IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1087/2/3/07

Victoria House,
Bloomsbury Place,
London WC1A 2EB

8th October 2007

Before:
VIVIEN ROSE
(Chairman)

MICHAEL BLAIR QC
PROFESSOR PAUL STONEMAN

Sitting as a Tribunal in England and Wales

BETWEEN:

INDEPENDENT MEDIA SUPPORT LIMITED Appellant

- v -

OFFICE OF COMMUNICATIONS Respondent

- supported by -

RED BEE MEDIA LIMITED

BRITISH BROADCASTING CORPORATION Interveners

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Mr. Stephen Hornsby (Solicitor, Michael Simkins) appeared for the Appellant.

Mr. Rupert Anderson QC and Mr. Alan Bates (instructed by the Legal Director of the Office of Communications) appeared for the Respondent.

Miss Jemima Stratford (instructed by Travers Smith) appeared for the Intervener, Red Bee Media Limited.

Miss Lesley Farrell (Solicitor, S.J. Berwin LLP) appeared for the Intervener, British Broadcasting Corporation.

HEARING

THE CHAIRMAN: Good morning. Mr. Hornsby you are kicking off this morning I think.

MR. HORNSBY: Good morning. Just before we being I propose to change the running order of the skeleton; the skeleton had four parts and the first part dealt with the issue as to whether there was an explicit decision; the second part essentially dealt with the issue as to whether there was an implicit decision. There were then two points which could perhaps be called "policy" points. What I propose doing is starting with the implicit decision first and then going on to the explicit decision relating to the issue of dominance.

Obviously there are three sorts of decision, the Tribunal are well aware of this and have been through this particular exercise a number of times before and I do not need, I hope, to burden you with much going through of the case law on this point.

The issue before the Tribunal today is essentially this, namely, whether there was a non-infringement decision in relation to the BBC case closure or whether this was simply a file closure along the lines of the *Automec* type case in European case law.

The Tribunal's own case law on this issue will be very familiar to it; it is essentially a question of fact that the Tribunal looks at and the first authority I would like to refer you to briefly on this is to be found at tab 3, paras. 1 – 2, and that is the *Claymore* case. If you want me to read the whole paragraph I will, but I am sure you are well aware of it.

THE CHAIRMAN: We will read it to ourselves, Mr. Hornsby. (Pause for reading) Yes, thank you.

MR. HORNSBY: So substance not form, all the circumstances are relevant. The second authority I would like to refer you to, again in the same way, is the *BetterCare* case and that is to be found at tab 1, para. 62. I draw your attention in particular to the last sentence in that paragraph. So labels are not determinative of the issue. The idea that close textual analysis is not appropriate as well is something that has been dealt with in the authorities. If you would like to have a look at tab 2 in the authorities' bundle, the *Freeserve* case, at para.91 – it is really the first sentence of that. (Pause for reading) Thank you.

Looking at all the cases the Tribunal has decided so far on this point, it is possible to summarise them as follows: Where there has been a material change of circumstances, as in the *Pernod* case, the Tribunal held that an appealable decision had been taken. On the other hand all the other cases where it has been held that the decision is unappealable there has been no material change in behaviour of the parties who have been subject to the investigation. If you think of *Casting Book* for example, that was held to be unappealable because the case was not worth pursuing; there were genuine difficulties in getting the

evidence together – there was an issue as to whether the game was worth it because a lot of the products were possibly produced in infringement of intellectual property rights.

More recently with the *Cityhook* case there was an argument internally within the Office of Fair Trading about whether the case could be characterised as an infringement by object, or an infringement by effect. There was no question there of the behaviour of any of the companies under investigation having generated the decision to close the file. It is the same with *Freeserve* and *BetterCare*, and I think there is one more authority – *Claymore* – again that was an issue as to whether there was an abuse of a dominant position nor not; no change in behaviour of the companies under investigation generated that decision, which was held in *Claymore* to be appealable.

So this would be new ground for the Tribunal if Ofcom was right on this; it would be a decision which would be a development of the Tribunal's case law and so far not consistent with the positions that have been adopted.

Now, we have to apply those principles to the facts of this case, the key issue is the material change of behaviour, the reduction in the duration of the contract. We agree with Ofcom that is the most important fact. The question is what weight to be given to that fact in analysing the outcome?

Can we just go on to tab 16, para. 10 which is the legal issue and its characterisation.

THE CHAIRMAN: That is Ofcom's skeleton argument?

MR. HORNSBY: That is right, yes. Perhaps I could just read the second sentence in that.

> "The fundamental question for determining the admissibility of Cityhook's appeal against the case closure decision remained, however, not what individuals within the OFT may have thought about the chances of an infringement being established, but whether the OFT had itself come to a firm conclusion that there had or had not been an infringement".

We agree with Ofcom that that is the test. It does not matter what individuals may think, the question is was there a collective decision of the Regulator that indicated that a firm conclusion had been reached on the issue of whether or not there was an infringement.

Now, we had thought that to judge from the statement of Mr. Stewart – that is in tab 12, para.52, we had thought that Ofcom was going to say that this was a *Cityhook* type case, that there were divergent views within the team, and therefore this was a case where you had a file closure because the divergences in view meant that a lot more work had to be done. To judge from para. 10 of tab 16 it does not seem that that particular point is going to be developed.

PROFESSOR STONEMAN: Can you clarify, you refer to para. 52 in the consolidated witness statement of David William Stewart, which starts: "In early May …" surely you are not trying to read anything into that one line sentence, are you?

MR. HORNSBY: I think there are a number of other references to divergent views amongst the team.

PROFESSOR STONEMAN: I just wanted to know which paragraph you were looking at – 53?

MR. HORNSBY: Sorry, it is 52: "Divergent views among the team."

> "In early May the case team focused on the potential theory of harm arising from the BBC contract with divergent views amongst the team."

We thought from that that a point was going to be made that this was a situation that was similar to *Cityhook* where there was a distinction in views between various sections of the Office of Fair Trading about whether this was an object infringement or whether it was an effect infringement.

So we would say what matters is whether there is a collective decision for which collective responsibility has to be taken, and if you go to tab 16, para. 22, which is Ofcom's skeleton, you will see there is a certain amount of tension between whether Mr. Stewart is speaking for himself or whether he is speaking for Ofcom as a whole. These considerations ultimately led Mr. Stewart, and therefore Ofcom, to conclude having regard to all the circumstances the investigation of the BBC contract should be brought to an end without Ofcom reaching any conclusion as to whether or not that contract infringed the Chapter 1 prohibition. Further, the decision to close the file did not involve and was not based on any such conclusion. Indeed, Mr. Stewart's own view was that whilst a reduction in the term of the agreement must serve to reduce Ofcom's concerns, it was not clear that the reduction would be sufficient to remove those concerns. We say in regard to that is that Mr. Stewart's own views are interesting, they have some weight, but what matters is the decision that Ofcom took, and you look at what Ofcom did, objectively, and you decide there as a result of looking at it objectively whether or not a decision was taken that there was not an infringement; or alternatively, that one was dealing with a file closure, because an awful lot more work had to be done.

We say that there are two sorts of evidence that the Tribunal needs to bear in mind when looking at which side of the line this falls. There is the internal evidence that generated from examining the decisions themselves, so you look at the evidence on the face of the file, if you like. The second sort of evidence is that provided by the affidavit when the authority knows that its decision is being challenged – in that case that is Mr. Stewart's affidavit. In

deciding which kind of weight you give to those two sorts of evidence, *R v Westminster Council ex parte Ermakov* [1996] 2 All ER 302 (CA) case is relevant. If you could turn to tab 22 in the authorities' bundle, and if you go to para. 312(e) and just read the last sentence in brackets, number 2, in brackets. There is a risk that evidence produced after the event, when subject to challenge is tailored to the fact that there is a challenge on foot. These principles are clearly relevant, we say, in competition cases – if you go to tab 23, which is *OFT v IBA Health* and go to paras. 102 to 106 you will see the issue has been before the Tribunal before. In *OFT v IBA Health* the evidence was not questioned, the evidence put in when the challenge was on foot. Here, on the other hand, if not questioning it IMS is saying that the better evidence is provided by evidence that is contemporaneous. That contemporaneous evidence may be contained in an affidavit that is produced after the event. On this, if you could turn to tab 32, which is the extract from Michael Fordham's book on Judicial Review.

There is a forest of authorities on the question of later reasons, and I just draw your attention to one of them. Half way down para.62.4.5 the case is *R v The Director of Public Prosecutions, ex parte Manning*. There was an inconsistency between reasons given and a contemporaneous note later disclosed. What we will come on to say is that the evidence of what Ofcom was actually thinking of doing when the offer was made to reduce the contract demonstrates that this file closure decision was not a file closure decision, but was actually a decision that there was no infringement and we do this by reference to the fact that Ofcom was prepared to consider that commitments were appropriate in this situation.

Before we come on to that particular submission, can we just go through the internal evidence, what the record actually shows? If you could go to tab 3 of the court bundle, you have the amended notice of application. You have there a point that has been made several times that there is some degree of tension between ----

THE CHAIRMAN: Which paragraph are you looking at?

MR. HORNSBY: Paragraph 1.7 of the BBC case closure, which is in tab 4.4 on p.2.

THE CHAIRMAN: So we are looking at the case closure document, para.1.7?

MR. HORNSBY: That is correct. There you have the sentence, based on the findings in the Channel 4 non-infringement decision on the structure of competition in the relevant market Ofcom considers that it is no longer appropriate, etc. I then draw your attention in the same document to para.1.36, and I will just read out that second sentence, which is important:

> "Ofcom would have considered carefully whether the length of the non-compete obligation for the BBC contract appreciably foreclosed the relevant market …"

So it would have done so, para.1.6 said that it did. Then carrying on:

> "In making this assessment, Ofcom would have considered the structure of the market and competition in that market, in particular given its conclusions in the Channel 4 Decision including the features of a bidding market and countervailing buying power."

THE CHAIRMAN: Could you just say again what is the submission that you are making to us on para.1.7 and 1.36?

MR. HORNSBY: Yes, it deals with the question of later reasons which I have tried to explain and the weight to be given to later reasons, and where an authority is under a challenge and therefore has to look to defend that challenge, there is a risk that it says things to give the impression that more work needs to be done when, in fact, the record shows that all work had been done.

THE CHAIRMAN: So your case is that if we look at these two paragraphs those are inconsistent with the version of events that Mr. Stewart is putting forward in his affidavit?

MR. HORNSBY: That is correct, we say that more weight should be given to the first of these paragraphs than to the second, because the second was inserted after the draft was communicated. The draft was communicated in December, and the final decision was taken – if I recall – on May 30th. I have one more point on that ----

MR. BLAIR: Before you leave 136 are you saying "would have considered" means "did consider"?

MR. HORNSBY: No. I am saying that Ofcom is saying both at the same time, that it looked at the structure of the market in relation to its conclusions on the BBC contract and that it would have done so – you cannot have it both ways.

THE CHAIRMAN: So you are saying that 1.36 is itself a later insertion and is inconsistent then with 1.7 ----

MR. HORNSBY: Yes.

THE CHAIRMAN: -- and that Mr. Stewart's evidence supports the 1.36 view of events, rather than the 1.7 view?

MR. HORNSBY: That is what his affidavit supports, that is the case that he is providing his affidavit in support of, but we say that actually all the work was done, nothing further had to be done, that the dye was cast if you like when the conclusions in the channel 4 non-infringement decision were taken into account.

If you look at tab 4.1 in the court bundle, and go to para.1.6 there is a sentence there which, in our submission, makes it clear what actually happened, and it is Ofcom's decision not to

take forward the related investigation of the BBC contract is contained in a separate document which adopts the reasoning set out in this document, in particular, in relation to market structure and market shares. So there is a cross reference there that goes back to the case closure document that we say piles a further level of confusion on to the situation. You have two bits of evidence to say that an investigation was done and firm conclusions were reached on the structure of the market that led to an outcome. Then you have a sentence put in once the authority knows that its decision is likely to be appealed, which says "We would have carried this exercise out."

If you go to para.10 there is more support for the fact that actually Ofcom had done everything it needed to do.

THE CHAIRMAN: Paragraph 10 of which document.

MR. HORNSBY: Sorry, paragraph 47 of tab 10 – this is Ofcom's defence. The second sentence is the important one:

> "Ofcom assessed the effects on competition of the Channel 4 contract in the context of the conditions in, and the structure of, the market, including the lengths of the terms of contracts within that market, the market positions of BBCB/Bed Bee, its competitors and customers, entry barriers, and the level of trade."

Our submission is that Ofcom's case was that all this work would have to be done again on the structure of the market, the conditions of competition, bidding markets, countervailing power, etc. In the light of the reduction of the duration of the contract from 10 years 5 months to 7 years 5 months is fanciful. Our submission is simply that the internal evidence demonstrates that a decision had been reached that seven and a half years was okay, that it did not constitute an infringement of the prohibitions. File closure is not a file closure, it is not an *Automec* situation. Subsequently an 80 page decision was produced by Ofcom taking three or four months to see the light of day, and demonstrated that a great deal of work had been carried out, a big amount of resources had been put into the exercise. We say that that demonstrates that a non-infringement decision had been reached but there were no particular resource constraints that stopped further work being done, everything that needed to be done had been done in relation to the structure of the market and the conditions of competition and the idea that this would all have to be done again is not convincing.

THE CHAIRMAN: Is it your case then that from the Regulator's point of view there was no possibility of the Regulator coming to a view that a seven and a half year exclusivity had a different effect on competition from a ten and a half year exclusivity and therefore which

ever way they might have decided in relation to the ten and a half year exclusivity there was no rationale for thinking that they had to address their minds again simply because of the three year reduction?

MR. HORNSBY: Yes that is basically our contention, that if you analyse the structure of the market and you reach certain conclusions about it, namely, that there is countervailing power, that the customer is actually rather indifferent to the length of these contracts, you do not then have to go back and do your bidding market analysis, your countervailing power analysis when the contract is reduced to seven and a half years from ten and a half years. You basically have a situation where the market structure is such that no one has real power to appreciably restrict competition by the length of the contracts that they enter into. Admittedly, it is a question of degree – ten and a half years in terms of the conduct it is more restrictive than seven and a half years, but we say that once you have reached the conclusion that the market structure is not one that lends itself to the customer being exploited, then you must really reach a similar conclusion in relation to seven and a half years. The matter can be tested, if you like, in the following way, but before I come to that test could I just refer you to tab 12, para. 42. Tab 12, para 42 go right to the bottom of the page and there is a sentence that begins with:

> "Balbir Binning [for the BBC] asked, in the light of the fact that the case team viewed a 10 year contract as 'too long', what factors would the BBC and Red Bee need to take into account when reviewing the contract. I did not give a suggested duration and rather pointed the BBC to the Vertical Agreements Guidelines."

