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**IN THE COMPETITION**

Case No. 1107/4/10/08

**APPEAL TRIBUNAL**

Victoria House  
Bloomsbury Place  
London WC1A 2EB

Wednesday, 3<sup>rd</sup> December 2008

Before:

THE HONOURABLE MR JUSTICE BARLING  
(President)

MICHAEL BLAIR QC  
PROFESSOR PETER GRINYER

Sitting as a Tribunal in Scotland

BETWEEN:

**MERGER ACTION GROUP**

Applicant

and

**THE SECRETARY OF STATE  
FOR BUSINESS, ENTERPRISE AND REGULATORY REFORM**

Respondent

- supported by -

(1) HBOS PLC  
(2) LLOYDS TSB GROUP PLC

Proposed Interveners

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**CASE MANAGEMENT CONFERENCE**

## **APPEARANCES**

Mr. Ian Forrester QC and Mr. Andrew Bowen (instructed by White & Case and Mr. Walter Semple) appeared for the Applicants.

Mr. Paul Harris and Miss Elisa Holmes (instructed by the Treasury Solicitor) appeared for the Respondent.

Mr. Nicolas Green QC and Mr. Aidan Robertson (instructed by Allen & Overy) appeared for the Intervener HBOS plc.

Miss Helen Davies QC and Mr. Andrew Henshaw (instructed by Linklaters) appeared for the Intervener, Lloyds TSB Group plc.

1 THE PRESIDENT: Thank you very much for coming at such short notice. Mr. Forrester, you  
2 made it across the Channel?

3 MR. FORRESTER: Yes, indeed.

4 THE PRESIDENT: Well done! We have obviously got a few things to get through, perhaps the  
5 first thing I could do before any of you leap to your feet is to just tell you where we have  
6 got to on the question of possible conflicts of interest and what we think are the resolutions  
7 to the problems. First, all three of us have got wives and all three wives have got some  
8 shares, two of our wives have shares in HBOS and one of us has a wife with shares in  
9 Lloyds TSB. The amount of shares vary – I think my wife’s shares are worth about £500  
10 as far as I can gather at the moment; they were worth considerably more at one time!  
11 (Laughter) As I say the amounts vary, they are all relatively small amounts, but we have  
12 come to the conclusion that probably they ought to be sold and I am only mentioning this  
13 now in case people think that that might be an advantage and so you can make any  
14 observations you like basically. But all our wives are willing, with varying degrees of  
15 reluctance, to part company with their shares.

16 If I just mention the other matters that we should disclose. Mr. Blair has an account with  
17 HBOS. Professor Grinyer and his wife have cash ISAs with HBOS, and my wife and all  
18 my children have current accounts with Lloyds, and it may be that my wife has a joint  
19 deposit account with Lloyds which therefore I might also be an account holder, I am not  
20 quite sure! (Laughter)

21 Finally, Mr. Blair’s father, who passed away some 10 years ago, was a director and a board  
22 member of what was then the Bank of Scotland in the 1960s, possibly extending in to the  
23 1970s, he was a non-executive director because he was a lawyer in private practice in  
24 Edinburgh.

25 That, as far as we know, is the extent of things that we ought to disclose to you. Does  
26 anyone have any observations or objections on any of that?

27 MR. FORRESTER: Sir, the Merger Action Group would say it is entirely immaterial from our  
28 point of view, we would certainly not consider it appropriate or necessary that any shares  
29 should be sold, particularly at this time of year, and we also are entirely untroubled by the  
30 fact that people on the Tribunal have bank accounts, which is perfectly normal. We see no  
31 obstacle whatever in anything that has been put before us.

32 THE PRESIDENT: Thank you.

1 MR. GREEN: Likewise, we take the view that disclosure by the Tribunal in terms is perfectly  
2 sufficient in all respects. You have disclosed the matters now transparently in the public  
3 domain and that, so far as we are concerned, is sufficient.

4 THE PRESIDENT: Thank you.

5 MISS DAVIES: That is also the position of Lloyds.

6 MR. HARRIS: Sir, the Secretary of State has no observations.

7 THE PRESIDENT: Is there anyone else who might be an intervener who might have an  
8 application. I do not know whether Sir George Mathewson is present or represented here?  
9 (After a pause) Apparently not. We will obviously have to make our own minds up then  
10 about what to request our wives to do, but thank you very much for your observations on  
11 that.

12 What I would propose to do next is to deal with the items that we need to deal with in  
13 roughly the order in which they appear in our letter to the parties and the applicant on 1<sup>st</sup>  
14 December. Thank you all, those who have put in written comments that is very helpful.  
15 The first item there is the question of the standing of the applicant, which of course is an  
16 unincorporated association recently formed. When the application was lodged we did not  
17 have any names. We now do have a document, which I assume everyone has, the  
18 Agreement setting it up, which does contain some names.

19 Mr. Forrester, obviously from a practical point of view the importance of this – leave aside  
20 the pure question of standing at the moment – but obviously there are issues that could  
21 arise such as costs issues which mean it is obviously a matter of some importance that we  
22 know who the applicants are, because obviously the unincorporated Association, although  
23 conveniently called “the Applicant”, the applicants are in fact the members of the  
24 unincorporated Association. Can we assume that all the people whose names appear at the  
25 end of that document are members of the Merger Action Group.

26 MR. FORRESTER: Yes, the Tribunal can so assume. There are six members, one is an  
27 architect, two are property developers, two are in financial services and one is a property  
28 manager. They are citizens who are businesses who have an interest in the maintenance of  
29 choice in the banking sector.

30 THE PRESIDENT: Are any of them shareholders? Is that something that ----

31 MR. FORRESTER: In the banks?

32 THE PRESIDENT: Yes.

33 MR. FORRESTER: One or two of them are, Sir, yes.

34 THE PRESIDENT: None of them are employees, I take it?

1 MR. FORRESTER: That is correct.

2 THE PRESIDENT: Would you happen to know whether any of your membership includes  
3 employees of the banks?

4 MR. FORRESTER: There are two categories of persons, the members, the six whom I have  
5 mentioned and there are about 500 what we are calling “supporters” persons who have  
6 expressed anxiety about the merger and a number of these are, so I am told, employees of  
7 one of the merging banks.

8 THE PRESIDENT: Right. We have not heard what submissions are going to be made, but there  
9 have been some submissions in writing. The statements you have made may or may not  
10 have assuaged some of the concerns that were ventilated. Our provisional inclination is to  
11 roll the question of standing over so that it was dealt with as part of our consideration of  
12 the merits – apart from anything else the merits is a factor very often in dealing with  
13 standing, and I will hear anyone else on that now, but that is what we would provisionally  
14 propose to do now that you have identified some of the people who are members.

15 MR. FORRESTER: Yes. In our submissions we will give some more particulars for the  
16 convenience of the Tribunal to get an idea of the broadness of the base of the concern.

17 THE PRESIDENT: Yes, well perhaps we had better just hear from the other people concerned.  
18 I am going to assume at the moment that HBOS – we are obviously in due course going to  
19 deal with interventions by HBOS and Lloyds and there is no objection to any of those two  
20 at any rate becoming parties, so I think you can assume that is what will happen.

21 MR. HARRIS: Sir, yes, as regards intervention I understand it is to be common ground between  
22 the four people represented today that the two interventions should be granted. There is a  
23 different issue regarding Sir George Mathewson, and no doubt we will come on to that in  
24 due course.

25 On the issue of standing the Secretary of State’s position is that we still do not have  
26 sufficient information upon which to make proper submissions regarding standing  
27 properly so-called, and that it would be insufficient only to receive further information in  
28 my learned friend’s skeleton argument potentially due on Friday evening. We would need  
29 to be provided as a minimum very, very promptly by which I mean first thing tomorrow,  
30 with further factual information regarding what I have just said so as, for example, it has  
31 come as news to me that there are two categories of member – I had no idea. It is news to  
32 me that some 500 of them are characterised as supporters, I would like to know more about  
33 that, so that will inform whether or not to take standing points and how to put them

1 I also would like, Sir, if I may, to just draw to our attention, attached to my skeleton  
2 argument for today a MAGs press release of 29<sup>th</sup> November. There is possibly no need to  
3 turn it up, but if you do have it to hand, this is one of the few sources of information that  
4 the Secretary of State does have regarding the constitution and membership and other  
5 standing of MAGs, and that refers in its first line to it being “A group of businessmen,  
6 customers account holders and shareholders. “ Now plainly, the degree and extent to  
7 which either the six members or the 500 so-called supporters fall into one or other of those  
8 categories has a material bearing upon the question of standing. So what we need urgently  
9 from the applicants is an explanation of the two categories and what precise interests they  
10 are each said to have by reference at least to the four categories that MAGs themselves use  
11 in their own press release, and it is only with that information that we can then take an  
12 informed decision as to how or if to take a standing objection in our skeleton argument on  
13 Friday night.

