smith's reference to taking into account the views of a senior legal adviser, not to mention the whole object issue, which again is an important part of the context in looking at the object issue; no problem was clearly articulated in the Decision letter on this issue. There is not clarity on this point.

Again, with regard to people having an eye to the Tribunal, we also know from Mr. Smith's witness statement, that it was considered that there was a risk that a case closure decision in these circumstances would be an appealable decision to the Tribunal. If you want the reference for that it is 53(e) of Mr. Smith's first statement. I cannot say what relevance Mr. Smith made of that but he did take into account these views in reaching his decision. We say it is part of the overall picture which raises these issues which we think needs to be investigated further before the Tribunal is properly in a position to decide.

If I could now just turn in conclusion effectively to say a word about the documents that we are seeking? You have raised the question of proportionality and the expense involved. We are not seeking a lot of documents for the sake of it, if we were we would have obviously sought the draft statement of objections and so on. What we are trying to do is identify the issues and in light of those issues that will assist in determining which documents may help on those issues. Obviously, from our perspective we do not know quite what is in those documents, we would not necessarily want to see all of them. One of the concerns that has been expressed to us is that disclosure of these sorts of documents impedes brainstorming by officials and so on. We do not necessarily want to see a minuted discussion of that nature, but what we do want to see, if possible, is documents that show what the view was on these extra avenues of work that are said to have been so crucial to the Decision, because we say that they raise questions about the actual decision that was reached.

THE CHAIRMAN: What Mr. Smith says is that insofar as they do relate to a decision he has effectively summarised them in his witness statement, and that otherwise the documents are documents which you would say you do not need to see.

MR. RAYMENT: We have explained why the views expressed in those documents do tend to suggest that there was a more negative assessment of this case than actually appears on the face of what Mr. Smith is saying. I am not saying he has done that deliberately, but for example, there is an internal document which actually records his decision and that has not been made available, and instead it is summarised. We do not understand why we cannot see the actual Decision.

THE CHAIRMAN: But if he says that it is a true summary of the document – the draft Decision Letter – he says it has nothing else in it other than what is in the actual Decision Letter. If he says that we have to accept that, we have no reason ----

MR. RAYMENT: Well you have to accept that unless you think there are genuine issues which it would help to actually see the underlying document. That explains the framework within which we are requesting these particular documents and if the Tribunal identified issues which it did feel it needed clarification on then that would provide the Office with an opportunity to review these documents to see whether, in fact, it did need to provide them. That might be one way of doing it so that things are kept to the minimum necessary to determine the issues that the Tribunal has to grapple with on the issue of admissibility. Again, we have raised the question about briefing papers that were prepared by the case team on the additional issues raised by the review process, and clearly those documents would contain material that would throw a slightly different light on Mr. Smith's decision.

THE CHAIRMAN: That means going behind what he says?

MR. RAYMENT: We say not.

THE CHAIRMAN: Well I do not understand ----

MR. RAYMENT: We say it is clarification because ----

THE CHAIRMAN: He has said what light they throw and if you are saying they throw a different light.

MR. RAYMENT: Well he has not said anything about the light that these documents refer to, because they are not mentioned. I have said that we think given the nature of the investigation that has gone on, there are these issues that arise. Clearly, those documents relate to what was explored and whether there was actually much more to look at, or not. That is what we are told. That gives rise to the issue that we think needs clarifying.

I am grateful. Those are my submissions.

THE CHAIRMAN: Thank you. Mr. Hoskins?

MR. HOSKINS: I would like to begin with what the principles are in relation to disclosure. Mr. Rayment says there is not much between us, but it looks like a case of giving with one hand and then taking away with the other, so I have just got to clarify - I think I can do it very shortly by asking you to turn to para. 27 of our skeleton argument. We say there are really three strands to the approach to be adopted. The first one is the quotes from *Claymore (Recovery and Inspection)* which says that as a matter of general principle disclosure is not automatic, and in order for disclosure to be ordered it must be necessary, relevant and proportionate.

THE CHAIRMAN: We have also, of course, got the words of Rule 19, which is 'just, expeditious and economical'.

MR. HOSKINS: Yes, madam, precisely. So, that is the starting point. That is the general approach to disclosure in the Tribunal, and, as we all know, the Tribunal has different types of jurisdiction, and that is the point that is made in *Claymore*. So, when one is looking in a particular case at whether something is necessary or relevant, for example. Our submission is that one has to take account of the relevant principles applicable to the type of jurisdiction the Tribunal is exercising and that we get from *Claymore.* That is why at the very first CMC we all realised that we were going to have to look at judicial review principles. Indeed, that is therefore what we have done in the skeleton.

What the judicial review principles show – I have set out all the principles, but I have flagged up one in particular – is that where the duty of candour has been fulfilled, has been purported to be fulfilled by a public body by means of a witness statement, then the courts should only order disclosure where it is shown that what is contained in the witness statement is either

inaccurate or incomplete. That is para. 18(d) of our skeleton argument. It comes from the *World Development Movement* case.

Mr. Rayment makes the point, "Well, inadequate might be another consideration", but, with respect, it does not actually add anything because if it is inaccurate or incomplete, and that is why it is not adequate for the purpose of deciding the issue. Adequacy in itself … concept, seems to add anything to the inaccuracy or incompleteness.

So, when considering the strands, "Is disclosure necessary? Is it relevant to the issue?" one has to then go on to the next level, which is looking at it - the Tribunal here is exercising a jurisdiction akin to judicial review, and therefore, generally speaking, disclosure will not be necessary or relevant where there is a full and frank witness statement.

There is a further layer, because even if Cityhook gets over those hurdles, it demonstrates the Tribunal's satisfaction that those hurdles have been surmounted. We say there is a third consideration, that which comes from public policy, from protecting the public interest and getting the seller to set out the different rules, the different legislation, both at domestic and. European level that recognise the need to protect public documents, internal documents. One sees the text that covers this laid out expressly - the Tribunal has to ask itself, before deciding whether to order disclosure, whether the need for disclosure in a particular case outweighs the public interest in the confidentiality of internal debate. However, the example given in para. 20 of our skeleton is deliberately an easy one because we would say that that balancing exercise would clearly ... where the documents were relevant, but peripheral. That does not mean that that is the only example where the balance would tilt one way. The point we are seeking to make is that when the Tribunal asks itself, Is disclosure necessary and relevant?" part of the exercise is also to say, "We need to weigh up the need to protect internal documentation against the need for disclosure in this particular case". That is not a rule where we know that one plus one equals two. It is taking account of all the facts, but it is an essential part of the process.

So, that is why we say there are at least three elements.

In relation to the final element Mr. Rayment objects to the use of the word 'exceptional'. The use of the word 'exceptional' comes actually from case law. It is not simply a creation on my part or on the Office's part; it comes from the *Cimenteries* case. That is at para. 24(b) of our skeleton argument. This is, again, in the European context. But, what the European Court has said in the *Cimenteries* case is that in proceedings before the EC courts, internal documents are not to be disclosed unless the circumstances are exceptional, and the applicants make out a plausible case for the need to do so. The *Cimenteries* case, just for reference, is in authorities'

bundle 2. So, that is where 'exceptional' comes from - it is not a creation on our side. It is the way they do things in the EC courts.

Madam, there is a three layer test, if you like – I am not saying it is necessarily applied as 1, 2, 3, but there are three elements that have to be considered and explored. The burden is on Cityhook to show that its request for disclosure meets all the relevant criteria. It is very interesting in the exchanges in Mr. Rayment's submissions when pushed, madam, when you asked him, "How will this help us?" his response was: "It may assist you once you have looked at it". To be fair to Mr. Rayment, a statement perhaps under pressure, but a very telling statement. They are saying "There are all these documents out there, it would be great if we could see them, and once we see them, we might be able to see why they help us". But, that is not the test. He has to show today, he has to convince the Tribunal today why those documents will assist in deciding if there was a breach.

Now it is also important when considering the question of: "Is disclosure necessary? Is disclosure relevant?" Relevant to what? Necessary for what? We say that the Tribunal has more than enough information before it to decide the preliminary issue, which is, "Was there an implied non-infringement decision?" It is useful just to pass very briefly through the previous decisions of this Tribunal in relation to non-infringement decisions. I will not take you through them in detail, but I will give you the references. *Bettercare* was a case in which the Director decided that there is no infringement without conducting a formal investigation because in his view the matter was sufficiently clear to enable him to reach a decision without further ado. That is para. 85 of the Judgment in *Bettercare* which is in the authorities bundle. *Freeserve* was a decision in which the Director decided that the information before him did not provide evidence of anti-competitive conduct (para. 94 of *Freeserve*). *Claymore* - this is the admissibility Judgment rather than the inspection and recovery Judgment in the authorities bundle at Tab 7 - was a case in which the OFT had fully investigated the matter. That is para. 132. It concluded to its satisfaction that there was insufficient evidence to establish an infringement (paras. 130 and 132). Furthermore, further investigation was unlikely to lead to a finding of abuse. (Para.57)

So, in each of those cases the Tribunal found that the relevant decision-maker had, as a matter of fact, reached a concluded view that there was no infringement. That is what Cityhook has to get to through to win the preliminary issue.

Now, what does the Tribunal have available to it at the moment? Well, there is the decision letter which very clearly states that there was no finding of infringement or non-infringement. It expressly says that there was no such ... It says that further investigation was necessary. It says that the reason for closure was due to administrative ... We also have now Mr. Smith's

two witness statements. I think it is probably an understatement to say that Mr. Smith has been candid about the internal debate that occurred within the office.

It is interesting listening and reading Cityhook's submissions. They do not really refer - and it is obvious they are ignoring the fact that there is this body of information from Mr. Smith---- There is a picking through of various passages, etc., but the reality is, when one reads Mr. Smith's witness statement - particularly the first part - he is very candid about what was going on within the office, and the struggles the Office was having in reaching a concluded decision. But, what is clear is that there was a dispute within the office about the various complaints. What is also clear is that the only voice in favour of a non-infringement decision - and that was that in the Case Review Panel - believed that further works should be done before such decision should be adopted. The easiest way to refer to these is in our skeleton at para. 31 where we have sought to summarise what was said about internal procedure ... So, if one looks at para. 31(c) :

> "Prior to the case review meeting, the case team's suggested way forward was for a statement of objections to be issued. The Case Review Panel proposed that further work should be done so as to allow a non-infringement decision to be adopted (1st Smith para. 37)."

So, there is a lone voice within the Office, saying, "We should get on and reach a decision". Even that lone voice believed that further work would not be necessary before that stage could be reached.