What you have there is an indication that the BBC felt that once a view had been reached in respect of the Channel 4 contract that similar sorts of conclusions ought to be reached in respect of the BBC contract.

The Channel 4 decision basically said, and this is simplifying it but I hope not distorting it, that you look at the market and you have, say, 60 per cent. foreclosure of that market to which the Channel 4 agreement contributes 10 per cent. In reaching an assessment about whether that contract infringes you have to take into account foreclosure created by other agreements. Ofcom did that, they took into account the BBC contract and they reached the view the Channel 4 contract did not appreciably restrict competition, 10 per cent. plus 50 per cent. in the BBC agreement does not amount to an agreement which appreciably restricts competition when you look at it individually.

What we say is that logically it is very difficult when that exercise is done in the Channel 4 case to say that the same conclusion is not appropriate in relation to the BBC contract (as

amended). Imagine, if you like, what a statement of objections would contain in relation to the BBC contract. You would set out the conduct of the company, you would say that this is an agreement lasting seven and a half years and you would then have to go on to describe the market structure and then reach a conclusion that the provisional view was that this agreement restricted competition.

Imagine out there at that point, before that statement of objections was issued there was a decision on the same market, looking at the same factual matrix by a Regulator saying all the things that the Channel 4 case non-infringement decision said. Our submission to you is that it would be extremely easy – extremely easy – to demonstrate to the Regulator that he had got it entirely wrong. The read-across that my learned friends are criticising us for doing would be something that they would have done and, in our submission, successfully had a statement of objections been issued in respect of the seven and a half years. So our submission is that the internal evidence demonstrates clearly that Ofcom had reached a view that in this market, in the structure of competition in **this** market an agreement of seven and a half years did not appreciably restrict competition under either of the prohibitions. We would say that is enough to conclude that a decision was reached.

We now turn to the evidence provided by Mr. Stewart in his affidavit, which we say goes much further than that, and actually demonstrates that Ofcom was well satisfied with an outcome of seven and a half years, but actually did not have any doubts at all that seven and a half years passed muster under both of the prohibitions.

If you go to tab 15, which is IMS's skeleton and para.4.12. We are saying there that Ofcom was not even clear that ten and a half years merited a statement of objections. Certainly, there does not seem to be any evidence of anything being issued - the timetable for it being sent slipped. Sean Williams, for Ofcom, said it was due to be sent out in April, well that did not happen. Whether this was just an attempt to try and get the BBC and Red Bee to cut the length of the contract is pure speculation, I have no idea; we have no idea at all. But then we move on and in 4.13 we describe the sequence of events which led to the file closure. March 8th is the key date here, and that was when the BBC first floated with Ofcom the potential reduction in the length of contract from ten and a half years to seven and a half.

MR. ANDERSON: Can I just ask my learned friend to point out the evidence on which he relies for the 8th March date, because we were not entirely clear from his chronology what he was referring to when he says it was first floated on 8th March.

MR. HORNSBY: This comes from the witness statement of Mr. Stewart, the amended statement of David Stewart. If you go to para.42 it says:

"On March 8th I [David Stewart] met with the case team. At that meeting, I and members of the case team explained that Ofcom's current view was that we had concerns that the BBC contract might infringe the Chapter 1 prohibition given that this was a 10 year contract for half the available market. During this meeting Balbir Binning of the BBC referred to his conversation with Sean Williams, noting in words to the effect that it could happen that the BBC and Red Bee would review the terms of the contract'."

So perhaps it was actually March 7th when the idea was first floated.

THE CHAIRMAN: It does not look from that as if any particular alternative length was discussed, simply the possibility of reducing the length of the exclusivity to bring it in line with the guidelines.

MR. HORNSBY: I quite agree. I will come on to actually show the significance of this "first floating" if you like of the idea that the contract could be reduced.

If you go to Ofcom' skeleton, tab 16, paras. 30 and 31 you will see there that Ofcom is concerned to discount the idea that there was any offer or acceptance of a reduction that might give rise to commitments.

If you turn now to para.64 of tab 12, you see there that that paragraph summarises a meeting that took place on June 27th. Mr. Stewart did not attend that meeting, but Selina Bevis did and she outlines the options the parties having indicated on June 16th that they were prepared to reduce the contract to seven and a half years. They could offer formal commitments in which case would be publication, there would be an opportunity to respond and that would ultimately lead to a decision that was publicised.

The second alternative was that if the parties chose not to offer commitments then Ofcom would proceed with its investigation.

The third alternative was if the parties were to reduce the term of their contract – well, no promises were to be given as to what would happen in those circumstances. We say whether or not a deal was made, whether or not there was a contract is neither here nor there. If you look at that paragraph the evidence suggests, if you like, a unilateral contract, you offer a reward – either by your behaviour or by your words you offer a reward for certain action, or the party receiving the communication understands that if certain things happen, if it does certain things there will be certain outcomes. That really does not matter at all, what actually ----

THE CHAIRMAN: What is the reward that you say is being offered there, because according to this paragraph there are three options that were set out as following on from a reduction in

the duration, either proceeding with the investigation or a no grounds for action decision – which I take to be a non-infringement decision; or a case closure decision. But are you saying that there would have been some understanding at the meeting that one of those was more likely to happen than the others.

MR. HORNSBY: [No recording] … the meeting for there to have been any other conclusion than the contract was reduced from ten and a half years to seven and a half years, that would be the end of the story whether by non-infringement decision or by file closure.

THE CHAIRMAN: Yes, the seven and a half years has by this time ----

MR. HORNSBY: Yes, it has. Now what we say is the fact that Ofcom believed that the reduction to seven and a half years was sufficient for the commitment procedure to be initiated shows that actually the file would be closed because their concerns had been satisfied if an informal assurance to the same effect had been offered, or were to be offered. We say that it is actually inconceivable in the circumstances of this case to have a conclusion other than that a non-infringement decision was effectively taken by this particular route.

THE CHAIRMAN: Yes, because there is the contrast between if the parties chose not to offer commitments, then Ofcom is indicating that they would proceed with their investigation and Mr. Blair has pointed out the following paragraph 65 and the account of the discussion wit h the General Council for Ofcom.

MR. HORNSBY: Yes, that is quite appropriate because para.65 does a number of things. It shows that an authority has to give reasons for its decision which we will come on to later, but it also shows that the commitments' procedure, which everybody in Ofcom believed was appropriate if the contract was to be reduced to seven and a half years, was something that met Ofcom's concerns. You can only use the commitments' procedures if your competition concerns are fully met. This is something that had been made clear to Red Bee and BBC quite early on by Sarah Turnbull. If you refer back to our skeleton and go to para.4.13, that refers to para.63 of the witness statement of David Stewart which in turn shows that everybody in Ofcom thought that the reduction to seven and a half years from ten and a half years was an offer of commitments.

PROFESSOR STONEMAN: Would you clarify exactly where we are?

MR. HORNSBY: Yes, 4.13 of the IMS skeleton and that refers to para. 63, tab 12 – the witness statement of David Stewart. If you go back to para.42, there is a sentence beginning: "Sarah Turnbull".

"Sarah Turnbull stated that the case team would need to be convinced that the contract [as amended] caused no competition problems and therefore that a Statement of Objections was not necessary."

Going back to para .63 you will see that Selina Bevis thought that this was an offer of commitments when it was reduced to seven and a half years.

Going forward now to para.65, Polly Weitzman says that if the contract was amended and the competition concerns were answered, then Ofcom could consider moving towards a case closure or a non-infringement decision. We say the fact that Ofcom was prepared to consider this with no dissent internally, as a commitments case where commitments' cases can only take effect if all competition concerns are addressed, demonstrates that if substance is to triumph over form, as it must, that an outcome – seven and a half years – means just as it would have meant under a commitments process, namely, that there was not an infringement in respect of the contract as amended.

THE CHAIRMAN: There is nothing here though that indicates that Ofcom told the BBC that if they offered a commitment to reduce to seven and a half years that that would be acceptable. The discussion was about bringing it into the five years contemplated by the guidelines and anything above that would require some further consideration, was it not? You would say not?

MR. HORNSBY: We would say not. We would say that the fact they thought seven and a half years would be okay in the relevant market and therefore appropriate case for commitments demonstrated that the same reduction achieved in a different manner would itself satisfy Ofcom that there were no competition concerns.

We say that basically the subsequent and external evidence, if you like, contained in Mr. Stewart's affidavit confirms the internal evidence which we have already gone through to the following effect that the Authority asked itself whether an infringement had occurred and the answer was "No" – the contract as amended passed muster, file closure was effectively a decision that there was not an infringement. We would therefore invite the Tribunal to conclude that there is a better analysis of events than that contained in tab 12, para.86 – that is Mr. Stewart's amended statement – if you would go there. He says: "It was immediately apparent that the reduction in terms was material and reduced our concerns." We say that understates the case –it is Ofcom's concerns anyway and not Mr. Stewart's.

THE CHAIRMAN: Let me just understand what you mean by that. Are you saying that Mr. Stewart's view is not Ofcom's view in some respects.

MR. HORNSBY: I have already said that actually – I have tried to say that. The key issue, and perhaps it comes out from the way an affidavit is put together – you have to actually speak to your own knowledge, but what matters is what Ofcom collectively thought. What we are saying is simply this: both the internal evidence, looking at the decisions as a whole, and the external evidence, that is the evidence in Mr. Stewart's affidavit, demonstrates not that the competition concerns were reduced but they disappeared as a result of the amendment, and the reduction in that contract from ten and a half years to seven and a half years.

The fact that Ofcom was prepared to operate the commitments' process where it is clear it can only be operated in circumstances where concerns are fully addressed – that plus the statements from Polly Weitzman and Sarah Turnbull, the legal officers of Ofcom, demonstrates that this was a case, we believe, where a final decision was made and the explanation that "it all had to be done again" does not wash.

We say it had all be done, everything that needed to be done had been done, they had looked at the market, they had reached firm conclusions on it; a change in behaviour took place. They thought "Ah, this is a commitments' case, namely, this is one where our competition concerns have to be fully addressed". The offer was floated and then we have this meeting that takes place from which I am sure the BBC emerged with the thought that it would all be over if they reduced it to seven and a half years.

That reduction then took place on 7th July 2006 and 11 days later the file is closed. We say that in an investigation where things moved rather slowly, this is another piece of evidence that demonstrates that Ofcom had got its ducks in a row, it had decided in effect that a reduction from ten and a half years to seven and half years would fit the bill. The letter came in informing Ofcom that the contract had been amended and it had been reduced from ten and a half years to seven and a half years; the file was then closed, the investigation concluded.

THE CHAIRMAN: Is it part of your case that they had concluded that the ten and a half years was not an infringement?

MR. HORNSBY: No, I do not think they had even got there. I do not believe that Ofcom had actually reached the point that ten and a half years was insufficient. The Red Bee statement of intervention in tab 13 – one of the documents referred to a letter which was going to be produced by Red Bee which would have demonstrated that in fact ten and a half years was fine. The evidence that we have already pointed to demonstrated that Ofcom in relation to a ten and a half year contract was not really in a position to issue a statement of objections. A date was put when the statement of objections was due to be issued and that was April, that

was Sean Williams. Then a deadline set by Mr. Stewart was not met. What we say is that it is very, very difficult to conceive how you actually put together a statement of objections in relation to a contract of 10 and a half years when you have looked at the market and reached the conclusion in that market that the structure of competition is such that 60 per cent. foreclosure is okay, cumulatively 60 per cent. is okay.

PROFESSOR STONEMAN: Can I clarify? You are saying that Ofcom did not reach a decision on infringement of the Chapter 1 prohibition but you are implying that once the term was reduced this seemed a good stage at which to cut and run?

MR. HORNSBY: They could not close it quick enough. The relief is almost palpable, reading the documents. You have the floating of an idea that the contract will be reduced, a decision already reached that Channel 4 did not infringe and there was no dominant position. Ofcom was seriously exposed at that point in our submission. It would have been very, very difficult for them to produce a statement of objections attacking a ten and a half year agreement once they had reached those conclusions in relation to the structure of the market and the contribution to foreclosure created by the Channel 4 agreement, taking into account the BBC contract.

PROFESSOR STONEMAN: But if we take the position we are here today, we have to decide whether it is an appealable decision. You are stating from your point of view Ofcom did not make a decision on whether the Chapter 1 prohibition was infringed or not and so you are saying there is not an appealable decision on that ground.

You are then going on to argue that, having got this reduction in the terms of the contract they decide to close the case.

MR. HORNSBY: And that was a decision.

PROFESSOR STONEMAN: And you are saying that that is an appealable decision?

MR. HORNSBY: Yes. Up to then you had, if you like, a situation that does not give rise really to an appeal before this Tribunal, namely a scenario which no longer exists, the 10 and a half year scenario. What we are saying is simply this: as far as the ten and a half years was concerned, Ofcom was not actually sure that that was bad either, but any doubt about its real views on the seven and a half year contract can be seen from analysing the decisions themselves as a whole, and also looking at Mr. Stewart's affidavit, which demonstrates, we say, very clearly, that their competition concerns were fully addressed, as they would have had to have been had this been a situation where the formal commitments' procedures were operated.

PROFESSOR STONEMAN: I just want to get it perfectly clear. Ten and a half years they could not decide whether it is an infringement or not, seven and a half years they could decide it was not an infringement.

MR. HORNSBY: Indeed, it took them seven days to close the file once that offer was concretised if you like.

Can I now go on to deal with some of the arguments in Ofcom's skeleton? If you go to tab 16, para.38 and if you read the last sentence, you have the following:

> "It is not open to IMS, in proceedings before this Tribunal, to seek to challenge the reasonableness of Ofcom's decision to close the file, or the adequacy of the reasoning in the decision document which set out that decision. Accordingly, the principles in *R v Westminster City Council, ex parte Ermakov* [1996] 2 All ER 302 (CA), as relied on by IMS, are of no application to the present case."

In our submission it is quite clearly possible to look at the adequacy of Ofcom's reasoning for closing a case. In fact, the Tribunal has done that on a number of occasions, most recently in *Cityhook*. If you go to the *Pernod Ricard* case in the authorities' bundle, and that is tab 5, p.255, para.4. It is referring to the situation under European community law, which we say is clearly of relevance here and also reflects the decisions taken by the Tribunal to date. "The reason in a case closure decision if you like must be sufficiently precise and detailed to give the court i.e. of First Instance, the opportunity to review the use of discretion." We say that it is actually beyond any doubt that we (IMS) can go through the exercise that we have just gone through to see whether it is genuinely a file closure, or whether in fact a non-infringement decision has been reached.