14 As to your suggestion, Sir, with respect, we agree to the “rolled-up”. If, in the event, that  
15 that information is provided and we do wish to take a standing objection or, for that matter,  
16 my learned friends for the banks wish to take an objection then that could be dealt with as  
17 one of the issues at the substantive hearing.

18 THE PRESIDENT: Thank you, Mr. Harris. Mr. Green?

19 MR. GREEN: Just a few points, so far as the MAG agreement is concerned, it defines  
20 membership in clause 1.2 as “open to companies and partnerships of all kinds and  
21 individuals who are parties to this agreement”, so as we understand it there are potentially  
22 six applicants, the so-called group of supporters are not applicants. It has to be determined  
23 by reference to the contract which governs the application. We certainly and strongly  
24 endorse the Secretary of State’s submission that the precise capacity of each of those six  
25 individual should be identified, we need to know whether they are shareholders or account  
26 holders, or are simply interested and concerned individuals. Indeed, in the application of  
27 the applicant, under the heading “Standing” at para.10 they make the correct point that  
28 what is of sufficient interest is a question of fact and degree in light of the circumstances of  
29 the applicant.

30 Now, we have been given no details of that whatsoever. We will not be in a position to  
31 make written submissions on Friday unless we have information of a precise nature in  
32 advance and we would endorse the submission that they should provide either a statement  
33 with the authority of a solicitor, or a witness statement or affidavit explaining their capacity  
34 in double quick time. I am not sure it extends to the so-called group of concerned

1 individuals because, so far as we are concerned, they are not applicants, just the six named  
2 individuals are.

3 THE PRESIDENT: Miss Davies?

4 MISS DAVIES: Sir, can I make a further point following upon Mr. Green's point. The  
5 constitution provides membership shall be open to companies and partnerships, and the  
6 website for the Merger Action Group advertises that and makes clear that membership is  
7 open to all suitably affected, so it is not at all clear to us that this is a closed class – there  
8 may be additional members joining and obviously insofar as additional members do join at  
9 any time they should be identified absolutely promptly and the same information provided.  
10 The second point as regards the supporters is that the website also makes clear that  
11 supporters are being asked to donate to a fighting fund to support this litigation and we  
12 obviously reserve our position about the position of those supporters obviously insofar as  
13 questions of costs, etc. arise.

14 THE PRESIDENT: Mr. Forrester, I think we have considerable sympathy with those requests, I  
15 think it is really going to be necessary to know what the interests of the six are, but also to  
16 know whether there are any other members now and, if so, the same details about them.

17 MR. FORRESTER: Sir, that is perfectly reasonable and that will be forthcoming. I will consult  
18 as to whether it is tomorrow or Friday morning, but there is no difficulty on our part in  
19 furnishing a list of the six with further details of their interests.

20 THE PRESIDENT: Maybe the six could be done rather sooner – I do not know whether that  
21 could be done today, done informally now? But obviously it would be helpful if it could  
22 be.

23 MR. FORRESTER: Can I just take instructions on that?

24 THE PRESIDENT: Yes.

25 MR. FORRESTER: (After a pause) With a copying machine we will supply that information  
26 before nightfall, in other words, at the end of the proceedings.

27 THE PRESIDENT: It may be at some point – when we get to the end – we can rise and provide  
28 facilities probably here for you to copy it and then there may be an opportunity for people  
29 to comment at that stage. All right, thank you, so we will leave standing over then for now.  
30 As far as interventions are concerned we will in due course provide an order giving  
31 permission for HBOS and Lloyds TSB to be allowed to intervene. Does anyone have any  
32 observations about the brief application from Sir George Mathewson?

33 MR. HARRIS: Sir, yes, the Secretary of State does, and they are briefly as follows, that Mr.  
34 Mathewson, it seems, has had the opportunity since the application was lodged last Friday

1 to demonstrate that he has additional legal grounds worthy of being ventilated, and he does  
2 not appear to have taken that opportunity. The only information we have from him in  
3 support of his application to intervene is this short, one page manuscript letter, and just  
4 quoting from that it seems to say that the basis of his intervention is: "... on the basis that  
5 ...” and I paraphrase, the government failed to take account of various alternatives. So that  
6 appears to be the legal contention that he wishes to make, failure to take account, as a  
7 group of public law judicial review, but that falls squarely within the remit of Mr.  
8 Forrester’s application on behalf of the so-called Merger Action Group and on that basis  
9 there seems to be no good reason why he should be allowed to intervene on the basis of the  
10 materials that he has so far put in.

11 Sir, if I could just add briefly, that it is certainly clear to me on behalf of the Secretary of  
12 State what Mr. Mathewson’s position is in any event, because in support of the Notice of  
13 Appeal at tab 29 of the bundle, there is a full text of a letter to Lord Stevenson co-authored  
14 by Mr. Mathewson. There is no need for us to go through that now, but there are four or  
15 five occasions within the text of that letter in which Mr. Mathewson makes the point about  
16 failure to consider alternative plans. So with respect we know what he has to say about  
17 that, and that seems to be the only thing that he wishes to say in his proposed intervention.  
18 We would be concerned about, given the expedited nature of this proceeding in any event,  
19 for lack of a better word, “cluttering” it up any further, and if, Sir, you were minded to give  
20 permission to intervene in any event then we would respectfully suggest that that should  
21 only be on the basis of written submissions.

22 THE PRESIDENT: Does anybody else want to make any comments?

23 MR. GREEN: We endorse that entirely.

24 THE PRESIDENT: Miss Davies? Mr. Forrester?

25 MR. FORRESTER: Given the exceptional distinction of Sir George, we would welcome what he  
26 would have to contribute to these proceedings.

27 THE PRESIDENT: Of course, he can contribute through you, can he not?

28 MR. FORRESTER: Indeed he can.

29 THE PRESIDENT: Thank you.

30 (The Tribunal conferred)

31 THE PRESIDENT: I think what we will do about Sir George Mathewson’s application to  
32 intervene is just stand it over. He is not here, he has not sent anybody to pursue it. We do  
33 not close him out but just stand it over. I think probably we would be fairly unsympathetic  
34 to any material that is simply going to duplicate what Mr. Forrester and his team is going to

1 be submitting on behalf of the applicants, and it does seem, as Mr. Harris says, the main  
2 point that Sir George Mathewson wants to get over is a point that is already being argued in  
3 the application, so we will not decide it we will just leave it for the moment.

4 MR. HARRIS: Sir, in that regard, I am assuming that Sir George will not be invited to put in any  
5 form of written submissions by what the parties are currently envisaging will be a Friday  
6 night deadline this week? On your current approach, Sir, he does not have permission to  
7 do so and we would not invite you to give any such permission. It also occurs to me, Sir,  
8 that if he did feel he had additional further points and he did want some kind of formal  
9 status before this Tribunal there seems to be no reason at all why he could not just become  
10 an applicant; membership is open to him, one assumes, under the terms of the constitution.

11 THE PRESIDENT: It may not make much difference either way. It may be that it would be  
12 appropriate to write to Sir George telling him what has happened here and with a courtesy  
13 copy of the order that is going to be made, or the crux of the order, and we will leave it at  
14 that.

15 That takes us on to expedition and the timetable. We have already indicated how we see the  
16 matter progressing. There is obviously a great deal of urgency if we are going to reach a  
17 decision on the application before the HBOS meeting which is a week on Friday. As we  
18 say in our letter, we envisage the hearing taking place on Monday and/or Tuesday. Can I  
19 take the views of you all as to an estimate of time. It seems to us that about a day is  
20 appropriate, but there was a hint in someone's written submissions that implied something  
21 longer was contemplated.