We also know what Mr. Smith's view was. Mr. Smith was the authorised decision-maker. He has told us that he believed that there was evidence of potential infringement. It is not a case where he says, "Well, I think there is some evidence of infringement, but there is a lot more evidence of non-infringement". That is not a fair way to read the statement. He states that he believes there was evidence of potential infringement, but that both cases would need to be developed significantly before a sufficiently robust SO could be issued.. That is summarised in our skeleton at para. 31(k) and (l) That gives the necessary references back to the witness statement.

I am getting ahead of myself in a sense. It is, of course, for the Tribunal to focus on what the question it will be asking itself will be, and the question for the Tribunal is: against the factual background set out in Mr. Smith's witness statement, when the OFT decided not to take its investigation any further, or, on its ... should that decision be objectively characterised as an implied non-infringement decision? Our submission - and this is where I am getting ahead of myself - is that there could not possibly be an implied non-infringement decision because the OFT had not completed its investigation, and the authorised decision-maker had not reached

any concluded view of the merits. As far as he had expressed any view on the merits, it was a preliminary view that he believed there was prima facie evidence of infringement.

Now, when one takes that factual scenario and compares it with the previous three cases (*Bettercare*, *Freeserve* and *Claymore*) there is only one answer. But, that is getting ahead of myself. The point is that that is the issue the Tribunal will have to ask itself, and the point for today is that applying it to previous case law to the evidence the Tribunal already has, there is no doubt that the Tribunal is perfectly capable of deciding whether there was an applied non-infringement decision or not; nothing else is required.

Madam, Cityhook needs a way into this, at the moment it is a shut door, so what do they put forward? In their skeleton, and this reflects what Mr. Rayment said this morning, at para.41 they say that the Tribunal is required to understand in some detail the material and basis on which the OFT says it did not in closing the case reach a view on the merits on the material it had obtained, so why does the Tribunal need that information – it is para. 42 of the skeleton. Cityhook's case is that in all the circumstances there is a genuine basis for questioning the OFT's conclusions on those three issues had it been as … as suggested. However that is dressed up, Cityhook is seeking to suggest that Mr. Smith's witness statement is not accurate because he has expressed a view on what the view of the merits were internally. What Cityhook is saying is that "We would like to see information and if we get it we think we might be able to show that Mr. Smith's stated view is not in fact accurate". That is a pretty serious point to make, and to make it you will need something that already existed to show to the Tribunal to say that there was reason to doubt the accuracy. It is not enough to say "If we see something it might show it was not accurate", we need to point to something now. The point that Cityhook relied on this morning was the suggestion that the Office's belief that further work was necessary may have been flawed – it may have been flawed because in fact further work was not necessary; or it may have been flawed because although the Office had identified that further work was necessary, it really did not believe that that further work would make any difference. That is they way it has been put.

Madam, you have correctly picked up Mr. Rayment on that point already, the preliminary issue, which the Tribunal is going to have to decide is whether, as a question of fact, the Office reached a concluded view as to whether the 1998 Act had been infringed. The issue for the Tribunal to decide is the basis upon which the Office decided to close t he investigations. The issue as to whether the Office was right to do so is a matter that would only arise from consideration if the Tribunal decided that it did have jurisdiction in respect of the Appeal.

When one comes to the details of the work that was considered necessary to be carried out, it is clear that as a matter of fact the Office had taken the view that further work was needed, both

in relation to the effect on competition and in relation to infringements and both in relation to the legal analysis of the … case.

THE CHAIRMAN: I assume what you would say is that it does not matter whether the case workers thought that further work was needed to come to a non-infringement decision or that Mr. Smith thought that further work was needed to come to an infringement decision; it is the further work that underlies that.

MR. HOSKINS: There can be no concluded belief as long as the Office believed there was further work necessary in order for it to come to a concluded view. It is interesting because, as I understand it, the fact of the Office believing that further work was necessary is not directly challenged by Cityhook. What Cityhook is saying is "We need to know the details of what that further work was". Well in fact we already have certain details of what was identified as being necessary, and again I will just give you the reference to that , 2nd Smith paras. 13 to 14 on object, and para.18 on effect. We do not need to look at the detail because investigation of precisely what further work was considered necessary is irrelevant because the crucial question for the Tribunal is to identify as a matter of fact the basis of the Office's closure decisions and it is not relevant in deciding jurisdiction for the Tribunal to investigate whether the OFT was justified in reaching such decisions. It is the existence of the belief that further work was necessary that is the relevant fact, the necessary fact – the detail is irrelevant.

So far as Mr. Rayment suggests that disclosure of that material will somehow reveal that the Office did not really believe it was necessary then that is just a fishing exercise against the backdrop of the closure letter, and Mr. Smith's two witness statements which are very candid about the process the Office has gone through – there was absolutely no objective basis whatsoever for suggesting that Mr. Smith's statements are inaccurate on that basis.

In the skeleton argument of Cityhook at para.52 there was an attempt – it was not taken up this morning – to suggest that despite what Mr. Smith says that somehow the Office had reached concluded views on certain issues:

> "Thus in relation to the telecommunications' market the decision letter contained *inter alia* the following conclusions:
>
> > (i) for the Collective Boycott case there is 'no evidence' of the impact of Cityhook's technology lowering costs for telecommunications companies which could then be passed on to consumers in the form of lower call charges."

It is suggested that that statement in the decision letter somehow indicates a concluded view of the matter, but that is not a proper conclusion, because in Mr. Smith's first witness statement at para.47 – and I would ask you to have a look at that.

THE CHAIRMAN: Yes.

MR. HOSKINS: This is where he summarise Mr. Mayock's advice, and towards the bottom of para.47 Mr. Smith says:

> "He further recommended that, prior to the issue of any SO, with regard to effects, the case team would need to supplement its arguments in the August Draft So with extra work to develop the theory of harm (in connection with the Collective Boycott case)…"

So when in para.52(i) of its skeleton, Cityhook suggests the OFT have reached a conclusive view on the effect on consumers that is not right, because one of the particular items of work which has been identified as part of the internal process was investigation of and development of the theory of consumer…

Madam, it is the same point in relation to (ii) in Cityhook's skeleton para.52. It is there suggested that a concluded view was reached in relation to the back up decision letter and contained the following conclusion:

> "… 'on the facts' at the time of the infringement it was far from clear according to OFT that the adoption of Cityhook technology would have increased the speed to market of services using cables under construction."

Well again it is not a correct implication that there was a conclusion on that issue, because if one looks at Mr. Smith's first witness statement, para.41, the final sentence, he explains that one of the lines of inquiry that was identified as part of the internal process was whether Cityhook's technology would have made market entry for telecommunications' companies easier.

Finally: (iii)

> "As to the specific costs of landing a cable these were 'minimal' as a proportion of installation costs and that 'in any event' other factors in the installation process would be 'more likely' to impact on telecommunications' costs to consumers."

And there is a reference to the decision letter. Again, if I can ask you to take up the decision letter this time, para. 14 of the annex that Cityhook's skeleton refers to, what the quote actually is from para.14 of the decision letter is "The OFT is not in a position on the information available to it to determine the impact of the use of Cityhook technology and would have had prices quoted by the respondent." That is not a final conclusion, that is an indication that at this stage of the investigation the OFT is not in a position to reach a conclusion, which is the opposite of what Cityhook says.

Insofar as there has been an attempt to point to objective facts that already exist to show that there is inaccuracy in Mr. Smith's witness statements they do not hold any water.

Madam, the Ofcom issue, with respect, is really taking us nowhere. In the disclosure request the Ofcom issue is raised and it seems to be suggested that the Ofcom issue itself would require some specific disclosure. In his second witness statement Mr. Smith again quite candidly said -----

THE CHAIRMAN: They overlooked it.

MR. HOSKINS: And now the only way it seems to be prayed in aid is to say that somehow because Mr. Smith did not take the possible reference to Ofcom into account that is evidence that Mr. Smith, despite what his witness statement said, actually believed that there was no merit, or there was less merit in Cityhook's complaint.

THE CHAIRMAN: I suppose it would be put on the basis that if he thought it ought to be further investigated and that it was not a non-infringement decision then he ought to have considered a transfer to Ofcom, or at least made inquiries of Ofcom in relation to it to make sure it ought to have been closed by the OFT and therefore, that is some foundation for an implied decision of non-infringement, because otherwise it would have come into his mind.

MR. HOSKINS: Madam, I think you have done a very good job of putting it at its highest. The issue of whether or not Mr. Smith should have considered whether to refer to Ofcom is a matter that might arise if the Tribunal has jurisdiction on a Judicial Review, but there is an awful lot of "ifs", madam, even in your formulation for it to lead to evidence that Mr. Smith's account is inaccurate, and that is what the burden is.

THE CHAIRMAN: I think it is a matter of submission anyway, is it not? No documents are going to help that – he did not look at it.

MR. HOSKINS: Precisely ----

THE CHAIRMAN: It is a matter of submission.

MR. HOSKINS: Going to the accuracy of Mr. Smith's witness statement.

THE CHAIRMAN: But it is saying Mr. Smith overlooked it, the reason he overlooked it was that he had come to a different decision, because Mr. Smith is a person who would not overlook it.

MR. HOSKINS: Too many "ifs" and probably too many "buts" as well. Finally, I would just like to look at certain of the documents that have been sought by City because what they are really looking for are internal documents – the vast majority are internal documents – created prior to Mr. Smith's adoption of the contested decisions. There are a number of problems with this as a level of principle. First, opinions expressed by individual officials during the course of an internal debate cannot be deemed t o constitute the opinion of the Office as a legal entity. They are personal opinions of its employees, they are not the concluded views of the Office.

Secondly, the content of draft internal documents also clearly cannot be taken as stating the Office's concluded conclusion on any issue, because they are, by definition preparatory documents that are subject to change.

The final point is that the Office's definitive conclusion on any particular issue is only adopted, only comes into being if and when a final decision is taken on that issue by the ultimate decision maker acting on behalf of the Office, pursuant to the Office's statutory authorisation. As we all know that person here was Mr. Smith.

In our submission, with respect, Cityhook has not got close to establishing why internal discussion documents leading to the final closure decisions would be necessary to enable the Tribunal to decide the issue before it. The crucial decision is that of Mr. Smith and he has given a very full account of the basis upon which he took that decision. So let me look at the categories of documents and let us see whether it is going to lead us anywhere.

First, Cityhook says it seeks the existence of certain briefing papers prepared by the case team. I should say it is not correct that those are not mentioned by Mr. Smith, they are mentioned in his first witness statement at para .43. As we know, because Mr. Smith has told us, the case team's view was that an SO should be issued. Given that Cityhook's case is that a non-infringement decision was adopted it is not at all easy to understand how the case team's papers arguing for an infringement are going to assist Cityhook which is arguing that it was a non-infringement decision.