THE CHAIRMAN: Yes, I do not think that is disputed. I understood para.38 as saying that if it turns out that it is a genuine case closure decision and not an infringement decision then it is not for this Tribunal to try to review that, but that you would say that the *Ermakov* principle, that one has to be careful about supplementing decisions with affidavit evidence is a more general application and just as applicable to the issue we have to decide as it would be to any Judicial Review of a case closure decision properly so called?

MR. HORNSBY: Yes, seen in that way, yes, I agree with you, madam. Can we now turn to tab 16, para.35. In this paragraph Ofcom is basically saying that in *Pernod* what OFT did was to put out a press release to say that their concerns wee met, and that makes it different from this situation. We would refer to the previous authorities that we cited right at the beginning, *BetterCare* in particular for the proposition that how you actually describe things is not entirely decisive. What matters is the substance of it and the fact that no press

release was produced saying that Ofcom was satisfied, did not actually mattered at all. What mattered is what Ofcom actually did.

If we go to tab 16, para.39. Ofcom basically makes the point here that the jurisdiction of the Tribunal is statutory, we agree with that analysis. However, you can look at relevant authorities from Europe to assess the appropriateness or otherwise of a file closure decision and what we say is that the authority that they have previously relied on namely, the *BetterCare* case does not seem to have been taken through with any degree of detail in the skeleton. What they are now relying on is the case of *IECC* which is a Community law case. *IECC* in the authorities' bundle is at tab 19 The facts of *IECC* are very complicated, they are to do with the re-mailing of letters in the European Community.

If you look at para.40 you will see that one of the arguments of the applicants there, who had had their complaint rejected, was that there was no discretion to reject a case where there as a manifest restriction of competition. What the court said in the final sentence was that it was not established by the Commission that there was actually a decision; no decision had in fact been taken.

If you go to para.57 of the same Judgment the second sentence says:

> "Furthermore, as already held in para.[40] above, it is wrong to claim, as the IECC does, that the Commission had already made a finding of infringement in Article 85 of the Treaty by classifying the CEPT Agreement as a price-fixing agreement, since the Commission had made no such finding."

What we say is that in relying on *IECC* Ofcom assumes what it needs to demonstrate; it assumes that a decision had not been reached, what we say is that a decision had been reached that the case was unlike *IECC* where the Commission had made no decision that there had been an infringement. We say also that the reliance on the *GEMA* case, which is in the authorities' bundle tab 9- the best way in is probably to go to tab 16, para.17 for reference to the precise paragraphs in *GEMA* - it is paras 17 and 18 of *GEMA*.

What Ofcom are saying here is that our argument requires that it should take a final decision. We are not making any such requirement; our case is that a decision has already been made, *GEMA* is irrelevant.

We would reiterate that all contested appealability cases have been ones, if the argument is accepted by the Regulator, there has been no change of behaviour. All the cases cited at the beginning have been cases where there has been no change of behaviour. The one case where there has been a change of behaviour was the *Pernod* case and in that case it was decided that an infringement had occurred which had been cured and that the material

change in circumstances made that the assurances that had been offered in that case had got rid of the competition problem and that the file closure was there for a decision which could be appealed.

THE CHAIRMAN: Can I just be clear about what you say the effect of a change of behaviour generally rather than in this particular case is, or do you say it has any legal effect in creating some kind of presumption, then if there is a decision afterwards it is a decision which flows from that change of behaviour? Can you just express it in a ----

MR. HORNSBY: I do not think we would be trying to argue for a general rule here, because the case law says that you have to look at all the circumstances in every case. I think it would probably be a good rule to have but that is another debate. What we are saying though is in the circumstances of this case the change in behaviour, and the file closure demonstrates that a final decision was reached.

Those are our submissions in relation to the implicit decision. We now go on to the Chapter 2 and Article 82 case. If you go to tab 16 para.27 and footnote 18 you will see that Ofcom fully accepts that the original complaint was also in relation to the duration of the contracts in relation to the BBC, it was not just in relation to the pricing. It is also common ground, accepted by IMS that it was not investigated by Ofcom.

Can we now turn to *Coca-Cola* which is at tab 20?

THE CHAIRMAN: It is rather more though, Mr. Hornsby, than it not having been investigated. I think the point that Ofcom make is that IMS was told at the time in response to the complaint that Ofcom did not consider that there were grounds to carry forward an investigation under Chapter 2 or Article 82 and that if IMS had wanted to challenge that then that was the time to challenge it rather than now. I think that is the point that you have to meet.

MR. HORNSBY: I did not quite understand Ofcom's case as being that, that a decision was taken which was appealable, or should have been appealed at that point. If we can perhaps leave that for a moment? We thought that the point that was being made by Ofcom was that their analysis of dominance pre-dated the agreements that we complain of, and therefore there can be no explicit decision in relation to those agreements under Chapter II, wherever they are contained.

MR. ANDERSON: If it helps my friend, our position is, and I hope it was clear from the skeleton argument but in order to give him an opportunity to address it now, our position is that we did not ever even open an investigation under Article 82 and we told them at the time; this

skeleton argument is the first time it has been revived. There is no part of the notice of appeal alleging some appealable decision in respect of Article 82 on the BBC contract.

MR. HORNSBY: I am indebted to my learned friend on that point.

THE CHAIRMAN: Just a moment. (After a pause) Yes, Mr. Hornsby, if you look in the bundle which is the notice of appeal bundle at tab 7, the first document behind that tab is an email of 6th June 2005.

MR. HORNSBY: Yes.

THE CHAIRMAN: Page 67 of that tab, the fourth paragraph down of that letter is where Ofcom say that it is not satisfied that it has reasonable grounds for suspecting that breach of the Chapter II prohibition has occurred, and the case will therefore be confined to Chapter I, Article 81 at this stage.

MR. HORNSBY: That is p.67?

THE CHAIRMAN: Yes, it is the letter from Ofcom to Mr Shah at IMS.

MR. HORNSBY: I see, it is the final point, yes. If you could please nevertheless go to the skeleton argument of Red Bee. If you go to para.4 and the footnote, the CFI held that paras 81 to 82 –

> "… a finding of a dominant position … is the outcome of an analysis of the structure of the market and the competition prevailing at the time the Commission adopts each decision. The conduct which the undertaking held to be in a dominant position subsequently comes to adopt in order to prevent a possible infringement is thus shaped by the parameters which reflect the conditions of competition on the market at a given time."

We say that whatever Ofcom said it was doing in its investigation, it actually made a finding on dominance, which has an impact on how Chapter 2 infringement might be analysed and on its decision on the Channel 4 case it looked at the structure of competition some time in 2004 – it is not entirely clear actually when in 2004 it takes that snapshot. The decision that it made in the Channel 4 decision was one such that it would be quite impossible for a dominant position to be abused because there was no dominant position at all.

We say, and if and when we get to the substance of this we will go into this in considerably more detail, that what Ofcom should have done is update its analysis and look at the conditions of competition a little bit later and take into account the change of ownership and so on and so forth. But what we are attacking is what Ofcom actually did, and we say that in the Channel 4 decision there is a finding that there was no dominant position in 2004. If

there is a finding of no dominant position in 2004 then if the market changes and becomes more open to competition – even though not as sufficient as it should have been – that there is actually a decision which means that anything that was done, any behaviour by a company that was not in a dominant position could not be analysed as an abuse of a dominant position because you fail at the first hurdle.

THE CHAIRMAN: But was that not a decision that they took much earlier when deciding not to open the investigation into the Chapter II aspect of IMS's complaint rather than in the case closure decision?

MR. HORNSBY: We say they took it at the time they took the decision because *Coca-Cola* says that you look at the circumstances at the time a decision is taken, and that the decision taken in May 2007 was that in 2004 (which they believe is the material time) there was no dominant position enjoyed by BBCB, ergo it's successor could not enjoy a dominant position in the relevant market. But that decision has an impact on how any abuse gets analysed, not just a pricing abuse, but tying, for example, and certainly exclusive contracts. So the fact that they made this published decision in May we say is an explicit decision that there is no way in which Chapter II could be infringed by the contracts entered into by BBC and Red Bee.

Once again we say the structural reasons that led to this were the ones of countervailing power enjoyed by buyers, the bidding market, where the market was actually – and we concede – slightly more capable of being analysed as a bidding market after the sale to Red Bee, and customer indifference. We say that the finding in the Channel 4 case, that there was no dominant position enjoyed by BBC Red Bee was one that would mean that there could be no abuse of a dominant position in all possible worlds. The structure of competition was such that there was no market power enjoyed by the party who had, if you like, the Crown Jewels, which was the BBC's business. We say that that is an appealable decision, that it is explicit *BetterCare*, where one of the criteria for an infringement occurred, namely whether a company was an undertaking, shows that there are a number of stages that you go through – you have to go through – to get to a point where you have an infringement and you have show an agreement between undertakings or, as in *BetterCare* that you were actually dealing with undertakings and not emanations of the State or some thing like that.

Our case is that Ofcom actually, in the Channel 4 decision took a decision, an appealable and explicit decision, that there was no dominant position enjoyed by BBCB/Red Bee as it

later become and that the issue of dominance which is, we believe, properly before the Tribunal, is something that we can appeal.

My two final points – I am coming to the end – they are much shorter. What Ofcom would have IMS do in this circumstance is if it is right for us to go to seek Judicial Review in respect of the case closure document and carry on with this appeal in respect of the decision concededly reached in respect of the Channel 4 contract.

If you would go to *Claymore* – authorities' bundle, tab 3, para.164. It is a passage I am sure you will be familiar with. The Tribunal is saying basically here that one should avoid absurdity. You should not have a situation where you have to run off to the Administrative Court for one portion of basically one complaint, whereas you can come here to appeal another portion. We would say that you have to look at the whole picture and that it is artificial and forced when you are looking at one market structure and two agreements within that market and within that market structure to say "We will close the case for one of them, but we would actually take a non-infringement decision, a very long and detailed document, in respect of the other less important – economically and commercially – part of the whole picture.

We have been able to find any case in the slightly more developed European case law where the European Commission has "Automec'd" if you like, one part of a complaint and then taken a non-infringement decision in relation to another. In other words, it has done a file closure for one agreement concluded by an enterprise, and then actually taken a non-infringement in respect of another.

We think there is a very good reason why the Commission has not proceeded in that way – the animals should two by two we say. It makes no sense to actually have a different approach to one part of the same overall situation, and then another approach in respect of another part.

If I could refer you at this point to the authorities' bundle? It is the *Scholler* case, tab 15, para. 95:

> "Furthermore, the Commission is required, in assessing the applicability of Article 85(1) of the Treaty, to examine the actual details of the case and cannot rely on hypothetical situations. In that respect, the court considers that, as the Commission has observed, it might be arbitrary in the present case to divide the contested agreement into different hypothetical categories."

That is referring there to the substance rather than to the form, but we say the substance and the form should go together. As we have already said, it is inconceivable in our view that

you can reach a different conclusion in relation to the BBC agreement to the one that you reached in respect of Channel 4. It is arbitrary to parcel them up in such a way as Ofcom has done in this case. It is unfair, we believe, to the complainant and not a correct way of proceeding.

Our final point is in relation to ---

MR. BLAIR: Just before you leave that point, I am sorry, at para.2.3 of your skeleton you say: "On the basis of binding domestic authority, Ofcom was not entitled to treat a complaint …" in the way you have described. What is the binding domestic authority?

MR. HORNSBY: *Claymore*.

MR. BLAIR: In this Tribunal?

MR. HORNSBY: Yes

MR. BLAIR: Binding on us.

MR. HORNSBY: Well I would have thought that you would normally follow your own Judgments and I think there have been a number of Judgments which have reflected this.

THE CHAIRMAN: Mr. Hornsby, is it your case that the fact that this decision relates to Article 81, post-modernisation as well as Chapter 1, makes any difference to this aspect of your submissions?

MR. HORNSBY: What, in relation to Judicial Review for one part of it and appeal to the Tribunal in respect of the other part? We do not see that modernisation makes any difference to what we believe is the proper outcome. If both cases had been subject to file closures then one would have said: "Actually there is a resource issue here". What actually happened was that the less important case was awarded. Scarce administrative time so that an 80 page decision could be written in respect of that and we say that that is not an appropriate way of dealing with matters where the outcome is that for one of those you have to go through the Administrative Court – the more important case you have to go to the Administrative Court and then go back in a snakes and ladders way to the bottom and then go back to Ofcom again, whereas at the same time in relation to the Channel 4 case we have an appeal before the Tribunal. We are being forced into completely different directions and it is almost impossible for anybody to exercise any rights that they might have if matters are parcelled up in this way.

The formal commitments process, the final point in the skeleton. If you could go to tab 16, para. 45. Ofcom is basically saying here that the procedure all came as a result of some spontaneous offer on the part of Red Bee and the BBC. We say that that does not actually address our point; our point is simply this, that going forward – if the Tribunal is minded to

permit the kind of procedure that has occurred here there would be very little point in having a formal commitments' procedure. A company under investigation could enter into very, very long term contracts for example, make small changes, say to the Regulator, "Actually we do not want to go through the formal commitments' process at all here, it is kind of embarrassing because there has to be some publication of what is going on, we do not like that." The Authority, perhaps in some cases genuinely hard pressed and with resource constraints, says: "Okay, we will close the file if you change your behaviour in this way", and then the complainant or the applicant is unable to appeal that to this Tribunal. We believe that that would have quite an adverse impact on the procedure – and this is where modernisation is relevant because the formal commitments' procedure, as you know, came in after modernisation – we believe that the values which modernisation were supposed to actually bring about, namely transparency, openness and so on and so forth, would not be served by a repetition of the procedure that has occurred in this case, we do not criticise it, it happens, we are not naïve; it is perfectly normal. But what we say is that we – and complainants after us – should at least have the opportunity to appeal a decision that is made in these circumstances.

What happened here was that a deal was done, and again we do not say it is wrong to do deals – goodness knows, we appreciate that all the Regulators have serious constraints on their time and resources, although not in this case we believe. What happened was that a deal was done here. We did not know what the deal was. We had no real idea whether the contract had been reduced significantly to meet our concerns or not, and then there was a period of silence. We did ask for some information about what changes had taken place, and we were told that this could not be given to us because of confidentiality concerns.