22 MR. FORRESTER: From the point of view of the Merger Action Group, Sir, we would say that  
23 a day should be plenty. As we have indicated in our application the issue is a narrow one  
24 and we do not think it is necessary to make a great meal out of it.

25 MR. HARRIS: Sir, one day the Secretary of State feels is adequate for this application.

26 MR. GREEN: Yes.

27 MISS DAVIES: We agree.

28 THE PRESIDENT: I think what we would like to do is to start on Monday with a view to  
29 finishing at lunch time on Tuesday, because obviously the more time we have in advance  
30 of the meeting which is taking place a week on Friday the better. So subject to any further  
31 comments we would like to start at 12 o'clock on Monday, that will give us a bit more than  
32 a day, if we finish at lunch time, and we could even flex a bit in order to start half an hour  
33 earlier if it was thought necessary. If we start at 12 on Monday and finish at lunch time on

1 Tuesday that would be, as I say, subject to any further observations, that is what we would  
2 propose.

3 That brings us on to the logistics. There is obviously some discussion in the written  
4 material that we have been sent about venue and forum, and touching on that we have  
5 received, and I hope you have now seen, a letter from Mr. Swinney, the Cabinet Secretary  
6 for Finance and Sustainable Growth in the Scottish Government. It is a letter which is  
7 dated yesterday and has a number of attachments including a letter from the Rt. Hon. Alex  
8 Salmon, Member of the Scottish Parliament, First Minister of Scotland to Mr. John  
9 Fingleton, Chief Executive of the OFT. I hope everyone did get that letter – I only saw it  
10 today – in which Mr. Swinney makes some observations as to the appropriate venue.  
11 There are, of course, as everyone knows, two issues. There is the question of the forum,  
12 and there is the question of venue. Provisionally, it seems to us that the logistics demand  
13 that whatever forum is determined that the venue will be here, because time is of the  
14 essence basically and I am afraid to lose the time that would inevitably be lost by travelling  
15 to, setting up, and travelling back from Scotland, when our logistics are here I am afraid we  
16 just have not got the time, bearing in mind the constraints on us to reach a decision by the  
17 time I have indicated.

18 So the venue, again subject to anything that anybody wants to say, it seems to us, will be  
19 here. I am leaving aside forum at the moment, does anybody want to make any  
20 observations on that before we move on?

21 MR. FORRESTER: Yes, Sir, I would like to make some brief remarks. In the Tribunal's  
22 decision in *Aberdeen Journals v The Director General of Fair Trading* in October 2001 the  
23 Tribunal's judgment looked at the submissions that had been made to it against going to  
24 Scotland to hear an argument, and the Tribunal said:

25 "The objection to going to Scotland for the hearing is essentially based on the  
26 extra cost which would be involved. That would be the cost of travel to Scotland,  
27 the cost of travelling time, and there might be some slight extra cost in terms of  
28 parties communicating with their other offices. But we do not regard those  
29 considerations as in themselves decisive. ...

30 What seems to us to be important on the question of where this hearing is actually  
31 heard is the general consideration that, in our view, the centre of gravity of the  
32 Competition Act should not be seen to be London in all cases. Although in some  
33 respects London is the centre of the legal community as far as competition law is  
34 concerned, this Act applies throughout the United Kingdom and there will be

1 many instances where particular regional or local issues arise. In principle, we  
2 think it is right to, as it were, ‘bring justice to the people’, and to hold the hearings  
3 where appropriate in a place where the public concerned is likely to have some  
4 interest in the proceedings. In this particular case the public concerned is the  
5 public in the Aberdeen area and it is unlikely that any member of that public  
6 would be sufficiently interested to attend any hearing in London. ... We do not  
7 regard the slight extra expense of taking that course as outweighing the general  
8 considerations which I have already mentioned. In all respects it seems to us this  
9 is predominantly a Scottish case and if this is not a Scottish case it is hard to see  
10 whether there ever will be many Scottish cases. On the principle of bringing law  
11 as close, as it were, to the ground as possible, we think it right in this case to  
12 exercise our discretion and to hold the hearing in Scotland.”

13 Now, we have received with interest the submissions of my learned friends in this case, and  
14 I think that there is a mingling of the question of forum and the question of jurisdiction  
15 which, as you pointed out, are two separate issues. I remind you that the scheme of  
16 arrangement governing the merger of the banks is under the jurisdiction of the Court of  
17 Session.

18 THE PRESIDENT: Mr. Forrester, are you making submissions now about what we call  
19 “jurisdictional forum”, because I am only dealing with venue at the moment.

20 MR. FORRESTER: Yes, indeed, my apologies.

21 THE PRESIDENT: I accept entirely what was said in *Aberdeen Journals*, and cost is simply not  
22 an issue here, it is simply a question of time.

23 MR. FORRESTER: Yes, let me begin by saying the members of the group would very much  
24 like that the argument should be heard in Edinburgh because there is a lot of public interest  
25 and people would be likely to attend in Edinburgh, and they would not take the trouble or  
26 go to the expense of coming to London to hear and that is not a trivial consideration that is  
27 an important consideration. There should not be an assumption, and I am delighted to see  
28 that you do not make such an assumption, that because my adversaries are members of the  
29 English Bar, who are admirable, their choice should determine either where the Tribunal  
30 sits or what jurisdiction applies, where the centre of gravity of the dispute is. I am  
31 instructed that if it would be of assistance to the Tribunal the Action Group is very happy  
32 to review with the Scottish Courts Administration and very rapidly or otherwise to find  
33 suitable location in which the Tribunal can sit and hear in Edinburgh on Monday and  
34 Tuesday.

1 THE PRESIDENT: We are grateful for that, but that is not the problem. It is not a problem to  
2 find somewhere to sit, we could go to a hotel if the worst came to the worst and do it there,  
3 that is not the issue. The issue is frankly we do not think, bearing in mind that documents  
4 are going to be coming to and fro we just do not think logistically we can set up in time to  
5 do it and get a decision out by the time we need to get a decision out; that is the bottom  
6 line, I am afraid, Mr. Forrester. It is nothing to do with the desirability or otherwise of  
7 being in Scotland. You may be right, we have not decided what is the appropriate forum or  
8 jurisdiction, we are not saying that it is not Scotland, and I hope that will be absolutely  
9 clear to your clients. We are not saying at the moment that the appropriate jurisdiction is  
10 not Scotland, we are not deciding that. We are just saying that physically we cannot do it  
11 in time if we have to spend so much time re-arranging ourselves. We think we can do it in  
12 time, just, as things are, but I am afraid we cannot just travel, a few of us – there is quite a  
13 lot of people who have to come in order for the Tribunal to set up. We have done it before,  
14 as you know, and if we had the luxury of time then it would not be a problem, and cost is  
15 not the issue, it is not as though we are trying to save any money; it really is a question of  
16 the time, and we have thought about this very carefully as to whether, if we thought it was  
17 right to go to Scotland, as to whether we could then do it in Scotland, and our unanimous  
18 conclusion – though we will hear anything people say about this, but I am not sure what  
19 could be said that would make a difference – is that we cannot do it in the time.  
20 I am very conscious, as we all are, of the interest that this issue has given rise to in  
21 Scotland, and we also appreciate that it does mean that it is going to be much harder for  
22 people who have that interest to come and hear, although subject to what is going to be said  
23 in a minute about confidentiality, there is at least a question mark over how much is going  
24 to be able to be heard by the general public – I have no idea of any detail, but it does seem  
25 at least likely from what has already passed in the documents that the Secretary of State  
26 may wish to adduce material for which we will have to go into camera, when it is being  
27 argued, and I do not know how much of the case will concern that kind of material, but it  
28 may be it will not, as it were, be such a good audience event as would otherwise be the  
29 case.  
30 So, as I say, we are very conscious of the points that you understandably make, and if we  
31 arrive at the conclusion that the appropriate forum is Scotland, it is regrettable in a way that  
32 we cannot actually in the time available get there and do it there, but I am afraid that is the  
33 problem.

1 MR. FORRESTER: Yes, well our primary desire, of course, is that the Tribunal take a prudent  
2 decision on what we filed last Friday, that is the overriding concern, and then our  
3 secondary concern would be that Scots Law be applicable. Where precisely you sit is less  
4 crucial, but as the Cabinet Secretary has said and, as I am instructed, there is a strong wish  
5 to sit in Edinburgh, that the hearing be heard in Edinburgh if that is at all possible. I do not  
6 think I can add any more. Thank you.

