IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1081/4/1/07

Victoria House
Bloomsbury Place
London WC1A.2EB

Wednesday, 20th June 2007

Before:

MARION SIMMONS QC
(Chairman)
MICHAEL DAVEY
RICHARD PROSSER OBE

Sitting as a Tribunal in England and Wales

BETWEEN:

CO-OPERATIVE GROUP (CWS) LIMITED Applicant

and

OFFICE OF FAIR TRADING Respondent

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Mr. Thomas Sharpe QC and Mr. Matthew Cook (instructed by Clifford Chance) appeared for the Applicant.

Mr. Rupert Anderson QC and Mr. Julian Gregory (instructed by the Solicitor to the Office of Fair Trading) appeared for the Respondent.

HEARING

THE CHAIRMAN: Mr. Sharpe, can I just mention that we do expect that this case is going to finish today, we are not expecting to go on tomorrow. I just wondered if you had managed to timetable it?

MR. SHARPE: I do not think I am going to be more than one and a half hours, but I should say I am pretty optimistic about timetables, but that is the sort of "envelope" I think we will call it.

THE CHAIRMAN: So if you went to, say, 12.30 ----

MR. SHARPE: At the latest, yes.

THE CHAIRMAN: Mr. Anderson?

MR. ANDERSON: I am sure I will be able to finish within a timetable that allows time for my learned friend to reply. We have set out pretty fully as I am sure you appreciate our case in the defence and the skeleton.

THE CHAIRMAN: Absolutely.

MR. ANDERSON: I do not propose to repeat what is in there, just to state on the record that we rely on everything in there, and if we do not raise it today does not mean that we are not pursuing a particular point.

THE CHAIRMAN: We very much appreciate all the skeletons, they are very useful. We do not think that we need to be addressed on the two cases either if that helps. Mr. Sharpe?

MR. SHARPE: Madam, with my friend, Mr. Cook, we appear for the CGL, the Co-Operative Group, and my friend, Mr. Anderson, supported by Mr. Gregory, appear for the Office of Fair Trading.

This is our appeal, or application for a review of the Decision. The Decision letter is so brief and I know you have probably read it many times, may I just take you to it quickly. You will find it in the Notice of Application, B1. As with my friend we are relying on everything we have put in to you and he must rely upon the Decision because, after all, that is what we are seeking to review. So we see in the first substantive paragraph they remain of the view that Mr. Bennett is chief executive and a CGL director, Southern is not independent of and unconnected to CGL in accordance with 3.1(a) of the undertakings. That really is the core of the Decision.

The next paragraph does not really concern us. It relates to a Fix It First remedy in relation to an unrelated transaction but I think you are all aware what Fix It First means here. It means briefly the situation in which prior to consummating the merger between CGL and the target, they sold it off in advance. Let us just hypothesise briefly. If they had sold off those undertaking branches to Southern prior to the merger itself we would not be here

because that merger would not be a referable qualifying merger and Mr. Bennett would remain a CEO and remain a director of CGL, it would not have been an issue. My friend says: "Such is life". That is it, "Such is life" – that is the vagaries of our legislation. That is not really a very satisfactory answer because the ultimate effect is exactly the same and I just offer that to you to give you thought, to give you a pause really to say: "We could have achieved this in a different way, and arguably perhaps we should have done if we had known at that time which company, which undertaking would have been the buyer for the branches. It will mean, of course, that if we fail today in getting the Office to review – and that is all we are seeking, a very modest application to review what they did, and do it again and do it properly – it means that in future there will be an enormous stress upon Fix It First type remedies. You may argue that is desirable, but actually it may be undesirable for companies rushing to find a buyer instead of consummating the transaction and then putting it to auction in public, as you know many of these issues would be at that time private matters.

Then we get to the purpose of para.3.1. This is very important, this is what we read: "The purpose of paragraph 3.1 of the undertakings is to ensure that pursuant to 73(2) of the Enterprise Act the substantial lessening of competition concerned or any adverse effect which has or may have resulted from it, or may be expected to result from it as identified in the OFT's Decision …" we call that the "original Decision" you will recall, "…are remedied, mitigated or prevented by divestment to a suitable purchaser."

Now, we agree with this. The Office got it right here. But you will see and you will have read in our documentation they have changed that view. We have the Act which is very clear which they have passed here and that is fine, but what they are saying in their defence and in Mr. Pritchard's witness statement is something quite different. They are saying that the job of the Office at this stage in getting remedies is to put the competitive situation back to where it was before the merger took place; to restore the status quo *ante*.

I appreciate there may well be situations where that is the only way to prevent, remedy or mitigate a substantial lessening of competition (SLC) – fine, that is not the way they are running their case. They are interpreting, and in the way they looked at undertakings throughout this case, with one view and that is to say: "Can we get back to the situation before the merger, that level of competition that existed then? We say that is plainly wrong and contrary to the Statute as they themselves in the careful drafting of this Decision were obliged to recognise. But there is a dissonance between this Decision, the defence and Mr. Pritchard's statement, and this is actually one of the most important issues to emerge from

this case – this is what other people are interested in, it is not just because this is to do with Co-Op and funerals – it is really to ask essentially what has the Office got to do when faced with the evaluation of remedies? Is it as they now argue to put the clock back before the merger took place, or is it, as the Act says, to prevent, remedy or mitigate the SLC?

Then we have in the final paragraph on that page the concern which they have isolated, and this is the familiar question that Mr. Bennett, as it were, wearing two hats, one as a non-executive member of a 28 person board of CGL and CEO, Southern would act, as I put it, a conduit for information - not just information generally, but information which would enable the two undertakings - CGL and Southern - to co-ordinate their activities at a competitive level, and very specifically matters such as pricing and other strategies - 'other strategic issues' as they put it.

Jumping ahead, there is not the slightest evidence that Mr. Bennett would ever, ever have any information about pricing in the course of his duties as a non-executive director. That was a fact unchallenged by the Office of Fair Trading in the evidence. It was made known to the Office before the Decision was made. Of course, we have the famous quotation from Mr. Hardman - information which competitors would relish - which of course has been seized upon by the Office, which I think as you have seen, and you probably went back to the attendance note of that, was qualified by him pretty quickly: yes, they would relish the information because, yes, they would be very curious to know what the business strategy -- the high level issues were. But, we also know - and you have read it - that the original Decision identified the competition concerns of the original merger as lying at the local level. That is where competition takes place. He qualified his statement, and that qualification did not get the prominence it deserves - understandably perhaps - in the OFT evidence.

So they have established their concern. There is a factual issue to examine there which you have to make a finding on that. Then we have to distinguish the utility of this high level strategic information which a non-executive supervisory board would inevitably get - there is no argument about that - to see whether or not it would ever have an impact upon the only competition that matters in this case, as declared by the OFT in their original Decision, which is competition at the local level. Of course, reading that original Decision you will remember that competition in the funeral business is a very odd sort of competition. I do not mean anything particularly light-hearted about this, but -- people do not shop around very much. They do not compare one funeral with another. There is not

an enormous amount of price competition as such - even if he were given access to price information.

Then we have the unsolicited complaint, which we now know was Mr. Huhne, MP, raising the concern. We have no evidence one way, but I am sure it was no doubt a spontaneous complaint, having regard to the funeral competition in Eastleigh. Nevertheless, he got it wrong. You will remember that. All he could see from the top, from his position as an MP, was that a sale to Southern was a sale to an undertaking in the same group. You will recall that it is not in dispute between us that whatever the relationship between CGL and Southern, they are not part of the same group. They are not interconnected bodies corporate in any way. There is no degree of shared management control, or one directing mind over the two (as with *Stericycle*). So, he had got the factual assumption wrong - perhaps understandably. But, nevertheless, it did not prevent the OFT acting upon it.

Then we have (over the page) the background - that Mr. Bennett's resignation would not be countenanced by CGL or Mr. Bennett. There is no evidence actually about Mr. Bennett's position and what his view is. He is not before the court, or whatever. But, you do know from our evidence, which has not been contested, that he is a very considerable figure, and highly respected within the Co-Operative movement. He has been, as we now know, for nearly twenty-four years a non-executive director of CGL. He is CEO of Southern. We know that. We also know - it is uncontested and it is obvious from the documentation - that even before the acquisition of the branches which were divested, Southern and CGL were in competition, albeit to a limited extent. Nobody ever raised any issue about the propriety (as Mr. Justice Donaldson then put it) of his wearing two hats.

Then we see the Decision is responding to the offer that CGL made regarding the firewall. You will recall that CGL said, "Look, if this is a problem we will take Mr. Bennett out of the decision-making in funerals". There is a tendency to think, reading the evidence, that CGL is only in the funeral business. Yes, it is an important part of its business, but, in fact, it is much less than retailing. It is involved in travel and pharmacies, as we know. It is only one part of which the non-executive supervisory board has ultimate responsibility for. But, it was understood that Mr. Bennett was perfectly prepared to recuse himself from any discussion; not receive any papers. What is more, KPMG, the auditors, were prepared to put their reputation on the line and said they would monitor this and certify to the Office that he had not seen any papers; no papers had been sent to him, and so on. We also know that he comes up for renewal in another three years' time. We do not know whether he is going to be re-elected or not. I have no information about that.

That was not good enough for the Office. We will see later (I will mention it now, but we will see later as well) that Mr. Pritchard acknowledges the offer in KPMG's role, but there is no evaluation -- there is no statement there which says, "We considered KPMG, but really we didn't think it was appropriate for KPMG to do this, or did not have the manpower, or the skill", or, crudely, "We don't trust them - after all, they are the auditors to CGL". That issue is not even addressed. That is trespassing into one of our grounds, and I do not want to dwell on it overly, but the fact is that we would have expected the OFT to have assessed that offer not just merely to note it and say that it did not fit in with their traditional template of structural remedies which we know about, but actually to assess what was key to the CGL offer - KPMG's role. KPMG are not fly-by-night people. We do not need to go into details . They are a highly reputable firm. They are putting their reputation on the line in offering a certificate each year, and there is no reason to believe that they would not have taken whatever steps were necessary to ensure that the undertaking was monitored carefully, and observed.

Then we have the conclusion, which essentially repeats that as long as he remains a board of CGL - and I presume they also mean CEO of Southern (they do not say that, but I assume that is probably what they mean ---- He cannot wear two hats, they are going to refuse approval.

I hope that was useful. That was simply to take us back to what we are seeking to focus on. We want to quash that decision.

As my friend said, you have received quite a lot of paper -Notice of Application, our defence, our skeleton, and our skeleton in reply to the OFT's defence, and the OFT's skeleton in reply to that, and the note which we put in on the two cases you kindly drew our attention to. So, I am not going to rehearse those submissions. We have done them at some length, and I am going to follow my friend, and give you some relief on that.

However, I do want to summarise some key elements in the OFT's argument, and, in particular, especially the one which says, "You've changed your mind, and therefore you're disabled from running these arguments now because they're new arguments which weren't raised in the Notice of Application". They are seeking to ask you to declare these arguments inadmissible.

We know that the OFT suggests that a number of changes have taken place. We have dropped arguments. Secondly, we have advanced new arguments. Thirdly, we have not challenged arguments, and, as a result, we must have accepted them. What we have done - and this is a general observation - is reply. Remember, our skeleton argument is both a

skeleton and a reply to the entirely new justifications advanced for the decision in the OFT's defence - justifications which were not advanced in the decision I have just taken you to.

Since those justifications are entirely different from those in the Decision which we dealt with in the Notice of Application, inevitably these changes in the OFT's position have had to be reflected in our case, both because arguments advanced against the old justification for the Decision are no longer relevant and because new arguments are needed to respond to the OFT's latest case. I want to make that good briefly.

Ground 1: this dealt with the way in which the OFT had construed the requirement in 3.1(a) of the undertakings, the proposed purchaser should be independent of and unconnected to CGL. You will recall in the discussions prior to the Decision, the OFT argued that the undertaking should be construed based upon, if you like, the reasonable man in the street test of what constituted a connection. What is its ordinary, natural meaning? What does it mean to an impartial observer – the reasonable man, or the reasonable MP? The Decision letter is not free of that because they repeat essentially their earlier view. We deal with that in para.31 of our Notice of Application, referring to the telephone call of 2nd March. In the time available I am reluctant to take you to that but, sorry, I am going to take you to it briefly. It is tab 9 of the bundle which is in front of you, the one we have just referred to. If you go to p.125 of that bundle and to the paragraph beginning: "AW appreciated the point …", "AW" is Ainsley Wilton of the OFT, then the third line: "PB" – Philip Brentford of the OFT – do you see it? "PB stressed that the undertaking should be read at face value." Do you have it?

> "They stated there should be no connection between CGL and the purchaser and that this should be interpreted on the basis of what the reasonable man on the street would mean 'constituted a connection'. In the history of the directorship it was a clear connection." etc.

He said there were other links but they were prepared to discount them. In the absence of anything else it seemed to us when we drafted the Notice of Application that the OFT was approaching the construction of 3.1(a) by essentially adopting that approach of the reasonable m an and not actually paying proper regard to the fact that undertakings fulfil a purpose and only take their life from s.73(2) of the Act. "Undertaking" is a term of art and it is there, as I say, to fulfil a particular purpose which is to ensure that the SLC is prevented, remedied or mitigated. It has nothing to do with what a reasonable man would mean by "connection". At that stage it was not suggested that the OFT had evaluated the

proposal in any other way and, in particular, by reference to the competition concerns which might or might not have arisen.

Since that was the justification we responded to it, but we explained the undertakings should not be divined in a vacuum, and must be interpreted by reference to s.73. Now, of course, in response in the defence they go on to say that the natural meaning is important, but it is actually not the only way of looking at this, and we did look at the competition concern which we were arguing, of course, was the correct approach in the Notice of Application, so at this stage we are in agreement. I think on a fair reading of the defence, and the witness statements one does see repeated references to the natural and ordinary meaning. There is no necessary correlation between that and something which would satisfy the test in s.73(2). It is perfectly possible in a statutory regime for words to have a particular meaning in accordance with, as it were, the policy of the Statute and for that to not actually chime with what an ordinary man on the street would mean, and perhaps more often than not. In other words, I think what I am saying is that actually there are two distinct approaches of looking at this interpretation and it would be a matter of pure luck that the ordinary man in the street's interpretation would accord with the statutory interpretation. The whole point is to eliminate the SLC.

The simple point for us this morning is that it seems as a result of the defence that they agree. We may have interpreted the Decision less generously than they wished, but there is not actually any disagreement, they were not concerned with the man on the street, they are concerned with satisfying the objective of eliminating SLC – at least that is what we thought. So given that they have accepted, in the defence they took account of those competition issues there is really nothing between us. But then of course they go on, as I mentioned earlier, to say: "Yes, but we are also interested in restoring the status quo *ante*. Our view, and our response to that is that while accepting that you took into account competition concerns, you have actually made a fundamental mistake in pinning your arguments to the mast of restoring the level of competition and taking your eye off the simpler objective of eliminating a substantial lessening of competition because those two need not necessarily be the same and there is no reason why they should be.

The only change in our position is in direct response to the changes in the Office of Fair Trading's position and we are perfectly entitled, indeed I think we owe a duty to respond to those arguments, and if they happen to be new ones not raised in the Notice of Application it is simply because they respond to arguments that were not in the decision.

Dealing with grounds 2 and 3, our case is that the evidence and analysis advanced by the office did not justify the conclusion that Southern was not a suitable purchaser or that the firewall solution was in some way not a proportionate and reasonable, adequate solution to the problem. We explained in detail why that was so and I do not intend to repeat that. We tried to explain that the OFT's evidence did not stack up. In their response to that in their defence and in Mr. Pritchard's evidence, they actually went much further than we thought they would do, because they have adopted really quite an extraordinary argument, but they had not carried out any in depth analysis or investigation which would allow it to conclude that Southern was an unsuitable purchaser. They argued that they were prohibited from carrying out such analysis or investigation by the Enterprise Act and the Guidance. It is striking that the OFT had not previously suggested during its discussions with CGL that the reason it could not approve Southern as a purchaser is because it was prevented from carrying out any further investigation.

Since the Office had not argued that its Decision is justified ----

MR. ANDERSON: Could I ask my learned friend to point out where we have said in our defence that the provisions prohibited us from doing it.

MR. SHARPE: I am going to come to that – at length. The OFT has not argued that its Decision is justified by evidence or analysis. They have not, as it were, taken a qualitative view and come to a decision in the exercise of its discretion – that is not what they purport to do. I have to say if they had done that, and had said that, our job would be very difficult because we would acknowledge we are in the sort of territory where they have done it, as it were, procedurally properly, but having used their expertise and evaluated all the competition issues, had satisfied themselves about Mr. Bennett's position, gone to the minutes of the board meeting, perhaps assessed the state of competition between Southern and CGL, we are not talking of massive investigation here, but if they had done something like that, and then genuinely come to a view in the exercise of their discretion, our task would be more difficult because we would be attacking their expertise and the deployment of their discretion. That is what they are accusing us of. We are not. I will explain that in more detail. We are attacking the process. Let me leave it at that.

We were obliged to respond to the OFT's new justification - that it was prevented from carrying out any further analysis in the context of the undertakings, partly because by reference to the guidance (where they interpret the guidance as disabling them from doing that), and partly because they say that impinges upon the Competition Commission stage where what we describe as the comprehensive analysis is required.

So, in our view they are advancing new arguments, and we are only replying to those new arguments in defence.

Let me take you to a couple of points in their skeleton. Despite what they say about analysing the competition aspects of the so-called connecting link, they really have not parted company with the natural meaning of what is meant by 'connected party'. They still say that that is the starting point. That is the word they use. It is the starting point. Respectfully, I think they have tied themselves in knots on this. We explain why the natural meaning was wrong. We explain why the natural meaning was wrong in the Notice of Application. In summary, since the undertakings were entered into in the context of Section 73, the concept of connection should be construed against the background of the Act rather than being construed in isolation. That is our point.

Those arguments were not repeated in the skeleton because they simply were not necessary. We thought we had reached some sort of accord. But, the OFT's objection raised in the skeleton is an incoherent one. We are being accused of not repeating a position that they purport not to advance. That is daft. If they were still advancing the position, we could be called to account for not pushing our case forward, but our understanding of the position was that the natural meaning argument was not what they were relying on. Now, they are either relying on it, or not. If they are relying on it, we have dealt with it at length in the Notice of Application. If they are not relying on it, we cannot be criticised for not addressing it any further. Unless my friend jumps up and says, "Where in the skeleton are you accusing us of this?", just for your note -- in the Points of Defence it is 4(d) and 46. I am going to come back to those later in response to my friend's invitation.