In its skeleton argument at para.63 – this is Cityhook's skeleton argument – it identifies the documents which it suggests are most likely to assist in clarifying the relevant issues that the Tribunal will have to decide and it sets out five documents there. The first one is the case review meeting minute. As is clear from Mr. Smith's evidence the CRM was an internal discussion. Mr. Smith tells us at para.34 of his first witness statement that the CRM was not definitive and did not bind the ultimate decision maker. Therefore, when one goes back to the three principles I set out an internal discussion or a document that records an internal discussion will record personal opinions of office officials but nothing more, and in any event Mr. Smith has explained the differing views expressed by the case team and a CRP at that meeting - Smith para.75 to 42.

The second document most likely to assist is Mr. Mayock's memo. Again, as we know from Mr. Smith's evidence, Mr. Mayock's memo expressed a personal opinion that did not bind the ultimate decision-maker. In addition, we know that Mr. Mayock expressed the opinion that issuing an SO was preferable to issuing a non-infringement decision. Mr. Smith tells us that at para. 48 of his first witness statement. So, again, how is that going to help Cityhook's case?

An expression of opinion that an SO is preferable to a non-infringement decision is not going to help Cityhook establish that it was in fact a non-infringement decision.

No. 3 in the list of likely candidates - Mr. Priddis' memo. Well, as again we know, Mr. Priddis' memo was concerned primarily with administrative priorities. That is Mr. Smith's first witness statement at para. 45. Again, we know that Mr. Priddis expressed a personal opinion that the available evidence did not support a non-infringement finding (1st Smith, para. 53(e)). It is a personal opinion, and it does not support Cityhook's case.

The fourth likely candidate - any memo of the meeting of 6 December, 2005. Well, it is the same point as I made in relation to the CRM. That was an internal discussion. It was not definitive. It did not bind the ultimate decision-maker. Mr. Smith has set out the views expressed at that meeting (1st Smith, para. 56).

We come finally at 63(5) to Mr. Smith's internal memorandum of his provisional and final decision. Well, in relation to those, there is no disclosure necessary because 2nd Smith, para. 27 confirms that there is no relevant information contained in those documents that is not already before the Tribunal. So, again, applying the standard judicial review approach when Mr. Smith's account is complete and accurate - and there is no reason to suppose the summary is not - it is not appropriate to order disclosure

Madam, it is for those reasons that we oppose the disclosure request in its entirety.

MR. TURNER: Madam, I propose to organise these submissions under three heads: first, the question that the Tribunal is concerned with in this application; secondly, the principles which the Tribunal should apply to answer that question; and, third, the specific points to be raised by Cityhook and how to deal with them.

The question you are concerned with is narrow. Is it actually necessary for you to see internal documents referred to by Cityhook, produced by the OFT officials, to decide whether the OFT had made up its mind on the issue of infringement of the Competition Act. Now, that issue falls into two separate parts. First, the question whether the OFT had made up its mind, reached a definitive conclusion is a concept which implies finality. It is in line with the ordinary dictionary meaning of the word 'decided'. There is nothing complicated about it That is the meaning which you find used consistently in each of the cases on admissibility that has come before the Tribunal. I will simply give the Tribunal some references to add to those of Mr. Hoskins. In *Bettercare*, para. 89, dealing with the undertaking issue; *Freeserve*, para. 98; and *Claymore* in a passage referred to in our skeleton argument at para. 155.

The second point, as Mr. Hoskins has rightly said, is that you are concerned with Mr. Smith. He was the responsible decision-maker within the Office of Fair Trading. You are not concerned, at any rate directly, with whether Mr. Mayup or Mr. Priddis, or Mr. Nikpay, or any

other of the officials in the OFT had made up their minds. The only question for you is whether Mr. Smith had reached the point which is described at para. 155 of the *Claymore* case - he had reached the point in his investigations where he could make up his mind on the point at issue. That is the question to which you are directing your attention.

I turn then to the question of the applicable principles. You have available to you not only a contemporaneous, reasoned decision letter, but two detailed witness statements from the responsible decision-maker, Mr. Smith. The basic test that you should apply appears not to be controversial between the parties, and I add nothing to what has already been said. What I would add is that there are certain considerations that should lead the Tribunal to be cautious before ordering the OFT in this application to disclose internal documents between officials that preceded the June decision letter. I mention three.

First, the documents emanating from officials other than Mr. Smith which Cityhook seeks are, as I say, of only indirect relevance at best. They contain the views of others, and, secondly, they are preliminary. Secondly, as with every public authority the OFT does have a legitimate interest in preserving a space within which its officials can exchange views on policy matters privately. That is a consideration to take into account as a balancing factor in deciding whether disclosure is needed. Thirdly, as a practical point, but by reference to the Tribunal's rules, as laid down in the rules, Madam, and as you have observed, the Tribunal should aim to secure the just, expeditious and economical disposal of these proceedings.

Now, in a case of this kind, where there is likely to be a significant amount of commercially confidential information in the OFT's hands, in the documents which are being asked for, there must be a real risk that ordering disclosure will give rise to satellite questions of confidentiality, and that these proceedings may become unnecessarily bogged down. As a result of that, any disclosure that is ordered, should be limited robustly to that which is needed to decide the main question.

Standing back, against that background, the acid test for the Tribunal is this: do the two Smith witness statements, and the decision letter of June 2006, leave you in real doubt as to whether Mr. Smith and the Office of Fair Trading had made up their minds as to whether there had been an infringement or not? Only if there is real doubt, then it would become necessary to be clear exactly what the doubtful point is, and how it is said by Mr. Rayment that disclosure of specific documents would be expected to throw light on the point, or points, of doubt.

I turn finally to the points that have been raised by Cityhook. Cityhook invites you to rule that there is doubt about the nature of the OFT's decision. Mr. Rayment has relied on one general consideration, and a number of specific points. The general consideration which is mentioned no fewer than seven times in his skeleton argument - and was repeated again today - is that the

Office of Fair Trading in this case carried out a four year lengthy investigation before downing tools. What is suggested is that that in itself is very likely to mean that at the end of the day all useful inquiries had been made and that a firm view on the question of liability had been reached, even if the case closure decision is presented as a question of organisation of priorities, moving on to more fruitful work.

The point is a bad one. There is no scope for inferring that the OFT had made up its mind on infringement when Mr. Smith says in express and detailed terms in his witness statements that he did not do so, and when he supports that by explaining exactly what the nature of the discussions were within the Office on a blow-by-blow basis, and what the outstanding issues were from his perspective. There is no attack by Cityhook on the **bona fides** of Mr. Smith. Now, Mr. Rayment referred earlier to paras. 24 and 26 of Mr. Smith's first statement in which he reported that in July 2003 the then Chairman, Sir John Vickers, had identified some unresolved issues. Where does that take one? There is no basis at all for saying that the issues identified were subsequently resolved, and the trawl through the witness statement uncovered no basis for reaching that conclusion, apart from the repeated refrain relating to the near effluction of time. But, Mr. Smith has dealt with that.

Turning to the specific points that have been raised by Cityhook in its disclosure request, those are attacks on Mr. Smith's claims that in 2006 he, the decision-maker, considered there was still work to be done before he was in a position to make his mind up on the question of an infringement of the Competition Act. Essentially, Mr. Rayment is saying that Mr. Smith's explanations are so vague that they cannot be taken at face value. But, the reality is that they are not in the least vague. There is nothing difficult to understand about his account of the debate within the Office on whether collective action by the members of the UKCPC could be safely categorised as a restriction by objection. Mr. Rayment has focused heavy attention on that in his application. But, the question is dealt with smartly and succinctly in Mr. Smith's second witness statement at para. 14. He says,

> "In order to reach a definitive view on this issue within OFT there would have been a need for further legal review and analysis of relevant case law and policy statements. There is no reason to doubt that. There is no reason to go behind it".

Similarly, on the question of effects on competition, I add only this to what my learned friend, Mr. Hoskins, has already said: today, Mr. Rayment referred to para. 51(c) of Mr. Smith's first statement to suggest that Mr. Priddis, who gave advice to Mr. Smith, had reached a fairly clear negative conclusion on the question of effects on competition. I ask you briefly to look at para. 51(c) in Mr. Smith's first statement, on p.18. As part of a series of points (a) to (d) Mr. Priddis referred to the lack of a compelling story of harm which was, in his view, problematic. Mr.

Rayment seeks to extract from that that a firm decision, at least on the part of Mr. Priddis, was reached. It needs to be viewed not merely in the context of the language that Mr. Priddis apparently deployed - the reference to 'problematic' - but also in the context of para. 51(b). There, Mr. Priddis himself refers to the fact that it was possible that further evidence could be gathered, and he noted that the case team had already prepared information requests to gather relevant data under Section 26 of the Competition Act. So, Mr. Priddis himself appreciates that the matter is not finalised, and that no conclusion has been arrived at.

In short, standing back, this is not a case in which contemporaneous documents need to be looked at by the Tribunal to supplement some perceived deficiency in the decision-maker's witness statement on the only live issue - was finality reached? Mr. Rayment's application for disclosure, respectfully, is mis-conceived.

Finally, I would say this: Mr. Rayment urges on you, at para. 4 of his skeleton, that the test for whether a decision has been reached should be as straightforward as possible, and with that we have no disagreement. It follows what was said in the *Freeserve* case at para. 91: complainants should know what their rights are; interlocutory skirmishes should be avoided - they are wasteful and they are not an economical or expeditious way for disposing of proceedings. But, what Mr. Rayment has done is then to proceed to carry out a subtle analysis, replete with innuendo, of Mr. Smith's witness statement. We should not be getting into shades of meaning or innuendo. Mr. Smith's statement is clear, and there is no basis to go behind it.

Madam, those are our submissions.

MR. JOWELL: May it please you, madam, I appear on behalf of British Telecommunications as intervener in this matter. I greatly adopt the submissions of my learned friend, Mr. Hoskins, and my learned friend, Mr. Turner. I join with them in submitting that this application for disclosure by Cityhook should be rejected for the reasons that they have already stated.

I am acutely aware of the need not to detain the Tribunal any more than is necessary. However, I do think it might be helpful if I was to refer briefly, with the permission of the Tribunal, to one or two of the authorities in the European jurisprudence that have, I think, not been referred to previously in the previous case from the CAT that have dealt with this matter, and which I think do elucidate the test that this Tribunal should apply.