7 THE PRESIDENT: Thank you. Does anybody want to say anything else about venue?

8 MR. HARRIS: Sir, extremely briefly, the decisive criterion, with respect, Sir, is the one that you  
9 have identified, namely, that time is of the essence as regards venue, and it cannot be done  
10 in Edinburgh, it should be done here and, with great respect to my learned friend, of  
11 course, that has largely, if not entirely, been brought upon by the actions of the applicants  
12 themselves in delaying so long in bringing the application. So simply on the question of  
13 venue for the reason that you, Sir, have already given, we would endorse the proposed  
14 decision to sit physically here next week.

15 THE PRESIDENT: Thank you. Just for the record, of course, it is Rule 18(2) of the  
16 Competition Tribunal Rules 2003 which makes provision for the Tribunal to hold any  
17 hearing in such place and in such manner as it thinks fit having regard to: "... the just,  
18 expeditious and economical conduct of the proceedings." I think the crucial word there is  
19 "expeditious". If we are going to reach a decision which will be timely in the context of  
20 the external constraints that face the parties then we cannot afford to lose the time that we  
21 would inevitably lose if we were to move the hearing to Edinburgh, so for that reason as far  
22 as venue is concerned the venue will be here.

23 Now, where does that take us to? Can we park the question of forum or jurisdiction for  
24 the moment and see if there are any other items of the timetable. We have given an  
25 indication that skeletons should be filed by 5 pm on Friday, therefore that will be  
26 simultaneous filing of skeletons by the parties. There will be no need for any further  
27 pleadings, either by way of defence or statements in intervention or, indeed, replies.  
28 Evidence: perhaps I can take soundings about evidence, whether anyone proposes to lodge  
29 any evidence?

30 MR. HARRIS: Sir, the Secretary of State will be lodging evidence, the current proposal is that  
31 that be done as close to 5 p.m. tomorrow, Thursday, as is possible, it is work currently in  
32 progress.

33 THE PRESIDENT: Does that mean that 5 o'clock will be the latest, it probably ought to be?

1 MR. HARRIS: Well, Sir, in the extreme expedition of this case we will obviously making every  
2 effort to make sure that 5 pm is the latest, if it can be done sooner it will be, but I would  
3 hesitate in the extreme urgency of this case to give a cast iron deadline to ourselves of 5  
4 o'clock. You will appreciate, sir, as you have already intimated that there are some  
5 logistical issues arising out of what can and cannot be disclosed and to whom. That needs  
6 to be taken into account so that adds hours to the task, is what I am saying.

7 THE PRESIDENT: Yes, people should obviously have time to see it before they have to put in  
8 their skeleton arguments, so I think one should not, as it were, let perfection get in the way  
9 of what is useful. I think something should come by 5 o'clock, even if it is a draft, or it has  
10 not been able to be executed, or whatever, I feel that the practicalities are such that really  
11 the bulk of what you are proposing to put in by way of evidence should be with the other  
12 parties. We will come on to the confidentiality in a moment, but they should have it  
13 by ----

14 MR. HARRIS: Perhaps we can strike a happy compromise in the following way: we will make  
15 sure that at least those within the confidentiality ring by 6 o'clock tomorrow have a full  
16 version of the statement with any unexpurgated materials and if the only thing that is  
17 hanging over then is the logistics of making sure that expurgated and confidentiality – that  
18 may happen later in the evening.

19 THE PRESIDENT: Yes, well unless anyone disagrees my feeling is that would be the best thing,  
20 if you make that undertaking ----

21 MR. HARRIS: Yes, Sir.

22 THE PRESIDENT: -- whether we order it or not, if we get around to it, but that is the  
23 understanding, those in the confidentiality ring, which we all anticipate is going to be  
24 created will get that by 6 at the latest.

25 MR. HARRIS: Yes, Sir, and of course the Tribunal.

26 THE PRESIDENT: Thank you. Nobody else is likely to be putting in any evidence? Then  
27 coming on to confidentiality, I see that some progress has been made on what looked like  
28 very sensible arrangements for a confidentiality ring. Just before we came in we were  
29 given an amended draft order. Mr. Forrester, have you been able to see that, which is in a  
30 form which is becoming fairly standard now, providing for a ring of external counsel and  
31 solicitors as relevant persons each of whom would given an undertaking which is also  
32 annexed to the draft. Is this now in the form of an agreed document?

33 MR. HARRIS: Sir, I understand it to be agreed by all parties, yes, the version that was handed in  
34 to you and date stamped by the CAT this lunch time.

1 MR. GREEN: There were four or possibly five names to be added. The text I think is agreed. I  
2 think Mr. Forrester has four names to add to it, and we have one, but I think the substance  
3 is agreed. I would suggest if it is confirmed as being agreed in substance we can make  
4 manuscript amendments here and now and sign it before everybody leaves the building.

5 THE PRESIDENT: That would be sensible, because the only confidential document I think we  
6 are talking about I think is going to be the witness statement?

7 MR. GREEN: That is right. It would be satisfactory if it is signed today so that the document  
8 can be disclosed into the ring tomorrow without any fear or risk of disclosure to  
9 unauthorised persons.

10 THE PRESIDENT: You mean, Mr. Green, that the undertakings are signed – those who are here  
11 can sign the undertakings, can they?

12 MR. GREEN: Indeed, yes, there will be individuals who will have to sign the undertaking but  
13 those who are here and can do should do.

14 THE PRESIDENT: Yes.

15 MR. GREEN: And we can make any manuscript amendments and initial them between the  
16 parties if that is considered necessary, but whilst everybody is here it would seem good  
17 sense to make as much progress with it as we can.

18 THE PRESIDENT: I think the answer is we will not say any more about this, we will just  
19 assume that you will be doing that now. We will make the order at the appropriate time.

20 MR. GREEN: One of the solicitors will communicate the final version to you, and as soon as  
21 that can reasonably be done.

22 THE PRESIDENT: Yes. And given the nature of the case and the arguments it is highly  
23 unlikely that anyone outside this ring will need to see ----

24 MR. GREEN: I do not think there is any dispute as to that.

25 THE PRESIDENT: Thank you for that. What does that leave.

26 MISS DAVIES: Sir, may I raise one point about timing that is raised in my skeleton?

27 THE PRESIDENT: Yes.

28 MISS DAVIES: In relation to the expedition in terms of the hearing, as I indicated in my  
29 skeleton we are very keen that there should be an expeditious delivery of a ruling in order  
30 that we can have final determination of this well before next Friday and I just wanted to  
31 make that clear again to the Tribunal and to those listening, but there are obviously other  
32 factors in terms of certainty and, as I have suggested, in an ideal world I would invite the  
33 Tribunal to give the ruling at the very latest by the morning of 10<sup>th</sup> December.

34 THE PRESIDENT: Which is Wednesday.

1 MISS DAVIES: Wednesday, in order that all parties can know with certainty what the position  
2 is well before the shareholder meeting is due to take place on 12<sup>th</sup>.

3 THE PRESIDENT: Well there are three possibilities. First, that we do not manage it, secondly,  
4 that we give the result but not the reasons which may have some benefit, and thirdly, that  
5 we manage to do both.

6 MISS DAVIES: I well recognise that that timetable imposes a burden on the Tribunal and I  
7 know that my learned friend, Mr. Harris, may wish to raise some issues about how the  
8 ruling is delivered, bearing in mind the sensitivity of the issues. But certainly our absolute  
9 imperative insofar as it can be obtained is to get certainty on this well before 12<sup>th</sup>.

10 THE PRESIDENT: As I understood your written submission it would serve your purpose if you  
11 knew the result – probably everyone would prefer to have the reasons.

12 MISS DAVIES: I suspect the reasons too – I think Mr. Green’s written submission suggested  
13 the result but there are also obviously potential questions of whether this might have to go  
14 further.

15 MR. HARRIS: Sir, yes, we are conscious of the company imperatives upon Miss Davies’s  
16 clients, and the Secretary of State is also conscious of course of the burden upon the  
17 Tribunal, but there is extreme expedition in this case, and we would invite an early  
18 decision.