Have I said enough to indicate on this point - which is hardly a major point ----? I anticipate my friend wanting to come back to the question of admissibility. I hope he does not. We were simply rising to the challenges my friend put down in front of us. It is really very hard to say that by not responding to things when we did not think they remained live issues, only to discover they have been re-lit in the skeleton -- In any event, if there is any doubt at all, we say that that approach is plainly wrong, and the only thing they can do is to resort to Section 73(2), which, incidentally, I thought they would do. If my friend wants to concede that point and fight his case on Section 73(2) I shall be very happy.

I refer now to paras. 3 and 16 of his skeleton. I am not going to take you to it, but there my friend argues that in some way our arguments drift to a challenge of the legality of the OFT's acceptance of the undertakings. We do not do anything of the sort. If we go to the

undertakings - we can remind ourselves of them at Clause 3---- May I suggest we go back in that first bundle to B4 at p.55? We have been focusing on 3.1(a). My friend's case is that further investigation is not required. But, just cast your eye over 3(1)(b), (c) and (d). (After a pause): The OFT in (b) must evaluate whether the proposed purchaser has the financial resources, expertise and incentive to maintain or operate each of the divestment funeral businesses as a viable and active business in competition. Now, does that require any further investigation? Of course it does.

THE CHAIRMAN: The introductory words are, "CGL and/or any proposed purchaser shall satisfy the OFT that ----" So it is not that the OFT does an investigation. It is that they have to be satisfied by you ----

MR. SHARPE: Madam, that is correct. And we did. This case is focusing on 3.1(a), and my understanding - and I do not think it is in dispute - is that Southern satisfied all of these other -- rather, were satisfied. But, they were not satisfied on the basis of, "Here's our evidence. Thank you". When they got our evidence they had to look at it and evaluate it. They had to subject it to some form of appraisal or evaluation.

THE CHAIRMAN: That is different from investigation, which is the word you used before.

MR. SHARPE: Yes. Is it? I mean, 'investigation', 'scrutiny', 'evaluation' ---- I think I use them as synonyms. What is not permissible, respectfully, is inaction.

THE CHAIRMAN: Investigation means that they have to take an active role ---- You are not suggesting that.

MR. SHARPE: Yes, it does, but I think 'evaluation' is an active verb -- to evaluate something?

THE CHAIRMAN: No. They evaluate what they have got. They do not have to go off and do their own investigation.

MR. SHARPE: Well, there is not the slightest evidence they did that on this, respectfully. I think you are putting the bar, with respect, far too low here. This is an interactive process, both in law and in practice. The CGL and its advisors gave the Office of Fair Trading a mass of information - they had meetings, and telephone meetings, and some documentation. They took a view as to what was needed to satisfy the Office. But here in the pleadings they say, "Well, we don't need to do anything else", you see.

I am just pointing to this and just suggesting to you that we are in danger of looking at 3.1(a) in isolation. This does require - and I will put it like this - an evaluation of the evidence before them. Now, whether that evaluation is a further investigation looking at facts, or acquiring new facts and so forth. We would respectfully say that that is a grey area. They have got to be satisfied - and I think they have got to be satisfied on the basis of

some form of evaluation -- and I will now go forward -- some form of investigation based upon the evidence before them. There is not the slightest evidence they did that.

Now, insofar as they are trying to characterise our case as saying, "Oh, well, we're drifting into an attack upon the undertakings themselves" -- We signed the undertakings. We stand by them. We are not challenging the legality of them. What we are challenging is the role of the OFT being faced with the undertaking and to assess compliance with them. There is no problem in them evaluating the undertakings. But, equally, there is a problem if they say that they do not really have to do very much, or anything. They have an obligation to scrutinise the evidence they have, and come to a view. Their evidence before the Tribunal is that they did not have to do that. That is really what it boils down to.

The second issue raised in the skeleton is an issue I adverted to earlier . We call it a solecism really of equating the elimination of the SLC identified in the original decision with ensuring that the post-merger competition restores pre-merger competition. As you have seen, that was not in the Decision. There was a proper paraphrase - an accurate paraphrase - of the Act in the Decision, but when we come to the defence, and when we come to Mr. Pritchard's statement he expresses it uniformly and repeatedly in terms of restoring the status quo *ante*. This is incorrect and we challenge that approach, and if that was the understanding of the law they brought to bear upon the assessment of our undertaking then it seems to me to follow inevitably that this Decision must be quashed, they must go back and do it again on this ground alone. It is not a situation where the purpose of the undertakings was agreed, we have to operate within the context of the Act.

Those are lengthy but preliminary issues which I felt I needed to address. Let me now turn very briefly to our grounds – and I will be brief on this. Taking ground 1, in the light of the OFT's case that they did, in fact, take account of connections giving rise to competition concerns, the only remaining issue is what type of competition concerns the OFT should have taken into account and now we fairly address the post-divestment competitive situation matched against the pre-divestment competition situation. This, we say, was the touch stone used by the OFT to determine whether Southern was a suitable purchaser or not. There is really no doubt about that, with respect. Mr. Pritchard spells out that link between the two companies might create less intensive competition by providing them, as he puts it: "with the means and/or incentive to co-ordinate their behaviour". So he says it is unlikely that the competition lost as a result of the merger would be effectively restored. (para.32 witness statement). So he is worried about the loss of intensity of competition, he is worried about the parties entering into illegal agreements, or co-ordinating their

behaviour, and then he evaluates that by saying that it is doubtful that the pre-merger situation would be restored as a result, so he is nailing his colours firmly to this mast.

As I said, this is the wrong test. The job of undertakings in s.73 is not to restore anything. It must be to remedy, mitigate or prevent the SLC fund to exist. At this point they say: "Actually it is all a question of margin of appreciation and you have it all wrong, we can do what we like within that margin." We said: "No, that is not right", because what we are considering here is jurisdiction. What legal test should we apply? Have we the jurisdiction to make up our own rules here. Section 73(2) is very, very clear, undertakings are there to remedy, mitigate, prevent the SLC, they are not there to restore the status quo *ante*. This means in one fell swoop – to your relief – I do not need to take you to any of the discretion cases my friend has advanced because they are wholly inapt for our understanding of this case, because they are dealing with cases where the OFT had jurisdiction to consider things, came to a view with which the applicants disagreed, and the applicants came here and were told "No", there is a discretion, there is a margin of appreciation of the facts and matters. Our case is very different. If by their own admission, unambiguously they have applied a legal test of restoration of the status quo – and that is the test Mr. Pritchard said he applied as the decision maker - if you disagree with that it then seems to follow he has gone beyond his powers, he has misdirected himself and, as a result, the Decision must be quashed and must go back.

There is a fundamental difference between the pure legal question of whether undertakings are required to restore the pre-merger situation and the type of issues that this Tribunal considered in the cases cited and perhaps I need not labour the point any further.

As we put it in our skeleton, the OFT cannot really be the arbiter of its own jurisdiction, it cannot make up its own rules, it has to work to the existing rules given by Parliament, and s.73(2) is as clear as it can be in my submission. In other words, there is not a range of reasonable answers here which a Tribunal might not want to question, second guess. There is only one answer to: "What is the legal test?" and they got it wrong.

On the substantive question of whether the purpose of undertakings is to restore pre-merger competition you referred us to the *Labatt* case, and I am not going to take you to it, which itself affirmed the earlier decision in *Southam*. In the *Southam* case in the Canadian context it is dispositive of the question: "What is it you have to do to remedy the situation?" You remedy it by eliminating the SLC. I am not going to lay claims that the Canadian authority is a direct and binding authority, it is not. It is the experience of a foreign court, albeit a distinguished foreign court, but the fact is their regime is very, very

similar to ours, particularly in the application of the SLC test. So we take a lot of comfort from that case as being a useful guide. In our ways it is the British equivalent of *Southam* and *Labatt*. This issue has not arisen and it is a matter which really requires attention.

All we are concerned about here is OFT action which eliminates the SLC or prevents it, or remedies it or mitigates it, following s.73(2). There is nothing in the Act that says: "Let us go back to the status quo *ante*"; it is quite the wrong question, and having asked themselves the wrong question it is no surprise they got the wrong answer.

Put it another way, under UK law the SLC standard, a merger may result in perhaps two aspects: a merger may result in competition being lessened in a way which is not substantial, or it may result in competition which has been substantially lessened, and we know that only the latter is prohibited. Therefore if a merger lessens competition in a way that is not substantial under the SLC standard, it cannot be prevented at all and must be approved. There is no logical reason why a stricter test should be applied in relation to mergers which are to be modified by undertakings than is adopted in the original merger itself. Therefore, provided a merger, modified by undertakings, does not result in the perpetuation of the SLC, whether or not it restores competition to the situation prior to the merger is irrelevant, it should be approved.

The OFT makes some play on the language of s.73(3) which deals with a comprehensive solution. The reference to having regard – notice it is not "you must do this", you must have regard – to the need to achieve as comprehensive a solution as possible. Then: "These undertakings must, if possible, fully restore pre-merger competition.". So being charitable it may be that they are trying to justify their stress upon the status quote *ante* as being the touch stone which we say is wholly contrary to s.73(2) by reference to the words "having regard to the need to a comprehensive solution". They are saying the only comprehensive solution must be one that restores the status quo *ante*. In our submission s.73(3) does not require such an approach.

I do not think it is necessary at all for me to take you back to s.73, but you will recall the repeated references to SLC. It is clear that the purpose of the undertakings is to cure SLC it is not to restore the status quo *ante*. Section 73(3) is clear in its own terms, the undertakings are there in order to remedy, prevent or mitigate the SLC. What is a comprehensive solution does not become more comprehensive by removing something which is not part of the problem – it is as simple as that. In other words, by removing elements or lessening competition which is not substantial does not make it comprehensive – "comprehensive" is a different word here. "Comprehensive" embraces a situation where

there are multiple problems arising from a merger, and the OFT must identify each and every one of those problems, and then agree a solution which deals with all of them i.e. comprehensively.

There may be a number of ways of dealing with that and I do not rule out the possibility that restoration of the status quo *ante* may be one of them – it might, but it would be just by chance that it should be having regard to all the circumstances. That is not the case here. All it must do is comprehensively remove the SLC and nothing more.

I suppose my final argument on this would be this: the restoration of the status quo *ante* is an acknowledged formula. Parliament, in its wisdom, could have chosen that as an alternative to the elimination of SLC, but chose not to do so. But of course, it could have gone down the American way as Mr. Pritchard very helpfully reminds us. It might be useful briefly to go to the defence bundle, where I can take you quickly to tab 27. If you go immediately to p.719-720 – do you have it?

THE CHAIRMAN: Yes.

MR. SHARPE: Starting at 720, Mr. Pritchard no doubt right on top of American law, looks at the American way, 720: "Restoring competition is the key to an anti-trust remedy." What he is doing in his witness statement and the Office through his guidance and leadership is bringing in to play the American law. Do you see:

> "Although the remedy should always be sufficient to address the anti-trust violation the purpose of the remedy is not to enhance pre-merger competition but to restore it."

Then he goes on:

> "The Division [Anti-Trust Division] will insist upon release sufficient to restore competition conditions the merger would remove. Restoring competition is the key to the whole question of an anti-trust remedy and is the only appropriate goal crafting merger remedies."

Then briefly over the page you will see that that is not just the Division it is also the Supreme Court endorsements there. What Mr. Pritchard has done is drawn freely on his American experience, but the simple point I wanted to make without jesting too much at Mr. Pritchard's expenses (which is a very dangerous thing to do) is also to say that this was an option open to Parliament. They chose not to do that, if anything they went down the Canadian way and, in my submission, 73(2) is as clear as day what the OFT was obliged to do – eliminate SLC, not restore the status quo *ante*. Page 719, while we have this, and I do not intend to take you back to it, you might care to cast your mind on something with

which we do agree with the Anti-Trust Division, where it says in the heading on the second part: "Remedies must be based upon a careful application of sound, legal and economic principles to the particular facts of the case at hand. I do not think we could have put it more cogently, and this is one aspect of the Anti-Trust Division's guidance with which we strongly agree.

It only remains for me to say if they have adopted a different approach by their own admission it must follow, in my submission, that the Decision must be quashed.

Let me turn quickly to grounds 2 and 3. Essentially, the OFT's position in relation to our grounds 2 and 3 – 2 is: they should have done some work and looked at this, and whether we have a more passive formulation: they should have done something; and 3 is our firewall proposal. They have advanced essentially the same defence, namely, they could not approve the proposal without detailed investigation, and under the Act and the Guidance they were not permitted to carry out such an investigation. Now, my friend was anxious to know where he says this. I am not going to take you to the defence, and my friend can explain it (if he can), but for your note it is 4(d) and 46 of his defence. He makes just that point. I will not focus on firewalls. I can make some submissions about that, and Mr. Pritchard not addressing KPMG, and so on. I am not going to deal with that any further.

In our skeleton argument we tried to be helpful, and say, "What is it that the OFT should be doing here?" We introduced a typology, really to assist the Tribunal. At the top there was the comprehensive analysis. That really does not concern us too much. That is the role of the Competition Commission, as Mr. Prosser will remember. That is the in-depth analysis which the Commission discharges with distinction. Then we have what we have called the 'detailed analysis'. This is how we describe Section 22. It is detailed. They have got to satisfy themselves that there is no likelihood of an SLC. Now, obviously it is not a comprehensive analysis. They can be pretty extended, and a good deal of data and information is put in; meetings are held. You will know about the procedure, for it, whatever it is, it is not a comprehensive analysis because they very frequently say, "We have gone about as far as we can go with this. We have really to take it to the Commission".

In this case the Office are not saying that a comprehensive analysis should be applied to the undertaking - nor are we. That is a job fairly and squarely for the Competition Commission. Let us rule that out. But, they are saying that they are not obliged to have what we call a detailed review which got them into the Section 22 situation with the duty to

refer but for the undertakings. They are saying that something less than that is sufficient to block the transaction between CGL and Southern.

We have called that 'overview'. It was meant to be a fairly neutral term. Whatever it is, it is not the other, and so it must be something else. This is what the OFT regards itself as entitled and permitted to do when assessing compliance with the undertakings. Amusingly, the OFT comes to us and says, "Well, there's no such category. There are only two - Section 22 detail, and then the review by the Competition Commission". We agree. Absolutely. There is no category known to the law of 'overview'. That rather makes our point. There is only a dual hierarchy of analysis comprehensive in the detail. A third attempt is merely our effort to make sense, to give a name to what I call the no man's land of the OFT's approach to this case. They say that it is sufficient for them to dwell in that innominate area. It is neither comprehensive, nor detailed.

At this point the argument for the OFT in the skeleton becomes rather confused. I am referring to paras. 7 and 42. We are told that the OFT is prepared to carry out something called a proportionate amount of analysis - an investigation. But, they do not condescend to any detail. Now, they cite coffins. Remember? They evaluated the common purchasing of coffins as a link. But, they say their analysis at the Section 73 stage will not necessarily be unsophisticated, whatever that means. But, the level of analysis will vary from case to case, but it will not be 'in depth'. Now, ultimately it is obvious from this - and they have had several goes at it - that the OFT is unable to explain or articulate in plain English what the correct approach should be, other than describing it as proportionate. They do not explain what this involves, and they do not explain what the opposite of 'in depth' is. It is obvious that they are putting forward a lesser standard of review, yet at the same time they come to the Tribunal and say, "Well, this category of overview does not exist".

In my judgment this suggests even more strongly, bluntly, that the Office of Fair Trading has not got a clue what it should be doing in assessing compliance with undertakings. It has had the opportunity to explain what it should do, and it has put it in terms of what it is not going to do. Then we have sophistry, not necessarily beyond sophisticated. I cannot make sense of that. My clients cannot make sense of it. Perhaps, more importantly, the people in the next merger discussion, and the one after that, will have difficulty making sense of it. Basically they are saying, "In this type of situation our discretion is such that we can really do what we like". They have got that margin of appreciation. The clear difference between us is, no, it is governed by law; it is governed by Section 73, and it is governed by a duty on your part to analyse the evidence put before you.

When we get to the specific issue of the reasons why Southern might not be a suitable purchaser, it is equally confused. I am referring, in particular, to para. 53 of the defence. They say, "There is a risk that overlaps in senior management may facilitate the exchange of information, or even an anti-competitive agreement". Of course, we have gone through the fiduciary duties issue - I hope to your satisfaction - in our note. But, they also seem to suggest that, "That is not an issue. After all, it might be in the company's interest to enter into anti-competitive agreements". So, in other words, Mr. Bennett has a fiduciary duty to enter into an illegal agreement. That is what they are saying. It is daft It is a novel proposition of law, which I do not think my friend will wish to repeat. I am surprised if they consider - if it be their case - that directors are under a fiduciary duty to enter into unlawful agreements. It is just too ridiculous for words.

On the other hand, you cannot dismiss the fiduciary duty of which Mr. Bennett is acutely aware owed to CGL, and his duties also to Southern. There is not the slightest suggestion anywhere, after nearly twenty-four years of service, that that has constituted a problem. What it does do is represent the OFT's rather tenuous grip upon what they ought to be doing, and the issues before them.

Similarly, they persist in describing Mr. Bennett as having a dual senior management role. Here again, I have referred to the undisputed evidence. There is all the world of difference between the role of the executive board of CGL, which is the decision-maker (that is the executive engine room of CGL and all its activities) and its board consisting of elected representatives from the constituent parts of the Co-Operative movement, as you know, who have become members because of their purchasing and involvement. We know that Southern's involvement is really trivial - 2 percent or something like that (3 percent?) - in terms of its voting and influence. Those are material factors.

Whatever it is, it is not in dispute that he exercised no executive power at all within CGL at the level in this peculiar Co-Operative structure which we all find rather difficult to analyse in the context of the sort of businesses we know intimately - the ordinary joint stock company. Here CGL is operated in a rather odd way. It has its executive committee (as the Act describes it should have) which makes the decisions, and then, under its rules, it has this supervisory twenty-eight person non-executive board which ensures the rules are met and the compliance issues. Yes, it deals with long-term strategic issues right across the piece.

Clearly, obviously, what the OFT have done is to do a quick read-across - and they persist in this - between the executive board of a company and all the evidence they have put

forward (the American evidence and the EC Commission and other things) is fairly and squarely dealing with a board in the conventional mould consisting of executives making decisions, dealing with pricing and other matters. That is factually not the situation here. We have to acknowledge the fact that there are major differences and accommodate them. Again, happily, that means that all the learning and case law about interlocking directorships cannot be applied in an unthinking way to the position of Mr. Bennett.