If you turn to tab 7 in the court bundle, at p.99. IMS was naturally concerned to find out what had happened, and was being met with this black wall of confidentiality – what we said was those concerns can be accommodated by us giving an undertaking to keep the information you communicate to us confidential. That was not sufficient, we did not find out that the contract had actually been reduced to seven and a half years until December 3rd, which was some four or five months after the case had actually been closed.

Obviously aware of the Tribunal's decisions in relation to failure to consult, a complainant, in particular the recent *Brannigan* case, and the conclusion reached effectively by the Tribunal in that case was that provided any failure to consult is cured later then it is not something that vitiates a decision. We understand and obviously accept that that is what the

Tribunal decided in that case, but we would say here IMS's ability to actually comment meaningfully on the decisions and the case closure ----

THE CHAIRMAN: Mr. Hornsby, I think you are getting into the merits of the case there. As I understood it, you were making the point that you were illustrating the lack of transparency that arises if this kind of informal assurance procedure, if I can call it that, is followed rather than the formal commitments' procedure, and you were illustrating the evils of that by showing how you were not informed of the contract period reduction, and I take that point but insofar as you wish to pursue a separate point about a procedural unfairness that must be part of the challenge to the ultimate decision and, at the moment, we are just deciding whether we have jurisdiction to hear that point amongst others that you would wish to make in challenging that decision.

MR. HORNSBY: I fully accept that, madam. So concluding we say there was a clear implied decision that the BBC contract (as amended) passed muster; this was a non-infringement decision; we say all the evidence points to this – looking at the decision, looking what the record shows and then looking at Mr. Stewart's affidavit, and particularly statements of Polly Weitzman and the other legal officers showing that the case would be closed only if the competition concerns were fully met.

We do not believe that the analysis should depend on how an outcome was reached. Basically the fact that the BBC did not want to go through the formal commitments' process should not mean that this is not an appealable decision when the amendments in the contract were exactly the same as those that Ofcom thought were sufficient to operate the formal commitments' procedure. That would really put, we say, form above substance – undesirable.

We believe that there was an explicit decision on dominance and market structure taken in 2004 that is contained in the Channel 4 decision. We say that any other decisions by this Tribunal would be dangerous for competition law enforcement, it would send an applicant to the Administrative Courts for one part of a complaint and to the Tribunal for another part of the complaint. If the procedure here is followed generally the commitment process we believe becomes a dead letter, transparency suffers, post-modernisation this is bad.

Finally, we say that all these negative outcomes can be avoided by simply following the relevant precedents in the Tribunal's case law, and that the most relevant is *Pernod* and that is the one that should be followed here.

I am most grateful

MR. BLAIR: (After a pause) If you can bear to turn up tab 12 in the court bundle, that is the affidavit or witness statement, and go to para.79, there is a list at the bottom of p.35 of the things that in the view of the team in Ofcom would remain to be done if they were going to get on their approach to the matter to a real decision, considering, for example, cumulative effects, consumer detriment, reasons for exclusivity and its duration (at the reduced length). This is after the offer, as it were, had been made to reduce the period of the contract. Your approach to that must be to say – perhaps I should not use the word – pure persiflage?

MR. HORNSBY: We might use that word to describe it, but I think what we would also do is point to the defence, tab16.

MR. BLAIR: Which part of the defence?

MR. HORNSBY: Where Ofcom actually says that it has done the work, that it analysed cumulative effects.

THE CHAIRMAN: Was it para.1.6 of the Channel 4 decision?

MR. HORNSBY: It is certainly there as well. In the Channel 4 decision itself they say they have done all that.

MR. BLAIR: Your submission about para.47 of the defence is really your answer to my question, that they had done much of the work, and so the idea that more was needed was – I think your word was "fanciful"?

MR. HORNSBY: Yes.

MR. ANDERSON: Just on that last point, I am a little confused as to where it is said that we said we had done all the work. From listening to Mr. Hornsby I understood that all he had relied on was the last sentence of para.1.7 of the case closure decision itself, and that is what I was proposing to address. If he claims we have said it somewhere else then I am still unclear as to where it is that he says we have said it.

MR. HORNSBY: If you could just give me a moment I will find the paragraph. (After a pause) Tab 10, para.47, that reads:

> "Ofcom assessed the effects on competition of the Channel 4 contract in the context of conditions in, and the structure of, the market, including the lengths of the terms of contracts [plural] within that market, the market positions BBCB/Red Bee …"

So Red Bee, that is post-sale of BBC Broadcast to Red Bee:

> "… its competitors and customers, entry barriers and the level of trade."

MR. BLAIR: That is a different list from the list in the witness statement at para.79, is it not?

MR. ANDERSON: Sir, that is because that is a list of investigations undertaken in the context of the Channel 4 decision where we accept we took an appealable decision. It is a little confusing because settled a defence that answers both the admissibility point and the substance of the Channel 4, this paragraph falls into that part of the defence which deals with the substance of the Channel 4 decision. We have left the BBC contract much earlier at para.32.

Madam Chairman, members of the Tribunal. The sole issue for the Tribunal today is whether Ofcom took an appealable decision within the meaning of sections 46 and 47 of the Act in relation to the BBC contract, because we accept that we did take such a decision in relation to the Channel 4 contract. We have set our position pretty fully, we hope in our defence and skeleton arguments, and I do not propose to repeat every point that is contained in those documents, but we do stand by and rely on the contents of both those documents, together with, of course, the case closure decision itself, and the evidence of Mr. Stewart.

Of course, the question is not whether it was right or, for that matter, fair, for Ofcom to close the file, rather than pursue its investigations and/or take a substantive decision. That is not the issue, that was an administrative decision, we submit, taken by Ofcom as a matter of administrative priority, and that decision we say is not a matter falling within this Tribunal's jurisdiction. That kind of a decision is the kind of decision of an administrative nature that a public body may take within the scope of its own discretion of an administrative nature that a public body may take within the scope of its own discretion and the place for challenging that kind of decision is the Administrative Court, and we say that fact remains wholly unchanged by the fact that Ofcom took another decision, even an associated decision from which an appeal to this Tribunal does lie. That is merely a consequence of the scope of the statutory jurisdiction conferred on this Tribunal.

If IMS are right, and that what we say is a genuine decision to close the file, rather than take a substantive decision one way or the other, is an appealable decision then in our submission that may give rise to adverse consequences for the investigation of complaints generally. There may, for example, be a tendency not to start investigations at all if there is a risk that closing the file at some point during the investigation might be considered an appealable, non-infringement decision. Moreover we say it could place regulators in some difficulty in taking into account changes in circumstances.

Regulators must have, and the jurisprudence in our submission demonstrates that they do have, a discretion to decide how best to deploy their resources. That decision on the deployment of resources is essentially a decision falling in with the scope of administrative

law rather than competition law albeit we recognise the overlap between the two, an overlap expressly recognised by this Tribunal of course in *Cityhook*.

In our submission, it is quite clear on the evidence before the Tribunal, and I will be coming to the evidence, that this was a case where Ofcom did not reach an express or an implied view that there had been no infringement in relation to the BBC contract. This is a case where Ofcom genuinely decided to close the file without reaching a view one way or the other. If I could just adopt some of the terminology that the Tribunal itself has used in some of the cases to test the test against which one would look at this decision. We would say Ofcom did not reach "a carefully considered and to all appearances final view", which is *BetterCare* para.66; or the decision to close the file did not "mask a decision" under which Ofcom "has in reality decided there is no infringement". That is *BetterCare* again, paras 87 and 83. *Freeserve* para.96 – it cannot be said in our submission that "the substance of the matter judged objectively is that Ofcom has decided expressly or by necessary implication that on the material before them there is no infringement".

Moving to *Claymore* at para.22: Has Ofcom "genuinely abstained from expressing a view one way or the other, even by implication whether there has been an infringement", and of course we would say it has genuinely abstained. Nor, and this is the *Pernod* point, and the commitments point which I will be addressing, can it be said that the decision by Red Bee and the BBC to reduce the terms of the contract – the exclusivity in the contract – from ten years five months to seven years five months can be said to have: "removed the competition problem", which was the premise for the decision of the Regulator in Pernod and the basis of this Tribunal's decision in *Pernod*. We say this is not a case where Ofcom has decided on the evidence before it that an infringement has not been established, and that is essentially what was decided in *Claymore*. I was not proposing to take you to all the cases but you will recall at para. 142 in *Claymore* you will see that the essential basis of the decision in that case was that following a two year investigation during which no stone was left unturned, and that the Office of Fair Trading was satisfied that there could be no further investigation, the decision was that there was insufficient evidence of an infringement, and the only issue there was: is that really a non-infringement finding or is it genuinely an administrative decision. The difference between, of course, a *Claymore* situation and this situation is that there was further investigation and analysis necessary before a decision could be taken one way or the other, but the Regulator, acting within the scope of its discretion decided – admittedly in the light of the reduced concerns arising out of the reduction in length of time – that it was no longer a priority justifying the continued

commitment of resources, and that is the essential issue with which this Tribunal has to grapple and looks at the evidence to see whether what I say is right, or whether what Mr. Hornsby says that the real view of Ofcom was that the competition concerns had been removed in the context of some deal which Ofcom did with Red Bee and the BBC – a case I have to say that Mr. Hornsby is advancing without any evidence to support in our submission whatsoever.

In the course of the skeleton argument of IMS a principal theme advanced is that you can really derive the correct or true status of the BBC decision by reference to the Channel 4 decision and since the Channel 4 decision was a non-infringement decision, it follows that the BBC decision must be the same. He bases that I think primarily on the fact that they are both contracts concerning the BBC, they concern access services. You looked at the accessed services in the context of the Channel 4 agreement and came to the view that there was no infringement, he says largely because of your analysis of the structure of the market, and if that is the conclusion you reached on Channel 4. You must have reached the same conclusion in relation to the BBC contract, because there is no logic to have reached a different decision. As was astutely put to him by you, madam, if that is the logic of his position it ought to follow that a non-infringement would have been the result on ten and a half years. The problem with that, of course, is that all the evidence before the Tribunal is that the Regulator had genuine concerns with the BBC contract, whereas it did not have concerns in relation to the Channel 4 contract, and that is because there are significant differences.

THE CHAIRMAN: Can I just ask you this, Mr. Anderson, if this had been conducted as a single investigation by Ofcom, and Ofcom had produced a single document in which they had come to a non-infringement decision in respect of the Channel 4 contract, but had said in that same decision: "We do not have a concluded view, and we do not consider it necessary to have a concluded view in relation to the BBC contract", would it still be the case that part of the single decision would be a non-infringement decision and part of it would not be an appealable decision within the meaning of s.46?

MR. ANDERSON: Fortunately I am not in that position. I fully understand why you have asked me that question. The answer is of course that one must look at the substance of what has, in fact, been decided, and it may well be there is no magic in the fact that there are two documents generated rather than one. What one must really look at is what was the substance of the decision taken by Ofcom in relation to the Channel 4 decision which we accept was appealable, what was the substance of the decision taken in relation to the BBC

contract and if, when you look at the substance of what was decided in relation to the BBC contract is that the case was closed without any decision being taken one way or the other, or by applying the test whether there was an express or by necessary implication a decision that on the material before it there was no infringement then the mere fact that that appeared in the same document as an appealable decision would not render that an appealable decision.

Now, I recognise that in *Freeserve* one of the problems the Regulator was faced in its argument was that in a single document it had used exactly the same terminology to reach an appealable decision in relation to one part of the complaint and in relation to the other three close the file, and the Tribunal did attach weight to the fact that they had used essentially the same form of words for all four and it would be artificial to treat them differently. But of course the reality is that one has to look at the facts and decide w hat is the substance, and the substance in that particular case was non-infringement decisions had been taken in respect of all.

It is true that the position that the Regulator found itself in in that case was more difficult because it conceded part of what it had in that single document was an appealable decision and the Tribunal could not really see what was different about the rest of the decision.

PROFESSOR STONEMAN: You draw a distinction, taken from *Pernod* , a decision was appealable, it removed the competition problem.

MR. ANDERSON: Yes.

PROFESSOR STONEMAN: Now, if I remember – having sat on *Pernod* – that the removal was only mentioned because that is what the OFT press release stated. So you picked it up "removed the competition problem", and you have contrasted that with "reduced the competition problem" ----

MR. ANDERSON: I do, yes.

PROFESSOR STONEMAN: Are there any authorities that tell us that removal is necessary whereas reduction is not? Or the extent to which a reduction is a removal?

MR. ANDERSON: I will think about that over the lunch time adjournment; I am not aware of any but it may well be the case of course that the mention of the removal of competition appeared in a press release, I think I recall it was in some of other correspondence as well passing between the Office and the parties, but the real point is that that was at the heart of the Tribunal's decision. The competition concerns had been removed was the premise upon which one could construe the closing of the file as a substantive infringement. In other words, if *Pernod* continued to act in accordance with the assurances that had been given it

necessarily followed that the Regulator's view was that there would be no infringement because there would be no continuing competition concerns. If it is simply a question of reducing competition concerns one cannot say the same thing; one cannot say that there are no continuing competition concerns. If there are continuing competition concerns, which his the reverse of that it necessarily follows that the Regulator has not reached a firm view one way or the other, and firm view is what is necessary before one can characterise a decision as a non-infringement, or infringement decision. There needs to be a firm view.

PROFESSOR STONEMAN: I think the point I am trying to make though is the word "removal" was pure circumstance of the case at hand. It was not picked on on that occasion in contrast to partial removal, or partial reduction. That is why I am asking if you can think about ----

MR. ANDERSON: I, of course, was not on the case and you were. I can only go on the basis of what the word "removal" means. "Removal" means there is no longer a competition concern; "reduction" does not have that meaning, and that is an important difference.

THE CHAIRMAN: I wonder if that would be a good moment to break for the short adjournment, Mr. Anderson?

MR. ANDERSON: I am in your hands, madam.

THE CHAIRMAN: We will reconvene at 2 o'clock. Thank you.

(Adjourned for a short time)

MR. ANDERSON: We have not over the short adjournment been able to provide any more jurisprudence to assist you. We have looked again at the *Pernod* case itself, and if I could invite you to take that up in the authorities' bundle, it is at tab 5, it does seem to us that a central part of the reasoning of the Tribunal in that case was the view that the Office of Fair Trading took that the competition concerns were removed in the sense that they no longer existed. In terms of where that is to be found, if I could invite you to look at paras. 50 to 55, that sets out the chronology of what gave rise to the assurances. Then at para.59 one sees the letter sent by the Office to the complainant, Pernod, and you will see in the main substantive paragraph the Office referring to the fact that: "... we believe that the assurances remove the competition problem that gave rise to the alleged breach; accordingly, we have closed our investigation." The point is then reiterated in the press release by John Vickers, Director General of Fair Trading: "The assurances remove the competition problem", and then a few pages further on the s.47 application at para.7: "It became apparent that Bacardi was willing to give the assurances in question. The Director took the view that only for the purposes of the future did these remove the competition problem that had prompted the investigation."