19 Two additional matters arise regarding timing, there is potentially market sensitivity about  
20 the decision that is reached, and I would just like to float – but no more at this stage – that  
21 consideration perhaps ought to be given by the Tribunal to literally the timing of the  
22 handing out of any decision, whether for example it be within market hours or outside  
23 and/or whether it should be communicated to parties confidentially first; none of that arises  
24 for decision today but we respectfully suggest it ought to be borne in mind.

25 I have another point regarding the question of potential appeals, I am happy to mention that  
26 now or ----

27 THE PRESIDENT: Just before you leave the market sensitivity point, you might as well tell us  
28 now if you have a view on when it should be delivered, or when it should not be delivered,  
29 you might as well tell us now?

30 MR. HARRIS: Well the handing down of a judgment into the public domain would preferably  
31 be done outside market hours. With vulnerable, volatile markets at the moment it is better  
32 to have a shortish period of reflection and the opportunity for people who have been  
33 present to comment on it, for example. In part that might be met, though probably not fully  
34 by at least giving the named parties to the application an opportunity to know the result

1 before that immediately becomes public since there may then be an opportunity to prepare  
2 for the publication, but the preferable course would be in the first instance, not for the  
3 publication or the making public of the outcome outside market hours.

4 THE PRESIDENT: We may not have the luxury though, may we?

5 MR. HARRIS: I appreciate that Sir, yes, so it is just being floated as something to bear in mind  
6 but ultimately expedition is the most urgent requirement.

7 THE PRESIDENT: Yes, thank you, and you were going to make another point ?

8 MR. HARRIS: Yes, it is conceivable that the losing party may wish to take this matter further  
9 and I do have a point to make there, if I may, Sir, very briefly.

10 THE PRESIDENT: Yes.

11 MR. HARRIS: Under the Rules, of course, there is potentially a month which even to seek  
12 permission from this Tribunal as to whether or not to appeal, but that would be manifestly  
13 unsuitable in this situation – that is Rule 58(1)(b) of the Tribunal Rules. No decision point  
14 arises today but we would invite the Tribunal to give very serious consideration to a most  
15 severe abridgment of times to appeal, or to seek permission to appeal from whomsoever  
16 may wish to make the appeal. So plainly that would apply to my client as all the other  
17 parties here, and we are talking here about a really extreme abridgment, possibly a matter  
18 of 12, 24, 36 hours, something along those lines, not a decision for today.

19 THE PRESIDENT: Normally speaking, not necessarily in cases before this Tribunal but in the  
20 general course people make the permission application immediately after the judgment has  
21 been given, orally.

22 MR. HARRIS: Sir, what we were going to say is precisely that, that in the circumstances of this  
23 case, insofar as there is to be an oral permission application to this Tribunal, or perhaps the  
24 Tribunal should even direct that if permission is to be sought from any party then it should  
25 be made orally and not in writing, and it should be made within X period of time of the  
26 decision being known.

27 THE PRESIDENT: On the assumption we have the power to direct that we would be very  
28 sympathetic to doing so in this case.

29 MR. HARRIS: Perhaps we can all reflect further on that because it is not a decision point for  
30 today. In this regard can I just draw the Tribunal's attention to the Guide to Proceedings in  
31 the Competition Appeal Tribunal and quite a surprising feature of this case, in para. 6.57 in  
32 my copy on p.24 of the Guide, under the heading "Time for filing an application for a  
33 review under s.120", so that is our case. It says:

1 “The Tribunal will normally regard application for reviews of decisions relating to  
2 mergers as meriting a high degree of urgency”.

3 Plainly in this case more than a high degree.

4 “As a result it is quite likely the parties will be expected to assemble and present  
5 their respective cases within demanding timescales.

6 And then the next sentence:

7 “It is therefore important that the Registry is contacted as soon as it becomes  
8 likely that such an application will be made.”

9 Most regrettably that was not done in this case, the first that the Secretary of State learned  
10 of this application was last Friday when the application was lodged, and I only raise that  
11 now because it lends further support, in my respectful submission, to this idea that if this  
12 matter is to be taken forward at an appeal stage then it must be done with the most extreme  
13 urgency, and we would not be in this position arguably had these pre-action obligations  
14 been complied with because issues either could have been narrowed, or they could have  
15 been avoided altogether as will become more apparent tomorrow when we serve our  
16 evidence, and so I just draw that to the Tribunal’s attention on this question.

17 THE PRESIDENT: I think it was written in your skeleton was it, or someone else’s?

18 MR. HARRIS: That was more regarding how we could not go to Scotland logistically, I am  
19 directing this more to the question: if there is to be an appeal then everybody frankly just  
20 has to put up with this being done at a rate of considerable knots.

21 THE PRESIDENT: Right, does anybody else want to make any comments about any of that?

22 MISS DAVIES: On the question of power to abridge time, the Tribunal in the *Umbro* case  
23 relating to disclosure did abridge time in that case to three days, bearing in mind the  
24 urgency of sorting out the disclosure.

25 THE PRESIDENT: For?

26 MISS DAVIES: Permission to appeal, and the Tribunal obviously has a general power to  
27 abridge time under Rule 19(2) of the Rules of Procedure, and we would certainly welcome  
28 an indication from the Tribunal that any application for permission should be made orally  
29 at the hearing at which the decision is delivered in accordance with Rule 58 of the Tribunal  
30 Rules, and also an abridgement of time for going to the Court of Appeal.

31 THE PRESIDENT: I think everyone can assume, if we can satisfy ourselves we have power to  
32 do it, in a case of this sort we ought to direct that any permission application be made  
33 orally immediately after the judgment has been given.

1 MISS DAVIES: Perhaps the parties can give some mature reflection to that, and that is an issue  
2 that we can address on Monday at the start of the hearing and an order can be made before  
3 it is needed.

4 MR. BLAIR: What occurs to me, it may not be a good point, but supposing that we do make  
5 such an order and supposing that there is an application and it is either granted or refused  
6 as it would be, this Tribunal would then be out of the picture completely and any question  
7 of control over what would happen in relation to the meeting fixed for Friday would then  
8 be a matter for the Court of Appeal. Has that been understood and absorbed in the  
9 application that is being made?

10 MISS DAVIES: Indeed it has, and there has been some consideration given amongst certainly  
11 certain parties about how that might be dealt with should it arise.

12 MR. FORRESTER: Two small points, it might possibly be the Court of Session.

13 MR. BLAIR: I have mentioned to the Tribunal about.

14 MR. FORRESTER: I did not doubt it, Sir. The other point just for the avoidance of doubt, my  
15 instructing solicitor did inform the Tribunal very shortly after we received instructions last  
16 Monday, I am not sure it is material, but just so that point is taken care of.

17 THE PRESIDENT: I think the only other issue that remains is the question of forum, is it not?  
18 Do people want to make some further submissions on that or are you content to rest on the  
19 points that you have made in writing?

20 MR. HARRIS: Sir, if Mr. Forrester is relying on his written submissions, I will briefly ----

21 THE PRESIDENT: I did rather stop him when he was launching into something further on that,  
22 so do you want to say any more about that?

23 MR. FORRESTER: Yes, Sir, if I could be indulged for a couple of minutes? The Secretary of  
24 State discerns no particular link with Scotland in the present case. We would strongly  
25 disagree with that proposition for the following reasons. The scheme of arrangement  
26 governing the merger of the two banks comes under the jurisdiction of the Court of  
27 Session. The two banks are headquartered in Scotland, or registered in Scotland. The  
28 dispute is between a number of persons resident in Scotland and the Secretary of State.  
29 Now, it is immaterial for purposes of deciding jurisdiction, it must be immaterial whether  
30 the Secretary of State's business office is located in London or elsewhere, because if any  
31 time the Secretary of State is located in London every time a decision is taken in London  
32 then English jurisdiction flows then your plain entitlement and duty to apply Scottish or  
33 Northern Irish law from time to time means nothing.

1           Moreover, we note that as to the damage to competition identified by the OFT, that was  
2           identified as being predominantly to be suffered in Scotland, where the significant  
3           lessening of competition would be most felt.