But, I am not actually here today - and let us be very clear - to try and persuade you that the evidence is dispositive. That is not my role. -- and therefore that Southern should inevitably be approved as a purchaser. At para. 39 of their skeleton they say it is 'far from clear that an in-depth review would have led Southern to have been considered suitable'. Well, fine. But, it is not my case. We do not need to show today that Southern would necessarily have been approved. All we are seeking is a requirement that the Office judge/evaluate/assess/investigate Southern's suitability, considered properly in the light of the proper legal test, and in the light of the evidence before it, and not adopt what I, with some hesitation, call almost a Pavlovian reaction that common directorship constitutes a connecting link sufficient to damn the transaction. As they say themselves, it was a de novo issue. There was no hint of selling to Southern at all at the time the undertakings were negotiated and agreed. Southern came on the scene, I understand, in January/February. Therefore, any analysis they would have done for the decision to refer, and then the decision to accept undertakings in accordance with Section 73 could not have accommodated any consideration of Southern. Therefore it required further evidence and further analysis to examine the role of Southern.

So, we are not coming here to say that the Tribunal must assess whether the OFT reached a correct decision on the basis of its evaluation and analysis of the evidence before it. Why? Because the OFT itself accepts that no real analysis or investigation was carried out. The question then becomes, "What level of analysis are the OFT obliged to do?" They say, "Nothing or very little". We say, "You've really got to look at this more carefully".

We are not challenging their jurisdiction to make decisions regarding compliance with the undertakings. They get dangerously near to that - for your note - at para. 10 of the skeleton. Of course they have jurisdiction. The reason why we are here is to ask, "What is the role of the OFT in assessing compliance?" The question is not whether they have jurisdiction to take a decision in relation to the suitability of purchase - because obviously it does - but whether it has jurisdiction to reach a decision which is not based upon evidence and analysis. It is a very simple point. The OFT says it has such a jurisdiction. We say

that it has not. That is really what we say in para. 30 of our skeleton. (That is just for your note - I am not going to take you to it.)

Now, you will recall the OFT, in defence of all of this, say, "Well, we've got to apply something called a clear-cut standard". Do you remember? "That's what our Guidance tells us we've got to do." They say the application of the clear-cut standard means that the OFT must be confident that the undertaking is met without carrying on any more investigation than that already carried out at the Section 22 stage. That is what they say. Of course, it is at the stage when Southern was not in prospect - or, indeed, when the undertakings were not in prospect. They rely upon the standard laid out in the Guidance (and I am going to take you to the Guidance in a moment). The reference at para. 8.3 to the need to be confident, but the competition concerns could be met without the need for "further investigation" and they also say that if they added any more than that that would undermine the distinction between their role and the Competition Commission.

On the Guidance, can I take you to the Guidance which you will find at tab 17 of the Defence bundle and if you would go immediately to p.200, and it should be headed "Undertakings in Lieu of Reference". My guess is that you have read this with care so I am not going to dwell over long, but you will see the language in para.8.2 – we need to take it up perhaps in line 4:

> "Any undertaking must be aimed at remedying or preventing the adverse competition effects identified in considering such undertakings the OFT will see to achieve undertakings in lieu that are sufficient to address clearly the identified adverse competition effects and are proportionate to them."

The rest of that is not particularly relevant, and then if we turn to 8.3:

> "In order to accept undertakings in lieu of Reference the OFT must be confident that the competition concerns identified can be resolved by means of undertakings without the need for further investigation. So undertakings in lieu of Reference are therefore appropriate only where the competition concerns raised by the merger and the remedies proposed to address them are clear cut and those remedies are capable of ready implementation."

I think that is about as far as I want to go. Let me address this. First, as you know, the Guidance is no more than guidance. It has no statutory force, it is a generalised statement by the office of how it considers it should perform its duties under the Act, so it cannot trump or amend any Act. So if there is any uncertainty in your mind after my submissions,

and I hope there will not be, any interpretation of the Guidance must give way to the Act itself. That is by way of introduction.

My first argument is that the Guidance is completely consistent with CGL's submissions that they are required to carry out what we define as a "detailed analysis" even in relation to undertakings. If there is any uncertainty they should interpreted in a manner consistent with the Act and, finally, if you are not convinced of that then you have to drop the Guidance and go back to the Act.

Before going on, just go back to 8.3, just as it were to anticipate submissions. You will see in line 3: "… without the need for further investigation" – do you see that? My friend makes play of this, he says that that absolves the OFT from any responsibility to take any further investigation. I submit that it is as plain as day that in the context of undertakings in lieu of a reference the further investigation that is being considered here is an investigation which would be in substitution for the undertakings in lieu, namely, a reference to the Competition Commission, and that makes sense. You can only accept undertakings if you are confident that you can make a Judgment on the facts and matters before you and if you are not you should not accept undertakings and you go back to your duty, which is then triggered, to refer the matter no longer suspended by any consideration of undertakings and refer the matter to the Competition Commission. That is what the authors of this Guidance meant, and it seems so obvious. Undertakings are there in lieu – in lieu of what, a reference? In lieu of a further investigation. And over all of this there is a duty to refer unless the Office is satisfied that it has something that it can apply, provide a comprehensive resolution to the competition problems, it has enough information before it, and if it does not have any of that it should not consider undertakings, let alone interpret them in a particular way. No undertakings should be accepted, the matter should go forward to the Competition Commission. That makes sense of the two stage review that we have in our country. The Office carries out a stage 1 investigation as we know, about the existence of an SLC. If it detects an SLC there is a duty to refer but if, in accordance with s.73(2), it can be resolved by an undertaking everybody is happy. The parties to the merger can offer undertakings and the Office can close its file and the Competition Commission does not have a further reference. So public and private interests harmonise. The Office then has an important responsibility to ensure that issues which properly ought to go to the Commission go to them and are not settled too early on the basis of inadequate undertakings. But once the undertakings are accepted, as we all know, then the door to the Competition Commission is closed. The nature of the OFT's role is further explained in

the explanatory note to the Enterprise Act, if you just care to turn back to tab 16, p.151, para.226:

> "The purpose of these undertakings is to allow the OFT, where it is confident about a problem that needs to be addressed, and the appropriate solution, to correct the competition problem the merger presents without recourse to a potentially time consuming and costly investigation."

In my submission the further investigation in the Guidance is the time consuming and costly investigation, also mentioned in the explanatory notes, I do not think that is a very difficult submission to make, and it is all in lieu, the undertakings are in lieu of such an investigation. So then the Office comes to us and says: "We cannot do a further investigation because we are disabled because of the Act and the Guidance", we say that is completely wrong. What the explanatory notes in the Guidance are referring to are avoiding further investigation by the Competition Commission. I will come back to that in a moment.

As you see, in 226, the explanatory note provides that in order to accept an undertaking in lieu the OFT needs to be confident, first of all about the problem, and then about the appropriate solution. In other words, it does not have to deploy all its resources in identifying the problem, the problem and solution are given equal weighting. In terms of the problem that needs to be addressed, the OFT has already carried out what we define as detailed analysis in deciding pursuant to s.22 whether the creation of a relevant merger situation has resulted, or maybe expected to result in an SLC. So at that stage the OFT is confident about the problem that needs to be addressed as required by para.226 in the light of the detailed analyses which had been performed to date.

In our submission it would be very odd and illogical if, having conducted a detailed analysis in respect of the problem something less should be needed to assess the solution, the remedy. We say they are obliged to consider with the same degree of seriousness an application, the nature of the remedy, in detail, and they have to do that in order to be confident that they have succeeded in eliminating the SLC. In my submission these two aspects, problem and solution, are indissolubly wrapped together. We see that clearly in 3.1(d) of the undertakings, to which I am not going to take you, which deal with the assessment of whether or not the subsequent divestiture would of itself create a substantial lessening of competition here. But plainly the OFT would have to assess whether it would or not and apply pretty much the same sort of reasoning and approach as in s.22.

At para.5(7) of their skeleton the OFT suggests that a further investigation would call into question the two stage system we have in the UK. We say "no". The prospect of a limited further investigation by the OFT at the remedy stage would prevent the need for a full Competition Commission investigation of the entire merger. This actually assists the two stage system and makes it more effective. In fact, if the OFT cannot complete its stage 1 responsibilities, which end once the undertakings have been complied with – not before – it would follow that the two phase system would be undermined, since if any issues arose in relation into remedies and anticipated undertakings phase 2 would always be required to deal with that. As I said, the purpose of phase 1 (including undertakings) is to obviate the need for this time consuming and expensive recourse to the Competition Commission, so the scheme does work, but it does require constant application by the OFT to conclude the stage 1 procedure properly.

I put this as a supplementary argument, I do not want to over exaggerate it, but there is a powerful policy reason for this as well. If parties go to the OFT, offer undertakings and they are accepted in future, and if you find against us I think parties are going to say to themselves if the OFT is not under any obligation to conduct an appropriate inquiry, an investigation to consider the issues and is simply standing back and saying: "We are disabled by the Act and the Guidance from doing that", I think there will be less undertakings offered in that situation because once the undertakings are signed and sealed, as I said, the door to the Competition Commission is closed. Parties have to assess what the likely behaviour will be of the OFT in applying and evaluating compliance with the undertaking. Putting it bluntly, if they get away with this here, people in the future are going to think very hard indeed before surrendering their freedom without recourse to the Competition Commission and relying upon something less than detailed assessment of application of their undertakings.

The OFT argues that the Guidance makes it clear that it cannot carry out further investigation into the undertakings. They rely, as I said, upon the Guidance, and they say the remedies must be clear cut, and they argue that the clear cut standard prevents them from carrying out any further investigation. What does "clear cut" mean in this context? Certainly they must be confident that the SLC will be eliminated or prevented, or mitigated, remedied. But "clear cut" does not mean "cursory", "summary", "visceral", "superficial" or any other similar words. It means, can mean: "following analysis the solution is clear cut". It is not in dispute that that analysis is less than comprehensive analysis we ascribe to the Competition Commission, but it is not superficial or the

overview standard, where we have attempted as best we can to describe, in the face of not very much help from the Office what it is they think they can do, or have to do.

I have already said that the Office rely upon para. 8.3 of the Guidance, and you have heard my submissions on that. When we talk about further investigation we confine that to further investigation by the Competition Commission. There is really no distinction between assessing the problem and the solution in this case.

However, in all of these cases involving undertakings - unless parties have gone down the Fix It First route - there will always be an element of bolt-on. The analysis which got the merger through Section 22 with a duty to refer is unlikely to be sufficiently comprehensive at that stage to embrace an evaluation of an undertaking or of the suitability of a potential purchaser. The OFT cannot just sit back and do nothing. It must make an assessment in order to finish its job under Stage 1. We say that in that context the reference to further investigation in the Guidance must be a reference to investigation by the CC because the OFT has already carried out a detailed analysis. But, we say further that that detailed analysis under Section 22 - and possibly under the first part of Section 73 - must, of itself, be incomplete unless the identity of the prospective purchaser, or purchasers, is known at that time. They have to consider and do more work to assess whether the SLC would be eliminated.

Of course, the degree of work will depend. You will recall in the *EDP* case that you pointed out to us, that there (as far as I could understand the case) the case was that the applicant was saying they had to go back to Square 1 and do an analysis <u>de novo</u>. The Commission said, "No, that's ludicrous! We've done all that analysis. We've erected the superstructure to assess where the incompatibility with the common market lay, and the strengthening of dominant positions, and so on. We're entitled to build on that, and bolt on that analysis to determine whether or not the undertakings are good".

That is pretty well the exercise that we are hoping the OFT will do if you find in our favour. They will take the analysis they have done for Section 22 - the analysis they have done to see that undertakings in general, in the abstract, were satisfactory - and apply that analysis and bolt on some more thinking. If we accept that, and we go through, that is fine. If not, well, we may come back here again. I hope that is not a deterrent to finding in our favour.

Let me wrap up the Guidance explanatory note point and why it looms so large in the Office's thinking. There is nothing in the Guidance which prevents the OFT carrying out the same detailed analysis in relation to undertakings under Section 73, as it did under

Section 22. It would obviously require less analysis because they have already done an awful lot of the work. But, we want them, and require them, to bolt on the analysis and not be satisfied with doing nothing. They have an obligation to do something.

Let me put it like this in conclusion: the OFT was required to conduct more than a superficial overview of a proposed purchaser. It was, instead, required to conduct its review with the same degree of diligence as it applied originally in deciding that there was an SLC. Since the Office accepts that it did not carry out any such review it follows that its rejection of Southern as a suitable purchaser is necessarily flawed, and since, on the basis of its own defence and evidence it applied a legal test to the restoration of the status quo - which we submit is flawed - the decision should be quashed, and the matter remitted to the OFT for proper consideration.

Madam, unless I can assist you further, those are my submissions.

(Short break)

THE CHAIRMAN: I have two questions for you and I think Mr. Davey has at least one. You mentioned that at the time of accepting the undertakings it was not envisaged by either the OFT or you, or your client, that the problem was going to be a potential purchaser. In that event, I just wonder - and would like to hear what you say - as to whether Section 73(5)(b) might have been relevant - so an application by you to vary the undertakings - or Section 74(2) (if it is a material fact).

MR. SHARPE: In other words, we could have avoided all of this by going back to the sort of variation in the undertaking or a release of the undertaking already signed off to the Commission.

THE CHAIRMAN: Or it became a material fact and they say, "Well, if you want to do that, then you go off back to the Commission". It does concern me, the idea that they take the undertaking and then there cannot be any reference to the Commission. One of the questions in my mind at least is that the sort of investigation, about what the Co-Op is, and how it works, and all of that, is very complicated. It is not clear from all the documents that have been provided exactly what the interchange of information could be, etc. That would be a matter which the Competition Commission could consider.

MR. SHARPE: Yes. Before answering, may I possibly take a moment to take instructions on one factual point? (After a pause): I just wanted to confirm the point that I conveyed to you earlier - that Southern did, indeed, come on the scene as a buyer. You know how the

system works. Once undertakings are agreed then the matter becomes more public than it would otherwise -- Well, it is public,-- the undertakings are in public -- and when the businesses are identified and then they are put up for sale. It was at that point that two serious bidders came on the scene. You appreciate the difference between the two - Southern wants to buy the whole lot; the other bidder (nameless perhaps for today's purposes) would only want to buy some. So, the under-bidder is not a substitute.

My instructions are that Southern did come on the scene later. Then the question is one of whether or not the undertakings would have been modified. Now, as I understand it, the undertakings took a long time to be agreed, and we have seen some of the iterations in the evidence (though it is not terribly important). Indeed, there was one aspect of the undertakings which I think was subject to a modification request. (I think it is irrelevant for our purposes.)

Our clear understanding - and I think it is in the Office's evidence as well - is that it would not have countenanced a modification request, and they would have dealt with it in much the same way as they're doing now. They would have rejected it. So, my instructions are, and my understanding is, that there would not have been much point in seeking a modification.

THE CHAIRMAN: That is how I then come in 74(2) because by having gone to them and said, as one did, "We want a variation because ----", then does 74(2) come into play?

MR. SHARPE: I am not sure, with respect.

THE CHAIRMAN: You see, I find it a little bit difficult that one starts with an undertaking which says 'independent', which you offered.

MR. SHARPE: Yes. As the evidence shows, it is entirely consistent with the standard form.

THE CHAIRMAN: Absolutely. It is independent. Clearly, something within the grasp of the man on the Clapham omnibus - which is not the test that we should apply, but, you know - is not independent.

MR. SHARPE: We agree. The advent of Southern as a buyer, as opposed to the under-bidder is a material fact - respectfully, I am not sure about that. I think as a matter of law what is meant by 'material fact' is something where here the Office have gone through their process of evaluation in looking at the problem and the aptness of undertakings. I think what Section 74(2) does is to actually address the situation where undertakings would be appropriate as a means of ending the SLC -- or, dealing with the problem of the SLC was based upon false foundation.

Now, that is not actually the situation we are faced with here, as you appreciate.

THE CHAIRMAN: No. A new foundation. It is not a false foundation - it is a new foundation.

MR. SHARPE: My learned junior helpfully adds that it is not change of circumstance, you see. That is how I would address that. I think from the Applicant's perspective, having signed the undertaking after to-ing and fro-ing, it then was faced with two bidders. I am not sure I respectfully agree the Co-Operative movement is so complicated. The Office of Fair Trading had to analyse the Co-Operative movement as part of its assessment under Section 22.

THE CHAIRMAN: They did not have to analyse the question of this sort of inter-relationship because it was not relevant at the time.

MR. SHARPE: No, but they were well aware of the corporate structure and the statutory regime, I am sure. I think the position here is that this is not a material fact which would have justified a reference. Any modification almost certainly - and I am looking to my friend (but he has to get instructions) - would not have actually changed the issue. Their concern was how they should respond to this situation, and whether it was in the old undertaking or the new undertaking. One they would not have agreed, judging by their subsequent conduct, to draft around Mr. Bennett, and so that is the end of the story, but even if they had agreed to it --- If they had agreed to it, that would have been the end of the story, but we were pretty confident that they would not have agreed to it, and events have proved us correct.

THE CHAIRMAN: Mr. Anderson, I am sure you will deal with the points when you make your submissions?

MR. ANDERSON: I will.

THE CHAIRMAN: The second question I had was that you took us to para. 226 of the explanatory note on the Enterprise Act. You were talking about the problem and the solution. Now, you are looking at the solution as the implementation of the undertaking. Isn't the solution the undertaking itself?

MR. SHARPE: It embraces both. With respect, you are absolutely correct, but we are dealing here with Stage 1. Stage 1 is completed when the undertaking are signed and implemented, and the SLC is eliminated. That is our submission. I think there is no dispute about that. Therefore, we say that the same quality of analysis applies to it in its entirety. Insofar as we have a problem which has been identified and a solution which has been identified, the solution is first, yes, the decision to accept undertakings - but not any old undertakings - appropriate undertakings and their implementation. I hope this is not an extravagant submission at all, but we say that you cannot say, "Well, our job's done when the

undertakings are signed". The job is done when the undertakings are implemented. That is our submission, madam

THE CHAIRMAN: Thank you very much. Again, I assume you will deal with that question as well?

MR. ANDERSON: I was intending to cover it in any event, yes.

MR. DAVEY: Mr. Sharpe, I am really taking you back perhaps to the Chairman's first question. You say that there is no read-across between ordinary companies and co-operatives, and, if you like, that co-operatives deserve special treatment. Yes?

MR. SHARPE: No. I do not want to interrupt you, but I hope I did not say that. I was very specifically dealing here with the management structure.