Very briefly, if I may, I accept what Mr. Rayment says - that the extensive citation of examples in different contexts may not be helpful - but I do respectfully submit that at least a couple of the cases may be of assistance to the Tribunal because they have not previously been looked at. I certainly will not detain you, Madam, for more than ten or fifteen minutes at the most.

Might I ask the Tribunal to take up a case? It is exceptionally short, but I think it would be helpful. It is the *BAT -v- Reynolds* case in the third bundle of authorities at Tab 6. Now, in

this case, Madam, you will see the facts are set out very briefly in paras. 1 to 4. You will see there that R.J. Reynolds and BAT had lodged complaints against the Commission against certain agreements concluded between Philip Morris and Rembran. Those were 1981 agreements. The Commission considered that the 1981 agreements infringed Articles 81 and 82, and served a Statement of Objections. But, then, after obtaining the views of the complainants and of the parties, the Commission conducted negotiations with the parties in order to make the agreements consistent with community law. Certain new agreements - the 1984 agreements - were then entered into. The Commission considered the 1984 agreements and said they did not infringe Articles 85 and 1986 of the Treaty, and after giving the complainants the opportunity to state their views, it rejected the complaints.

What the Applicants sought is set out in para. 4. They said, "We would like to produce certain documents in order that they are forwarded to the court" and also to them so that they could consider those internal documents. The first application was for the 1981 Statement of Objections, and you will see that that part of the application is dismissed at paras. 6 and 7 of the Judgment on the grounds that the Statement of Objections was irrelevant because it reflected only initial intentions of the parties and was therefore not of relevance in the proceedings.

The second application is at para. 9. You will see there that it says that Reynolds essentially requested the court to call upon the Commission to submit to it all the documents in the Commission's possession which might reveal the reasons for which the Commission proposed formally to prohibit the 1981 agreements, and for which it came to the conclusion that the 1984 agreements did not come within the prohibition.

You will see at para. 10 that the Applicant contends that in light of the assessment of the 1981 agreements, they should have condemned the 1984 agreements, and the Commission has given no valid reasons for this change of assessment, either in the Statement of Reasons on which the contested decision is based, or in the course of the written procedure. So, it says there is a conflict of interest. Then it says that there are even grounds for believing that the change was due to reasons extraneous for the cases themselves, and it contends that pressure had been put on the Commission - in particular, separate meetings held with the parties to the agreements which were attended by a former vice-president of the Commission in the capacity as advisor to Philip Morris.

The relevant part of the Judgment is really at para. 11.

> "It should be said that examination by the court of the Commission's internal file with a view to verifying whether the Commission's decision was influenced by factors other than those indicated in the Statement of Reasons on which the decision

> is based, or stated by the Commission during the proceedings would constitute an exceptional measure of inquiry. Such a measure would pre-suppose that the circumstances surrounding the decision in question gave rise to serious doubts as to the real reasons, and, in particular, to suspicions that those reasons were extraneous to the objectives of Community law and hence amounted to mis-use of powers".

It then notes at para. 12 that it must be observed that no-one has submitted that there has been a mis-use of powers in that case.

Over the page, Madam, you will see at para. 16, in rejecting the further application, the final clause at para. 16, the matter that they raise "-- does not constitute a reason for suspecting the existence of covert reasons extraneous to Community law". On that basis it rejects the application to inspect the file.

So, you will see the test there is stated as an exceptional measure which pre-supposes serious doubts as to the real reasons, and in particular suspicions that those reason were extraneous and a mis-use of powers. Now, alleging mis-use of powers - that is to say, that a lawful power has been exercised for a purpose other than that for which it was conferred - is a very serious matter, both in Community law and in English law. It requires objective, relevant and consistent evidence. The test is a strict one, and it is only in exceptional cases that the European courts will even accept that plea.

Now, the second case, which is just in the next tab - and it is exceptionally short - is perhaps even closer to our present case. This is the *ICI* case. In this case what is sought is the hearing officer's report. You will see that at para. 2. ICI seek the production of two sets of documents which the Commission has refused to disclose - first, the report of the hearing officer; and, secondly, internal documents whose existence was revealed by certain press releases. Now, the hearing officer's report is in many ways directly analogous to the CPR case review meeting and the memorandum of Mr. Mayock that form the first two of Cityhook's disclosure requests. You will see the submissions of the parties are at paras. 4 to 5, and the court's conclusions are stated at para. 7.

> "It is clear from the terms of reference of the hearing officer, that as far as the Commission is concerned, the hearing officer's findings are in the nature of an opinion, and that it is in no way bound to follow them. It must therefore be stated that the hearing officer's report does not constitute a decisive factor which must be taken into account by the court for the purpose of performing its judicial review".

Therefore it dismisses the application for the hearing officer's report.

Then, on the press releases, which were said to be inconsistent with the decision, you will see at para. 11 the court re-states the Reynolds's test, and at para. 12 it notes that there are no serious doubts. Then, at paras. 14 and 15 it says,

> "The press statements, or interviews given by the Commission officials cannot reflect the institution's own position which remains that laid down in the preamble to the contested decision. In those circumstances it must be held that there are no solid reasons for the court to consider at this stage in the proceedings that the contested decision may have been prompted by reasons different from those which it sets out".

What I say is that that is a very conservative and cautious approach. The reason for it is not difficult to discern. It is set out in the case which is in the next tab of the bundle, which I will not take you to, but the key passages of which are set out in our skeleton argument at para. 8. That is the *NMH* case. What the court said in that case at para. 36 was,

> "That restriction on access to internal documents is justified by the need to ensure the proper functioning of the institution concerned when dealing with infringements of the Treaty competition rules".

The court also held (at para. 38) - and the point Mr. Hoskins has already made - that, "The court exercises its power of review only with respect to the final administrative act" - that is to say, in this case the decision and not the draft or preparatory documents.

So, what we say is that this is a very important principle of public policy. The private internal deliberations of a public authority are not for public consumption, because if its internal deliberation and debates are to be stripped bare to the scrutiny of all in the courtroom its function will be severely impaired. It is simply not fair to expect public officials to be subject to the forensic microscope of the courtroom. It puts them in an embarrassing position, and in an unfair position, and it inhibits their ability to do their job.

One might actually draw an analogy with the rule protecting legal professional privilege which says, of course, that documents between you and your lawyer are privileged except in exceptional circumstances of fraud or scandalous conduct. We say that this might not be quite as important for the public policy, but it is nevertheless of that type. That is why the reasons for ordering disclosure of public internal documents do need to be genuinely exceptional.

Now, my learned friend, Mr. Rayment, professes in his skeleton argument to accept those principles laid down by the ECJ, but the reality is that whilst he pays lip service to them, he considerably understates them, and he fails to apply them according to their full terms and needing and effect. I think he summarises the law as being that disclosure is not routine, and requires a plausible case for it. But, it is not just that. The ECJ's position is that you acquire solid evidence of mis-use of powers - not merely a plausible case in the abstract. I think Mr.

Rayment submitted orally that the test is whether it may help the Tribunal to understand what was done. Well, we say that bears no relationship to the test as laid down by the ECJ. What is necessary and proportionate in this context must import not just the cost and delay that you mentioned, Madam, but also the damage to the public policy in protecting internal documents. As Mr. Turner has said, unless there are serious doubts as to the truth or accuracy, or completeness of what is said in a witness statement, then there is no basis for ordering disclosure. To adopt the test that Mr. Rayment actually applies rather than the test that he professes to adopt would allow disclosure far too easily, and gives insufficient weight to the requirements of public policy.

So, if I may turn briefly to two further points? One is that that is all very well ... that is what the European Court of Justice says, but is that binding on this court? I say it is binding. First of all, the procedural law of the European Court of Justice is binding on this Tribunal according to the case of *Pernod Ricard*, which I do not intend to turn up, but I would invite you to read paras. 228 to 229. We say that *Pernod Ricard* is good law. I understand that the OFT doe not take that position, or reserves its rights, but we say that clearly there can be no question but that for present purposes it is to be taken as law.

So, that leaves the question of whether there are any relevant differences. I think Mr. Rayment says that there are. He does not explain what they are, but I assume that what will be said against me is that this is made in a specific statutory context where you are seeking to decide whether a decision is appealable - that is to say, whether it is an administrative priorities decision or a non-infringement decision. That matters in English law, whereas it does not matter in EC law because it determines whether the appeal can be heard by the CAT at all. Now, it is entirely true that in European Community law there is only one court that will determine the matter whereas in the UK there are two. Mr. Rayment says that the effect of finding that the decision is not appealable is that ousts the jurisdiction of the Tribunal. But, to put the point rather more neutrally it is simply that jurisdiction over the OFT's decisions is shared between two courts. The jurisdiction of the courts and tribunals of England as a whole are not ousted. Appealable decisions are for this Tribunal, and other decisions are for the administrative court - such as those on administrative priorities. That scheme of split jurisdiction - it may be wise, or it may be unwise - is what Parliament has laid down. That is the scheme that is laid down in the Competition Act, and it cannot be a relevant difference for the purpose of Section 60 because that would be tantamount to saying that the Tribunal is entitled to disregard the procedural safeguards for the enforcement of competition law in the UK in order to maximise its jurisdiction to get cases at the expense of another court.

So, for those reasons we say that there is no relevant difference and that ECJ authorities are binding. But, even if they are not binding, we say that they are certainly helpful. I say for the same reasons that Mr. Hoskins raised and Mr. Turner raised, that in applying that approach, or even a similar approach, Mr. Rayment has come nowhere near. He expressly disavows any suggestion of bad faith on the part of Mr. Smith, and he is right to do so. There is nothing remotely justified on the facts of this case that would justify an allegation of bad faith.

But, having made this concession, he then raises a number of other matters which he says call matters into question. Well, that is being willing to wound, but afraid to strike. We say that is an approach that should be roundly rejected by this Tribunal. The only matter that might even conceivably lead to this Tribunal questioning whether the decision is to be taken at face value is the length of time, and that has been fully and coherently explained by Mr. Smith and any question mark vanishes. As regards the other points, they are simply irrelevant. Put at its highest, they may be relevant to the correctness or the reasonableness of the decision. I can see that Mr. Rayment might want to argue the fact that the OFT, after four years of investigation in which, in his view, it had already collected enough information for an infringement, or a non-infringement decision, he might want to argue that that is unreasonable, and to duck out of the issue and take an administrative priorities' decision. But that is a matter, as you yourself have pointed out, madam, that is for the Administrative Court. It is for that court to assess the rationality of the decision. The only question for this Tribunal is the nature of the decision, and on that issue no disclosure is required for its fair resolution.