4   THE PRESIDENT: In some respects I think, not in all respects.

5   MR. FORRESTER: Not in all respects, but I think it is there ----

6   THE PRESIDENT: One of the markets was particularly affected in Scotland.

7   MR. FORRESTER: Yes, so that therefore means that in our contention, since the applicants  
8           reside in Scotland, since the Court of Session has jurisdiction over the scheme of  
9           arrangement, since it is in Scotland, although not only in Scotland that the significant  
10          lessening of competition would occur, those factors should lean the Tribunal to finding that  
11          this is a matter where Scottish jurisdiction is more appropriate than jurisdiction in England  
12          and Wales. I would submit that some of the arguments to the effect that because it is more  
13          convenient to have argument before this Tribunal in London it is also convenient for  
14          English law to apply, those must plainly be wrong.

15          I think they must plainly be wrong because it cannot be because of the convenience of  
16          naming English counsel and arguing in this nice place that determines, shall we say, the  
17          centre of gravity, the proper law of the dispute that should be decided by reference to the  
18          factors that I have mentioned – the more appropriate factors that I have mentioned, where  
19          the competitive effect is felt and where this group of citizens resides, and where other  
20          persons affected by the merger and the anti-competitive effects or otherwise of the merger  
21          principally reside.

22          Finally, of course, the Bank of Scotland is one of Scotland's most distinguished best  
23          known institutions, it is one of its oldest companies and has a unique role in the Scottish  
24          economy, Scottish history, Scottish life, issuing bank notes and so on. Those  
25          considerations are not trivial and I submit they should lean the Tribunal to finding that  
26          Scots jurisdiction is appropriate.

27   THE PRESIDENT: Thank you very much.

28   MR. HARRIS: Sir, may I briefly reply to those six points in the order in which they were  
29          advanced to supplement the written submissions that the Secretary of State has put in on  
30          this point. The first point was the scheme of arrangement. Respectfully, the scheme of  
31          arrangement is nothing to do with this case, it is a company law procedure that happens to  
32          be proceeding in a different place, it has no bearing upon the question of judicial review of  
33          the Secretary of State's decision, it could be some other court fixture; it simply has no  
34          relevance.

1 Secondly, Mr. Forrester said the two banks are registered in Scotland, but that is a very  
2 minor consideration particularly when one takes into account the substance of the matter  
3 rather than the form, registration is a mere form, and in my skeleton argument, based upon  
4 the letters that are annexed to it, I set out the proportions of business of the two intervening  
5 banks the subject of the proposed merger, and if you could just turn that up it is para.21,  
6 and if needs be the correspondence attached to it, but this just sets out the substance of the  
7 correspondence. We do not need to run through the detail, but you can see simply from the  
8 figures, members of the Tribunal that registration in many ways is a matter of form in this  
9 case, because the substance of the business is to a large extent under all of these measures,  
10 to a very large extent under all of these measures outside Scotland. That, if you like, takes  
11 us into points three and four. Mr. Forrester's point three was that the applicants reside in  
12 Scotland and that a particular market affected is in Scotland, but as to the latter, point four,  
13 the particular market, well quite plainly on these figures and, in any event, on the OFT's  
14 decision, and as you rightly pointed out, Sir, in submissions the very substantial other  
15 markets that are affected that are not peculiar to Scotland. This is, I would submit, a  
16 nationwide matter, and it is a nationwide public interest consideration that lies at the heart  
17 of this application, and that is why the Secretary of State stands by the submission that was  
18 made, that he discerns no particular link with Scotland; Scotland is plainly involved, but  
19 then so is the rest of the nation.

20 As to the specific issue regarding the applicants residing in Scotland, if I could invite your  
21 attention either to my skeleton argument at para.13 or to the press release that accompanies  
22 it, what the Merger Action Group itself says is that the group wants to act as a rallying  
23 point. If you have the press release it is the fifth paragraph down, and my para.13 quotes  
24 the same point: "They will be engaging with trade unions, industry bodies, consumer  
25 association and communities across the country". So there are two points really that arise  
26 there. The first is that lends weight to the submission that I have just made, which is that  
27 this is a nationwide issue, otherwise they would not have ever said that, and perhaps a more  
28 subsidiary response is that whilst it may be the case that the MAG has, I had counted it up  
29 to be five members, but it is perhaps six who may this afternoon all reside, we are told , in  
30 Scotland, but there is no particular reason to think that it will be limited to five or six  
31 applicants who have and will for ever more reside in Scotland, and we are not told anything  
32 further about the 500 supporters. So that deals with the first four of my learned friend's  
33 submissions and we say they do not go to undermining the nationwide flavour of this case.

1 Then he raised, as I understood it, as a fifth point the question of “counsels’ convenience,  
2 or location of legal teams should not have a particular bearing, and with respect I might be  
3 prepared to agree with that in another case, but it does have a peculiar relevance to this  
4 case, namely the question of appeal. We have just been mooted, and it seems clear to  
5 everybody that if there is to be an appeal by any party it will have to be done as a matter of  
6 the most extreme urgency. Now, if that happens, and this case is a Scottish forum case  
7 then it will go to the Court of Session and that will immediately disqualify the lion’s share  
8 of counsel instructed in the case, unless already called to the Scots’ Bar. That may be an  
9 insurmountable obstacle given the extreme urgency of this case, and I would respectfully  
10 submit that on the facts of this case, it is a relevant consideration, whilst it might possibly  
11 not be a relevant consideration in another case, it certainly would be beyond any sensible  
12 scope of truly urgent appeal to instruct a brand new team of counsel for the Secretary of  
13 State and the two intervening parties. Mr. Forrester, I see from a document, is already  
14 Scots qualified so it does not apply to him of course. So on the facts of this case it is a  
15 relevant consideration.

16 The last point that he mentioned is that the Bank of Scotland is a distinguished Scottish  
17 Bank, well we do not dissent from that, but it is, with respect, a minor consideration in the  
18 light of the other factors that are addressed in these oral submissions and the written  
19 submissions that I have already submitted. Unless I can be of further assistance we object  
20 to it being a Scottish forum case, it should be in England and Wales.

21 THE PRESIDENT: Thank you, Mr. Harris.

22 MR. GREEN: Just a few points. First of all the relevant test is what is the centre of gravity of  
23 this case? The centre of gravity of this case that concerns financial stability in the United  
24 Kingdom, and para.28 of the Secretary of State’s decision contains in the very last sentence  
25 the following:

26 “On balance he has concluded that ensuring the stability of the UK financial  
27 system justifies the anti-competitive outcome which the OFT has identified and  
28 that the public interest is best served by clearing the merger.”

29 The decision that was therefore predicated upon the UK financial markets as a whole. The  
30 second point arises out of the statistics set out in Mr. Harris’s skeleton, the data was  
31 provided by the companies, it is accurate. If you reverse the percentages you see where the  
32 centre of gravity of both of the merging parties lies. For Lloyds 87 per cent of employees  
33 are based outside of Scotland, 91 per cent are branches, circa 97 per cent of income net of  
34 insurance claims, and 97 per cent of assets. The figures for HBOS are slightly smaller, for

1 employees 77 per cent are not Scottish, 81 per cent are branches, 89 per cent of income net  
2 of insurance claims and about 89 per cent of total assets so the preponderant centre of  
3 gravity of the two companies is not in Scotland.

4 So far as Mr. Forrester's points are concerned, the scheme of arrangement is as Mr. Harris  
5 puts it, irrelevant, and it is irrelevant, it has nothing to do with the issues arising in this  
6 case. Mr. Forrester says there are six Scotsmen who are applicants and the Bank of  
7 Scotland is a truly Scottish company. HBOS has approximately 2.1 million shareholders,  
8 100,000 are Scottish, approximately 5 per cent are therefore Scottish, and the shareholders  
9 are going to exercise their rights at the end of next week. Even though obviously the  
10 company has strong links with Scotland, its centre of gravity is in Scotland.

11 So far as procedural issues are concerned, we endorse the submission made by Mr. Harris  
12 about the route of appeal, this was an issue which arose in *Aberdeen Journals* as to where  
13 the appeal should lie and problems did arise because the entire teams have to change  
14 between the appeal before this Tribunal and the Court of Appeal, the Court of Session.  
15 Now that was not a problem in that case, it was irksome, but no more than that, it was  
16 possible to do.