MR. DAVEY: Perhaps I can re-phrase it. You are asking that the motor of the management structure of co-operatives, as distinct from ordinary companies, should have been considered at the time when the evaluation process was going on.

MR. SHARPE: Right.

MR. DAVEY: What I am wondering is: if this problem of the management structure creating a different view of independents (which is what the undertaking was about) -- If that was going to be a problem, why was it not flagged up when the undertakings were being entered into?

MR. SHARPE: Let me start at the Decision. Let me make an admission, which I hope will not be unwise. If Mr. Bennett were a member of the executive board of a CGL and continued to be CEO of Southern, we probably would not be here because under the 1965 Act, which we described in our skeleton, you may remember, what is incorporated under the provident societies' legislation, is that you have to have a committee/a board. That committee has one feature only - its job is to run the business. That is satisfied by the executive board of CGL. I repeat, if Mr. Bennett were on that executive board, taking day-to-day decisions - and I put it no higher - it is unlikely that we would be here. What he is is on the board of something which CGL's rules provide for, for which there is no statutory requirement for. It is just CGL. It is a very large organisation and it has a large number of members ----

MR. DAVEY: 140 members is what springs to my mind.

MR. SHARPE: Those are just the corporate members. Of course, there are millions of people who are also members of the Co-Op. Now, that is the structure . Because CGL is a very large Co-Op, I presume, their rules provide for this executive supervisory board - non-executive supervisory board.

Now, the analogue we have given is that of a set of trustees. In that sense Mr. Bennett is really not on all pars. So, there is no read-across between his election to that post by the corporate membership. Of course, he is not there as a Southern representative. He is there as a representative of the large number of corporate people who elect him because of his (if I may put it this way) personal stature in the Co-Operative movement.

So, we say there is no read-across, and therefore no obvious reason why that connection should disable the transaction proposed.

Of course, the answer to your second question - "Why was it not anticipated? --- The only answer I can give you, which I believe to be true, and on my instructions, is that Southern was not contemplated as a buyer until January or February, and came out of the bidding process. You know the other bidder is not a Co-Op.

MR. DAVEY: Yes. What I was really trying to get to was whether it might have been wise to have said, "When you are talking about independents, please do remember that we're a Co-Op and not a joint stock company".

MR. SHARPE: It would not have got us anywhere, of course, judging by the attitude the Office ----

MR. DAVEY: That is speculation. It could have been flagged up ----

MR. SHARPE: I am not aware that it was flagged up.

THE CHAIRMAN: You say it would not have got you anywhere. Where it would have got you is that they would have said, "We're not going to accept undertakings".

MR. SHARPE: Yes, that may well be right.

THE CHAIRMAN: That is why, going round this area, they have accepted the undertakings and then they are stuck because they cannot go backwards unless you can use 74(2) ----

MR. SHARPE: The get-out clause - which I do not think you can.

THE CHAIRMAN: I am not saying you can. I wanted to hear submissions on it. But, unless they can use that, they are absolutely stuck.

MR. SHARPE: It is stuck. My friend is busily re-writing his submissions because, of course, none of this is the Office's case - that somehow or other we were to blame. We should have anticipated this, and, as you say, in the event of a brick wall, we could have gone to the Commission and taken our chances. This was a very small transaction. We are talking about a handful of undertakers in a small number of locations. I hesitate to say this, but a Competition Commission inquiry can be a long, arduous and very expensive business. So, It think there was a resolve on the part of CGL to rely upon the Office's good sense. As I say, this has not been raised. I am not saying these are not important and interesting points,

but the key, to me, is that if they had been raised, yes, we may have had a Competition Commission inquiry with all the expense and delay. But, the legislative scheme was actually designed to avoid that in precisely this sort of case where the competitive overlap is relatively trivial, and where you can have amputation - as, indeed, had been the case in any other Competition Commission Inquiry or OFT investigation that I guess you are familiar with. The key point for us though is if they had refused and we were not keen to go to the Competition Commission, were they entitled, and this is why we are here, are they entitled to refuse on the basis of either the plain meaning of ordinary language. Ordinary language here is a difficult thing to lean on. I have a business, and I am told by the Office of Fair Trading that I have to sell it in order to consummate another transaction. All right, I sell it to my son. Now, is that connected or unconnected? We do not talk to each other and we compete horribly against each other, is that an issue? Is that a connection? The ordinary man in the street will say "What, selling to his son? For goodness sake there must be a connection". The real issue is you have to turn over the page and look at the analysis and see whether or not competition would be affected. If I sold to my third cousin twice removed is that a connection for these purposes? The Office's view on all of this is that it is all positively … in a way, they do not need to know. They have done all the analysis they need to do and their case put before us is that the Guidance and the explanatory notes say they do not need to do any further investigation. My view is precisely the situations I have posited here in a light hearted way are instances where they have to look at the issue a little bit more carefully than they admit to have done.

Madam, you were quite right, if I may respectfully say, to say "yes", the undertaking says "To satisfy", I can understand that. That tells us on whom the burden is. But to draw an analogy with 81(3) in the world of European law 81(1) prescribes a legal agreement, but 81(3) allows a means by which certain agreements can be enforced – clearance, exemption. We know there the burden is on the parties claiming the exemption, but it does not mean to say that the decision maker, which could be the Commission, it could be the court, the Office of Fair Trading, whatever, has to do nothing in response to the weight of evidence put to it. They are given the evidence and then they say:" I am not satisfied", but nobody has complained in this case that we have failed to give them all the evidence they have needed at all, that is not the issue. The issue is whatever evidence we give them they are not entitled to engage in any further investigation, that is the simple point which we find so

difficult to understand, that the British Competition Authority should be so distant from what is always an engagement between the parties.

MR. DAVEY: And at the stage you had asked them to approve this intimation do you think you gave them sufficient evidence on which a reasonable person could have taken ----

MR. SHARPE: Well we certainly gave them a lot of evidence. There is one gap which is highlighted in the evidence, and that was the rules relating to conflict of interest which they say was not given to them and I have had it confirmed to me that it was not given to them, and the reason was they had described it at sufficient length it was not really necessary to give them the paper - it was overlooked, I think, but was that a material factor? No, there is nothing in the evidence, nothing before the Tribunal to say: "We rejected this on the basis we were not satisfied, on the basis we were not satisfied, on the basis of inadequate evidence." I think their case is a very strong one, it is pitched very high. We could have sent round 10 pantechnicons of evidence and they would have said: "It is not our job to investigate at this stage, send it back".

MR. DAVEY: At all events, Mr. Sharpe, you are saying that Mr. Bennett, who seems to be the sort of bête noir in this imbroglio – if I may mix a few languages, if not metaphors – you are saying that he did not have any executive power and effectively there was no worrying link?

MR. SHARPE: That is not even in dispute.

MR. DAVEY: That is your situation?

MR. SHARPE: That is as agreed and not contested.

MR. DAVEY: So you are saying there is no competition concern there?

MR. SHARPE: The OFT's concern, which they highlighted in the Decision, for which there is no evidence, and indeed is contrary to the evidence – I do not want to get into discretion at that point. They say: "Oh he'll get all this nice information about pricing", well the supervisory board, all the records show they never looked at prices, that is not an issue for them.

MR. DAVEY: No, not a concern in fact.

MR. SHARPE: Not a concern.

MR. DAVEY: Exactly. Did I see in the correspondence, Mr. Sharpe, there was some question of a management buy out at some stage.

MR. SHARPE: There was some ----

MR. DAVEY: In the correspondence?

MR. SHARPE: Yes, I think you are referring to a situation where some of the owners of the undertakers, there was a question mooted whether they could buy out and separate themselves from Southern.

MR. ANDERSON: I think, Mr. Davey, there were communications between the OFT and CGL with a view to altering the terms of some of the undertakings so that they would cover a concern that CGL had about whether a management buy-out was connected or not, those were resolved. Whether there was in fact a management buy-out ----

MR. DAVEY: There was certainly some correspondence and did I see in that correspondence that one of the conditions for considering such a thing was that all the directors would resign? Any directors?

MR. SHARPE: You are ahead of me, I cannot remember this at all. Would you just allow me a second. (After a pause) My recollection is rather hazy, and please forgive me, but as I understood it, it was to break the continuity between the old and new businesses, the directors of Fairway, the acquired company would have to resign, thus eliminating any connection between them and their former businesses. Of course, that is not an issue which we would dispute here, because they were executive directors, they were running Fairways and it is right that they should disappear, and not be absorbed by CGL, having some form of executive responsibility in the enlarged CGL Group and possibly having some link with their former businesses. As I understand it that proposal really did not get off the ground.

THE CHAIRMAN: I do not think it did get off the ground, but would they have been executive or non-executive?

MR. SHARPE: I think they're all executive directors, yes.

THE CHAIRMAN: Because my recollection of the correspondence, which you can check over lunch, is that you asked the OFT and said to them: "Of course, they will resign" because it would not be ----

MR. SHARPE: We will check on that; that would be entirely consistent with the case before you, that if Mr. Bennett had had an executive role in CGL ----

MR. DAVEY: We would not be here.

MR. SHARPE: Yes.

THE CHAIRMAN: You are saying there is a difference between the top whatever it is called, and the Executive Board?

MR. SHARPE: I hope this is not in dispute, although there is this curious factual assertion in the Decision that he would have access to pricing data and therefore use that as a means of co-ordinating Southern's prices. The evidence shows, and I did not think this was in

contention with the office that at that sort of level, they are performing a role very different from an executive management board of a company. They are representing the members' interests – they want to make sure the rules are observed; yes, they deal with strategic top issues, but when one marries that with the mischief that the OFT discovered, the source of the SLC in the Fairways' merger, which was essentially local competition – if you want a funeral in London you do not go to Glasgow and ask for an offer there ----

MR. PROSSER: Could I just take you up on that, Mr. Sharpe, you have been concentrating on the pricing side, you have just mentioned the point I was going to bring up, which was a strategic overview of these non-executive boards?

MR. SHARPE: Yes.

MR. PROSSER: This is surely just as much where he is going to get information that will be useful to Southern, even the discussions on purchasing Fairways would have come before the board, so he would have been party to that anyway, and wider views as a generality: "Do we need to improve the profitability of our funeral businesses?" So it is not just individual pricing of funerals, it is the strategic view where he is going to bring quite a lot of information back to Southern.

MR. SHARPE: I did of course mention pricing because, as you know, that is part of the Decision and we think that is a false basis in the Decision. When we turn to the strategic position, well the minutes and documents surrounding the supervisory board, which the Office ought to have considered and acquired, would show the type of decision making at that level was not such which would impinge itself upon the concerns in these four or five areas where there was overlap.

MR. ANDERSON: I think my learned friend should point out that no minutes of the supervisory boards or the board of directors were ever submitted as part of their case to the Office of Fair Trading.

MR. SHARPE: Well they should have asked for them. I did not actually say that and I know very well that they were not. Respectfully, we might be moving away from the OFT's case here and my friend can revise his case if he likes. He is saying they do not have to consider, even if we had given them the minutes, under the Guidance and the Act they are disabled from conducting any further investigation of this. What is sufficient is the connection. Now, there is force in the argument respectfully that a board at a supervisory level, looking at strategic issues, will get information and that is probably what Mr. Hardman meant when he talked about information competitors would relish, which I guess

is as much in your mind as it is in mine. But the key issue is what sort of competition are we considering here? Are we considering local competition on a day to day level, and the information the OFT is considering is information which would lead to co-ordination of activity and they focused on pricing and strategic vision. We can say: "What competition had you in mind?" and the Office's view is: "We do not need to address that, it is sufficiently obvious". We say: "No, it is not sufficiently obvious given this frankly peculiar structure in the Co-Operative movement". It is not so difficult measured by many of the things the Office of Fair Trading has to deal with. The fact is there is not the slightest bit of evidence to suggest that Mr. Bennett over 24 years misused information, recalling also that his company, Southern, already competes with CGL, albeit in a small number of areas. We have registered that point, and nobody but nobody has questioned his probity, or his ability to co-ordinate competition, it has just never been an issue.

THE CHAIRMAN: The OFT, I think, would not dispute that the solution stage, rather than the implementation stage, so the solution being whether they accept the undertaking, the terms of the undertaking, that they do consider whether the terms of that undertaking are going to meet the risks. The question is: at the implementation stage?

MR. SHARPE: Respectfully is that right? We have seen Mr. Pritchard's evidence?

THE CHAIRMAN: Well we will find out when ----

MR. SHARPE: It is in black and white. His idea of accepting undertakings was to restore the status quo *ante*, and then he says if you have a director, albeit at the supervisory level ----

THE CHAIRMAN: What he says is: "you can be confident if you do that, and therefore that is the way that we are doing it ----"

MR. SHARPE: Yes.

THE CHAIRMAN: "—and that is within our discretion", that is what he says.

MR. SHARPE: Yes, but fortunately we have an Act of Parliament in between, because the Act of Parliament says: "Eliminate the SLC".

THE CHAIRMAN: Yes, he says: "We can be confident it will eliminate the SLC if we do that, and we cannot be confident otherwise".

MR. SHARPE: Cannot be confident of restoring competition to the status quo, that is what he says in terms. He never once says that the presence of Mr. Bennett on the board and CEO he could not be confident that the SLC would be eliminated. There is simply no analysis at all directed to that, because as I submitted – perhaps at undue length – that is not the test they were employing. Now if he had said in his evidence: "We looked at this carefully and we think there is still a risk of a substantial lessening of competition by virtue of the

information", well we can address that. What information? It cannot be pricing so it must be strategic. What strategic information? Let us say there is some strategic information going through – would that substantially lessen the competition or maintain the SLC identified in the original decision? Well the answer is "yes" or "no", but we have no evidence to that effect, no reasoning, no evidence. All we are asking is: "If that is your case, prove it", or rather "Give us some evidence."

THE CHAIRMAN: It is not for them to investigate, it is for you to satisfy.

MR. SHARPE: The burden is on us to do that. We admit that, but it does not mean to say that the recipient of the information we are giving them, in order to satisfy them, should just be entirely passive. This is far too important for them to do nothing; that is our case. In fact, they have condemned themselves out of their own mouth because it really is the case that they have not examined the maintenance of SLC and how indeed Mr. Bennett's position would jeopardise that. They have considered a totally different legal position which my friend will have to explain to you of restoring competition to the status quo before the merger. As I said, that is the American way - not the British way. The Act of Parliament says that they must look at it. Now, it is altogether more difficult to do it the British way, I think, because even if we admit that Mr. Bennett was privy to information - and there is not the slightest evidence he ever mis-used it over twenty-four years - you still have to show that that information would retain the SLC that the Office identified. They have the additional problem of identifying the SLC in the context of local markets - not national markets.

So, as far as we can see, in terms of process this has been a disaster, but it has been overlaid by a misapprehension of their legal duties - that is to say, to eliminate/prevent/mitigate SLC as opposed to restoring competition to the situation before the merger. So, if you start off asking yourself the wrong question, I am afraid you are going to get the wrong answer. For those reasons it should go back and they should do it again. That is all we ask.

THE CHAIRMAN: I think you have made it very clear now.

MR. SHARPE: Would you allow me just a moment? (After a pause): May I just add an addendum to that point? I am conscious I did not quite get to the core of the question. The Office's case, I think, is really expressed very clearly in para. 14. It says, "Where there is a possibility that the remedy might not effectively restore competition, and it is not possible for the OFT confidently to dismiss the possibility ... the remedy will not be clear-cut". In other words, if we fail to satisfy them, they will not go forward to consider any further

issue that might arise in order for us to be in a position to satisfy them. That is the legal position under this first stage generally.

We say that is wrong. There should be here a responsibility placed upon the Office to rise to this and engage in a dialogue and not sit back and say, "We're disabled by reference to the Guidance". I have made submissions on the Guidance. I think they have got it hopelessly wrong. I do not want to repeat them again.

THE CHAIRMAN: Thank you very much, Mr. Anderson.

MR. ANDERSON: Madam, can I leave you with a couple of thoughts over lunch-time, and then I will resume.

If I can just deal with a couple of points while they are freshly in my mind from what my learned friend has been saying in answer to the exchanges between himself and the Tribunal? Madam Chairman, you raised a point at the outset about, "Well, couldn't this all have been sorted out at the time that the undertakings were being sought, and then the problems associated with Mr. Bennett's position would be looked at in the appropriate forum ----?"

THE CHAIRMAN: I am not sure that is quite what I said, but I do not find that question being answered as yet.

MR. ANDERSON: One of my learned friend's points was, "Well, that's not part of the OFT's case". If I could just invite you to look very quickly at para. 20 of our defence, we do effectively make that point - in other words, it is an issue that would better have been addressed at the time that the undertakings were sought. It might have been a question from Mr. Davey. (After a pause): It is perfectly true that they may well have got the answer if they came to the Office at that stage and said, "Can we put in a qualification to the notion of 'connected' and say that where the chief executive of a purchaser sits on the board of CGL, that shall not count as a connection for these purposes?" They might have suggested that, and it is very probable that the Office would have said, "No, we don't accept that qualification, and if you don't want to accept the undertakings without that qualification, then there will be no undertakings. We will go to the Competition Commission, and you can argue the special situation of co-operatives in front of a body that can look at this in sufficient depth".

The second point I would like the Tribunal to be aware of is the totality of the material that CGL submitted to the Office to support this request for approval is contained in Tabs 5 to 10 of the Notice of Application - letters from Clifford Chance and a copy of the annual reports and accounts of Southern. That is the totality of the material they expected to

satisfy us on. Now, to say that we simply sat back and washed our hands and said, "We can't do anything" is misleading. We wrote to them and said, "We notice Mr. Bennett as Chief Executive of Southern sits on your board. Can you please satisfy us that that is not a cause of concern?" All we got was, "He doesn't get details local pricing information". Well, we made it clear -- I made it clear at the meetings that we were still troubled by this connection. We are not satisfied.

Now, what this Tribunal today needs to decide is whether that attitude - given the statutory regime - was an attitude that no regulator, properly directing its mind, could reasonably have concluded. We say that posing that as the right question in the judicial review, the answer is quite clearly, "No, you cannot so say", and therefore this appeal must be dismissed. Of course, I will address you on the question of, "Is the level that we applied - namely, restoring the status quo ante, the wrong legal test. My learned friend makes a great deal of that point. We say that there is not a distinction as clear-cut as he is endeavouring to make. At this stage of the Phase 1 investigation our policy is that in order to comprehensively address/remedy/mitigate/prevent the substantial lessening of competition, what we seek in the form of undertakings, given that it would be avoiding a detailed investigation, is to seek to restore the status quo ante. That is a perfectly legitimate interpretation of Section 73. It is a matter of policy, yes, but it is a matter of policy within our margin of appreciation. It is the approach that is taken by the Competition Commission. You will see from the *Somerfield* case that it is the restoration of the status quo ante. That is the very phrase that this Tribunal was considering.