In our submission removing a problem and reducing a problem are clearly different, and it is apparent from paragraph 146 that the view that the Tribunal took was in answer to the first question as to whether there had been a decision, the answer to that first question, it seems to us, is that the OFT decided that Bacardi's assurances remove the competition problem that give rise to the alleged breach. We would therefore submit that in the circumstances of that case it follows, almost as night would follow day, that in the light of that there can be no longer any competition concerns and that is the basis for the finding of closing the file on that basis being a non-infringement decision. That is to be contrasted, we would say, very much, with the position that is described in both the case closure decision and in Mr. Stewart's witness statement where it is quite clear that the competition concerns had not been removed. Of course, they had been reduced – it does not take a genius to recognise that if you have foreclosure concerns on a ten and a half year contract those are likely to be less if it is at seven and a half. But it is clear from the evidence, and I will be taking you through the witness statement in due course, that the concerns that Office had in relation to the BBC contract were different to the concerns – or the lack of concerns – in relation to the Channel 4 contract, and it cannot be said that anywhere in the material before the Tribunal had the Office ever expressed the view that seven and a half years would remove competition concerns.

PROFESSOR STONEMAN: I am not sure how much mileage there is in taking this further, but if we go back to para.16 in the same document – Bacardi gives assurances on exclusivity - where you refer us to the removal of the problems.

MR. ANDERSON: Yes.

PROFESSOR STONEMAN: In the middle of the third paragraph of the quote from John Vickers: "... prompted the investigation that should widen competition opportunities", not that it will remove barriers to competition in the market. So "widen" is not as definitive as "remove". So you remove the problem and you widen competition – reducing the problem would also widen competition.

MR. ANDERSON: I would read that "widening the competition" as a bonus, on top of the fact that the competition problems have been removed, but the key point – and really the main point that we rely on is the fact that the premise for the decision was that the concerns had been removed. There was therefore no other view than that there could be no infringement from the date of the assurances moving on, providing the assurances were adhered to.

PROFESSOR STONEMAN: I think your point is made, thank you.

MR. ANDERSON: Just returning to this question, which is a point I will come back to but just by way of an introduction, on the read across from the Channel 4 decision to the BBC case closure decision – a point that Mr. Hornsby has made on a number of occasions – we say the inappropriateness of that read across is quite apparent when one looks at the basis upon which the Channel 4 non-infringement decision was reached, which was essentially no abuse on the Chapter II because of no dominance, which we would submit is utterly irrelevant to the BBC contract, because at least by that stage the Office was not looking at Chapter II at all in relation to the BBC contract, and secondly that the essential point was that the Channel 4 agreement would benefit from the vertical block exemption which at no stage was that ever considered applicable in the case of the BBC agreement, certainly at ten and a half years, also at seven and a half years – the limit of course being five years. Of course, there are even problems in the BBC contract because it is more than 30 per cent. of the relevant market.

If I could turn to the case closure decision itself, which you will find at tab 4.4. If I could deal firstly with the para.1.7 point which my friend attaches a lot of weight to.

> "During Ofcom's investigation, BBC Broadcast and the BBC amended the term of the Access Services SLA from its end date of 31 December 2015, a duration of ten years and five months, to 31 December 2012, a duration of seven years and five months. In the light of that amendment, and based on Ofcom's findings on the structure of competition in the relevant market as set out in the Channel 4 Decision, Ofcom considers that it is no longer an appropriate use of Ofcom's resources to engage in further investigation in to this matter."

So at face value that is clearly wholly consistent with the case that we are making today and is set out in Mr. Stewart's evidence. Mr. Stewart is not seeking to advance a different basis for having closed the file. The findings on the relevant market set and the reference to that in the Channel 4 decision does not in any sense undermine that proposition. What one was looking at in the context of both agreements was what effect did that particular agreement have given the structure of the market? In the context of the BBC contract that gave rise to very different considerations than in the context of the Channel 4 agreement. Now, it is true that in the context of the Channel 4 agreement some investigation of the market was undertaken, and it would be not unreasonable to suppose that were the Office were to continue in their investigations on the BBC contract they would draw on the work that they had done in that context. But that is not the same as saying because they had undertaken that investigation and because they had concluded that the Channel 4 contract did not

infringe the Chapter I or Chapter II prohibitions it necessarily followed that they had no concerns – or the same conclusion must follow – in relation to the BBC contract, and that is made abundantly clear in the evidence of Mr. Stewart.

Paragraph 1.22 of the case closure decision sets out ----

THE CHAIRMAN: I am not sure if you are able to elaborate – or maybe this is what you are taking us to – what findings on the structure of competition in the relevant market, what kind of thing might that be referring to?

MR. ANDERSON: I cannot say without myself giving evidence. My guess would be that it is simply a general statement on the background findings they have made in relation to who is in the market – market shares, those sorts of things. It is the factual background against which an assessment of the BBC contract would be made. But it is perfectly true, when one looks at the Channel 4 Decision, there are certain findings made about the bidding structure, bidding nature of the market. If we were in the position of having an infringement decision on the basis of the BBC contract, and the non-infringement decision on the basis of the Channel 4 contract, there may be an entirely different debate to the debate we are having today, but as things stand one cannot conclude from that paragraph – and that is all Mr. Hornsby has identified, from that paragraph – that we had completed our investigations into the BBC contract; that is the point he was making in relation to that.

One sees from para.1.22 that the Office did have concerns about the BBC contract, in subparagraphs 1 to 7 one sees that. The Decision then sets out a set of competing submissions, between Red Bee's submissions and then the BBC's submissions, then IMS's submissions, and these are competing submissions which have not been resolved and were overtaken by events.

Then para.1.36 sets out the operative part of the Decision, noting that the non-compete obligation is longer than the period usually considered acceptable, that is seven and a half years against five years. It notes that there does not appear to be a clear industry average practice – a matter that would clearly need to be looked at if one were going to investigate further. Ofcom would have considered carefully whether the length of the non-compete obligation for the BBC contract appreciably foreclosed the relevant market – not a fact that in itself can be determined simply by any findings that have been made on the structure of the market. One has to look at the effect of the BBC contract against that structure.

> " ... in making this assessment, Ofcom would have considered the structure of the market and the competition in that market, in particular given its conclusions set

out in the Channel 4 Decision, including on the features of a bidding market and countervailing buying power."

So the assessment would have to have been made against the background of the work that had already been done. Of course, it is not our case that, as a result of the reduction from ten and a half to seven and a half, Ofcom would have had to go back to square one. Clearly there was work on which they would have drawn. The point is there was concern about ten and a half years expressed to the parties, and being investigated. There was then a significant change in the length of the contract and that then gave rise to a new set of analyses of what the effects of that would be, and those were the factors that were set out in the paragraph to which Mr. Hornsby was taken earlier.

Then Mr. Stewart's evidence and that is to be found at tab 12. I do not intend to go through this statement in great detail, because it is a very detailed witness statement. It is designed to be that because it is designed to give a full picture to the Tribunal. It is in fact unchallenged as to its facts, despite what Mr. Hornsby has said, he has not adduced any conflicting evidence, he has not applied to cross-examine Mr. Stewart, it is therefore unchallenged evidence and it provides a full chronology.

Before I turn to the statement itself, let me first address the argument that Mr. Hornsby advances that little weight should be attached to this evidence, because it is ex-post elaboration. He relies on two cases – he took you to one of them, *Ermakov*, which is at tab 22. The important point to bear in mind when looking at this case is that what was at issue in this case was the admissibility of a witness statement. What had happened is that in the decision the Home Office, or Westminster Council, had given one reason and were adducing witness statement designed to advance a completely different reason for the decision they took. That is why this case we say is not of much assistance in this case because Mr. Stewart is not advancing a different reason, he is advancing precisely the same reason. But what has been alleged against Ofcom is that the Decision gives an incomplete picture of what in fact happened – the suggestion being that there was some sort of a deal done. That is why he is entitled to set out in some detail what, in fact, happened and when we look at what in fact happened we will see that there is nothing in the suggestion that there was a deal done.

So it is not surprising that Lord Justice Hutchison, at 315 H observed that for the court to admit evidence from a public body to elucidate the reasons which it gave at the time of the decision is one thing, but to admit evidence that the true reasons were fundamentally different is quite something else. So the principle in *Ermakov* is not a principle of any

relevance in this case and the same point essentially arises in the *Angol* case, which is the previous authority.

So now looking at the witness statement itself, first at paras. 4 to 11, which set out the background to the witness statement. The key point is that Mr. Stewart was himself the decision taker – that you can see from para.2, and the last sentence of para.11. It explains the delegating process by which Ofcom has delegated to Mr. Stewart the power to take the decision on behalf of Ofcom itself. Paragraphs 12 and 13 – 13 is a long paragraph with a whole series of bullet points and that is intended to demonstrated to the Tribunal the broad workload that Ofcom has. That takes one through to para.14 at p.10. Paragraphs 14 through to 21 are designed to illustrate the extent of the workload and the pressure on Ofcom at the time and this is to meet a point made by IMS in its skeleton that at no stage did they have any impression that Ofcom's resources were stretched.

Paragraph 22, we get into the chronology of the investigation itself, and the first point to make, which emerges at paras. 26 and 27 is that even before Ofcom began investigating the BBC contract which, of course, was not until after the OFT had taken its decision in November, the preliminary analysis of the Channel 4 contract was non-infringement, and that so far as Chapter 1 was concerned, that was based on the virtual block exemption, removing the need for resources to be devoted to a substantive assessment under Article 81. So from the outset, if you like, a different preliminary view in relation to the two contracts under Article 81.

The second point, and this emerges from para.28, but I am not sure, in the light of the exchange between Mr. Hornsby and the Tribunal, that this is really in dispute. The next point to emerge is para.28 where it is clear the only investigation opened in relation to the BBC contract was under Chapter 1 and Article 81, that is about two-thirds of the way down – "I agreed to open the investigation." There were frequent references to this witness statement, to the fact that the investigation was limited to Article 81, it appears in the bulletins that were posted on the Ofcom website at the time, published on 15th December. The references, I think, appear in either the defence or the skeleton argument as to where they can be found.

The next point to make is that the investigations were carried out in parallel as a matter of good allocation of resources and efficiency, they were not combined into a single investigation and that emerges from paras. 29 to 34. The initial view on analysing the BBC contract differed from the Channel 4 contract (para.37).

"The case team expressed the preliminary view that the BBC contract did not have the benefit of the vertical agreements block exemption due the market share and due to the duration. The case team noted that the BBC and Red Bee had highlighted the complexity of the BBC's requirements, in particular due to scheduling and regionalisation on its regulatory obligations. The team propose to conduct further work to continue to debate these complex issues."

I know Mr. Hornsby has made the point that Mr. Stewart's views are not material – I would point out that Mr. Stewart is, in fact, the decision taker.

"At this point I was of the view that the case should head towards a statement of objections given the long term exclusivity for a large portion of the market. However, I as also conscious that further work needed to be done by the case team to properly analyse the case and that this view could change."

So they had not made up their mind but their preliminary view was infringement on the BBC contract to be contrasted with non-infringement on the Channel 4.

In paras. 38 to 41 he is intimating those views to the parties. Paragraphs 42 through to 60, he sets out communications that passed between Ofcom and the parties. It is said in para.42 that on 8th March the idea of a reduced term was first floated. If I could invite the Tribunal just to read that paragraph again.

THE CHAIRMAN: (After a pause) It is not entirely clear at the end of that paragraph, the comment about the block exemption not applying, whether that is a comment that Mr. Stewart is now making, or whether that was something that Sarah Turnbull ----

MR. ANDERSON: No, that is a comment that Mr. Stewart is now making. He intended to make that clear, I think, by putting in the phrase: "I should point out that ..." That is, I think, a comment from him to the Tribunal. At the meeting all that was done was, when the BBC indicated that they were thinking of reviewing the terms of the contract, not specifying, one could do it either by reducing duration or by lifting exclusivity, but they raised that as a possibility and they are simply directed to the guidelines.

The next paragraph Ofcom point out to the BBC and Red Bee that they were not convinced with their justifications for the duration and "... without further work our preliminary thinking could result in the issue of a statement of objections." They then asked whether the statement of objections would set out a length that was acceptable, and the response says that that is unlikely, the statement of objections will simply say "Bring it to an end."

The message that emerges from these paragraphs is that Red Bee and the BBC were trying to tie Ofcom down, and Ofcom was very careful not to be tied down and would do no more

than point to the five years on the vertical block exemptions. That emerges again you will see in para. 47 – they I indicated five years would be the limit – that is from the block exemption. They then seek to argue that that is too severe. Paragraph 49, submissions received – following review of the arguments the case team concluded that there was still a concern regarding the length of the BBC contract. Of course, at this time we are still looking at a ten and a half year contract. There are then debates within the team about the theory of harm, and the potential foreclosing effect of the agreement.

PROFESSOR STONEMAN: Mr. Anderson, before you go further on, could you clarify for me what exactly goes in a statement of objections, and what its legal status is?

MR. ANDERSON: Well it is a pre-cursor to an infringement decision. What goes into it rather depends on what the nature of the complaint is, but it essentially encapsulates the preliminary view of the Regulator that there has been an infringement setting about the basis upon which they reach that preliminary view. The party is then given an opportunity to comment on that, and either persuade the Regulator that their concerns are unfounded, or they do not persuade the Regulator and the Regulator then moves to an infringement decision, but without it the Regulator cannot take an infringement decision. Of course, it is not necessary to issue a statement of objections if one is intending to issue a non-infringement decision. It is part of the process of preserving the rights of defence, so that the alleged anti-competitive undertaking is given every opportunity to persuade the Regulator that it has not been infringing the prohibitions.

Matters then proceed through the chronology until para.60. Red Bee contacted Selina Bevis (the case leader) to discuss on a hypothetical basis the outcome of the submissions. What happened was that the Ofcom team was about to submit to the next stage up in the hierarchy their preliminary views, Red Bee and the BBC asked Ofcom to hold off on that until they put in a submission that they were about to make, which was a submission on 16th June. On 16th June Ofcom received the joint submission. It obviously prefaced everything by saying: "We do not think there are any concerns at all", but included a proposal that the parties would reduce the term from ten and a half years to seven and a half years, which would take it back to the length of time before it had been extended on the sale.