17 If one is contemplating the possibility of appeals arising within days, which is what is  
18 contemplated, if it should become necessary, then the prospects logistically of organising  
19 entirely new teams of counsel to represent the clients when they have not been involved in  
20 the hearing below is a real problem. Mr. Harris is right, that in most cases it would not be  
21 an issue, but in a case of extreme urgency the need to move seamlessly from the Tribunal  
22 to the Court of Appeal is a real issue and, as we understand it, there is another subsidiary  
23 issue: as I understand it there is no ability to abridge time for appeals to the Court of  
24 Session and there would be 42 days on any view in order to enable an appeal to be brought.  
25 There is therefore less control that the parties would have over ensuring a speedy appeal  
26 before the Court of Session; those are my instructions. We can endeavour to get chapter  
27 and verse if it would assist.

28 This case is not like *Aberdeen Journals* or *Wiseman* both of which were heard in Scotland,  
29 because both of those were quintessentially Scottish cases, *Aberdeen Journals* concerned  
30 the newspaper market in Aberdeen, and *Wiseman* concerned the milk market in Scotland,  
31 but this case concerned Scotland, but peripherally. Its economic gravity lies across the  
32 United Kingdom as a whole, and predominantly outside of Scotland.

33 So far as forum is concerned, it may not be necessary for the Tribunal to decide that today,  
34 it could be a matter that you could reserve until next week, and possibly to the judgment,

1 because it primarily concerns issues of appeal. In *Aberdeen Journals* and *Wiseman* very  
2 minor issues of evidence arose and we had to deal with Scottish procedure, but I rather  
3 doubt that any particular procedural issue is going to arise, which is going to require the  
4 Tribunal to decide today what procedure it should adopt in relation to any particular piece  
5 of evidence. You may decide therefore that it is something that you can ponder in the light  
6 of submissions and you may be able to come to a more mature judgment next week  
7 rather than today, and we can then certainly check the position in relation to abridgment of  
8 time insofar as that is a relevant factor, because I cannot put my hand on my heart today  
9 and say that is correct, those are simply my instructions at this stage.

10 THE PRESIDENT: Mr. Semple and Mr. Forrester may have the answer at their fingertips to  
11 that one.

12 MR. GREEN: I think we would need to check the rules – not that I am doubting Mr. Forrester’s  
13 undoubted ability and familiarity with Scottish procedural rules. Unless I can assist further  
14 on that issue, that is all I wish to say.

15 MISS DAVIES: Sir, we fully endorse everything that has been said on behalf of the Secretary of  
16 State and HBOS. My learned friend, Mr. Green, referred to it as “centre of gravity”, this  
17 Tribunal put it in a different way in *Claymore*, “the jurisdiction of closest connection” at  
18 para.195 of the decision in *Claymore*. So the issue for the Tribunal is: Does England and  
19 Wales have the closest connection to this dispute bearing in mind the factors identified in  
20 the Tribunal’s Rules, or does Scotland. As my learned friend, Mr. Green, pointed out, this  
21 case is very different from other cases in which the Tribunal has decided that the forum is  
22 Scotland, because those cases were concerned not with a merger that had nationwide  
23 impacts but with behavioural conduct in particular locations in particular jurisdictions.  
24 With respect to my learned friend, Mr. Forrester, it simply cannot be right that this issue is  
25 determined by where the adverse effects on competition were held to potentially occur by  
26 the OFT, not only were those actually nationwide in two out of three cases, but in fact the  
27 transaction has much broader impacts and the statistics that had been provided by my  
28 learned friend, Mr. Harris in his skeleton, indicate that for the employees of the two banks,  
29 who are obviously the most directly affected by the merger they are predominantly based  
30 in England and Wales. For customers we do not have the direct figures, but one can see  
31 the figures of branches, and income and assets which suggest where they are, and we have  
32 been told this morning some information about HBOS shareholders, so for all those  
33 reasons we fully endorse the Secretary of State’s submissions and those made by HBOS  
34 and would invite this Tribunal to conclude the forum is England and Wales.

1 One small point where I may take issue with my learned friend, Mr. Green, is we would  
2 invite a ruling on that issue today, because it might affect the substantive legal principles to  
3 be applied to the judicial review.

4 THE PRESIDENT: I was going to ask about that, it seemed on a very superficial look at the  
5 position that as far as judicial review is concerned there is no distinction between the two  
6 sets of laws.

7 MISS DAVIES: That may well be right, and certainly there is no differentiation being suggested  
8 in the notice of application, but from a strict legal perspective we would submit it would be  
9 better to have a determination on forum before we embark on a substantive hearing rather  
10 than at some stage in the future.

11 THE PRESIDENT: Thank you very much. Mr. Forrester?

12 MR. FORRESTER: I have three points. First, in response to my learned friend for the Secretary  
13 of State, the suggestion that if the matter is nationwide then English law applies is not a  
14 proposition to which we would assent.

15 THE PRESIDENT: Nationwide does not equal England?

16 MR. FORRESTER: Yes, for obvious reasons. If I can help the Tribunal, I think that is a pretty  
17 straight forward proposition, one may or may not agree with it but it is not difficult to  
18 understand what is being said.

19 THE PRESIDENT: A bit 19<sup>th</sup> century, is it not?

20 MR. FORRESTER: Yes. The second proposition is because counsel from England have been  
21 instructed this should have relevance to, shall we say, the proper law of the dispute. I  
22 disagree with that proposition. The applicants elected to consult a Scottish solicitor, and to  
23 instruct Junior and Senior Scottish counsel, and in our submissions we indicated why we  
24 thought Scots law was appropriate, so as of last Friday our adversaries in these proceedings  
25 could have drawn the conclusion that indeed Scottish law would apply and could have  
26 consulted the admirable skills of the Faculty of Advocates in the congenial town of  
27 Edinburgh.

28 THE PRESIDENT: Is your submission that it is not really a relevant factor?

29 MR. FORRESTER: Yes.

30 THE PRESIDENT: Whether or not they could have overcome it?

31 MR. FORRESTER: It is a subset of the convenience of the parties – it is inconvenient to travel,  
32 it is inconvenient to do this and that. Choice of counsel cannot, I suggest, determine the  
33 proper law of this dispute. It cannot determine the centre of gravity, so the applicants felt  
34 and feel that Scotland and Scottish law is the proper forum, and for the reasons that we

1 have set forth, the applicants instructed Scots' counsel. It so happens that I am qualified in  
2 both jurisdictions, but the applicants elected to peril themselves by entrusting their affairs  
3 to Scots' lawyers and it should not be relevant to the Tribunal in reaching the conclusion as  
4 to whether this is an English matter or a Scottish matter that my learned friend admirable  
5 leading members of the English Bar happen to be English lawyers.

6 THE PRESIDENT: We do not get much help from the Rule itself, do we? It just says that – I  
7 think I remember rightly – "... shall have regard to all matters which appear to it to be  
8 relevant ..." and in particular various things that are specified.

9 MR. FORRESTER: Sir, if it is the case that the Tribunal, as I quoted in the press and journal  
10 case, has to go close to the people that means sitting from time to time in Scotland, sitting  
11 from time to time in Northern Ireland, sitting most of the time in London, but if every time  
12 a case arises with a Scottish element the forum becomes English because of the selection of  
13 counsel, that seems to me the wrong way around, it is attribution of the centre of gravity of  
14 the dispute to an irrelevant factor which is the jurisdiction in which instructed counsel are  
15 qualified.

16 The factor by which we would submit you must be guided in deciding this question is the  
17 centre of gravity, or what a private international lawyer might call "the proper law of the  
18 dispute" and for the reasons that have been set forth in the application that is Scotland. The  
19 level of turnover of the two banks, the nationality of the shareholders of the banks is not as  
20 important as the fact that the applicants are saying, as the OFT was saying, there will be a  
21 significant lessening of competition in certain Scottish markets.

22 THE PRESIDENT: And in certain English markets?

23 MR. FORRESTER: Yes, indeed, but particularly I would suggest though certainly not  
24 exclusively. So the applicants say: "We have businesses to run in Scotland, we want  
25 choice in the banking sector; this will reduce choice and that will prejudice us and we  
26 would therefore like the merits of the merger examined neutrally by an expert body. So it  
27 is by reference to that and not the turnover of the two institutions that we would say you  
28 should determine the centre of gravity of this particular dispute.

29 THE PRESIDENT: What do you say about the issue that was raised as to whether there is any  
30 difference so far as the rules of judicial review and the grounds for judicial review between  
31 the two jurisdictions?