It is also quite clear from the original decision in this case, which you will find in the Notice of Application at Tab B3 - what is called the Original Decision - which is essentially the Section 22 decision ---- If I can invite you simply to look at the section on undertakings in lieu at p.51 ---- This is the discussion of undertakings in lieu from which the undertakings you have been taken to emerge. Paragraph 63: "In lieu of reference to the Competition Commission CGL has indicated a willingness to divest a range of funeral businesses sufficient to address any competition concerns. As noted above, the OFT has identified five local areas where the merger has resulted, or may be expected to result [and that is a point I will be coming back to - the level of confidence the OFT is needed to reach at this stage] in respect of all five the OFT considers that the party's proposed divestments appear to be sufficiently clear-cut to remedy the substantial lessening of competition identified in these areas".

Then at para. 64, which is important: "Furthermore the Office considers that any divestment should seek to ensure that the local conditions of competition are returned to that which existed prior to the merger, especially given the importance of reputation and location. Therefore, the OFT considers that the divestment as a going concern of the Fairways funeral businesses in these five local areas sufficiently clear-cut to remedy or mitigate the substantial lessening of competition".

So, it was quite clear at that stage that the relevant test being applied was restoring the status quo ante. It is too late now for my learned friend to challenge that test.

Of course, our submission is that it is not an incorrect application of the relevant statutory test, and I will take you to the regime after the luncheon adjournment if that is a convenient moment.

THE CHAIRMAN: Since nobody envisaged that it was going to be Co-Op -- Southern -- or whoever it was who was within the ----

MR. ANDERSON: I think what is said is that Southern did not come on to the picture until later. We all know - and I am sure Mr. Bennett knew, even in his supervisory role - that other co-ops operate funeral businesses.

THE CHAIRMAN: Just assume for the moment - hypothetically -that nobody envisaged that it would be anybody who was part of the network -- the movement -- the co-op movement.

MR. ANDERSON: The network of leading funeral service suppliers in the country, yes.

THE CHAIRMAN: -- that they would be part of the movement. You accept the undertaking. It says 'independent'.

MR. ANDERSON: Yes.

THE CHAIRMAN: They then come along and say, "We actually want to sell it to Southern". You say, "Well, that's not independent". They say, "Well, actually, it is independent for the various reasons which we need to go into, and we did not need to have to put that before you before, but there are all these reasons ----" Now, is there a provision in the Act which allows you to say, "Well, wait a minute! If that's what you want to do, then we need to consider re-referring this to the Competition Commission".

MR. ANDERSON: I will discuss that with those behind me, but I suspect the answer is, "No, there isn't".

THE CHAIRMAN: Which puts the OFT in a bit of a cleft stick, does it not?

MR. ANDERSON: Well, we would say it does not. It simply means that we do not approve this purchaser unless it is clear ---- This question of the plain and ordinary meaning which my learned friend attacks, we say must at least be the starting point. What my learned

friend has not addressed is that these undertakings, before they are accepted, to out to public consultation. One must have a degree of certainty. Really our case is that if it is a relevant connection, that is probably enough to reject them. We have rejected a couple. We do not undertake further in-depth investigations. Accepting undertakings is designed to avoid the need to do that. We need legal certainty. We need clarity. Modification - or even release from undertakings - also requires one to go out to public consultation if the Office has accepted in the first place the case for making such a change.

THE CHAIRMAN: You say the gate comes down at that point, and you either comply with the undertaking, or not.

MR. ANDERSON: Yes.

THE CHAIRMAN: And you really do not have to do anything more.

MR. ANDERSON: I say that we do not have to do anything more ---- Of course, if they are able to satisfy us that quite clearly this connection is de minimis an irrelevant connection, and not capable of giving cause to any concern, then ---- That is what we did in the context of the fact that Southern is a member of CGL. We said, "That's so de minimis, so irrelevant we will not hold that as an obstacle ----"

THE CHAIRMAN: Are you going to have to put that out to consultation because ----

MR. ANDERSON: No, because we simply said it was an irrelevant connection. This connection we could not say was an irrelevant connection. It was a structural connection at board level. We were told that it provided Mr. Bennett, the Chief Executive of Southern, with strategic information - information which, on their own admission, competitors would relish (however qualified he may have made that when he realised what he said). Nonetheless that is evidence that was presented to us and which we had to take into account.

That is where we would draw the distinction between a relevant connection and an irrelevant connection. But, this we certainly could not dismiss as an irrelevant connection.

THE CHAIRMAN: Once there is a relevant connection then it is done, and you cannot do anything more. But, you would have to go out to consultation, and that is one of the reasons.

MR. ANDERSON: The regime requires legal certainty and transparency. That is why the public consultation process is required, both for the setting of the undertakings and variation to them. You cannot meet the requirements of legal certainty and transparency if, as effectively my learned friend's case is, you can ignore the words 'independent of .. unconnected to'. "They're not independent. They are connected. But, you need to go off

and engage in precisely the same level of investigation you engaged in in order to identify the substantial lessening of competition ----" That is their case. It is spelt out in terms. It is that level of investigation - notwithstanding that the undertakings say, "It is for them to satisfy us, and the material that they have presented to us amounts to that ----" and most of that is just letters from Clifford Chance, and a report and accounts from Southern.

(Discussion as to timetabling)

(Adjourned for a short time)

THE CHAIRMAN: Mr. Anderson?

MR. ANDERSON: Madam Chairman, members of the Tribunal, the issue in this case is whether the OFT's Decision to refuse to approve the sale of the divestment branches to Southern was unlawful. There is no challenge to the OFT's Decision on whether or not a merger situation has arisen, there is no challenge to whether or not that situation may be expected to result in a substantial lessening of competition, particularly in the five localities. There is no express challenge to the decision to accept undertakings in lieu, or indeed the basis upon which the undertakings were accepted, nor is there any challenge to the terms of the undertakings. The sole issue is whether the OFT acted unlawfully in refusing to approve the sale to Southern on the grounds that Southern was not independent of and unconnected to CGL within the meaning of para.3.1(a) of the undertakings, by virtue of the fact that its chief executive, Mr. Graham Bennett, sat on the board of directors of CGL.

In my submission, this is really rather a simple case. CGL agreed to certain undertakings to deal with a substantial lessening of competition. It evaded thereby a reference to the Competition Commission. It agreed to sell the businesses to an unconnected third party, the third party that it has identified is not independent and unconnected, and my learned friend has simply not begun to address the fact that at the very least the starting point in this case must be the terms of undertaking 3.1(a). He has not begun to address that. His case can strike out independent and unconnected as being irrelevant for the purposes of the task he says the OFT should have undertaken. In our submission this is not a matter of dispute, the Tribunal clearly in this case is applying Judicial Review principles, that is to say by reference to the evidence before the OFT at the time of the Decision, and that is accepted in footnote 1 to para.5 of the Notice of Application – that is the evidence one is looking at, the evidence that was presented to the decision maker at the time of the evidence.

In applying Judicial Review principles therefore one must ask oneself: "Did the Office misdirect itself in law? Did it have regard to irrelevant matters, or disregard relevant

matters, and did it reach a conclusion that no reasonable regulator could have reached? We say the answer to all those questions is "no". It is developed in paras. 21 to 24 of our defence, and it does not appear to be challenged, and I do not propose to develop that. There are two points, of course, which emerge from that. The first is that there is clearly a margin of discretion or a margin of appreciation open to the Office. It is a question of judgment and this was recognised by analogy in the *Somerfield* case which, Madam, you will remember well.

There were a number of points in *Somerfield* which are material in this case, and it is the only case I was planning to take you to, but if I could invite you to take up the first volume of authorities at tab 16, which is where we find *Somerfield*. Now *Somerfield* was a challenge to the Competition Commission which had ordered the divestment of certain outlets. The challenge brought by *Somerfield* was not a challenge to the principle of divestment, it was a challenge to the details of which outlets and what purchasers. The important points that emerge from *Somerfield* are firstly the margin of discretion, and if I can invite you to turn to para.86 of the Tribunal's Decision – it begins at p.33 of the Judgment, which is p.422 in the sequential list of pages. We begin with the Competition Commission statutory powers:

> " …set out in 2 above. It is not contested in the present case that Somerfield's acquisition of the disputed stores gave rise to an anti-competitive outcome within the meaning of s.35 and that the SLC was thereby created. It follows in our view that the SLC in question was required to be remedied as quickly and as effectively as possible. So having found an anti-competitive outcome under. 35(3) of the Act the Competition Commission had to decide what action it should take for the purpose of remedying, mitigating or preventing the SLC it had found. In that regard under 35(4) the Competition Commission had to have regard to the need to achieve as comprehensive a solution as is reasonable and practicable."

So the test that the Competition Commission applies is exactly the same test that we find in s.73(2) and (3).

> "Such action includes divestiture. It follows in our view that the Competition Commission had a clear margin of appreciation to decide what reasonable action was appropriate for remedying, mitigating and preventing the substantial lessening of competition."

Of course in this case, by its very nature we would submit the margin of appreciation must be greater in the case of the Office of Fair Trading's position because they are necessarily

viewing things with a greater degree of uncertainty because they do not have the benefit of the detailed, or as my learned friend would put it, comprehensive investigation that the Competition Commission undertakes.

At para.91 the Judgment records a relevant finding in the Competition Commission Report, that is 11.9.

> "Divestment of the acquired store to a suitable purchaser would normally remedy, mitigate or prevent the SLC, we suggested in the Remedies' Notice that the stores to be divested in the relevant local markets would be those stores acquired from Morrison's unless we considered that divestiture of alternative stores would satisfactorily restore competition in the local markets concerned."

So the first point to note is that the test Competition Commission are applying, in order to meet precisely the same statutory duty, is a restorative test. Picking up the Tribunal at para.94:

> "In our view the Competition Commission starting point was entirely consistent with the Competition Commission Merger Reference Guidelines published in June 2003, thus the CC Merger Reference Guidelines emphasise [a number of paragraphs] the importance of restoring the status quo *ante*."

So restoring the status quo *ante* is the Competition Commission's guidance for implementing s.35 which is the same test as 73. Then quoting para. 4.23 of that Guidance emphasises:

> "That remedies that aim to restore all or part of the status quo *ante* market structure are likely to be a direct way of addressing the adverse effects."

Then over the page, para.97:

> "*Somerfield* does not challenge the validity of the Guidelines and must have been aware that at least Competition Commission Merger Reference Guidelines in June 2003 before it embarked on the acquisition, the above Guidelines are statutory guidelines published under 1063 of the Act that appears from the Competition Commission's website, were widely consulted upon before being adopted."

Of course, in this case we would say it was quite clear to CGL that it was restoring the status quo *ante* that was the basis upon which the decision to accept undertakings were made. That was quite clear from the exchange between the parties when CGL were seeking to have the undertakings extended so that they could dispose of either a CGL outlet or a Fairways' outlet in the five localities, that was rejected by the Office on the grounds

that that would not restore the status quo *ante*. That debate happened before the undertakings were given and, as I pointed out before the luncheon adjournment, para.64 of the s.22 Decision made clear that the undertakings were being accepted in those terms because the Office took the view that it would restore competition.

The Tribunal then continues to comment that it was quite proper for the Competition Commission to act in accordance with its Guidelines:

"In particular, in our view, it is not unreasonable for the Competition Commission to consider as a starting point restoring status quo *ante* would normally involve reversing the completed acquisition, after all it is the acquisition that has given rise to the SLC, so to reverse the acquisition would seem to us to be a simple direct and easily understandable approach to remedying the SLC in question."

We could not put it better, that is precisely what we say was necessary in this case to dispose of these outlets, but dispose of them to somebody unconnected. If they are connected you are likely to give rise to a whole series of other problems of a different nature that would require detailed investigation before a view could be taken, and that is precisely what the acceptance of undertakings is designed to avoid.

Paragraph 100:

> "We do not consider the Competition Commission's approach in deciding that its normal starting point is to consider divestment can be criticised outwith its margin of appreciation."

Then just to note in para.101 on p.37:

> "The remedies phase of the competition inquiry lasted a month with relatively intense exchanges between the Competition Commission and *Somerfield* in which the former in our view fairly gave *Somerfield* the chance to convince it of possible alternatives. At that stage of an inquiry it would not be practicable, nor in our view reasonable, to place the onus on the Competition Commission to do extra work, e.g. calculate new diversion ratios or itself seek evidence from valuers and the like as suggested by *Somerfield*."

Oddly enough it seems to be my learned friend's suggestion, albeit in the light of *Somerfield*, that the Competition Commission even under its comprehensive review is not itself obliged to go out and start finding evidence and undertaking an investigation. It is for the relevant party to persuade the Competition Commission of the appropriateness of its remedies. The suggestion in this case appears to be that the Office itself should be undertaking an investigation – the way they put it is: "an investigation of the same intensity

as the Office undertook in reaching its conclusions it reached on the merger situation and the substantial lessening of competition." Of course at this stage of the case where the undertakings have been accepted it is even less compelling to suggest that the Office should be going out investigating whether a situation which, on its face, is clearly outside the undertakings should nonetheless be accepted, because if we had dug deeply we might at the end of the day be persuaded that Mr. Bennett's position does not raise concerns. That, we say, is simply an untenable position for the Co-Op to adopt and one that would render this particular mechanism under the Act extremely cumbersome and difficult and would lack certainty, transparency. It is simply not practical.

We summarise our case in para.5 of our skeleton, and that summary is essentially this: We conducted an in-depth investigation in accordance with our role under the Enterprise Act before concluding the s.22 Reference was satisfied. The default position would then be a Reference, unless we exercised our discretion under s.73 to accept undertakings. In exercising that discretion under 73 the Office is required to have regard in particular to the need to achieve as comprehensive a solution as is reasonable and that is the source of restoring the status quo *ante*.

So the OFT, in the exercise of its judgment, its policy, is to seek to restore the status quo *ante* and we say that is a legitimate policy decision and not a separate legal test, an erroneous legal test as suggested.

The Office accepted the undertakings after they were offered by the Co-Op and, as a result, the Co-Op avoided the costs of the delays, and of course the process under which the undertakings were eventually agreed was a process of negotiation and it was a process that involved analysis by the Office of the proposals and indeed in the course of that exchange the Office did suggest to the Co-Op that there was a way around the problem. Mr. Bennett could resign his position on the supervisory board of the Co-Op and the response was "That will not be countenanced." So there was a way out for the Co-Op, they elected not to adopt that suggestion.

We say that on a clear wording of para 3.1(a) Southern is clearly not independent of and unconnected by virtue of the position of the chief executive. In our submission nowhere, either in their written pleadings or today, has the Co-Op addressed that problem that faces them. Nor, in fact, do they actually disagree with the fact that the plain meaning of the undertakings provide the starting point.

THE CHAIRMAN: There is a circular thing here, is there not, because what they say is that if you look into the evidence behind the particular man then they are independent and

unconnected. So they say either when you look at the words “independent” and “unconnected”, it must be within the s.73 test, and if you therefore look at the evidence, then the result of that will be that one should come t o the view that they are independent and unconnected?

MR. ANDERSON: I think with respect you are putting it far better than they have yet put it.

THE CHAIRMAN: I am not sure that is with respect to me.

MR. ANDERSON: With respect to him. They do not appear to dispute that there would be a need for an investigation, whether as result of that investigation they were able to establish they were not connected. I am not sure they go that far. What I think they are saying is, “If we undertook an investigation we may be satisfied that this connection does not maintain the substantial lessening of competition”.

THE CHAIRMAN: It is not a relevant connection.

MR. ANDERSON: It is not a relevant connection. What we say is that looking at the face of it, you cannot rule out that it is a relevant connection without much more detailed further investigation. We have passed the point for that now.

THE CHAIRMAN: So, you accept that it has to be a relevant connection.

MR. ANDERSON: We accept that it has to be a relevant connection, and a dual management role -----

THE CHAIRMAN: It is normally a relevant connection.

MR. ANDERSON: It is quite clearly normally a relevant connection to simply be told - but without having any evidence provided that ---- “Well, he doesn’t get information that would be of any value at all, ever” simply is not sufficient. I mean, this man has sat on the board of CGL for a quarter of a century. He is the Chief Executive of Southern. It is not disputed that he has access to strategic information, and it is not disputed that that is information that competitors would relish. It is simply no answer to say, without any evidence of exactly what the supervisory board does ---- We know it supervises the Chief Executive and the executive board. We know that it is involved in the strategy of the Co-Op. It is not answer to simply say, “But they don’t get any information on the individual pricing decisions at the local level, and therefore it can be of no concern to you”. Clearly, strategy and, indeed, group pricing can be highly material matters to competition, even if that competition is at a local level.

So, we say, having conducted one in-depth investigation, in its substantive assessment, it is clear that the OFT, in accordance with its guidance, does not, or should not, be engaged in a second in-depth investigation, certainly at the implementation stage.

We say that the Co-Op suggested approach is contrary to the statutory scheme, the explanatory notes and the Office's policy as set out in its Guidance. Were the Office required to carry out such a further investigation for the purposes of applying the Section 3 undertakings, that would be a disincentive for the Office to accept such undertakings.

In order to address this, one needs to consider clearly the statutory regime. You have been taken to that as well as the Guidance. Those are summarised at paras. 5 to 8 of the defence, if I could ask you just to have those open in front of you for a moment. The main points to emerge from that regime are that at the Section 22 stage the Office is merely forming a belief that it is, or may be, the case that the merger has resulted, or may be expected to result, in a substantial lessening of competition. It does not need to assess the extent of that, or the full consequences of it - merely that it believes that it is, or may be, the case that a substantial lessening may be expected to result.

The distinction which my learned friend has jumped on after the Tribunal drew the Canadian case to their attention, is, "Ah! Well, you've only got to remove the lessening of competition to the extent that it is substantial. You need to then investigate whether the continuing concerns arising out of Mr. Bennett's dual role makes such a lessening of competition as there may be only less and not substantially less. That is simply unrealistic in the context of this stage of the inquiry.

THE CHAIRMAN: That case was not dealing with the reference stage. It was dealing with the ultimate stage, was it not?

MR. ANDERSON: Absolutely.

THE CHAIRMAN: So, it is very different.

MR. ANDERSON: I think if one looks at paras. 14 and 15 of the *Southam* judgment I think they had forty days of hearings with fifty witnesses, or something. Well, if that is what is necessary to ascertain the line at which a lessening of competition ceases to be substantial - --- It is simply not tenable. It is inconsistent with Section 73(3), inconsistent with the Guidance, inconsistent with the explanatory notes, and inconsistent with the entire regime.