The next paragraph, which is an important paragraph, is what was Ofcom's initial reaction to that, and essentially the Ofcom reaction was that they proposed to treat that submission as an offer of commitments.

Mr. Hornsby attaches a lot of weight to that. He says that you cannot go down the commitments route unless you are satisfied that they meet the competition concerns, so

treating them as an offer of commitment is to be regarded as equivalent to accepting that that reduction would meet your concerns. We say that is wrong; all that Ofcom has done is to indicate that they were prepared to treat them as an offer of commitments, which would then move to the procedure that is set out in the guidelines, and if I could invite the Tribunal just to look at the Guidelines which are in the authorities' bundle, at tab 29, and it is the procedure beginning at 4.15 in the Guidelines. No requirement for anyone to offer commitments.

> "4.16 A person or persons may offer binding commitments to the OFT at any time during the course of an investigation and up until a decision is made. However, the OFT is unlikely to consider it appropriate to accept commitments offered at a very late stage in its investigation (for example, after the OFT has considered representations in relation to its statement of objections)."

Of course we have not reached that stage.

> "4.17 If a person or persons wished to offer commitments prior to the issue of the OFT's statement of objections and the OFT considers that the case is one in which commitments may be appropriate, the OFT will issue a summary of its competition concerns to such person or persons. Such a summary is not a replacement for a statement of objections. It will set out the OFT's competition concerns and a summary of the main facts on which those concerns are based. However, it will not generally include detail of the source of the facts on which the OFT relies.
>
> 4.18 Once commitments have been offered, the OFT may enter into discussions with the person or persons in order to reach agreement as to the form and content of commitments which would be acceptable to the OFT."

Then the fact that they have gone down that process – 4.19 does not preclude the OFT from taking a decision. Then at 4.21 if the OFT proposes to accept commitments, it will give notice to third persons – in this case such as IMS – who then have an opportunity to comment on them and only after that does the OFT consider whether to accept them.

So the processes offer commitments. The Regulator then considers them, sets out its concerns to the party, enters into negotiations, then puts it out for consultation and then decides if they are appropriate. We did not even get in this case to the point ----

THE CHAIRMAN: Yes, 4.21 – is it the case that under this procedure the third parties, such as the complainant, is only notified of the possibility of commitments once the OFT has formed a preliminary view – or it says "proposes to accept commitments."

MR. ANDERSON: Yes, but the way it works is that the offer is made, the OFT will then consider it – to consider whether they are appropriate or not; enter into a period of negotiation e.g. they may think "seven and a half years is too long, we want less than that", and they go through that process, if they then consider it is in principle appropriate – not that they will accept them but it is in principle appropriate, they then put it out for consultation. In this case, of course, we did not even get to the point of commitments being offered. All that happened was that Ofcom, once they received this submission said: "We will treat this as if it were an offer", then the process would have started, but they did not even get to that point because Red Bee and the BBC said "No", these are not an offer of commitments. So all that Mr. Hornsby has submitted, and I will give the floor to him in a moment, all that has happened is there has been a statement that Ofcom are prepared to treat this submission as an offer of commitment, and not a conclusion that commitments are appropriate.

MR. HORNSBY: Could I ask my learned friend to please read para.4.3 of the commitments' documentation which is on p.11?

MR. ANDERSON: Yes.

> "The decision whether to accept binding commitments is at the discretion of the OFT. The OFT is likely to consider it appropriate to accept binding commitments only in cases where:
>
> * the competition concerns are readily identifiable
> * the competition concerns are fully addressed by the commitments offered, and
> * the proposed commitments are capable of being implemented effectively and, if necessary, within a short period of time."

MR. HORNSBY: Thank you.

MR. ANDERSON: Of course, in the course of the process that is set out in paragraphs 4.15 to 4.23, the intention is that those criteria will then be assessed and tested, but in this case, as we see from para.64 the BBC and Red Bee did not want to go down that path at all. Then in paragraph 64 if they do not want to go down the commitments process they are asked what are the options? The three options are then set out. You can offer commitments, and then we will proceed with the procedure that I have just taken you to, or not – in which case we will continue with the investigation, or you can take some unilateral action and we will take that into account in the context of our investigations, the options being: a statement of objections if we still have concerns, or sufficient concerns to justify a statement of

objections, no grounds for action, which is a non-infringement decision; or case closure. In my submission there is absolutely nothing before the Tribunal that would justify it reaching the conclusion Mr. Hornsby invited you to reach that somehow that was a sham and that the suggestion of a statement of objections was not real. All the evidence to date had been that there were serious concerns in relation to this contract and the seven and a half years not being five years or less did not remove those concerns.

There is then reference at which the views of General Counsel were stated and then:

> "However, if the contract was amended and that amendment following due investigation answered the competition concerns, then Ofcom would consider moving towards a case closure or a non-infringement decision."

It is fairly non-committal because one at that stage has not conducted any investigation. This is not a situation in which the competition concerns were answered, merely reduced, so wholly consistent with Ofcom's position throughout. So no commitment, no further discussion and then on 7th July simply informed that the contract has been reduced at length. Now, Mr. Hornsby invites the Tribunal to conclude that some deal was done, some informal understanding that the evidence is only consistent with Ofcom having secured this reduction and thereafter satisfied that their competition concerns were removed in the sense of *Pernod* or addressed, in my submission that is a submission that simply does not stand up; that is not consistent with any of the evidence before the Tribunal; that is why Mr. Stewart has set it out at length in his witness statement, explaining every communication there was between the parties and the only conclusion in our submission that can be reached is that there was no acceptance of commitments, no agreement with the parties.

Of course, the change in circumstances was a significant change (para.68). It was a material reduction in the length of time of the contract and it also meant in Mr. Stewart's words, the reduction in term meant that a considerable amount of investigation and analysis to that point carried out by the team, including large amounts of the case team's analysis and the draft statement of objections in progress at the time, which related to ten years would have to be revisited. We are not saying that we had had to start from scratch, merely that this was as significant change in circumstances and we would need to look at matters again – it was a different ball game.

> "The analysis of an agreement with a duration of more than ten years on an exclusive basis was no longer applicable and as indicated by the BBC and Red Bee prior to them amending the contract the reduced term would require Ofcom to undertake an analysis of those facts to access the extent of any competition

concerns. It is clear that a reduction in the term of the agreement must serve to reduce Ofcom's concerns, however it was not clear that the reduction would be sufficient to remove them."

Then para.69 Mr. Stewart again refers to the further work required, that case closure was the preferred route, because it did not seem a good use of resources to do the further work necessary to reach a definitive conclusion one way or the other; it is now unlikely that Ofcom would wish to proceed to a statement of objections given the reduced term. There is then a meeting of the IMG (the internal group) in which the way forward was discussed and the view was that in the light of the changed circumstances Ofcom should not put further resources into the BBC contract analysis, that a draft case closure document should be created for consideration.

Then Mr. Stewart sets out some particular reasons why the resources were under strain at that time – directing resources into drafting the documents. Then in para.79 an indication of the kind of further work ----

MR. BLAIR: Just pausing there, may I ask you about para.76?

MR. ANDERSON: Yes.

MR. BLAIR: If you take it at face value, the case team presented a summary of their findings in the investigations and their proposed findings. But in the light of what you have just told us about para. 70, which is that IMG basically said: "Close if you can", what does para.76 tell us?

MR. ANDERSON: Well those are the provisional views, no final view of course, or no final decision is taken until the final decisions are issued, because they propose to put out drafts and get submissions on them, and that is what they then did. They sent out to draft documents, and then received comments and submissions on them. IMS, as you will see in the following paragraph, came along and made a number of submissions urging us I think at that stage to move on to an infringement decision.

MR. BLAIR: So the July meeting did not sort everything? Or perhaps it is the fact that IMG is a different Body from PE? PE is the Policy Executive?

MR. ANDERSON: Well they are simply being kept updated. Documents are sent to them for information.

MR. BLAIR: Just a progress report further up the organisation.

MR. ANDERSON: Just a progress report for their information.

MR. BLAIR: Thank you.

MR. ANDERSON: But the key point though is sending out drafts – oh, the summary of their findings, I think that is really a summary of where they are to date, yes.

MR. BLAIR: That is what threw me. Thank you.

MR. ANDERSON: Paragraph 79 – a considerable amount of further work to do. What Mr. Stewart is seeking to do in para.79 is to explain the kind of areas they would need to be looking at in the light of the change in circumstances, and the findings that they had reached in the Channel 4 agreement which, of course, at this stage was still only provisional, and would not answer these issues in the context of the BBC contract.

PROFESSOR STONEMAN: Can I raise something on 79 – one of the thought exercises I have been going through reading this is what would have happened if Red Bee had increased the term of the contract instead of reducing it? So instead of coming from ten down to seven and a half it had gone from ten up to twelve and a half?

MR. ANDERSON: Yes.

PROFESSOR STONEMAN: Because that would have had the same implications for the Ofcom workload, and if we have been told we are not proceeding with this because of the increase in the workload that has resulted from the change in the contract, one could argue that the same decision to close the case would have been made if the length of the contract had been increased rather than reduced.

MR. ANDERSON: I see the logic of that and, of course, in a sense that is right. The change in the length of the contract did increase the workload, but of course reducing the term clearly reduces one's competition concerns, and therefore the complaint, if you like, falls lower down the list of priorities. If you increase the term you cannot say that your competition concerns are reduced, you would say they are increased, in which case it may go higher up the list of priorities. It is a combination of the increased workload and it becoming a less high priority case.

PROFESSOR STONEMAN: So this is a balance between the increased workload and the reduced competition concern?

MR. ANDERSON: Yes.

PROFESSOR STONEMAN: How is that – what you describe in your opening statement – a purely administrative decision?

MR. ANDERSON: Well it is an administrative decision in the sense that it is a decision to close the file because of the allocation of resources in the context of the list of priorities that Ofcom has, though I recognise the point that was made by *Claymore* that you cannot separate them wholly into two different categories. There is an overlap between the two, of

course there is. Our function in this context is to ensure conditions of competition in the telecoms' sector, but there is a limit to what we can do. In this particular case the decision was taken not to allocate further resources in the light of the case becoming – because of the reduced term – if you like, less important, if I can put it that way. That is essentially an administrative decision in the sense that it is not a decision as to whether there had been an infringement. In other words it is not a Competition Appeal Tribunal case, it is an Administrative Court case and in that sense I say it is an administrative decision.

Then paras. 80, 81, more assessment of further work required. Then Mr. Stewart's decision to close the case and in para.82 he explains why he closed the case:

> "In view of the competing demands on Ofcom's investigative resources, continuing the case would not represent the best use of Ofcom's resources."

PROFESSOR STONEMAN: Could I intervene once again, this time in terms of a comment on para.83?

MR. ANDERSON: Yes.

PROFESSOR STONEMAN: Which I think is a rather damning comment on the concern of any Regulator. The Regulator's concern should be about the consumers not about the companies themselves, just because they are happy with the lack of competition, it does not mean that the consumer should be happy with the lack of competition.

MR. ANDERSON: I understand that, of course. For this particular service consumers do not pay anything. They are not paying extra for it.

PROFESSOR STONEMAN: It comes out of the licence fee I believe in some way or other.

MR. ANDERSON: Well, of course it does, and the people who spend the licence fee are the broadcasters, and the BBC has a great concern not to spend the licence fee money except to the extent that it is necessary because anything spent on this is at the expense of something else. So if there was a genuine concern it would be legitimate concern, vicariously on behalf of viewers by the BBC. But I think the only point that Mr. Stewart is making is that the consumers, the immediate consumers of this service were not concerned – or did not appear to be that concerned, but he explains that may be because they had not applied their minds to it, so it is not a major point in my submission.

PROFESSOR STONEMAN: My view I think is that basically of course they would like a nice easy life, but competition is not about a nice easy life and to actually state it in this form as an excuse for not going forward with the case is not in the best interests of regulation.

MR. ANDERSON: Well we hear what you say. I do not think that is what we intended to say by that paragraph if that is how you read it. I think the simple point was that the immediate

people who were paying for this service had not been expressing concerns to us in the way that you might expect the purchasers of a product that was somehow over priced through anti-competitive behaviour might be expressing concerns. That is the only point I think he is making.

Then at the end of the witness statement he addresses some of the points made by IMS in its submissions which are, in my submission, self-explanatory.

It may not be necessary for me to spend a great deal of time going through the cases, the test I am sure the Tribunal is very familiar with. Without turning them all up, if I could just make a few points on some of the cases.

THE CHAIRMAN: There is just one point that arose not so much out of Mr. Hornsby's submissions this morning, but out of the appellant's case generally, which is in a situation where there has been a substantial investigation by Ofcom, whether that in itself creates an inference that the decision arising from that investigation is either a non-infringement decision or an infringement decision rather than a decision in between those two, or a case closure decision as we have called it. Would you accept that where the investigation has been thorough and has gone on for some time, that that points us in one way or the other, or you would not accept that?

MR. ANDERSON: I would not accept it in quite so black and white and general a sense, because in both *Cityhook* and *Claymore* there had been extensive investigations. If one looks, for example, at *Claymore*, if I can just take you there, tab 3, para.142. This is under the Tribunal's analysis:

> "In addition, the letter of 9 August 2002 was written at the end of an extensive and wide ranging investigation which had lasted nearly two years. It is not suggested that, in the Director's view, there were further matters to be investigated, or avenues of inquiry left unexplored."

So the investigation had been completed. The Director was not suggesting that there was any further work to do.

> "In all the circumstances, including the note of the meeting of 19 June 2002, it seems to us inconceivable that, in closing the investigation, the Director had not assessed the evidence before him and come to a conclusion that no infringement could be established on that evidence."

"... that evidence" That evidence being at the end of the complete investigation, not as here where the Ofcom has set out that there would be further investigation and analysis required. The sort of situation is explained further – sorry, my learned friend wishes to make a point.

MR. HORNSBY: Could you also read para. 145 – the first sentence, please?

MR. ANDERSON: Yes.

> "Similarly, in our view that conclusion by the Director was to all intents and purposes a final conclusion, subject only to re-opening on the basis of 'compelling' new evidence.

Paragraph 155 – really, the debate in *Claymore* was whether there was a difference between a finding that the evidence did not establish an infringement, and finding there had been no infringement, and there was some debate between counsel and the President about life on other planets, the fact that you cannot prove that there is none does not mean that there is. The point about *Claymore* is that the investigation had been exhausted; that is not the case here.