So it is for those reasons, in addition to those given by my learned friends, Mr. Hoskins and Mr. Turner, I would invite the Tribunal to reject this application. Thank you.

THE CHAIRMAN: Now, it is a quarter past one.

MR. RANDOLPH: Well, indeed, madam, I had noted that as well. I do not want to come between you and ----

THE CHAIRMAN: How long are you going to be?

MR. RANDOLPH: I would imagine the same sort of time as Mr. Jowell.

THE CHAIRMAN: He was 15 minutes.

MR. RANDOLPH: Yes. It may be better because then there is Miss Murphy and then obviously t here will be a reply from Mr. Rayment.

THE CHAIRMAN: Yes, we are going to go on this afternoon.

MR. RANDOLPH: Yes, I think we are.

THE CHAIRMAN: How long are you going to be?

MISS MURPHY: In the light of what has been said so far, madam, I would not anticipate I should need any time because we fully support the submissions that have bee made by my learned

friends, so it would just be at this stage unnecessary duplication. We say simply that we support the arguments that have been made.

THE CHAIRMAN: How long do you think you will be in reply?

MR. RAYMENT: I would not have thought more than 15 minutes.

THE CHAIRMAN: So that is half an hour.

MR. RAYMENT: I hope you will not hold me to that too rigidly, but I do not expect to be long.

THE CHAIRMAN: So that is half an hour.

MR. RANDOLPH: That is half an hour, madam, so I am in your hands.

(The Tribunal confer)

THE CHAIRMAN: Five past two.

(Adjourned for a short time)

MR. RANDOLPH: I think we are all here. Madam, gentlemen ----

THE CHAIRMAN: Yes, I was just a little concerned about the microphones, because I think there has been some difficulty with the microphones over lunch.

MR. RANDOLPH: I understand there were difficulties this morning. I think mine is picking me up – I do not know whether Mr. Hoskins' picked him up.

THE CHAIRMAN: I do not know which one is not picking up.

MR. RANDOLPH: I think there was an issue with Mr. Hoskins' this morning.

THE CHAIRMAN: Ah, so if Mr. Hoskins talks to us he talks to us out of **that** one, over **there** does he?

MR. HOSKINS: That one was playing up this morning as well. I think if I have to I will use **that** one.

MR. RANDOLPH: I will be delighted.

THE CHAIRMAN: As long as we all know what we are doing.

MR. RANDOLPH: Yes, I will be delighted to share my microphone with Mr. Hoskins! (Laughter) As ever we always try to assist.

Madam, gentlemen, I can be brief as I said I would be. The matters I am going to raise before you this afternoon are matters arising from Cityhook's skeleton, so they will not be repetitious of my skeleton. Also, just one point of housekeeping, if I may, an issue with regard to directions going forward, whatever the decision of this Tribunal with regard to this application there will be a hearing, one assumes, on the point of admissibility on 30th January, and at the moment that is presently set out in terms relating only to some of the Interveners, because that order was made prior to our applications being heard and determined.

THE CHAIRMAN: You need to vary the order.

MR. RANDOLPH: We need to vary the order. That I submit could be dealt with in writing. Obviously there is the question of proportionality. It would make a lot of sense to deal with it that way I would respectfully submit rather than having us all back here and troubling the Tribunal. I do not think it will be a difficult change or amendment to the order, it is just a question of fitting us in.

THE CHAIRMAN: On the same terms ----

MR. RANDOLPH: It could well be on the same terms, cascade effect, but obviously giving my learned friend, Mr. Rayment, sufficient time to deal with it. This time it worked, I would suggest, pretty well.

THE CHAIRMAN: Yes.

MR. RANDOLPH: There was not duplication because of the co-operation between the parties and the same could be said to be true going forward for the ----

THE CHAIRMAN: Have we made an order in relation to the skeletons for the next hearing?

MR. RANDOLPH: Yes, you have, madam.

THE CHAIRMAN: So it is a matter of fitting you in, is it?

MR. RANDOLPH: It is just a matter of fitting us in.

THE CHAIRMAN: Well I think that can be done in writing.

MR. RANDOLPH: Exactly, I am very grateful.

THE CHAIRMAN: We can work out a relevant ----

MR. RANDOLPH: I am very grateful, I just wanted to flag that up so we did not forget it and then have to come back later on.

Coming back to today and this application, first, I would obviously adopt what my learned friend, Mr. Hoskins, and the other Interveners have said to date. I just want to raise two or three points in addition to that.

First, in relation to the s.60 point, you heard my learned friend, Mr. Jowell, usefully go through some of the European case law. One of the points that Mr. Rayment makes at para.18 of his skeleton is that actually the Tribunal is not going to be bound by s.60, s.60 does not bite in effect, and they give one particular reason for that. They say in particular there is no corresponding question that arises under Community law (para.18 of his skeleton). The Tribunal will have well in mind the words of s.60, but for your note it is usefully set out at para.228 of the *Pernod* case – I say usefully, because I am going to turn to *Pernod* in a moment. Section 61 states that:

> "The purpose of this section is to ensure that so far as is possible, having regard to any relevant differences between the provisions concerned, questions arising under this part in relation to competition within the United Kingdom are dealt within a

manner which is consistent with the treatment of corresponding questions arising in Community Law in relation to competition within the Community."

So that is the section. The point that Mr. Rayment makes is that there is no corresponding question that arises under Community law. We would, with respect disagree with that, there is a corresponding question, and that question is this: the question of whether a regulator has a discretion to close a file on the basis of what is known in Community terms as lack of Community interest, and in this jurisdiction in regard to the OFT's practices, as administrative priorities. So the question is whether there is discretion to close a file on that basis. We say obviously there is, and I will come to that in a moment and I will ask you to look at, if I may, in the brief time I have, the *Automec* Judgment in that regard.

Just to make good my point on the fact that s.60 does bite, para.234 – you do not need to turn this up – of the *Pernod* Judgment of this Tribunal makes clear the relevant test to be applied is stated to be by virtue of s.60 of the Act, we should resolve the questions before us in the same way as they would be resolved under Community law in an equivalent situation. Indeed, it seems that s.62 of the Act gives us little or no choice in the matter.

The "equivalent situation" we say is, is there effectively a discretion to close? Is there a lawful discretion to close the file on the basis of either lack of Community interest or administrative priorities?

We say as a matter of law that, with respect, Cityhook's approach to s.60 is flawed, and effectively it does bite because there is a corresponding question that arises as a matter of Community law. If that is right then effectively it would seem to me logical to pass on to that corresponding question, and on this I can be very brief, because the Tribunal will have well in mind what the practice is in Community Law with regard to the discretion given to the Commission which is, to this extent, equivalent to the OFT - the discretion that it has when dealing with complaints, and the position is very usefully set out in the *Automec* case, which is in the Interveners' bundle (bundle 3) tab 3. It may be helpful to go to it briefly, not least because of the facts. Mr. Rayment's refrain when seeking to distinguish the cases upon which either the Office or the Interveners were relying was to say "They are not the same". There will very rarely be a completely similar case, but that is not the way in which useful reliance is placed on cases. You seek to elucidate the relevant principles, and demonstrate how they can apply in a given situation.

In the *Automec* case one can see – I am not going to go through it – I will just give the relevant paragraph numbers. The facts are set out from para.1 through to para.15 and they show that effectively this action in terms of the interest in it, for *Automec*, which was an Italian company, started back in 1983, that is when BMW Italia told them that they did not want to renew the

contract, and then Automec issued proceedings before the Milan Tribunal – the District Court in Milan. Then it made an application to the Commission – effectively a complaint – on 25th January 1988. This is important to the extent that it gives a view on the time lines.

The Applicant then further complained in September 1988 – that you can pick up at para.8, and then in February 1989, so a year and a bit on from the original complaint, brought an action for the annulment of a letter from the Commission which had been sent on 30th November 1988, and then in the middle of 1989 the Commission sent another letter to the Applicant, and that was replied to on 4th October 1989. Eventually the Commission responded on 28th February 1990, and that was the letter which led to the application to the Court of First Instance.

So one has a time line there of the matters in question starting back in 1983, the complaint being made at the beginning of 1988 and effectively the Commission replying back in 1990. So it is not four years, but it is two years. The point has been made "Oh this is terribly long, terribly long", well actually time can roll on unfortunately without decisions being made, but that in itself is not a reason for saying "One has to look behind the reasons given as to why a particular decision has been made. In *Automec* of course the court held that the Commission had a discretion not to make a decision, and had a discretion to close a complaint file on the grounds of effectively administrative priorities. That one can pick up at paras.76 and 77 of the Judgment. Paragraph 76 says that the Commission is under no obligation to rule on the existence or otherwise of an infringement. It cannot be compelled to carry out an investigation – the first point. Paragraph 77 – "In this connection it should be observed that in the case of an Authority entrusted with a public service task …" as is the Office of Fair Trading in this case, "… the power to take all organisational measures necessary for the performance of that task, including setting priorities within the limits prescribed by law, where those priorities have not been determined by the legislature, is an inherent feature of administrative activity". The conclude by saying that that is compatible with the obligations imposed on the Commission by Community law.

Then the Court goes on to deal with how the Commission investigated the matter in that case, and that can be seen at para.82, and it says – this is important, we would submit –

> "In this connection the court finds in the first place the Commission carried out a careful examination of the complaint during which it not only took account of the factual and legal particulars adduced in the complaint itself, but also conducted an informal exchange of views and information with the applicant and its lawyers. It was only after it had appraised itself of the further particulars given by the applicant on that occasion and the observations submitted in response to the letter, that the Commission rejected the complaint. Therefore, having regard to the factual and legal

particulars set out in the complaint the Commission carried out an appropriate examination thereof and cannot be accused of a lack of diligence."

THE CHAIRMAN: Is this a case where they effectively opened the file, the s.25 point, or is it a case where those matters went to deciding whether they were going to open the file?

MR. RANDOLPH: No, the case concerned the decision of the Commission to effectively go no further with the complaint because of the decision that there was no Community interest in doing so.

THE CHAIRMAN: So it is deciding whether or not to open a file, which is different to our case?

MR. RANDOLPH: No, madam, with respect. We would submit that they did open a file, and then they decided that actually there was no Community interest in continuing with the file and therefore they decided to go no further. Now, the question that was raised ----

THE CHAIRMAN: They got past the equivalent of s.25?