The next point is that the undertakings are, of course, to remedy/mitigate/prevent, and that was what these undertakings were sought, and that is the test the Office applied as a matter of policy. In order to ensure that that test is met, the Office looks for a restoration of pre-merger levels of competition. That is the basis upon which, as is quite clear, the original Decision was taken.

The explanatory notes to the 2002 Act indicate that the Office should employ undertakings in lieu where it can be confident about the problem and the solution, and thus that the

undertakings will correct the problem without recourse to a potentially time-consuming and lengthy investigation. So, what one is looking for are undertakings that the Office can accept with confidence. The Office can only accept undertakings with confidence if it is clear what they mean. One needs legal certainty and clarity, and transparency - otherwise the requisite confidence will not be there. It is neither here nor there whether the potentially time-consuming and lengthy investigation is one that is to be undertaken by us or by the Competition Commission. The whole idea is to avoid a detailed investigation certainly at the implementation stage - which, I keep repeating, is the stage we are at now. It is not a challenge to the undertakings. It is a challenge to the implementation.

The undertakings need to address clearly the identified adverse effects. That is para. 8.2 of our Guidance. The Guidance again emphasises the need for confidence (that is 8.3) - confident that the competition concerns can be resolved without the need for further investigation. There my learned friend seeks to put the gloss on that OFT Guidance as meaning 'without the need for further investigation by the Competition Commission'. We say that is not what the Guidance says. It says 'without the need for further investigation'. "Undertakings are only appropriate where concerns and remedies are clear-cut and capable of ready implementation." The ready implementation is part of the problem with the firewall solution which my learned friend did not address at all this morning - and I do not propose to say anything more than I have said in my written submissions.

If they are not clear-cut and capable of ready implementation, it follows that the Office cannot be confident. At para. 8.4: "Where there is doubt about the precise identification of the substantial lessening of competition, or the effectiveness of the undertakings, then it is unlikely the clear-cut criteria would be met". Hence, clarity in terms of wording and the scope of the undertakings is sought. "Subjective qualifications on the need for further extensive investigation of the actual effects of departing from the clear wording are to be avoided."

Mr. Pritchard explains at paras. 29 and 30 why the Office seeks to restore pre-merger levels of competition. As I say, that is a policy decision with the OFT's margin of judgment, and that is the Office's policy on how best to address its duties under Section 73.

It is worth noting that restoring competition is in fact the approach that is adopted in other major jurisdictions with the possible exception of Canada - but, certainly in the US and in Europe. My learned friend took you to the Department of Justice policy guide. Now, of course, what that policy guide should be compared to is the Office's policy. Section 7 of the Clayton Act (which is somewhere in the bundle - I forget where) -- The actual legal test

is a substantial lessening of competition. Indeed, that is where we over here got the phrase from - the Americans. The policy of remedying substantial lessening of competition in the US is restoring the status quo. That is, similarly, the approach that is adopted in the European context merger regulation.

Article 8.4 of the EC Merger Regulation (Vol.2, Tab 27): "The Commission has power to restore the situation prevailing prior to the implementation of the concentration". That is what it does - it is restoring the status quo. In its remedies notice (which I think is actually annexed to Mr. Pritchard at SRP1, Vol.2, Tab 22, para. 6): "It is the responsibility of the Commission to show that a concentration creates or strengthens market structures which are liable to impede significantly effective competition in the Common Market. It is the responsibility of the parties to show that the proposed remedies [and again you will see that the onus is on them to show the Commission - not for the Commission to go out and find the answer] that the proposed remedies, once implemented eliminate the creation or strengthening of such a dominant position identified by the Commission. To this end, the parties are required to show clearly to the Commission's satisfaction, and in accordance with its obligations under the Merger Regulation, that the remedy restores conditions of effective competition in the Common Market on a permanent basis".

At para. 7: "In assessing whether or not a remedy will restore effective competition, the Commission will consider all relevant factors . . . It follows that it is incumbent on the parties from the outset to remove any uncertainties as to any of these factors which might cause the Commission to reject the remedy proposed".

Of course, that is applying in respect of the overall policy of the Commission - that is not just on Phase 1.

Similarly, the FTC in America (Vol.3 of these exhibits, at Tab 26): "The objective of a divestiture is to maintain or restore competition". I think that these other materials are dealt with by Mr. Pritchard in his witness statement.

It all tends to show that the policy that has been adopted in this case, and generally by the Office of seeking to restore conditions of competition is implementation of the duty to remedy, mitigate or prevent a substantial lessening of competition.

THE CHAIRMAN: It may be that what is being said by Mr. Sharpe is that the statutory words of 1973 are wider, and that by saying that restoring competition is what you do, you are ... your discretion.

MR. ANDERSON: He may have been challenging the Guidance. He may have been challenging the basis upon which the decision was made. But, that is not what they have chosen to do.

THE CHAIRMAN: He is, because he is saying that you have had an error of law, and the error of law, as I understand it - and I may be wrong - is that you used restoring the status quo rather than the words in Section 73.

MR. ANDERSON: We are applying the wording in Section 73(2) and (3) which requires us, in a comprehensive and practical way, to remedy, mitigate or prevent a substantial lessening of competition. In circumstances where we are the first phase of an inquiry, our policy within the margin of judgment that is available to us is to accept undertakings that restore the status quo ante - exactly the same test as is applied by the Competition Commission in Phase 2, and accepted in the *Somerfield* decision. So, there is no question of fettering discretion. It is a question of having a practical, workable and lawful policy. That is what we would say in answer to that. It is an application of the statutory test. It is not a departure from it.

Now, applying those principles in this case, Mr. Pritchard at paras. 31 to 39 of his witness statement, identifies the problems in principle associated with this kind of (what we call) structural connection -- dual management role, less intense competition, a means or an incentive to co-ordinate, and problems associated with constructing Chinese walls inside one's own mind. If there are structural links of this kind, bearing in mind that we submit it is not appropriate to embark on a detailed investigation of whether those concerns might ultimately be realised or allayed, there are bound to be concerns which this mechanism simply does not enable to have dispelled. Unless they can manifestly be dispelled then it is clear that there is a problem that they can be confident. That is the difference between this connection and the membership of CGL or the arm's length coffin purchasing arrangement which, of course, is a connection.

Mr. Pritchard then goes on to describe concerns about behavioural remedies in paras. 40 to 48. That is of relevance to the firewalls problem. The only point that I think is really made on the firewalls is that he has not expressly set out there any assessment of the qualities of KPMG as a monitor. That rather misses the point. There are no aspersions against KPMG. I know them well. The point is that the Office needs to be confident that it is a remedy that will not require ongoing monitoring, investigation, considering reports. Indeed, it is perfectly possible that one scenario might be that KPMG say, "Well, actually it's not working".

So, why did we accept these undertakings and what is the relevance of the process? This is described by Mr. Pritchard at paras. 51 to 60. The important points are that we rejected certain amendments which were suggested - in particular to replace the requirement to divest Fairways with the offer to divest either Fairways or Co-Op Group. That was rejected on the grounds that its effectiveness was less clear - issues to do with the importance of reputation and branding. In order to get back as closely as one could to the pre-existing conditions of competition, selling off CGL outlets was not so certain as selling the Fairways outlets to achieve that result.

We say that no attempt was made by the Co-Op to qualify the term 'unconnected'. This was a point that was made in the defence at para. 20. The Co-Op is far better placed to identify the peculiarities of its movement than the Office is. 3.1(a) - independent of, and unconnected to was not the subject of any debate from them. They sought to change, or to have amended, other aspects of the undertakings, but not that one.

The undertakings were put out for consultation in accordance with Schedule 10. We say that supports the view that the plain wording of the undertakings must, at the very least, be the starting point, and if there is to be a departure from undertakings in the form of modification, a further process of consultation is required.

If I could just at that point (while I am on the point of modification) deal with the point that you raised this morning ---- Section 74(2) does not assist in this sort of case at all. 74(2) is concerned with the arrangements - that is to say, the acquisition, the merger, and the findings of substantial lessening. So, if we have accepted undertakings on a certain factual premise about the merger, which subsequently turns out to have been wrong, then we are not precluded from referring to the Competition Commission because we have learnt something that we did not know about at the time.

Varying undertakings. That is governed by 73(5) and Section 92. Effectively, what those two sections come to is that undertakings can be modified where there has been a change in circumstances. That is what obtains from Section 92(2): "The OFT shall, in particular, from time to time consider whether an enforcement undertaking [and that is what this is - an undertaking in lieu is an enforcement undertaking as opposed to an enforcement order] whether (b) by reason of any change of circumstances an enforcement undertaking is no longer appropriate and one or more of the parties to it can be released, or it needs to be varied or be suspended by a new enforcement undertaking".

The facts of this case to date - the mere fact that Southern was not identified as a potential purchaser and therefore this question was not addressed at an earlier stage is not a change

in circumstances. The sorts of change of circumstances that this provision is directed at is, for example, if, in one of the localities there was a new entrant, and the entry of that new entrant caused there no longer to be a competitive concern in that area, one might release that area from the undertaking. But, the presence of Mr. Bennett on the board of CGL for twenty-four years, and also the Chief Executive of the vendor, is not a change in circumstances. Of course, we would need to consider any application based on that premises on its merits. We have not had one. The process, of course, is that even if we are persuaded, in principle, that there has been a change of circumstances justifying a change in the undertakings, we would still need to put that out to consultation and take into account the results of that consultation. So, the answer to your question is that we are stuck where we are at the moment in the absence of a change in circumstances.

THE CHAIRMAN: What happens then if they cannot sell the business?

MR. ANDERSON: Well, then the undertakings provide for the trustees to take over, and they then do it. We have not got to that stage yet.

THE CHAIRMAN: You can never get back to referring it at all?

MR. ANDERSON: Not unless Section 74(2) applies, and that there is some information about the merger situation that we were not aware of at the time, or there is a case made out for the modification of the undertakings.

THE CHAIRMAN: You say 'or there is a case made out for the modification ----' Then you would modify, but otherwise you would not modify.

MR. ANDERSON: Yes.

THE CHAIRMAN: If you are not satisfied you will not modify, and they say you would not be satisfied ... in this case you would not be satisfied.

MR. ANDERSON: That may be right.

THE CHAIRMAN: I do not think we would be here if you would be satisfied.

MR. ANDERSON: You may well be right, but that is not the situation we are in fact in. You may well be right I am not suggesting that I am encouraging them to apply on that basis for a modification, no. But, the point is that a decision is made at a certain time: "Do we go down that route, or do we go down the reference route?" Once the decision has been made, then you are committed to that route. That is the way the regime operates. In a sense, it may be a gamble on the part of CGL to have avoided the hassle of a Competition Commission reference. They are slightly more constrained than they might be had they been able to persuade the Competition Commission that there was nothing wrong with Mr. Bennett's position in being Chief Executive Officer of Southern and ----

THE CHAIRMAN: At what point do you say they ought to have come and said, "Well, actually there's nothing wrong with Mr. Bennett's position"?

MR. ANDERSON: Our position is that the appropriate time to introduce qualifications to the terms of the undertakings, which is what we day they are seeking to do, is at the time that the undertakings are being negotiated. We say that it is not much of an answer, frankly, to say. "Well, Southern didn't come into the picture until late". This is the Co-Op Group. They have 140 members. They know that eight Co-Ops have chief executives sitting on their supervisory board. They know that other Co-Operatives run funeral service businesses and the purchaser may have been from amongst them. They know their organisation. That was the stage at which they could have raised it.

THE CHAIRMAN: But if they overlooked it at that stage because they did not think anybody was interested within their network, they could have come along under 73(5) and asked for modification.

MR. ANDERSON: Well, if there had been a relevant change of circumstances after the undertakings had been implemented ---- You need a relevant change of circumstances because Article 73(5) needs to be read in conjunction with Section 92(2): "-- shall, in particular, from time to time consider whether by reason of any change of circumstances the existing undertaking is no longer appropriate and it needs to be varied by a new undertaking".

THE CHAIRMAN: That is an obligation on you.

MR. ANDERSON: Yes.

THE CHAIRMAN: Not an obligation on them.

MR. ANDERSON: It would be they that would be seeking a change. They would need to persuade us that it was appropriate to change the undertaking, and the basis upon which we would consider whether it is appropriate is that there has been a material change of circumstances.

THE CHAIRMAN: You think they have to effectively satisfy you under 92(2).

MR. ANDERSON: Yes. Yes. Of course, there are other options open to them. They do not have to confine their attention to one purchaser. They do not have to insist - or, as they say they will not countenance Mr. Bennett's resignation.

THE CHAIRMAN: He could resign from Southern as well.

MR. ANDERSON: He can do a number of things, but a lot is being painted as if there is some rigidity in the Office's position. The rigidity, if anything, comes from the Co-Op who will

not countenance Mr. Bennett's resignation from either, and has presented, we would say, remarkably little in terms of material to satisfy us that there is not a problem here.

MR. SHARPE: May I intervene briefly? I do not want to keep on getting up. However, this line of submission is wholly inappropriate - questions of countenancing resignations, or whatever. The fact is that Mr. Bennett is a free agent. We have not power over him whatsoever. Right? He is very much aware of his situation. He has chosen not to resign. That is a fact. It is not contested. My friend cannot, and should not, embroider the evidence.

Secondly, he was elected to his position by a very large constituency who fully expect him to see out his term, if not longer. CGL has no power whatsoever to dismiss him from the board. So, he can neither be obliged to resign - we have no power over him individually; nor can CGL kick him out -- unless it is for extreme dereliction of duty, which actually does not apply here.

Those are the facts and that is the box within which we have to operate. We are not being rigid. The rules are there, and these are facts we have all got to live with, and they are all absolutely uncontested.

THE CHAIRMAN: I assume he is treating it as a matter of principle.

MR. ANDERSON: I am grateful to my learned friend for that. I used the word 'countenance' advisedly because that is what we were told by them when we suggested this - that it would not be countenanced. In fact, their first position was that they would not even put it to Mr. Bennett. Then their words were that "It would not be countenanced."

THE CHAIRMAN: I think what you said was countenanced by CGL or by Mr. Bennett?

MR. ANDERSON: Yes. I am turning now briefly to the three specific grounds that have been set out in the notice of appeal. Ground 1 was that the Office applied too strict a test in two ways, one is that we wrongly construed "unconnected" or "independent of" and "unconnected to" but what a reasonable man in the street would understand that to mean. That, they say, was wrong, it must be construed to mean only "unconnected" to the extent that that connection would fail to remedy, mitigate or prevent a substantial lessening of competition. We say the problem with that is that it does not address the principles of legal certainty transparency and the consultation. It has got to be, at the very least, the starting point. My learned friend simply sidesteps that altogether. We say on any view Mr. Bennett's dual management role is a connection, and falls outside the scope of suitable purchasers as defined in 3(1) at least on a prima facie basis.

My learned friend says: "But look at 3.1(b), 3.1(c) , 3.1(d), all of those may raise problems – they may do; in this case they did not. They were able to persuade us that Southern had the financial resources, that a sale to Southern would not create other substantial lessening of competition, the only problem was the connection.

THE CHAIRMAN: 3.1(d) – I do not have it in front of me now – even if you have to be satisfied so they have to provide it to you ----

MR. ANDERSON: Yes.

THE CHAIRMAN: -- there is more of a margin there.

MR. ANDERSON: We will assess the position, that is what we did here. We did not simply say "Connection means any connection of any kind and we are putting our fingers in our ears now, we do not wish to hear anything from you on anything." No, they sent us a submission, that is tab 5, setting out the details of why they say 3.1(a), 3.1(b), 3.1(c), 3.1(d), caused the problem. We then went back with some questions saying "We are a little troubled about a couple of the connections, CGL, Southern's membership of CGL, Mr. Bennett's position." They explained to us the position about Co-Op membership of CGL, we were satisfied that that is going to be a relevant connection and will not cause any concerns, so too with the coffins. We were not so satisfied in relation to the connection, we held a meeting. We asked them about the information and we were told – this is all in the evidence – yes, he will get information of a strategic nature which any competitor would relish receiving but he does not get detailed pricing information. That did not satisfy us, that is a perfectly reasonable position for the Office to have taken.

THE CHAIRMAN: A perfectly honest way of proceeding by CGL?

MR. ANDERSON: Oh yes, I am not suggesting anything improper. Paragraphs in the notice of appeal are rather suggesting it has never been suggested that Mr. Bennett has behaved in anything other than an appropriate way in accordance with his fiduciary duties. That may well be right but one cannot assess whether this structural connection would either tacitly or inadvertently, or indeed, for that matter deliberately result in them being less effective competitors than if this connection did not exist. Only the Competition Commission ultimately could have decided that and they elected not to go down that route.

We took into account the fact that the chief executive sat on the board, we did consider there to be a risk of information exchange as we made quite clear in our Decision letter of 3rd April.

So on the material, which is there for the Tribunal itself to look at, can it be said that the Office took a view that no reasonable regulator could have taken on the material, and we say the answer to that is plainly "no".

As to restoring competition as being an inappropriate test I think I have dealt with that, and it is also addressed in our skeleton in paras. 8 to 25, and we say the answer is effectively contained in *Somerfield*.

Grounds 2 and 3 are really taken together in my learned friend's skeleton. We say the position has shifted between the notice of appeal and the skeleton. I do not want to dwell on that point, we have made the point. My learned friend's response that the ground has only shifted because our ground has shifted we would not accept, because we say that it has always been the case – it has been quite clear to them – that restoring the status quo *ante* has been the basis throughout, in discussions before the undertakings were concluded and in the section 22 Decision itself. They appear no longer to be arguing that the meaning of independent of and unconnected to can only legitimately be interpreted as excluding purchasers the sale to whom would result in a substantial lessening of competition. That appears from para.33 of their notice of appeal to have been an argument they were at one time advancing, their case essentially being if we meet the 3.1(d) test we will necessarily meet the 3.1(a) test and, as we point out, they are dealing with different situations, they serve different purposes.

The level of inquiry I have dealt with. They recognise that the Office's concern is about a flow of information, but then they argued, at least in the notice of appeal, that the Office had to be satisfied that that conduit for the flow of information would in fact be used (para.36(b) of the Notice of Application). We say that that is far too high a test, we merely need to be confident that this remedy operates in a clear cut fashion in such a way that conditions of competition will be restored so that it is a comprehensive and effective remedy. So the analysis in the Notice of Application of tacit co-ordination and deliberate co-ordination etc. we say is neither here nor there, but it is interesting if you look at para.44 of the Notice of Application (I am not taking you to it now) it is quite clear that the level of investigation they are suggesting the Office should have undertaken suggests that this connection cannot simply have been dismissed as being an irrelevant connection in the same way as the membership of CGL could be dismissed. One would need to explore the minutes of the board of directors over a period of time to see what issues were discussed, they had packs submitted to them as to what information was available; they needed to do

the same for his position as chief executive of Southern. It could be potentially a very large investigation.