THE CHAIRMAN: Yes, because in Mr. Stewart's evidence, when they were discussing what further needed to be done the focus at that time may well have been what needed to be done in order to establish an infringement, not in order to establish a non-infringement, but that generally speaking where the decision is that after a full investigation that there is evidence of dominance, say, that that does count as a non-infringement decision under Chapter II.

MR. ANDERSON: I would accept that but the difference between that scenario and this case is that the investigations were not complete. In *BetterCare* the Tribunal just found on the facts; it had been determined in an unprovisional way that it was not an undertaking and since it was not an undertaking that was one of the ingredients of the finding. Similarly I mentioned earlier this morning *Freeserve*, again that was a special sort of case in the sense that the Tribunal found on the facts that there was a firm decision – a term used in para. 97 of *Freeserve,* the language used is not "provisional, uncertain, or particularly informal, but definite in nature." The other factor in *Freeserve* was that in the decision Oftel had considered and addressed all the arguments that had been put to them in the course of the investigation, so it was very similar to *Claymore*.

Aquavitae and *Casting Book* do not really take the matter much further, because in *Aquavitae* they had not even got around to making a complaint. *Cityhook,* that was a case about closing a file on collective boycott and whether that case closure was a non-appealable decision. We would adopt the approach set out by the Tribunal at para.241, this is at tab 7:

> "In the process of making up its mind at any stage of its investigation, the OFT must necessarily balance the evidence and analysis it has before it against the resource implications (financial, human and logistical) of seeking further

information or conducting further analysis. This involves consideration of its other work commitments and of alternative uses which it could make of its resources. That deliberation necessarily takes into account a mixture of substantive and administrative considerations, which cannot be easily be separated from one another."

- a point that was being made to me. Then over the page to para. 244 – this is dealing with the point that you should not categorise these decisions as purely administrative because of the overlap – in the middle of the paragraph:

"What the OFT concluded was that, on balance, it did not consider that it had sufficient information to proceed to make an infringement decision a that stage of its investigation and that further evidence-gathering or analysis would not be warranted, having regard to its administrative resources and other workload which it considered to compromise 'more promising cases'."

We would submit that that is precisely the situation that we faced here, albeit with what my friend describes as the 'change in behaviour' being material in the sense that it reduced the priority to be attached to that particular case.

Then at paras.283 to 286, if I can invite the Tribunal just to read those few paragraphs.

THE CHAIRMAN: (Pause for reading) Yes.

MR. ANDERSON: Accepting that each case, of course, must be decided on its own facts, and one cannot simply read across from one case to another, we would submit that if the Tribunal asks itself, having reviewed the evidence before, and the submissions, is a non-infringement decision a necessary implication of Ofcom's decision to close the file? We say the answer is clearly "no".

I was not proposing to take you to the European Jurisprudence because, in my submission, it does not add anything really to that debate. The point about the European Jurisprudence is that a case closure decision of the kind we submit this was, or a non-infringement decision, as my friend categorises it, are both appealable under 230 to the same venue, so that distinction becomes a less important distinction. But what does emerge from cases such as *Automec* is that a complainant cannot insist on the commission reaching a substantive decision. They may decide to close the investigation and they may decide to close it at any stage. That emerges in the *IEC* Judgment which you will see at tab 19.

THE CHAIRMAN: I do not think Mr. Hornsby was contesting that.

MR. ANDERSON: In answer to the point that you were making, that it is clear, at least in the context of the European Commission, that the existence of the discretion, if I can just ask

you to look at para.37, I will read it out and you can look at it in your own time. Tab 19, para. 37 of the ECJ in *IEC*:

> "The existence of that discretion does not depend on the more or less advanced stage of the investigation of a case."

That was the only point. On the implied decision – just to wrap that up very quickly – the principal thrust of IMS's case on an implied non-infringement decision is that Ofcom's conclusions on the BBC contract can be ascertained from their conclusions in the Channel 4 contract and that it is artificial to – in his word – 'bifurcate' the two cases. We say that is erroneous. The two investigations were clearly separate allegations relating to different contracts, concluded at different times, between different parties for different durations, and containing different terms. That was illustrated by the fact that the two investigations were seemingly proceeding towards two different outcomes before the change in the decision to reduce the term.

There was a unilateral change in circumstances and simply no support whatsoever for the suggestion that a formal assurance was accepted, or an agreement was reached. The reduction in term was a material change in circumstances which caused Ofcom to reach the view that this was no longer appropriate use of resources to continue investigations.

On the Chapter II, the express ----

THE CHAIRMAN: I do not think we need to trouble you with that, Mr. Anderson.

MR. ANDERSON: I am obliged. In *Claymore* a point made by the then President was – it cannot be right that part of a document, your rights – such as they may be – are to the Administrative Court and in relation to another part it is to the CAT. But of course in a sense that is a problem IMS already faced in its BBC contract. Its complaint was Article 82 and Article 81. We said "We are not going to look at Article 82". Any complaint against that could not have been made to you, it would have had to have been made to the Administrative Court. It would be very difficult to conclude – I say "very difficult", one would need to look at the facts, but it is perfectly possible that when a complaint is made the Regulator may decide to take only part of that complaint on, and it may well then be that the only remedy in relation to that part of the complaint not being pursued is Judicial Review. Indeed, in the cases, the Tribunal itself has recognised circumstances where a decision to close a file would clearly be a non-appealable decision. For example, a concurrent investigation in Europe ----

THE CHAIRMAN: Do we have to decide that in this case, Mr. Anderson?

MR. ANDERSON: You do not, it is a point that is made in a number of previous cases about the fact that it is absurd to have part of a complaint going down one route, and part going down another route and we say "I am afraid that is just the result of the statutory jurisdiction the Tribunal has."

I hope I have dealt with the argument about undermining the commitments' process, this was just a case where assurances/commitments did not arise because that is not what we were prepared to do informally, or the parties were prepared to do formally.

Unless the Tribunal has any questions, those are my submissions.

THE CHAIRMAN: One point – the point that IMS made about the parties could in effect drag out an investigation almost indefinitely by making small changes to the contract every time they thought that Ofcom was on the verge of issuing a statement of objections, and thereby create the need for more investigation. How do you answer that?

MR. ANDERSON: In my submission that is a fairly fanciful suggestion. What happened here was a very significant change in circumstances, a single change in circumstances. I am sure any Regulator worth his salt would see through a ploy of that kind, simply to tinker with the engines in order to buy more time. I mean obviously each case depends on its own facts, but we do not see any concern arising out of a decision in our favour in this case that that point gives rise to. But obviously any Regulator is bound to take account of material changes in facts that occur in the course of an investigation.

PROFESSOR STONEMAN: A few minutes ago you said that resources were taken away from a case and used in a more promising direction – the word you used was "promising", I think.

MR. ANDERSON: I think if I did I was reading from a Judgment, but yes.

PROFESSOR STONEMAN: What is more promising in this sense? If you take the resources away from this case what would be the characteristic of a case where there is more promise?

MR. ANDERSON: Well there may be a number of contexts. One may be where there is a more realistic prospect of being in a position to issue a statement of objections or an infringement decision. In the context of Ofcom's wider duties and functions "more promising" may well be a use of resources where consumer benefit can more readily be identified.

PROFESSOR STONEMAN: Can I take your first definition, that is where there is more chance of issuing a statement of objections? In a sense it puts it as if Ofcom's main task is to actually find infringements; it is not really concerned with finding non-infringements – or with not finding infringements it is concerned with finding infringements.

MR. ANDERSON: Well it is concerned in devoting resources to investigations where there is more likely to be an infringement than not because then intervention is necessary.

PROFESSOR STONEMAN: Right. What I have in my mind is whether we can characterise the Ofcom decision (if there is a decision) without presuming that there is a decision or not – the Ofcom Judgment, shall we put it that way so that we get rid of the word "decision" – the Ofcom Judgment was that on the basis of the material available, and the future resources that are likely to be available, Ofcom decided that they were unable to show to the necessary legal standard that there had been an infringement of the Chapter I prohibition in the case of BBC contract.

MR. ANDERSON: I would not accept that characterisation of Ofcom's Judgment at all, no.

PROFESSOR STONEMAN: Where does it differ from ----

MR. ANDERSON: Because it is explained at length in the decision, we took the view that the allocation of resources to this case would be inappropriate given that the concerns we had in relation to a contract of ten and a half years must necessarily be reduced, albeit not removed, and that is why we took the decision we took, not because we would necessarily have an uphill task in finding an infringement. The question was: should we devote more resources to this case whatever the outcome might be – infringement or non-infringement.

PROFESSOR STONEMAN: Right, so the crucial issue was that the reduction in the terms of the contract which, by the way I note is back to the level it was when the initial IMS complaint went in in July 2005, and therefore there is no situational change with respect to July 2005.

MR. ANDERSON: We have given no indication that the pre-increased period was acceptable.

PROFESSOR STONEMAN: But the Judgment was that that reduction in the terms of the contract reduced any competition concerns that there might be to a level that was acceptable.

MR. ANDERSON: Clearly they reduced ----

PROFESSOR STONEMAN: To a level that was acceptable?

MR. ANDERSON: No, to a level that made it no longer an appropriate use of resources, not to a level that was acceptable. We made clear, and it is made clear in the documents that five years we would have regarded as the upper limit and as Mr. Stewart makes clear seven and a half did still cause us concerns. The question was: did those concerns, and the profile of this case in the circumstances of all the demands on Ofcom's resources, make it an appropriate use of resources to continue to devote time and effort to that complaint and the decision was, in the circumstances "no". That is not the same as saying that the reduction rendered the contract acceptable or removed our concerns.

THE CHAIRMAN: Thank you, Mr. Anderson. Now, Mr. Hornsby, would you like a short moment to gather your thoughts? I am sorry, the Interveners – Miss Stratford.

MISS STRATFORD: I am most grateful, madam. On behalf of Red Bee I adopt and will not repeat any of what has been said by Ofcom, indeed, I passed a note to my instructing solicitor shortly after Mr. Anderson started addressing you this morning saying that he was stealing all of my best lines, but I am certainly not complaining about that; that is as it should be.

I should just like to add some very short submissions, first on the principles to be applied and secondly, on why there is no implied Chapter I prohibition, non-infringement decision. In light of the Tribunal's indication a few moments ago I will not say anything about Chapter II.

On the principles to be applied, this is a case where Ofcom genuinely abstained from expressing a view one way or the other, even by implication on the question whether there has been an infringement of the Chapter 1 or indeed the Chapter II prohibition. Of course, in using those words I paraphrase the words of the Tribunal in *Freeserve* which were quoted in *Claymore* at para.122.

This is therefore a classic case, we say, where a decision was genuinely taken to close the case on grounds of administrative priority and IMS may not bring an appeal against that decision before this Tribunal. It was a decision taken on pragmatic grounds, of the sort that in our submission Regulators must be free to take if they are sensibly to allocate their limited resources.

IMS seek now to submit that the case closure decision constituted both an express non-infringement decision in relation to the Chapter II prohibition but also an implied non-infringement decision in relation to the Chapter I prohibition. Now, you have heard detailed submissions from Ofcom and, I say again, I will not repeat those but if I may, and if it would assist, I will just add three short points on the argument that the case closure decision must be read as an implied, non-infringement decision in relation to the Chapter I prohibition.

First, it is obvious in my submission that the investigation still had a considerable distance to run had Ofcom decided to continue to devote part of its resources to it there was a lot of work still to be done. The points set out in Red Bee's submissions dated 16th June 2006, which we have put before the Tribunal as an annex to our statement of intervention, and for your note – I do not think there is any need to turn it up now unless you want to – the statement of intervention is at tab 13 of the documents' bundle, and annexed to our statement of intervention is that submission.

Of course, it is Red Bee's submission that Ofcom could not lawfully have decided that the BBC contract infringed the Chapter 1 prohibition. The submissions of 16th June show the sort of arguments which Red Bee would have developed and, indeed, the BBC would have developed, and continued to put to Ofcom if the investigation had continued towards a statement of objections.

However, on the basis of the evidence before the Tribunal in this case, the witness statement of David Stewart, we have to accept that Ofcom in June 2006 was not yet persuaded that there were no Chapter I concerns. Again, there is no need for you to turn it up, I know you have looked at David Stewart's witness statement at considerable length, but for your notes, for example the final sentence of para.68 on p.32 makes this point.

Equally, Ofcom continued to receive additional submissions from IMS which, according to David Stewart, raised issues which would have necessitated further work, and I refer again for your note to para.79 on p.35 of the witness statement. In my submission, therefore Mr. Hornsby is wrong to seek to characterise what Ofcom were saying about the further work that they would have to do as suggesting they would have to repeat the Channel 4 work; that is not what was being said and obviously would not have been sensible. Different work would have been needed to progress the BBC investigation.

All this shows that Ofcom was right to consider that they were very far indeed from being in a position to issue a statement of objections, let alone an infringement, or indeed a non-infringement decision. Thus in contrast to the situation which was before the Tribunal in *Claymore* this was not a case where – to use the words of the Tribunal there – "no stone was left unturned". There were many stones still to be turned and turning them over could have revealed all sorts of different things.

My second point is a very short one; it is something that Mr. Hornsby alluded to in passing this morning, but I think in a slightly different context, and it is this: in my submission it is noteworthy that David Stewart's witness statement records at several points that there was disagreement within the team. Mr. Hornsby referred you this morning to para.52, but for your note you will also find record of some disagreement at paras. 53, 59 and 86B. The short point is simply that the parallel with the *Cityhook* case is, in my submission, apparent here and in this respect as indeed it is in other respects in this case.

THE CHAIRMAN: Well "disagree with in the team" only takes one so far in that if Mr. Stewart had actually made up his mind and had got whatever authorisation he needed to issue a non-infringement decision there may still have been case team members who disagreed with that, but that would not stop there from being an appealable decision.

MISS STRATFORD: Of course, madam, I entirely accept that as indeed I must, but Mr. Stewart set out in his witness statement the systems that exist within Ofcom, I am not the person who is best placed to address you on those but we can see that there is a careful hierarchy as one would expect, and I am sure Mr. Stewart would take all of the views and representations of his team into account very seriously, and I simply make the point that there are a number of references to the fact that there were differences, not to say disagreements between the people who were working on this case.

The third point, if I may, is to say a few words about commitments, about which we have heard quite a lot this morning from Mr. Hornsby. It seems to me that it may assist the Tribunal if I make clear Red Bee's position in relation to commitments.