MR. RANDOLPH: No, madam, I think it did get past that because effectively they were saying "Yes, we are opening this", they had opened it, they looked at it carefully, and then they decided there was no Community interest in going forward on particular grounds – they were saying "The infringement has stopped, there are proceedings in the national courts, etc." but effectively it was their prioritisation programme that was being implemented in that case, and in fact in that case, I think it was the first case where the court was called up on to investigate whether the Commission did have such a discretion – could it do that? Was it lawful for it to say "Actually, no, we are not going any further; we are not investigating this any further because there is no Community interest." *Automec* said that "You have a duty, Commission, to go forward. You have a Treaty obligation to ensure that you must investigate all complaints, and you must come to a final conclusion." Now, the court said "No, actually, not least by virtue of the fact that you are a public authority and you have lots of competing interests to balance", and that is the reason why they say that at the end of the day the court held that actually the Commission's task was, as is set out at para.86 of the Judgment, they have to take account of all the legal and factual particulars, and they should balance the significance of the alleged infringements as regards the function of the Common Market, the probability of establishing the existence of the infringement and the scope of the investigation required in order to fulfil its task. Effectively it says at the end of the day: "Yes, you were entitled to come to this decision and not proceed with the case because it simply did not feel and find on the basis of an investigation that it was in the Community interest to do so. That, we say, is the equivalent of the OFT's administrative priorities' programme, and we will say, and we do say, that if s.60 does bind this Tribunal then you will look at *Automec* and you will be bound by that to that extent. Even if you are not bound by it, it certainly will be of

assistance, and that assistance will be that a body in the position of the OFT is entitled – lawfully entitled as a matter of discretion – to close a case on the basis of administrative priorities. That, we say, is very important, because Cityhook does not seek –overtly in any event – to impugn the evidence of Mr. Smith. It says that it was given full candour but it does seek to go behind it. It does not seek to say as a matter of fact, yes, it was so flawed, so inaccurate, or so whatever, or not full in its candour that you should go behind it. If that is right then we say that is the end of the matter because there is a lawful discretion on the OFT – or given to the OFT – to close a case through the administrative priority programme. That discretion has been lawfully exercised as can be seen by Mr. Vincent Smith's evidence, and therefore at the end of the day that is an end of it, and you do not go to disclosure or anything else; there is simply nothing to allow this Tribunal in that case to order any form of disclosure. That deals with the s.60 point, madam, and the only other point on this particular issue I wish to remind the Tribunal of is the domestic situation as has been seen in the *Aquavitae* case, not the small voluntary disclosure Judgment that is in your bundle of authorities, but the more substantive Judgment which is in the OFT's authorities bundle for the September hearing, which I think is at Tab 8 of that bundle. You do not need to go to it now, but it is remarkable how close that Judgment is to these facts - to the extent that the Appellant in that case, Aquavitae, sought to go behind the decision to close the file. You can see that at para. 201 of that Judgment. It was unsuccessful. Why? It was unsuccessful on the grounds that the evidence from the authority was accepted by the Tribunal as being genuine (para. 203) and that there was a genuine independent reason for closing the file (para. 209). In that case there was the forthcoming Water Act that was about to come in. So, OFWAT decided that it would not be in its interest to arrive at a decision that might well be overtaken by events. Now, we say we have got a very similar situation in the present case. It was not in the OFT's interests because of the administrative priority programme to continue any further. So, we say that that is an important analogous case.

Now, finally, Madam, gentlemen, I can deal with this point shortly, and this is the question of if I am not right on that - in other words, that really disclosure could be ordered, should disclosure be ordered, and should, in particular, disclosure of the documents being sought to be disclosed, and the subject of Cityhook's application ---- should they be disclosed? This is the point that we raised in our skeleton argument about internal documentation. I do not need to reiterate that. I just make this point: in the skeleton of Cityhook it is said (at para. 19) that the rationale for protecting internal documents is fully taken into account in the principles on which disclosure should be made in the present circumstances. Well, we would, with respect, disagree, and it would appear that Mr. Rayment's case has altered because during the course of

his submissions this morning to you he agreed that the case law relating to the fact that internal documents should not be disclosed because that would impact adversely on the functioning - the proper functioning - of an administrative authority ---- You will recall that line of case law which can be seen in cases such as the *Atlantic Containers* case (known as the *TAA* case). He admitted in his submissions to you this morning that, yes, effectively that does appear to be relevant, but then he does not seem to have taken that very much further. Well, if it is relevant, we say it is critically relevant because if disclosure of internal documents which are sought by Cityhook were ordered to be disclosed, then we say that that would impact adversely on the proper functioning of the OFT and that would go forward, we would say, as a most unfortunate precedent with regard not only to practice in this jurisdiction, but also it would give rise to a potential conflict between this jurisdiction and that of the European court. Pursuant to my argument on Section 60 one tries to obviously avoid any such conflicts. Where the position of the European court, as seen in the *Atlantic Containers* case, is quite clear - internal documents should not be disclosed save in the most exceptional circumstances because **inter alia** this will impact adversely on the Authority's ability to function properly ---- Well, if this Tribunal were to go in another direction, then that, as I say, would be very unfortunate.

Finally, Madam, gentlemen, I can conclude in the following manner: EC law permits an Authority not to proceed with a complaint on grounds of administrative priorities. It is not permissible, as a matter of law, to go behind a decision to close a file on grounds of administrative priorities via the disclosure of internal documents, save in the most exceptional circumstances (and my learned friend, Mr. Jowell, has been to that). I do not think it is even suggested by Cityhook that those most exceptional circumstances exist. All they have done is seek to lower the bar. We say that that attempt is impermissible as a matter of law. Cityhook may well be disappointed with the position it finds itself in. Undoubtedly they are. So was Automec in the case to which I have taken you. But, the court of first instance in that case made it clear that despite the evident disappointment, that decision could not be re-opened; they could not go behind it; they could not look at it in any way - let alone in any meaningful way.

Finally, in that case, in the *Automec* case, it will be recalled that there were national proceedings before the Italian court. That was something that the court of first instance did take into account in looking at the overall circumstances of the case (paras. 87 - 96 of the Judgment). Of course, the same is true here - there are two sets of proceedings on foot, albeit stayed: one, a judicial review proceedings; one, a damages action. So, it is not a question of being completely shut out from anything. Obviously, those will be contested in the appropriate manner if those proceedings come back to be heard. But, the point is, here, that there should

not be disclosure because we say there is really no justification - or, indeed, jurisdiction - to make such an order. Effectively, disappointment does not mean that they should be given the relief they seek. So, for those reasons, Madam, gentlemen, we would adopt the concluding position taken by the Office, and call for the dismissal of this application in its entirety. Madam, unless you have any further questions?

THE CHAIRMAN: Thank you.

MR. JOWELL: Madam, it might be of assistance, for your note, that on the last point that you were asking Mr. Randolph about with regard to whether Automec applies after investigation has been opened ---- Just for your note, the Commission's notice on the handling of the complaint is at Tab 4 of the third bundle. For your note, para. 41 records the Automec position that you can close on the basis of Community interest, and paras. 55 - 57 make it clear, in my submission, that there are various stages at which the Commission will consider the matter.

THE CHAIRMAN: I am just wondering in *Automec* at what stage it was.

MR. JOWELL: Well, it seems to be in *Automec* that paras. 80 and 82 of the Judgment will give the answer to that. It appears to have opened the file, but not carried out an investigation.

THE CHAIRMAN: So, that distinguishes it from the present case where they have opened the file and had four years of very detailed investigation .

MR. JOWELL: Madam, it does. It may well distinguish it from the present case, but it is quite clear both from the notice and from the European court's jurisprudence in this area that the discretion to close a file on the basis of Community interest does not stop once you have opened the file.

THE CHAIRMAN: No. No. That is very helpful. I had realised that. I wanted to know at what stage the *Automec* case ---- The *Automec* case was at an early stage.

MR. JOWELL: An early, but not the earliest stage, Madam.

MR. RANDOLPH: Madam, just to pick up on that - there may just be a tension as between paras. 80 and 82 in the Judgment because para. 80 says that to decide to close the file on a complaint without carrying out an investigation ... yet, para. 82 says, "In this connection the court finds, in the first place, that the Commission carried out a careful examination of the complaint".

THE CHAIRMAN: But a determination of a complaint and an investigation may be ---- They may be very well chosen words.

MR. RANDOLPH: They may have been, and, of course, the original language might not have been English. In any event, the file was opened.

THE CHAIRMAN: Thank you very much. Miss Murphy, you are relying on everybody else?

MISS MURPHY: Yes. As I said earlier, I do not know that there is anything other than repetition.

THE CHAIRMAN: I just wanted to make sure.

MR. RAYMENT: I can be very short. I just want to touch, first of all, on issues arising in connection with the object issue - or, what has come to be called the object issue this morning - and very briefly the position on EC law. Madam, at para. 31(d) of the Office's skeleton argument it says that the reason that the draft Statement of Objection should not be issued was because of a legal debate about the alleged infringements amounted to object infringements. There was a debate going on. It had been going on for some time. There was a Position A. There was a Position B. Analysis was mentioned in the decision letter, but we finally come to the explanation given by Mr. Smith in his witness statement, which was that even after all of that, there was further analysis and review of the case law required. We simply cannot understand what more was required. The fact that we are simply told there was further analysis and review of the case law, in all of the circumstances we say does raise a genuine issue about what the basis of the actual decision was.

THE CHAIRMAN: Mr. Rayment, you keep repeating ----

MR. RAYMENT: I know I do. I know I do.

THE CHAIRMAN: You cannot understand -----

MR. RAYMENT: And everybody says ----

THE CHAIRMAN: That is not sufficient.

MR. RAYMENT: Everybody says in the circumstances it is all perfectly clear, and we say that that is not true.

THE CHAIRMAN: No. No. 'You cannot understand' is not the same as 'clear'. What you are trying ----

MR. RAYMENT: In the context.

THE CHAIRMAN: -- to do is to say, "Well, whatever he says may be clear, but you cannot understand how he could have come to that view", and you want to know how he did come to that view. You are not saying that he is not *bona fide*. So, that indicates a fishing exercise.

MR. RAYMENT: Well, that is one possible conclusion that you could draw, but we say that that is not true. We say that it does raise a genuine issue about on what basis the decision was actually taken. You have the two sides there. You have been investigating both sides of the argument for all this time. We are not talking about factual investigation. We are talking about ----

THE CHAIRMAN: But that would be saying that there are documents which show that what he is saying is not genuine - whatever he is saying ---- whether he is saying that he made a decision on priorities, or whether he has given an explanation of the whole thing and it is left for us to decide whether or not he made a decision on non-infringement.

MR. RAYMENT: Well, I have suggested why I say that it raises a question that needs investigation, and I cannot take it any further at the moment.

THE CHAIRMAN: I wanted to give you the opportunity.