THE CHAIRMAN: I suppose they are saying that you did not consider whether it was irrelevant or relevant, and that is why there is no ----

MR. ANDERSON: But we did, we expressly did. We said: "This is a dual management role, and that is a structural link, a conduit for information." They themselves said it was strategic information that a competitor would relish. To say in the light of that no reasonable regulator could have concluded that that was a relevant connection I say is a hopeless submission.

We make it quite clear in our Decision that there is a potential flow of information in both directions, and that makes it an even more complex problem, and we therefore say that this connection placed Southern as a clearly inappropriate purchaser in terms of the undertaking and the onus, both as a matter of principle, and on the terms of the undertaking was for the Co-Op to satisfy us that it was an irrelevant connection and therefore not a connection or if a connection was not such as to give us any cause for concerns at all we could confidently ignore it as a connection, and they singularly failed in that task.

I think most of the other points I was going to make are made in our written submissions. One point the Co-Op submits that we do not do a margin of appreciation because it is a question of jurisdiction – either we are right or we are wrong. I think, with respect, we may be missing each other on the submission. Assuming I have applied the right legal test the Office has discretion as to how to apply that test. Our submission is that restoring competition is a legitimate application of the statutory test; it is legitimate within our discretion, our judgment.

The point is made that, as a matter of logic, the same levels of investigation should be applied to the question of whether or not there has been a substantial lessening of competition and the appropriateness of accepting undertakings, and by dint of logic of my learned friend's argument it must extend also to the implementation of the undertakings because his case is: "You should have investigated this connection, this role of Mr. Bennett, to the same level as you investigated all the other aspects of the merger leading up to your SLC decision", and we say that is simply inconsistent with the statutory regime, the two phase nature of an inquiry, our Guidance and the explanatory notes, and that fallacy in my learned friend's position we say is borne out by their repeated reliance in their skeleton of the thought of returning to 3.1(d), the point being that 3.1(d) might well involve some level of investigation. If you do it under 3.1(d) why do you not do it under 3.1(a)? Our

answer is the answer to 3.1(d) might be clear, for example, we may already have done all the relevant work on the SLC stage. If we have already done all the relevant work then the answer may be clear. If the answer is not clear we are not about to embark on another in depth investigation to see.

THE CHAIRMAN: I think we dealt with this earlier when I raised it and I think what you were saying was you have to be satisfied, and it is for them to satisfy you and if you are not satisfied with what they give you then do not accept the undertaking.

MR. ANDERSON: Yes, well it is not that we do not accept the undertaking, it is that we do not approve the purchaser.

THE CHAIRMAN: Yes.

MR. ANDERSON: The Co-Op cites the absence of any alternative to the OFT's view, that is to say that they do not have, if you like, the chance to air their position in front of the Competition Commission as a reason why the Office should undertake an in depth investigation. We say that is wrong, that issue should be addressed at the time they decide whether or not to accept these undertakings. They should look at the undertakings amongst themselves, and their experienced advisers and decide what problems might these undertakings give us if we accept them in these terms. We say it was incumbent on them to anticipate the problem they are now faced with. Unless I can help you further, madam, those are the Office's submissions.

THE CHAIRMAN: Thank you very much. We are going to have a 10 minute break and that probably helps you as well. How long do you think you will be?

MR. SHARPE: I will finish at 4.30.

THE CHAIRMAN: By 4.30?

MR. SHARPE: Well before 4.30.

THE CHAIRMAN: If we have a 10 minute break it is not going to hold us up.

MR. SHARPE: No.

(Short break)

THE CHAIRMAN: Mr. Sharpe?

MR. SHARPE: Madam, gentlemen, it falls to me to reply. By its nature a reply is rather a jagged activity because I am responding to the points made by my friend, and have obviously had no notice of the way he has presented his case other than his written pleadings. Let me start first by saying this: to counsel you against trying to re-write the past with the benefit of hindsight we have to accept the situation where it is now

impossible to go to the Competition Commission where, despite my friend's prevarication it is possible – or virtually impossible – to seek a modification of the undertaking.

THE CHAIRMAN: Well only because you say, which might be right, that they would not accept it; it is a bit circular and it is the same question.

MR. SHARPE: Unless you order them to – well, I am saying going back to look at this again.

THE CHAIRMAN: If there was an error of law then they would have to look at it again.

MR. SHARPE: Go back and do the job properly.

THE CHAIRMAN: And they would have to do the job. If there is no error of law then that is the end of it.

MR. SHARPE: I do not think it is entirely circular. The third fact I wanted to introduce is it is a fact that Southern came on the scene after the event, but there is not the slightest evidence to suggest that any of the executive board or the managers involved anticipated a bid from any other aspect of the Co-Operative movement, none at all, so I do not think we can be held to be derelict for not anticipating each and every event. Maybe with hindsight we should, but there is no evidence to that effect. You know the identity of the other bidder which is not a member of the Co-Operative movement. That is the sort of box we are in and the danger is to say, "Well, this could have all been done differently by us so that we would not be here". That is a good thing perhaps. Those are the facts. In the immortal words of the Commercial Bar, "We are where we are".

In the course of my submissions this morning I thought I had thrown out a challenge to my friend. You see, their position is, as I understand it, that faced with this situation they are not entitled to proceed to a further investigation. That is how they put it - for the reasons my friend has repeated: the Guidance, the explanatory note, the scheme of the Act. That is how he puts his case. But, then, in their own evidence, they say, "Yes, but on the other hand we can look at things and our inquiry need not be unsophisticated". Do you recall? "But, it will not be in depth. But, it will not be unsophisticated" or whatever. I despaired then. I despair now. All I wanted was, in plain English, what it is that the Office of Fair Trading thinks they are doing when assessing compliance in relation to an undertaking. We have not had an answer.

What we have had though is a re-definition of the problem. Very early on in my friend's submission he introduced the concept of a relevant connection. Now, that does not appear anywhere in the Decision, in the evidence, in the defence, in the witness statement and the skeleton. But, of course, it is a concept with which we are 100 percent in agreement because our definition of a relevant connection is a connection which, if allowed to persist,

would give rise to the maintenance of the substantial lessening of competition - in other words, would not meet the statutory test in Section 73.

THE CHAIRMAN: 'Would or might'?

MR. SHARPE: Yes, I have to say 'would or might', yes. Yes. But not merely on the basis of assertion, but on the basis of some evidence that would justify both aspects.

Now, simply putting the case in that way, which is, after all, the way we have put our case, does not answer the question - it just defines it in a different way. When pressed, my friend really did not answer what is meant by 'a relevant connection'. It is true, in fairness, that he pointed out the very small share of membership rights that Southern has in CGL. So, we may have a de minimis notion. Now, there is also the question of coffin purchases, which, happily, we have not dealt with very much. That was a connection which was permitted. But, he did not really rise to the sort of challenge I made about connections which, to the ordinary man in the street, selling to my son or to my third cousin -- Does that automatically damn the transaction or does it actually require further scrutiny to see whether in fact the provisions of Section 73(2) are satisfied, or not.

It is our case that in each and every instance where there is a connection, it is not really sufficient to rely upon the plain language as my friend constantly seeks to go back to.

THE CHAIRMAN: I think what they say is that you have to satisfy them, and you did not. So, if you satisfied them because your friend or your brother, or whatever -- if you have satisfied them that otherwise you were totally unconnected and never saw this person, etc. ---- they would be happy. But, if it turned out that you slept in bed with them every night, they would not be so happy.

MR. SHARPE: A very felicitous example! That is what he is saying, or may be saying, now- but prompted by your own comment this morning to me about where the burden of proof lay. But I repeat my answer to that. The burden of proof is one thing. But, that does not mean to say that the recipient of the information has to just sit back passively and absorb it like some sort of medieval potentate eating a grape and saying, "Well, I'm not satisfied". They have got to engage. This is a severely practical procedure.

Clifford Chance, on behalf of CGL, exchanged the letters which you have seen in the tabs, and engaged in telephone meetings (I do not think they met face-to-face, which in retrospect may have been a pity - but it was not Clifford Chance's fault). If that is right ----

THE CHAIRMAN: I think Mr. Anderson said there was meeting. Is that wrong.

MR. SHARPE: It was a telephone meeting. This is very modern procedure, and I am sure it is the right way to proceed. That is not an issue. The point I am making is that this type of

procedure is in fact an iterative procedure. It is an engagement between the parties. The parties must engage and obviously CGL does its best to note exactly what the burden of proof is, where a burden lies. But, the fact is that what the Office of Fair Trading is saying in this case, in black and white, is that they are not obliged -- they are disabled by their Guidance, and so on from taking, as it were, any active role. The questioning you put to me earlier about active and passive ---- What this is really about is: is it sufficient for the Office to say, "We can undertake no further investigation?"

Let me scotch one further point. I hope my friend was not making the point that what we put forward to the Office was inadequate, or insufficient data. That is an entirely new point. Nobody has queried the adequacy of the lengthy communications by CGL's advisors with the Office. Nobody. Indeed, nobody has said, "You've failed to satisfy us in those terms on the basis of that ongoing dialogue". Each letter was ended with a note saying, "Well, if there's a problem and you want anything else, let us know" - as one would expect from good solicitors.

So, we cannot really have an argument now before the Tribunal that, in some sense, that data -- that evidence was inadequate. It was not. The argument they have put forward is that in this case they do not really have to do anything. That is really what it boils down to. At the same time, they qualify that by saying that they could engage in some form of inquiry, and it need not be unsophisticated - whatever that may mean - but it will not be in-depth.

Today, we have also heard that this would create the enormous burden upon the Office of Fair Trading. One doubts that. What we have here is a Stage 1 procedure. The Office are already engaged in a pretty detailed exercise - we called it a detailed analysis advice because it is detailed - in relation to whether or not an SLC exists. They did not drop it then. They then had to consider, under Section 73, whether undertakings would be acceptable. They came to the conclusion that undertakings would do the trick. This was a pretty minor merger, and this could be settled by selected amputation.

The notion that when we get to the stage when all of that is implemented - whether or not somebody is an acceptable buyer or not - acceptable by reference to Section 73 - as imposing an enormous extra burden on them, is somewhat fanciful. They already have a superstructure of understanding about the players, the industry, and the nature of competition sufficient for them to have come to a view about the presence of SLC and the utility of undertakings.

So what we are really asking them to do is actually to run the extra 100 yards -- I put it like that - not even the extra mile -- to assess whether the compliance itself would be sufficient to meet the statutory test. That is actually all we are seeking. We want the matter remitted so that they can consider the evidence, and ask for more - indeed, for CGL to provide more.

Of course, my friend has also repeated the notion that somehow or other Section 73 - the prevention, remedy, or mitigation of SLC - must be read - must be read - in the context of restoring competition to the status quo ante. Now, I hesitate to say this, but it is rather a dangerous thing to have said to you, madam, in particular, after *Somerfield*, because he quoted *Somerfield* back at you. I am going to take you back to *Somerfield* and remind my friend exactly what the Tribunal was doing. The Tribunal was not establishing for all time that there is a congruence between the elimination of SLC and the restoration of the status quo ante. Bundle 1 at Tab 16, p.423. I am going to take this quickly. Remember what my friend was saying. He was saying that there is this equivalence between eliminating SLC and going back to the status quo. That is what they have to do. What is more, it is sanctioned by this Tribunal, albeit in the context of the Competition Commission. I am not going to worry about that. Let us just look at it. Picking it up at 89: A major issue concerns the starting point the Competition Commission should adopt when considering a remedy ----". The issue here, as you see, was which stores should be sold. Now, in any bid you bid for the stores, put them together - that is the plan - and of course the bidder wants to have some choice in managing the resulting portfolio between his existing stores and the stores acquired. Yes? The issue, as I read it from the text here, is that the debate was: "Well, should it be my existing stores - some of which should be sold - or should it be the target stores - some of those should be sold?" That was the sort of choice that was open to the Competition Commission.

> "*Somerfield* considers that, absent exceptional circumstances, in the normal course of events the acquirer should be left to dispose of either the acquired store or the existing store, unless there is a good reason for requiring the acquired store to be divested, since the separation of ownership of the two stores will restore the status quo ante. The Competition Commission maintains, by contrast, that it is entitled [not obliged] to adopt the starting point that the status quo ante is or will be restored by the divestment of the acquired store ----"

That is obviously right. Having acquired it, or wanting to acquire it and being told you cannot, or having acquired it you have got to sell it, quite literally takes you back to where you were. Then he goes on,

> "-- although it is open to the acquirer to demonstrate to the Competition Commission's satisfaction that the disposal of the existing store would be equally effective in remedying the SLC".

There is not the slightest argument of equivalence here. It is simply saying that the Commission really had a choice -- had a discretion, and there may be a dispute about that -- --

THE CHAIRMAN: I think I just put this point to Mr. Anderson, did I not?

MR. SHARPE: Well, then, it must be right, ma'am.

THE CHAIRMAN: I did put the point to him.

MR. SHARPE: I did not hear a satisfactory answer, with respect.

THE CHAIRMAN: It is the same point though that I put to him, is it not?

MR. SHARPE: Well, it might be, but forgive me for repeating it if it is so.

THE CHAIRMAN: You are entitled to repeat it, or use it, or ----

MR. SHARPE: You see the point here. My friend is saying there is an equivalence. So, when they talk about restoration of the status quo that is the same thing as eliminating SLC and the ----

MR. ANDERSON: That is not what I said, but I am sure what I did say will be on the transcript which the Tribunal will look at.

THE CHAIRMAN: We did address this between us.

MR. ANDERSON: We did certainly, yes.

MR. SHARPE: I think my friend was indeed trying to make that equivalence. That is how I understood it. He has got to. If he does not, it is as plain as day, as stated in the defence, though not in the Decision, and as stated in Mr. Pritchard's evidence, they have gone wrong in law.

This case, in my submission, offers no support whatsoever. All it does is offer support that in the choice of remedies available to the Competition Commission and the Office of Fair Trading there is a measure of discretion. It is clear that if you oblige a bidder to sell the acquired stores and get back to the previous position, you have restored the status quo ante. As I submitted this morning, there may well be some situations where that is entirely right to eliminate the SLC. It may be the only way in some situations.

Now, if that is the case here, there is not the slightest evidence in the decision, or anywhere else, to sustain that proposition. The safer deduction is that the Office have strayed into illegality here to enforce comfort from *Somerfield*.

THE CHAIRMAN: What you are saying is that you provided evidence that this could be done without restoring the status quo and they failed to consider that.

MR. SHARPE: In its own context we argue that they had nothing to fear from the alleged relevant connection - namely, Mr. Bennett's respective positions. We queried strongly their nomenclature that he held senior management/executive/dual management positions. We argued strongly in writing (you will see it in the evidence) that this board is actually the guardian of CGL's values. It is not an executive board which is very clear from the evidence that was put in, and has no executive function in that respect.

THE CHAIRMAN: You say that those matters should have satisfied them just by you telling them. I am not questioning whether that is right, but just by you telling them then that this was a case which was, on their test, irrelevant rather than relevant.

MR. SHARPE: Their test is, "We don't want to know". Not so much, "We're satisfied" or, "-- not satisfied". If this involves further inquiry -- further investigation by them ----

THE CHAIRMAN: "We don't want to know."

MR. SHARPE: "-- we are disabled from going forward by virtue of our clearest interpretation of the Guidance, and therefore we're not really interested".

THE CHAIRMAN: You are saying that at the final stage - the stage of implementation - when you say to them all the matters that you have just outlined, they are under a duty effectively both to consider and investigate (in my sense of investigation) and in order to be satisfied as to whether what you have said is correct?

MR. SHARPE: Or perhaps, if I may reverse that to say before they say they are not satisfied we are entitled that that decision should be taken with in a jurisdiction which requires them to have all the relevant evidence in front of them.

THE CHAIRMAN: When you say "all the relevant evidence in front of them" does that require them to carry out an investigation?

MR. SHARPE: It puts them on inquiry and, yes, it does require them if they are dissatisfied not to lie back and say "Go away, we're blocking this, we're not going to give it consent", but to state the basis of their concerns and then allow time for the parties to come back and try their best to satisfy them. But the position adopted throughout the pleading in this case is: "We really cannot do that, the door is closed because we're not allowed as a matter of law

or of practice through the Guidance, to consider it." We say that is wrong. This is a major, major procedural error which marks this case as a very important one.

Turn it round, I look at it as I must from CGL's perspective, the burden of course is on us, we have to satisfy them. They must also conduct themselves in a manner according to law, they must have the right legal test which they have not, despite their efforts – *Somerfield* is not authority for that, it is no good. At the same time the door must remain open to the evidence and if they are not concerned they should engage in a dialogue, and it need not be a lengthy dialogue, it need not be a long or particularly intense procedure. We are always in this case building up evidence upon evidence that has already been collected and understanding that has already been accumulated. It is not an industry which the OFT knows nothing about – they know a lot about this industry, but they also know a lot about CGL by virtue of the s.22 and s.73 Decision. It is just that they failed, they decided "When we get to the stage of compliance really we have a much more relaxed attitude towards this". Of course, that relaxed attitude has dramatic and quite serious financial implications for CGL because it would be obliged to go out and get another bidder, if there are no other bidders – I do not want to go into details in open Tribunal, but it is a major financial problem.

My friend says it is all part of the margin of appreciation. There is no misunderstanding between us because, and I will repeat what I said this morning and I will do it briefly, you do not have any discretion about your jurisdiction . If they are able to say we do not really need to consider this, we do not need to go the extra 100 yards to assess the evidence, and if necessary seek more and engage in a dialogue, then my friend is right, they would not be here – as I submitted this morning – then they have the margin of appreciation. But then on the other hand they do not have the jurisdiction their case falls and they must go back and examine it with more care. How much care, what issues fall within the discretion they adopt, how much balance they give to certain features, is much more difficult. They have expertise and knowledge and they should deploy it. If they do that in good faith and take account of all relevant considerations and so forth it would then be extremely difficult to come back here and challenge it, as we saw in *Somerfield*. But this is not a discretion case, as my learned friend dearly wants it to be. It is a question of law, they have gone wrong in two major concerns – wrong legal test, and secondly they have closed the door to the dialogue that CGL wanted to engage in.