The account given in David Stewart's witness statement accords with Red Bee's recollection and understanding of what took place and accordingly, although the possibility of a formal offer of commitments was discussed, commitments were not entered into in this case. In my respectful submission the crucial point for the purpose of the issue which you have to decide in the case before you today is that Ofcom never decided whether or not to accept any commitments that might have been offered, and thus unlike the position in *Pernod*, no implied, non-infringement decision can be taken from Red Bee and the BBC's unilateral decision to reduce the term of the BBC contract.

Contrary to what I understood Mr. Hornsby to be saying at some point this morning, in my submission it cannot be right that whether or not there was some change in behaviour by the parties who were the subject of an investigation by Ofcom, is in some way determinative of whether there is an appealable decision.

Mr. Anderson has already shown you the detailed procedure for the offering and acceptance of commitments which is set out in the OFT's Guidelines (tab 29) in particular at paras. 4.16 to 4.23, and there is no need to go back to those unless you wanted to. The point I would make is that the fact that Ofcom was at one stage prepared to consider the reduction in term as an offer of a commitment does not tell one anything about whether if formal commitments had been offered they would have been accepted.

The Guidelines, and the procedure as set out in the Guidelines, show in particular that there is a detailed procedure for the offer and acceptance of commitments, and that this includes the giving of notice of the proposed commitments to interested third parties, such as, of course, IMS, and consulting on those proposed commitments. As has already been alluded to this was something which, for commercial confidentiality reasons, Red Bee and the BBC were not prepared to countenance in this case. Mr. Hornsby, I believe, talked about

"embarrassment" this morning and with respect that is not a fair characterisation of what went on; there were commercial confidentiality reasons and that is one of the reasons why the formal commitment process was not pursued. What I want to emphasise is that commitments were not given and instead Red Bee and the BBC unilaterally amended the contract, and that this was at some commercial risk to the parties. I say that because there was no guarantee whatsoever as to how this would affect the Ofcom investigation.

Of course, I want to be careful and I do not want to stray into giving evidence, which I cannot do – and you have no evidence before you from Red Bee, indeed no provision was made for Red Bee to serve any evidence for the purpose of this hearing – but as Mr. Anderson has already emphasised, and contrary to what Mr. Hornsby has asserted speculatively – and it can only be speculation – there is no evidence before you of anything like a deal or anything of that sort. I do think it is important for the Tribunal to bear in mind that with hindsight it is very easy to view the decision that Red Bee and the BBC took in the light of what we know eventuated. Of course, at the time matters appeared very different to the parties concerned.

Just as a footnote on commitments, and this is my last point, I would just note that if there had been any commitments given, and of course I stress that there were not, but if there had been any appeal against commitments would be determined not on the merits but applying same test as would be used on Judicial Review; I refer to para.3A of Schedule 8 to the Competition Act. Mr. Hornsby thinks it is 3B. I can check, but I think it is 3A. Those are my submissions madam.

THE CHAIRMAN: I did not quite understand that last point about commitments being appealable on a Judicial Review test?

MISS STRATFORD: Madam, it is simply this, for at least some of Mr. Hornsby's submissions to you I understood him to be submitting that what had in fact happened here was a formal process of commitments and that it was a pretence to suggest that it was anything else. I simply think it is useful for the Tribunal to bear in mind that even if that had been the case, which it was not, any appeal from such an acceptance of commitments would not be an appeal on the merits, it would be by way of Judicial Review, albeit before this Tribunal, not in the administrative court. It would not be a full merits' review.

PROFESSOR STONEMAN: Can I ask you about the balance of risk and the commitment involved in a unilateral change in the contract and an offer of commitments. Commitments, once agreed upon, cannot be changed. A unilateral change in the contract can be reversed at any time and therefore there is no risk in offering a unilateral change of contract because if

you do not get the required response from Ofcom, you can always put it back to what it was originally.

MISS STRATFORD: I may perhaps been less than clear by using the expression "unilateral" which I think we have all been using but of course it is important to remember that this was a contract between two independent parties, Red Bee and the BBC, and to achieve the reduction in term – again I do not want to give evidence and, indeed, I was not instructed in the case at that point ----

PROFESSOR STONEMAN: No, I am not asking you to give evidence.

MISS STRATFORD: -- but to achieve the reduction in term we can see from Mr. Stewart's evidence that it was a process that apparently lasted over some time, and it is ----

PROFESSOR STONEMAN: But the evidence does not tell us whether that was because of the discussions with Ofcom, or whether that was because the two parties to the contract had differing interests.

MISS STRATFORD: That is entirely right, but we certainly can see that it is a contract between two independent parties so to suggest that it could simply be easily switched to and fro at will in my submission is not realistic.

PROFESSOR STONEMAN: But the commitments you would have had to make to Ofcom, if you had gone down the commitments' route, you cannot reverse those.

MISS STRATFORD: I accept that the commitments, once given, in this case would be binding.

PROFESSOR STONEMAN: Thank you.

MR. BLAIR: A small point, you may not be able to answer it, but you said there was no deal or anything of that kind and of course you cannot give evidence, but someone reading all the evidence might infer that you were pretty sure with the BBC that you knew you had got Ofcom where you wanted them to be because you shrank a contract of 125 months down to 89 months when the maximum that they normally allow is 60, so you went about half way – you must have been pretty certain of your ground. Now, all that is in the evidence, but you probably cannot say anything about it.

MISS STRATFORD: Well only because (a) as I said already, I was only recently instructed in this matter so I cannot speak even from my direct knowledge of what was going on at the time. My instructing solicitor certainly could, but from my discussions it is my clear understanding that there was no certainty whatsoever about what the outcome would be. Of course, you have already the point that the reduction in term, it is perhaps not coincidental that it went back to the length of term that had originally applied.

MR. BLAIR: Thank you very much.

THE CHAIRMAN: Miss Farrell, do you want to address us?

MISS FARRELL: Yes, very, very briefly. The application to intervene on behalf of the BBC was of course made on the basis of making no duplication in relation to evidence and, indeed, legal submissions and therefore on that basis after having heard from Mr. Anderson and Miss Stratford I can of course be brief and keep to that indication we gave before.

I simply wanted to reiterate what we had said in our letter to you of 2nd October in which we indicated that in all material respects we support the account of the history of events leading up to the case closure decision as set out in the witness statement of David Stewart, and we accept those as accurate – they are an accurate account of how the CCD was reached. On that basis therefore we adopt and endorse the legal analysis put forward both by Ofcom and indeed supported by Red Bee and therefore consider that there is very little that we can add. Simply to reiterate, as I have made clear, we accept the account of events in the witness statement of David Stewart. It is very clear – the last point that was raised by the Tribunal – that there was no certainty in relation to the offer being made by the BBC and Red Bee, and it was very unclear what response would come from Ofcom.

Thank you.

THE CHAIRMAN: Mr. Hornsby, I think.

MR. HORNSBY: (no microphone) Is it on now? I am very sorry. I was just saying that I thought that I hears a formulation of the floodgates' argument from Mr. Anderson to the effect that if IMS were right in this matter then Ofcom would have to take on a lot of cases and pursue to the bitter end a lot of cases that were not worth the effort. Could I just briefly refer you in this connection to *BetterCare*, in tab 1 of the authorities' bundle – para.58; I will just read out the relevant section: "According to the Director, if Bettercare's arguments were accepted ..." and this is a quote from the Office of Fair Trading:

> "... 'the effective operation of the Act would become almost impossible' because of the large volume of complaints. The Director would be forced into only rarely rejecting complaints, or limiting the reasons for rejecting a complaint, for fear of creating an appealable decision. Either development would be contrary to good administration."

Now, that submission was dealt with later on by the Tribunal in para.97:

> "More generally, we are somewhat sceptical about the Director's 'floodgates' arguments. We are deciding the present case on its own facts. We are not deciding any other case. We suspect that in many other cases it will turn out that, unlike in this case the Director has not in fact made a decision whether the relevant

> prohibition has been infringed. Even in other cases where for some reason he decides the Act does not apply, in many instances the answer will be so obvious that no-one is likely to invest time and money in bringing an appeal."

Now, we would say that none of Mr. Anderson's fears or apprehensions are relevant in this case because we are only looking at the facts of this particular case and in deciding whether there was an appealable decision in this case – you are deciding only this case, you are not deciding any other case.

Turning now to the substantive points for the last time. Can I just refer you to tab 12, and this picks up the point made by the Tribunal in one of its questions. I guess perhaps you could characterise the issue as being one of causation – why was the file closed? Was it because there was a material change in behaviour, or was it because of administrative priority, or was it some kind of equilibrium between the two whereby if an agreement is reduced and is less of an infringement then the weight to be attached to other administrative priorities is greater.

If you turn to para.42 of Mr. Stewart's witness statement, three quarters of the way down you will see the following sentence: "Sarah Turnbull stated that the case team would need to be convinced that the contract ..." and I think this must mean the contract as amended, "... caused no competition problems and therefore that a statement of objections was not necessary." No mention at that point about administrative priority – simply that what Ofcom wanted to hear about from the BBC and Red Bee was some change in its behaviour, or some change in the duration of the contract that would remove the problem.

That point is reiterated going forward by Polly Weitzman, if you go to paragraph 65 in the witness statement. Half way down it says:

> "Polly Weitzman, general counsel for Ofcom summarised if there was no amendment to the BBC contract then Ofcom was likely to proceed to a statement of objections. However, if the contract was amended, and that amendment following the investigation answered the competition concerns then Ofcom could consider moving towards a case closure or a non-infringement decision."

Well what it actually did was the first of those two, it closed the case, and we say it is absolutely clear that this was because the competition concerns of Ofcom were fully addressed by the alteration in the contract.

Going on to para.79, this was a question raised by the Tribunal, all the extra work that needed to be done on the contract of seven and a half years. Well, if after an investigation has been open for over a year, and all Ofcom's timetables have gone out of the window, and

one reaches the point that after one year or more of an investigation being opened there is still a substantial amount of work that needs to be done, one is almost in despair of Ofcom ever being able to reach a decision that an infringement has occurred. In this connection I refer you for the first time to the decision itself. If you go back to the Channel 4 decision, tab 4.1 – there is a section called "Ofcom's Investigation" that begins on p.10. There is initial concern about foreclosure which must include looking at the contracts cumulatively, and over the next two pages over 20 items describing what Ofcom did – a very full and thorough investigation in which all elements of market structure, accumulation, bidding markets, countervailing power would have been necessarily examined.

Going forward to para.82, p.37 of Mr. Stewart's witness statement, I will just read out the key sentence:

> "Put simply at 10 years 5 months I thought that the agreement was likely to merit a finding of infringement, albeit that no final decision had been made ...",

presumably no final decision had even been made to send a statement of objections.

> "... at 7 years 5 months I was open to persuasion that it was not an infringement but the material I had seen was not persuasive and in some material respects further work needed to be done."

I just ask the Tribunal one question: how is that not a decision that on the material before them Ofcom had no means, or no basis for taking a non-infringement decision? We think the answer was absolutely clear, there was not enough there at seven and a half years to send a statement of objections. Sarah Turnbull's point, mentioned in para.42 was that their concerns have to be addressed fully and by then being fully addressed that means there is no case for them doing a statement of objections. In our submission seven years and five months is clearly a case, on Mr. Stewart's own evidence, where there was not an infringement decision.

The Tribunal raised a question as to why it was the case was closed? Was it administrative priority, or was it because of a material change in behaviour? We know that there is an alternative third way, if you like, whereby there is a change of behaviour and suddenly it does not become quite so necessary to devote all the resources to it. I think that is quite a convenient way of formulating it, it is rather a convenient way also to formulate a situation to say that one's concerns are reduced, albeit not removed, in our submission this is pure 'word-smithing' What basically happened here was that, as Sarah Turnbull's statement shows (and Polly Weitzman confirms) a unilateral change of behaviour, call it whatever you want, took place, and as a result of which the file was closed. If there had been real

concerns about administrative priority you would have expected them to have manifested themselves really rather earlier than they did. Mr. Stewart's affidavit asks us to consider as plausible the fact that in one week between this offer being made and it being accepted, and the file being closed it had become so apparent that it was not worth devoting resources to the matter, that there was only one possible way of dealing with the situation.

The next thing that we are invited to believe is that despite the fact that there was no reason to carry on looking at the BBC contract, there was still time to write an 80 page decision in respect of the Channel 4 contract – why was this necessary if administrative priorities pointed in the direction of leaving the case entirely on one side? In our submission had it been the case that there were real administrative constraints the Channel 4 ought not to have been taken at all, there ought to simply have been a case closure in relation to that as well.

My learned friend talked about Judicial Review and this bifurcation – I think it was actually *Claymore* that used the word "bifurcation". It is a substantive rather than a procedural point but it goes really quite a long way. What the court was saying at that point was that when an argument has absurd consequences if accepted there ought to be a gravitational pull against you accepting it. We say that it is absolutely absurd for IMS to have to take a Judicial Review proceeding in respect of the BBC contract whereas before this Tribunal there is a full appeal on the merits.

Finally, and this is the last point, commitments: Mr. Anderson did not read out the key bit, and I did ask him to do so and he did. The key element in the OFT's Guidelines is that competition concerns must be fully addressed, and in our respectful submission we have not yet had a satisfactory explanation as to why Ofcom thought that this was a commitments' case and, if that was the case, why its competition concerns were not fully addressed by the amendment made.

Finally just a couple of comments on the Red Bee submissions. In the letter that was annexed to the statement of intervention Red Bee raised a very interesting and important legal point, namely whether or not in circumstances such as this a door is opened or not w when a contract is entered into pursuant to a business sale. In other words, when you are looking at an issue as to whether competition is restricted or not the counterfactual is what would happen if vertical integration continued or not. In our submission that is an extremely important legal question on which there is really quite clear guidance in the vertical guidelines and that guidance is not of any assistance to Red Bee. It is a point of considerable importance and it would be a somewhat unfortunate consequence of this case if there were no opportunity here to ventilate that point. That is not the main submission

that we make in relation to these matters. Our main submission is really simply this, that there is no case that Mr. Anderson has been able to point to which would authorise the kind of treatment of a complaint in relation to one issue of market foreclosure; there is not one single instance where he is able to point to a bifurcation of approach and a file closure in one part and a formal decision in another part.

Unless the Tribunal has any further points those are my submissions.

THE CHAIRMAN: Thank you very much, Mr. Hornsby. Thank you to everybody for your written and oral submissions. We will now go away and consider our decision and you will be notified in the usual way as to when that will be delivered. Thank you very much.

(The hearing concluded at 4.15 p.m.)