MR. RAYMENT: I am very grateful. As far as EC law is concerned, our position is essentially as in our skeleton, and we adopt, in fact, on this issue - if not on any other issue - the submissions of the OFT - that Section 60 does not apply to these sorts of issues. We would also draw attention to the fact that the provisions are different here and do create a relevant difference - first of all, in the context of appeals under Section 46; and, secondly, the context in which disclosure of documents takes place in competition proceedings before the Office of Fair Trading, and in particular under the Office of Fair Trading's rules (I think it is Rule 5(3)) that sets out the test for disclosure of documents. It is a simple 'may be withheld'. We would suggest that the bar is not as high in this country as has been suggested it might be in relation to EC law.

THE CHAIRMAN: Under the EC law, Section 60, this is a matter of procedure because disclosure is a matter of procedure in the courts.

MR. RAYMENT: That is right.

THE CHAIRMAN: Does that distinguish ----

MR. RAYMENT: Well, that is the point, I think, that the Office already takes, which is that this is not really a question arising under this part in relation to competition as such. It is really a procedural issue.

Unless I can assist you any further.

THE CHAIRMAN: No. Thank you very much.

(Short break)

THE CHAIRMAN: The Tribunal dismisses the application. Our reasons will follow in due course.

MR. HOSKINS: Madam, there is the question of costs of the application because we would like to make an application for costs. I do not know whether you would like to hear me on that now or whether that is something which should follow the Judgment. It would be unfortunate if there had to be another hearing just to make the costs application. I am in your hands.

THE CHAIRMAN: We will hear you.

MR. HOSKINS: We understand - obviously it is the case - that Cityhook was acting through its directors, who lodged the appeal. But, it has now been acting through both solicitors and counsel for some time now. Our submission is that this claim should never have been brought.

THE CHAIRMAN: The claim or the application?

MR. HOSKINS: I am sorry. This claim for disclosure ---- the application for disclosure. Absolutely. I am sorry. Cityhook accepted today that the judicial review principles in relation to disclosure were applicable to its application. Mr. Smith's first witness statement was very full. It was expressly stated to have been made in order to comply with the duty of candour as

set out in the judicial review authorities. Yet the disclosure request was made after that witness statement had been served. So, we say on that basis, given that the first witness statement was clearly sufficient, that the application should not have been brought. With all respect to Cityhook, its arguments as to why the Tribunal should go behind Mr. Smith's witness statement really just did not get off the ground today.

That is why we say that there should be an order as to costs. If this was High Court proceedings - indeed, if this was judicial review High Court proceedings - then there would be no question that the court would be keen to deal with costs of the issue as the issue arose rather than reserving it to the end of the proceedings. In my submission there are no special reasons - because the application came before the Tribunal as opposed to the High Court - why costs should not follow the event.

THE CHAIRMAN: Do you have a schedule of costs today?

MR. HOSKINS: We do not today, Madam. The order I am seeking is that Cityhook should be ordered to pay the Office's costs of the application to be subject to assessment by the Tribunal if not agreed. That would allow us to put our bill of costs to Cityhook. We can see if we can reach agreement, and if agreement was not possible, then I would suggest that both sides make written submissions to the Tribunal, and the Tribunal deals with the costs on the paper, and simply deals with it that way.

That is our application. Thank you very much.

MR. TURNER: Madam, I am awaiting instructions on costs. Discussion is being held which ----

THE CHAIRMAN: That was the exodus that went out, was it?

MR. TURNER: It should take no more than a minute or two. May I trouble the Tribunal on a separate matter, which will not detain anybody? While the Tribunal was considering its decision there was a discussion between the parties as to the timetable for skeletons for the next hearing.

THE CHAIRMAN: Excellent.

MR. TURNER: Subject to the Tribunal's view there is a measure of agreement which is simply that the existing timetable should not be disturbed, and that the other interveners will put in their skeleton arguments at the same time as our skeleton argument, which is after the Office of Fair Trading.

THE CHAIRMAN: I have not got the order in front of me.

MR. TURNER: I will remind the Tribunal of what it says. Cityhook are to put in their skeleton argument on admissibility by 9 January. The Office of Fair Trading follows with its skeleton on 16th, and then the interveners follow two days after that, taking account of the OFT's

skeleton to avoid duplication. The proposal is that all of the interveners may as well do so on that day. Then, the reply from Cityhook comes on 23rd for the hearing on 30th.

THE CHAIRMAN: So, you want para. 15 amended?

MR. TURNER: Yes.

THE CHAIRMAN: Are all the interveners here?

MR. TURNER: yes.

THE CHAIRMAN: In the same way as we put in the words not only 'if so advised' but that 'there should be no duplication'. We will put in those words again. That does not apply between you and the three interveners, or is there some ----

MR. TURNER: Well we will take steps between ourselves, we will have a discussion and make sure that we minimise duplication to the maximum possible extent.

THE CHAIRMAN: So effectively you become the lead.

MR. TURNER: Well that may not turn out to be the case, but we will discuss between ourselves the most suitable way of organising it.

THE CHAIRMAN: All right ,so we will put the words in so that it applies to I will say four of you – you know what I mean by "all four" ----

MR. TURNER: Yes.

THE CHAIRMAN: So that there is no duplication at all between the Interveners?

MR. TURNER: Yes, we will take steps to ensure that that is so, madam.

MR. RANDOLPH: Obviously, madam, insofar as that is possible, because it has worked well on this occasion because there was a cascade issue – there was a cascade from my learned friends, skeleton argument to ourselves, so there were just three of us rather than four plus a joint. I think it would be unfortunate if there happened to be by accident a slight amount of duplication. Insofar as possible that would be helpful if those words could go in. I am perfectly happy to undertake now that we will do our utmost to ensure that there is not duplication, and no doubt we can liaise.

MR. TURNER: Madam, we have a limited application for costs. It is for the costs of preparing our written submissions. The circumstances were exceptional on this occasion because we went first, we therefore did all of the work before any of the other parties and had to put in our submissions, as it were, blind and therefore incurred costs which were not duplicative of other parties. We had a legitimate interest to protect because there is confidential information potentially in the OFT's material, and therefore we were here for a legitimate reason and put in the first skeleton.

THE CHAIRMAN: So you only want the costs of that first skeleton?

MR. TURNER: The costs, not of appearing today, but preparing our skeleton argument, yes.

MR. RANDOLPH: I do not know whether I entirely endorse what my learned friend has just said with regard to the fact ----

THE CHAIRMAN: I assume that was just him.

MR. RANDOLPH: Indeed, I am not going to say anything about my learned friend's application at all, I am not going to seek to subvert that at all, or criticise it or say anything about it at all, I am just wondering what flows from it, because he seemed to imply that because he went first he should somehow get some reward for doing that, but as you will have noted, madam, there has been no duplication and, indeed, our submissions concentrated on an area that was not touched on by my learned friend at all, and that is to say the s.60 and the EC law point which I have addressed you on today. So to the extent that there was a difference of treatment and a difference of approach we say that, insofar as my learned friend, Mr. Turner, is entitled to his costs then we too should be entitled to our costs. I do not know whether I would restrict them in the way that my learned friend said.

THE CHAIRMAN: I think the reason that he is probably doing that is that you were here to protect your own interest today, and if you choose to be here ----

MR. RANDOLPH: Yes.

THE CHAIRMAN: And so I think what he was probably implying is that they written submissions may have assisted the overall determination of it and it was not necessary except to protect one's own interest, or it was paramount to protect one's own interest to be here.

MR. TURNER: Madam, that is right. In normal circumstances the Intervener finds itself following the Office of Fair Trading, or whoever the public authority is in a Judicial Review case, both at the hearing and also in written submissions. It is there to protect its own interest – often the rule is that it is cost neutral. There was reversal in this case in that we put in, as it turned out, a fairly substantial skeleton without knowledge of what the OFT would say.

THE CHAIRMAN: Do you want to remind me why that happened?

MR. TURNER: The Office of Fair Trading's request was that its skeleton argument should go in when it did for logistical reasons, as I recall. It was not as result of our request.

THE CHAIRMAN: You can remind me, but was it not as a result of the fact that they wanted to know what the Interveners were saying because of the confidentiality matters?

MR. TURNER: No, not to my recollection. Confidentiality was a matter that was, as it were, deferred in case disclosure should be required to be given. It was because the Office of Fair Trading intended to put in further factual material and it told the Tribunal that its skeleton could not be ready earlier than it was.

MR. RANDOLPH: I would agree with that.

THE CHAIRMAN: I was just wondering what is on the transcript.

MR. RANDOLPH: I was just trying to look at that.
MR. HOSKINS: Madam, I am probably the person best qualified to express a view.
THE CHAIRMAN: You remember, do you?
MR. HOSKINS: The way it was originally put by me was that we wanted to approach it as a specific disclosure application and so we were going to put in witness evidence and then obviously there would be a skeleton to follow. At the last CMC, madam, you and I discussed whether the best thing to do was to have witness evidence and then the skeleton later on, or whether we do both at the same time. I explained that if we were to do both at the same time we would have needed a longer time period, so there was a delay to the first time we put in any material. On that basis the Tribunal directed that it was proper to deal with it witness statement first and then skeleton argument. The reason why we needed more time was, of course, we had the witness statement to prepare, and we were keen to make sure that that was done as fully and properly as possible.
THE CHAIRMAN: And the Interveners, they had the witness statement to have a look at and decide whether they wanted to put any submissions in?
MR. HOSKINS: That is right.
MR. RANDOLPH: Absolutely, madam, but of course, as my learned friend, Mr. Hoskins, made clear at the hearing and, indeed, today I think, that witness statement only dealt with matters of fact specifically did not deal with submissions on law, and we had this debate last time.
THE CHAIRMAN: Was there not supposed to be some liaison though about that?
MR. RANDOLPH: Well, I do not think there was because Mr. Hoskins made the very valid point, if I can describe it as such, because he said "We can either put the evidence in and then later put the skeleton in on law, or you can have everything but it will just have to be later", and that would have really made the timetable ----
THE CHAIRMAN: It would have put it all back.
MR. RANDOLPH: It would have pushed everything back, and today would have been vacated.
THE CHAIRMAN: This was the pragmatic approach.
MR. RANDOLPH: This was the very pragmatic approach that the Tribunal adopted, and I think it has worked very well, if I may say so. But what it did not do – as Mr. Turner has pointed out – it meant that there was very full evidence of fact from the OFT but nothing on law. Therefore Mr. Turner went first, absolutely, and he did – if I may say so – an exemplary job of putting forward the law as he saw it, but equally he did not touch on certain other matters, and those matters we touched on individually, and so for the reason that Mr. Turner wants his costs I want mine! (Laughter)
THE CHAIRMAN: You are saying you are not sure you want to limit it to the way ----

MR. RANDOLPH: Well I appreciate I should not ask for too much, but equally if one does not ask ----

THE CHAIRMAN: You want the equivalent of what Mr. Turner gets if Mr. Turner gets it?