Let me just conclude the point by looking at the Euro authorities which my friend brought to your attention. We can start off with the remedies document – I am reluctant to take you to it unless you have got it to hand.

THE CHAIRMAN: I have.

MR. SHARPE: It is a defence document at tab 22, and go to page 357. I want to deal with this very quickly because I read para.6 of the notice and I could not understand how it supported my friend's case. Remember what he was saying, he was saying "Sharpe has it all wrong, the UK concern is SLC but actually the restoration test is also part of Euro jurisprudence", but it is not. You know the Euro jurisprudence, it is to prevent the creation or strengthening of a dominant position, and that is exactly what para.6 says. I simply make the point and move on, i.e. no help. When it refers to the remedy restoring conditions of effective competition", that is not going back to the status quo *ante*, in fact it is silent as regards that. It simply says "We want to get rid of anything that contributes to the strengthening of a dominant position", or by analogy the SLC under UK law. He has read into this what he wants to read in it (like all of us), but "The remedy restores conditions of effective competition" does not mean to say you put yourself in a position where especially the structural arrangements are restored. *Somerfield* does not help, nor does this notice, and nor finally does the merger reg., that is even clearer.

THE CHAIRMAN: Where do I find that?

MR. SHARPE: You are going to find that in the authorities' bundle 2, tab 27. Remember what my friend was doing here, he was saying this was so ordinary and commonplace, this restoration of pre-merger competition – he took you to this quickly. Let us take a little bit more time with Article 8 para.4. You see what we have here is a situation in para.4 where the Commission found that a concentration which had already been implemented is then subsequently declared incompatible with the Common Market. So it has actually been introduced, declared incompatible, or in (b) "implemented in contravention of a condition attached." This is a fairly exceptional situation. Not surprisingly the remedy that is apt to deal with that is to tell the parties who have implemented an illegal concentration to go back to the status quo. They are not allowed to proceed subject to undertakings that are chopping away here and there, so this is a special case ----

THE CHAIRMAN: Am I right in thinking that the original Decision actually said "undertaking to restore the status quo", so effectively maybe at that stage it was for you to appeal?

MR. SHARPE: No, with respect. My instructions are that CGL were quite happy with the original decision.

THE CHAIRMAN: Restore the status quo?

MR. SHARPE: No, they were happy with the original decision which decided to suspend the duty to refer subject to undertakings.

THE CHAIRMAN: And it specifically said "To restore the status quo".

MR. SHARPE: It did, but insofar as we were content to accept undertakings, as it was at the time subject to negotiation, our rights have not been affected by that observation. Unless we disagreed with it.

THE CHAIRMAN: But you do now, you say that they had no power to do that?

MR. SHARPE: No, no, no, it would have been if they had condemned the merger and had not taken undertakings, for example, then our rights would have been affected.

THE CHAIRMAN: But your rights are affected, as you say, because ----

MR. SHARPE: No, sorry, forgive me. The position is I think analogous to the situation where we had in *Coca-Cola* a few years ago, Coca-Cola wanted to do a merger, and the Commission said "You are in a dominant position but the merger will not affect it" and they got terribly upset at being categorised as being in a dominant position and challenged that, because that finding was rather awkward for them to deal with, but it did not of itself change their rights, and they were not permitted to proceed. Now to the extent that their interpretation of the law here does not change our rights – and it does not now, it is an error of law ----

THE CHAIRMAN: An error of law in the original Decision?

MR. SHARPE: It is an error of law in the original Decision that has been translated and taken down into their interpretation of the undertakings. So it is the application of this error.

THE CHAIRMAN: It is the multiplication of an error of law.

MR. SHARPE: That is it, it is the application of this error. Given the finding that they were prepared to suspend the duty to refer, which is uncontroversial and we were content with that, and given the belief that they would enter into negotiations to accept adequate undertakings there was simply no possible ground to proceed. What you would be doing is coming here and saying "We agree with the outcome, but they have got the working wrong, can we go back? What is our remedy? To quash a Decision with which we were in agreement?" No. "But let's see how they implement it", and now we have seen it in the context of not the Decision itself, which is silent you will recall – I took you to it this morning – the Decision does not say we want to have the restoration of the status quo *ante*. The Decision is very carefully drafted and repeats s.73. But what we have here in the implantation of the Decision, through the defence and through Mr. Pritchard's evidence is

that when he, the decision maker, was analysing this up to a point he was applying the law. Now, arguably we were on notice as to how they were applying it, that is one thing, but actually suffering loss and potential damage is another, that is why we are here today rather than months ago.

Just to come back, if I may, to Article 8. This is an exceptional jurisdiction, it deals with situations where concentrations have been entered into, subsequently declared incompatible, and it is then the only appropriate remedy is not to give the parties who behaved illegally the benefit of their illegality but to tell them to go back to the status quo. It is emphatically not evidence that the only appropriate remedy to eliminate in this case the strengthening of a dominant position is the restoration of pre-merger competition. It is indeed, on the contrary, the only appropriate remedy where people have entered into an illegal agreement and that is a pretty easy distinction I think to advance, and it is in fact the rationale behind Article 8.

MR. ANDERSON: If my learned friend really needs to explain to the Tribunal why he regards 8.4 as dealing with an exceptional circumstance, it is the primary tool for the Commission to deal with mergers where they found them to have an adverse effect.

MR. SHARPE: I am not going to delay to my friend's convenience. It is indeed the primary tool, but this jurisdiction where things are entered into illegally, where there is no hope at all of any form of keeping the transaction alive then it is plain that restoration of the status quo would be appropriate, because that is, after all, the inevitable and logical consequence of a finding of illegality. That is not the situation we found here, where the Office have declared that undertakings would be a suitable way forward.

I go back, my friend cannot run away from s.73, and I put to you this morning that if Parliament in its wisdom had wanted a restoration type remedy it would have said so. There are ample examples especially in the United States and we know all about the United States' jurisdiction, as does Mr. Pritchard, and they chose not to do that. So, respectfully, the way to approach this in my submission is to look at Section 73. The only test is the elimination -- or, the prevention, mitigation or whatever of SLC. There are no grounds whatsoever for the restoration of the status quo unless, as I pointed out, I hope fairly this morning, that is the only remedy that would be applicable. On that there is not the slightest evidence before the Tribunal.

I mention public consultation. You are very much aware that once undertakings are at the point of agreement they go out to consultation so that third parties can make a contribution and deploy their expertise, and say that this will work, or they will not work. It is a

variation of market testing, if I can use that phrase. But, it goes to transparency, as my friend quite accurately pointed out. He then makes the point, "Well, wait a minute. If you interpret these things contrary to the ordinary man's interpretation, then somehow the consultation would be less effective; it would be extremely difficult. People would be consulted on one basis and then a decision would be made on another". I think that would have been his submission.

In reply I say this: if the correct approach is to have undertakings which can only be interpreted in the context of Section 73, which is our submission. These are words not conjured out of the air. They owe their existence to Section 73. Then to take his argument and deploy it in our cause you have to see whether the connection is a relevant connection. I put it hypothetically: all he does by introducing the words 'relevant connection into the undertaking' is actually to redefine the problem, as I said earlier. If really it is a relevant connection the man on the Clapham omnibus reading the consultation on the OFT website is going to be no better or wiser. In fact, my friend is correct - it is only a relevant connection which can disable any transaction. So, the question then becomes, "The man on the Clapham omnibus has got to consider what is a relevant connection anyway".

All we are asking for is a test based upon a relevant connection, i.e. one that preserves an SLC and discards those connections which are not relevant - that is to say, they do not preserve the SLC.

That is all that is left of the point about consultation. It does not save the matter. It just re-defines the problem and one hopes that people who look at these things will act accordingly and understand what the Office is doing. We know from the record, from Mr. Pritchard's evidence, that nobody responded to the undertaking. That does not make my point. It does not make my friend's point. But, I merely observe that this is not something where anybody has been misled - not even Mr. Huhne.

Of course, my friend made a point about, "We are where we are. We cannot go to the Competition Commission now." Yes, it is true - CGL did take a risk. It took a risk about the undertakings. All companies in this position do that. It is unambiguous. But, it did not take a risk that the OFT would, as it were, close the door and not listen to any further argument, and not seek to exercise its powers within the Stage 1 procedure. That is the question for adjudication. It could be argued that because there is no escape from these procedures -- because at this stage we cannot go and seek the comfort of the Competition Commission, it is precisely because of that that the OFT has a higher level of obligation to do the job properly and to consider all the evidence and interact, and not lie back, as I put it

earlier - simply because there is no escape valve. We would make that submission. After all - just to repeat the point - this was a time when CGL was at its most vulnerable. It cannot go anywhere else. I have to say, happily it is before the Tribunal. I think I mean that.

The point is that what we are seeking here is that there is no order demanding that the transaction be allowed to proceed. You know that. We are seeking an order that they go back and do the job properly.

THE CHAIRMAN: And do an investigation, i.e. that they should actually look into it and not just rely on what you tell them.

MR. SHARPE: At all times they should exercise their judgment and expertise. So, in that sense it is not a case of relying on everything we have told them. No. They have got to look at it and assess whether it sounds right. If that means cross-checking or seeking further evidence, and saying, "We're not satisfied", so be it. They have to come back and engage in a dialogue.

THE CHAIRMAN: If they say, "Well, look, we're not satisfied on what you've told us" ---- We had this in Cityhook about decision-making. I do not know if you have read the paragraph ----

MR. SHARPE: The dialogue I would expect to be resuscitated would be -- Well, we know their view. They are not satisfied. Now, the meeting would be, "Look, what would satisfy you? What is it we have to do? What documentation or evidence would satisfy you -- would be likely to satisfy you?" Then, CGL and its advisors would accumulate that, such as it is; would make good the point about the board not dealing with pricing and day-to-day commercial issues, or even year-to-year commercial issues ----

THE CHAIRMAN: But dealing with strategy.

MR. SHARPE: Well, let us see what that means. Yes, I am instructed that the board deals with strategy, but I am also instructed that that does not mean what it means at the board of ICI - about its future direction, or whether it should accept a takeover bid. It deals with issues pertaining to the co-operative movement.

THE CHAIRMAN: Where their business should go.

MR. SHARPE: Or the maintenance of the values that animate it. Now, that is not a dialogue that takes place too often in a commercial board - though it does actually, I am happy to say. But, the co-operative movement has a distinct character about it, and its members are only there because they want to advance those values. That is the job of the board. The trouble with the Office is that they have so readily assumed the read-across between the

board of ICI, or whatever, and the board of CGL. In fact, as they well knew, and failed to explore, the proper read-across would have been with the executive board.

Now, what we want, quite simply, is an opportunity to make that good. "If you are not happy with that, tell us what will make you happy and we will try and satisfy you." Now, if the answer is, "You've tried and failed", well, we have tried and failed. But, I suspect we would not be here if we thought that if we tried again we would get a negative answer. It is just that having closed the door, and having closed off the dialogue, and made the decision, and with the attitude they have taken that they are not susceptible to further argumentation and evidence, it means that the issue is a closed issue.

Of course, I was alerted by my friend for not mentioning the firewall. I did mention the firewall. It seems such an obvious solution to the problem insofar as here you have a reputable firm of accountants - and we agree on that ----

THE CHAIRMAN: That is not the problem, is it? The problem is that if the reputable firm of accountants advises that, in fact, there is a problem, it is too late. So, it is not really a firewall in that sense.

MR. SHARPE: Well, let me speculate what might happen. It is a firewall that has not worked. If that deplorable situation should arise, then we have already seen that it would be open to the Office to come back and look at the undertaking, which they would have interpreted in a particular way ----

THE CHAIRMAN: By then the thing would have already been sold. Too late in this case.

MR. SHARPE: I am not so sure. I think the position might be - and I do not want to regret saying this - that there may well be the residual power in the context of revised undertakings to tell them to get rid of it.

THE CHAIRMAN: To Mr. Bennett?

MR. SHARPE: I think you will know that where such matters do fall apart, the issue could easily go forward for some form of reference. But this case cannot be decided on the basis of something going wrong. (After a pause): I am being encouraged to give you an example relating to Tesco, but I do not know anything about it, and so I am not going to. I do not think it matters.

THE CHAIRMAN: If it is the Tesco case, I do not think it helps matters, no.

MR. SHARPE: That is why I was not raising it. I just wanted to say I was not publicly raising it.

Why should it not work? The fact of the matter is that the test on the part of the Office is: is there absolute certainty that any undertaking in this case would work? That is not the

test even they are employing. They have just got to be confident that it would work. Now, what is wrong with that? Well, they say, "Well, it's a behavioural remedy". Of course, if that is all that matters, then no behavioural remedy should ever be accepted. Okay? So, it cannot be a blanket ban on behavioural remedies. "Well, it's of infinite duration." It is not infinite. As we have heard, it may not be next week, but of Mr. Bennett's future we have no knowledge and have no evidence whatsoever.

THE CHAIRMAN: Mr. Bennett may be replaced by somebody else in the same situation.

MR. SHARPE: Maybe. That would depend upon the electorate - those who elect the board. A factor in who they decide to elect could easily be the consequences for this transaction. That would be a transparent issue. 'Infinite' is just putting it too high. It is not a short-term remedy in the sense of six months or a year, he is on the board for somewhere ----

THE CHAIRMAN: Until 2009.

MR. SHARPE: Yes. The point is they are simply unprepared to deal with KPMG's assurances that they will do their job properly and ensure that ----

THE CHAIRMAN: I do not think they say that KPMG will not do their job properly, what they are saying is that by then the cat is out of the bag.

MR. SHARPE: No, what they are saying, and I will take you back to it ----

THE CHAIRMAN: Those sitting behind Mr. Anderson have just nodded.

MR. SHARPE: Well what they may say now is somewhat difference to the defence. Paragraph 78 of the defence:

> "The proposed involvement of KPMG was insufficient in itself to make the OFT confident, without the need for further investigation …"

It is not clear to me whether deep investigation was needed.

> "… that these concerns would be unfounded (which is not to say, of course, that such further investigation could or would not have been carried out had CGL accepted a reference to the Competition Commission."

So what they are really saying is "It is all too difficult for us to take KPMG's words of what they are going to do, it is a matter for the Competition Commission." In fact, they are going further than that, they are saying "further investigation is something we cannot do." We reject that completely, they were perfectly at liberty to bring in KPMG and say what is it you are thinking of doing and let us see if we are satisfied with that" and they chose not to do that. They chose not to do it, they said they could not do it. In other words, you would have to have a reference to the Commission in … on perhaps one point, whether KPMG could monitor a behavioural remedy for under three years. Even in my friend's

terms of discretion is that reasonable exercise of discretion, because in our judgment the final remedy is an entirely proportionate remedy to deal with this supposed illusory, perhaps, residual significant lessening of competition which may exist. I do not know the answer to that. I am here basically, fundamentally to say the OFT have closed the door, they should be told to open it and listen to what CGL and KPMG would be saying on that.

THE CHAIRMAN: We can only tell them to open it in this if they have made an error of law, or wrongly exercised their discretion.

MR. SHARPE: Yes, and our case is not really pitched ----

THE CHAIRMAN: It is on error of law.

MR. SHARPE: It is primarily on error of law, that is grounds 1 and 2, in 3 we do stray into discretion, as we say in terms they have failed to take into account facts they should have done, this was a proportionate and reasonable remedy so we have there used the language of discretion in dealing with that. They have responded by saying either they have the discretion to dismiss it out of hand, which is a bold assumption, or as I have just repeated from their defence, that they are actually disabled from considering it further, it is a job for the Competition Commission which we also say is wrong. They should have considered it, they had the power to do so, and they were wrong – even if they are right on the law – in the exercise of their discretion to have dismissed it out of hand.

There are a couple of points which I am going to deal with briefly but they are rather important ones for those sitting behind me in the Co-Operative movement, and it is perhaps worth explaining. The Co-Operative movement is not essentially a network ----

THE CHAIRMAN: I did not mean it that way. I was trying to use a word ----

MR. SHARPE: We would prefer a more neutral word – "movement".

THE CHAIRMAN: Yes.

MR. SHARPE: That is traditionally how it has been done since 1824 or whenever it was, and in any Judgment we would appreciate ----

THE CHAIRMAN: I will not use "network" in the Judgment.

MR. SHARPE: Thank you! There are connections of goodwill and comity, but they are not in each other's pockets. We are not actually coming together and agreeing to do things with third parties or whatever.

I must repeat again there is no sense that the words "dual management" could properly be applied to Mr. Bennett. He manages his business Southern, and he is CEO of that, no problem – not on the board, it does not matter, he is the top man there. But he has not, and has never exercised any executive managerial responsibility in CGL and that is a point of

some importance. The 28 non-executive directors are not executive, they are not seen as management, not even in the most trivial and misleading of senses. There is a management committee, the executive committee and they do the managing, and they report to the CGL board of non-executives, and the CGL board's primary responsibility as I put it earlier – and this met with the approval of those behind me – was to maintain and develop the values of the Co-Operative movement, and that is basically their function.

Madam, gentlemen, unless I can assist you further, those are my submissions in reply.

THE CHAIRMAN: Thank you very much.

MR. ANDERSON: Could I just make one point, on a point my learned friend made when he interjected in the course of my submissions, I did not have the reference to hand, but if you could take up the Notice of Application bundle, and turn to tab10, which is the last word on this exchange in relation to the sale to Southern, and it is a letter from Clifford Chance dated 26th March – seven days before the Decision – and it is on the second page, the penultimate paragraph, I will just read it to you and leave at that and say nothing more: "Even if it were within the OFT's powers to insist on the resignation of Mr. Bennett's directorship of CGL as a condition of its consent to a disposal to Southern pursuant to the undertakings this would not be countenanced either by CGL or by Mr. Bennett as it would compromise the democratic principles of CGL and the Co-Operative sector and would be disproportionate in view of the fact that funeral services is only one of a number of business areas in which CGL is active.

MR. SHARPE: I am obliged to my friend and I hoped I said nothing different. The point about the reference to democratic principles, as you know now, Mr. Bennett is elected to that board.

THE CHAIRMAN: Yes.

MR. SHARPE: And to put pressure on him to get out and for him to resign would be leaving his electorate in the lurch; I am sure that is how he sees it.

THE CHAIRMAN: There is no criticism of Mr. Bennett for what he is doing, he is acting as a matter of principle.

MR. SHARPE: Thank you, madam.

MR. ANDERSON: I have nothing else unless I can help the Tribunal.

THE CHAIRMAN: No, thank you. Can I just thank both of you for your very informative submissions and succinct submissions; I have thanked you before for your skeletons. We will consider it and in due course there will be a decision.