MR. RANDOLPH: Yes. (Laughter) If, madam, you were minded to give Mr. Turner more than he actually asked for then I would like that too! (Laughter). Thank you, madam.

MR. JOWELL: Madam, I would seek our costs on the same basis as that set out by Mr. Turner, and/or Mr. Randolph! (Laughter)

MISS MURPHY: Madam, it will come as no surprise that we would echo that on behalf of Global Crossing.

MR. TURNER: I have nothing further to add to that.

THE CHAIRMAN: Mr. Rayment?

MR. RAYMENT: Thank you, madam. My first application is to be able to actually respond in writing to the various applications that have been made. Any order of the Tribunal requiring us to pay costs in this situation is going to have quite serious implications for Cityhook. Also, my instructing solicitor tells me there are issues about CFAs and interlocutory costs' orders which I am not in a position to assist you with today. I know litigants funded by means of such an agreement and we would very much value being able to see your Judgment before responding on the question of costs, obviously we would do that in writing to avoid the need for a further hearing.

I must say, when the applications for intervention were made I do recall some discussion about costs – I appreciate that was not necessarily directed specifically to interlocutory matters, but I would wish to refresh my memory on exactly what was said at that point as well.

THE CHAIRMAN: What about the OFT's costs. Is there a problem on a CFA in ordering costs?

MR. RAYMENT: The problem is I am not in a position to assist you. The position is that a costs' order will have potentially serious effects and I want to consider all the matters in the cold light of day.

MR. HOSKINS: If I could respond to that? The whole point of us making the application today was to save further costs. A lot of time and effort has been spent on this disclosure application and, with respect, it is not good enough, when a simple, straightforward application on costs is made to say "We cannot deal with it today."

In relation to the CFA, again it is not good enough to say "There is a CFA". That may go to the basis upon which my learned friend and solicitors, etc. get costs at the end of the day if they were to win, but they cannot have any impact on the Tribunal making a costs' order against them where they have lost a disclosure application. The order is against Cityhook ----

THE CHAIRMAN: I am just wondering if we should rise for 10 minutes and you can look it up, Mr. Rayment.

MR. RAYMENT: I am grateful, madam. I cannot pretend to ----

THE CHAIRMAN: Do you have a White Book with you?

MR. RAYMENT: No, I do not.

THE CHAIRMAN: We will provide you with a White Book.

MR. RAYMENT: I just need to understand what the issue is that is being flagged up?

THE CHAIRMAN: Yes. If there is a bar then that is one thing, but if one makes the ordinary costs' orders and then it all gets dealt with in the wash somehow, then we could make the costs' orders, if we were going to make any, but we can consider it, and then the implications could be dealt with afterwards.

MR. RAYMENT: It may be that the issue I am struggling with is about reserving it rather than ----

THE CHAIRMAN: The question may be that we assess the costs but the question is whether they are paid forthwith?

MR. RAYMENT: That is what I mean about reserving ----

THE CHAIRMAN: Yes, rather than reserving the costs' issue.

MR. RAYMENT: Yes.

MR. HOSKINS: Madam, there was one other comment I wanted to make before we deal with this issue. Obviously in dealing with each application for costs, I will say the obvious, the first question is "Should the Office get its costs?"

THE CHAIRMAN: Yes.

MR. HOSKINS: And that is separate then from how the Interveners ----

THE CHAIRMAN: I think I just said that.

MR. HOSKINS: I am sorry, I did not want there to be a sort of *in terorem* argument put that you can order all these costs, and the OFT can be dealt with separately.

THE CHAIRMAN: Yes.

MR. HOSKINS: Thank you, that is all I wanted to add. There is a White Book **here**.

THE CHAIRMAN: We will rise for 10 minutes or so.

(Short break)

THE CHAIRMAN: Mr. Rayment?

MR. RAYMENT: Madam, I am very grateful for the time and I am sorry to have kept you. The position is that there is no absolute rule, or anything on inquiry about costs in this situation. However, madam, in relation to the fact that the company is funded by a CFA that is, of

course, because it cannot privately fund the action. The problem, I am instructed, is that if there is an order that will create a liability for the company ----

THE CHAIRMAN: Even if it is -----

MR. RAYMENT: Even if it is to be assessed later.

THE CHAIRMAN: Even if it is not to be enforced?

MR. RAYMENT: On what?

THE CHAIRMAN: Not to be enforced until the end of the case?

MR. RAYMENT: That means the company would be insolvent, and I do have the two directors here if you need to hear more about that.

THE CHAIRMAN: The company is not trading, is it?

MR. RAYMENT: The company is not trading, no.

THE CHAIRMAN: It is only running this action.

MR. RAYMENT: It is just dormant apart from this - a sign of love. So, it is in those circumstances that I invite the Tribunal to reserve the question of costs to the outcome of the case. That is the position as I am instructed on it. I am principally talking about the OFT's costs.

THE CHAIRMAN: Let us just deal with the OFT's costs, and then we can consider ----

MR. HOSKINS: It is obviously not a very satisfactory situation if the company can keep coming to court without any costs actually being visited against it. One possibility would be in relation to legally funded claimants who lose - a costs order is made against them immediately.

THE CHAIRMAN: That is why I am saying 'not to be enforced', but the problem is that there is a liability. The liability would have to go into the accounts and if the liability goes into the accounts then they would be wrongfully trading. So, they would have to go into liquidation. If they went into liquidation ---- I see what is being said. If they went into liquidation, then it is the liquidator. That is all expense as well. So, that is not going to process this matter. One has, I suppose, some sympathy with that. I suspect the OFT does not want to cause that sort of situation. I do not know what instructions you have in relation to that.

MR. HOSKINS: It is not a packet analogy ... but with the football pools order to use the colloquialism, the point about the order is 'not to be enforced without leave of the Tribunal' ---- It is not to be enforced unless and until the company has funds to meet that liability. So, it is not an immediate liability. It is a liability which was contingent upon the company being in a position to pay the costs and the Office, in this case, making an application that those costs should be paid. So, at best it is a contingent liability.

THE CHAIRMAN: If that is right, that may be the way round it. But, I think everybody would want to know that that was the position before we made the order.

MR. HOSKINS: The problem is: where do we go from here because the next stage, of course, is a preliminary issue. It may well be that fortunes are reversed on that day and the problem does not arise. But, I think there is a problem now because if we are successful on that day and we apply for our costs, is it simply to be that the public purse is to bear the costs of this?

THE CHAIRMAN: I think that is a very different situation to the situation today because the situation today is an application which ---- I do not want to say what we are going to put in as reasons, but one has to look at whether or not one considers that it had a reasonable chance of success or not. It may be that this application falls on one side, and that hearing falls on the other side. There is a different public interest point in it.

MR. HOSKINS: We may be in the same position at the hearing. We may not, but ---

THE CHAIRMAN: I think we need to look at today and not concern ourselves with that because they are very different. Your way round it would be right if the position is that that did not put them into insolvency.

MR. HOSKINS: Can I just take instructions?

MR. TURNER: We have very little to add. It is clear that the cost discipline should apply to Cityhook as applies to any litigant - that there should be a discipline, and it should not feel that it can come to court costs-free. At the same time, of course, we are sensitive and the OFT is of course sensitive to the fact that you have a small company and there are concerns about ----

THE CHAIRMAN: It is public interest.

MR. TURNER: It is public interest litigation. Nevertheless, in the circumstances in which we find ourselves, Madam, our suggestion would be that for today costs should be reserved because these are quite important points and I do not think we are in a position to resolve them today satisfactorily.

THE CHAIRMAN: You are probably going to say the same thing?

MR. HOSKINS: Madam, I may get to the same place, but there is a point I would like to make first. It has been explained to us that the company is not trading. It has been explained to us that this litigation is being funded by a CFA. If the company is to go into liquidation, that will be the death of a dormant company which is not doing anything. The sole purpose of this litigation, as we know because the High Court action for damages is there, is for the shareholders to make money.

THE CHAIRMAN: Well, it is to recover money ---- It is not to make money. It is to recover money which they ought to have earnt.

MR. HOSKINS: That is right. But, it is a purely commercial interest - individual's commercial interest. In those circumstances our submission is: where is the public policy in allowing a speculative application leading to damages - because that is all this is - to be run at the public

expense - not just the intervener's expense all the way through. That cannot be right. So, if the consequence is putting a dormant company into liquidation, what will happen is that the liquidators will come in, the liquidators will then decide whether there is anything in this claim. If they decide there is, they will bring it and they will make a distribution if they succeed at the end of the day. But, it is, in our submission, completely unacceptable as a matter of public policy that for purely individual financial interests, we should have this amount of money wasted, and there be no penalty on Cityhook. If it is liquidation, so be it, the liquidator will take over and decide whether to continue the action; that is all this is, it is a damages' claim.

THE CHAIRMAN: Well, but it is a damages' claim in a public interest area and for a public body to effectively put a company into liquidation and if it turns out in January that they actually were right then that, I am not sure, is a very comfortable position to be in.

MR. HOSKINS: Well, madam, I have made that point, I want Cityhook to hear it.

THE CHAIRMAN: Yes.

MR. HOSKINS: And if they lose in January you know what I am going to be saying and on that basis as you surmise I am happy to get to where Mr. Turner has got to, which is costs to be reserved, but I want Cityhook to be clear where we will be coming from if we win in January. Indeed, even if we do not win on the preliminary issue there will still be this costs' issue.

THE CHAIRMAN: There will still be this costs' issue.

(The Tribunal confer)

THE CHAIRMAN: Mr. Rayment, what we are minded to do is to reserve the costs, but we want it to be noted that we would have been minded to day to make an order for costs in favour of the OFT to cover the written submissions and today's costs. As presently minded, we are not minded to make an order for costs in favour of the Interveners.

MR. RAYMENT: I am very grateful that indication.

THE CHAIRMAN: We will reserve the costs.

MR. RAYMENT: I am very grateful.

THE CHAIRMAN: There is a difference between the application today and whatever happens in January, it is a different sort of application, I am not saying what costs' order we would make on that, but the application today was a difficult one to make, and the question is whether that ought to have been made.

MR. RAYMENT: I think that is understood.

THE CHAIRMAN: Is there anything else? We have dealt with the amendment of the other order; there are no other applications today. Thank you.

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