32 MR. FORRESTER: I think it is fair to say that there is not much difference, there is one  
33 difference that might be material, and that is to do with unincorporated bodies. There is a  
34 Judgment of Lord Clyde, where he indicates that the court should be flexible in cases like

1 this one where an unincorporated association comes, but that is merely a matter of how the  
2 case is labelled.

3 THE PRESIDENT: Is that on standing? Their alleged standing?

4 MR. FORRESTER: Well standing or the name under which the litigation is pursued, yes, we can  
5 call it “standing”. So is the case brought in the name of Mr. Smith, secretary of the  
6 bowling club, or is the case brought in the name of the bowling club? There is a slight  
7 difference I believe there, but under the guidance of my learned Junior I can say that the  
8 differences between Scottish law and English law as to judicial review are not great.

9 THE PRESIDENT: The main thing really that matters is which court is the court of appeal – in  
10 practical terms?

11 MR. FORRESTER: That would indeed be a difference, yes, Sir.

12 MR. BLAIR: Could I ask a question – I am sorry I should know the answer. Does the Lord  
13 President of the Court of Session have authority to admit English counsel to plead before  
14 the Inner House *pro hac vice*.

15 MR. FORRESTER: Providing an application has been made I am told that that can be done.

16 MISS DAVIES: Sir, I am told it can be done but it has been very restricted in its approach.

17 MR. FORRESTER: The Tribunal would certainly have our reassurance that no objection would  
18 be made to such a course in this case if that were to become relevant.

19 MR. GREEN: When we attempted this in *Aberdeen Journals* it was not so much the court,  
20 although there were logistical problems in obtaining rights of audience, it was our brethren  
21 in Scotland who posed the obstacles which turned out to be insurmountable, we need Bar  
22 consent; it turned out to be insurmountable in *Aberdeen Journals*.

23 THE PRESIDENT: Scottish counsel were instructed in due course?

24 MR. GREEN: Scottish counsel were instructed.

25 MR. BLAIR: So you need the consent of the Dean, do you?

26 MR. GREEN: We needed the consent of the Dean, as I recollect.

27 MR. HARRIS: May I raise three very short matters. First, we agree with Miss Davies, my client  
28 would like, if at all possible, to have a decision on forum today rather than it be left over,  
29 and that takes me into my second point which is that the Secretary of State would be very  
30 concerned about any difference at all between Scots law and English law, because counsel  
31 currently instructed for the Secretary of State, and I apprehend on behalf of the two banks  
32 as well, are in the process of putting together skeleton arguments, and we would therefore  
33 need, if it is to be a Scots’ law case, to get on top of additional law in respect of which we  
34 are not formally qualified, and that certainly gives a concern to the Secretary of State,

1 because unlike the others we are currently engaged in a time consuming exercise of putting  
2 together evidence as well as dealing with the ----

3 THE PRESIDENT: So you would like to know?

4 MR. HARRIS: Yes, and we would like it to be English law, of course. (Laughter) The last  
5 point, with permission of the Tribunal, my learned friend has mentioned about the counsel  
6 – I say again in an ordinary case the question of qualification of counsel, and the need to  
7 change counsel between a first instance hearing and an appeal would not arise. But it is,  
8 with respect, the applicants who have brought this upon themselves, and it ties in with my  
9 point earlier on about the lack of any pre-action notification. The Secretary of State was  
10 faced with a fully fledged, fully fleshed out significant application and the first we have  
11 heard of it is on Friday night; little wonder that they should then turn to local counsel in  
12 London to deal with it in such incredibly urgent circumstances, and of course there would  
13 have been terrible logistical difficulties, even had there been relevant Scottish counsel  
14 available, in doing the work that has already been done and will have to be done urgently  
15 over the next 36 and 48 hours, namely seeing witnesses or those instructing and obtaining  
16 instructions, putting together witness evidence dealing with documentation and what have  
17 you. So I do not accept that it would have been possible on the facts of this case  
18 realistically to go to the Scots Bar and therefore for that not to have been an obstacle, and  
19 the reason it is an obstacle is because of the way the applicants have behaved, so that is a  
20 reason why whilst it would not normally be relevant it is on the facts of this case. Unless I  
21 can assist further?

22 THE PRESIDENT: As I have given Mr. Harris a second go, Mr. Forrester, is there anything you  
23 want to add in the light of that?

24 MR. FORRESTER: Well I think that there would be lots of Scottish lawyers who would have  
25 been happy to be involved in the matter on Friday night, and indeed I have received email  
26 messages from several of them ... (Laughter) ... saying how they would be happy to be of  
27 use. So I do not think that that things close down in Parliament House in Edinburgh on  
28 Friday afternoons as my learned friend fears, so if the Secretary of State had read the  
29 application and noted that we asserted that Scottish principles applied he could have  
30 instructed Scots counsel.

31 The applicants have instructed a Scottish team and we think that it is appropriate, not  
32 because of the applicant's choice of counsel, but because of the questions of the reality,  
33 what we are challenging in this case the exercise of a discretion wrongly, and the adverse

1 impact upon competition affecting the applicants and where that is so, for that reason we  
2 persist in saying that Scotland is the proper forum.

3 THE PRESIDENT: Right. We are obviously going to have to go out for a few minutes to think  
4 about the forum issue, and to think in particular about whether we can do it quickly enough  
5 to give you a decision this afternoon in the light of the very helpful submissions you have  
6 given to us. Is there anything else which is outstanding of the things that we need to do in  
7 order to get the show on the road for Monday? Have we covered everything else? In the  
8 meantime while we are deliberating it will give you an opportunity to deal with the  
9 confidentiality order.

10 (Short break)

11 (For judgment see separate transcript)

12 THE PRESIDENT: I hope that is sufficient for present purposes.

13 MR. HARRIS: Sir, thank you for that judgment, the Secretary of State seeks permission to appeal  
14 the decision on forum, pursuant to Rule 58. I will do this very briefly because you have  
15 already, of course, heard my submissions as to why England and Wales should be the  
16 correct forum. You have said at the end of your judgment, Sir, that this was a difficult  
17 matter, not at all easy, but that in the end you came to the conclusion that it should be a  
18 Scottish forum, on that basis I would respectfully submit that there must be a reasonable  
19 prospect of overturning a decision that has been a difficult one to make. The two points  
20 that I effectively pray in aid are, very briefly because you have heard them from me before,  
21 that as you pointed out as well in your judgment this is a nationwide matter, and that is  
22 reinforced by the figures that do appear in para.21 of the skeleton argument. If it is right to  
23 say that there is a particular impact upon Scotland, then just looking at those figures alone it  
24 must be right to say that there is an even bigger impact upon places outside Scotland  
25 because of the sheer preponderance of the weight of business that takes place outside  
26 Scotland. It simply follows as a matter of logic in my submission.

27 I also repeat very briefly what I said before, which is the focus of the decision, and hence  
28 the attack upon the decision has, with respect, got nothing to do with Scotland. The focus  
29 of the decision and hence the attack is upon the public interest consideration that became a  
30 part of the Enterprise Act, and by definition that is ensuring financial stability within the  
31 UK. So again that has no focus upon Scotland. So effectively for those two substantive  
32 reasons I would invite you to give permission, and bearing in mind you have found it to be  
33 a difficult matter yourself.

34 (The Tribunal conferred)

1 THE PRESIDENT: Mr. Harris, we refuse leave to appeal. Although we entirely accept the point  
2 you made about it being a nationwide matter, the problem is we do not have a choice of a  
3 forum that is nationwide, we have to choose between Scotland, England and Wales or  
4 Northern Ireland, and we have given our reasons why we think that if the dispute has a  
5 particular connection with any of these it has particularly a connection with Scotland. But  
6 rightly or wrongly we think that the discretion element in our decision will mean that an  
7 appeal probably has no real prospect of success.

8 MR. HARRIS: Thank you.

9 THE PRESIDENT: I am sorry, Mr. Green, Miss Davies, if there is anything you want to add to  
10 it?

11 MR. GREEN: I think we have a month in which to make our application for permission to  
12 appeal! (Laughter).

13 THE PRESIDENT. Right! The only other matter is confidentiality. I think it has been agreed  
14 that you are going to send the outstanding signatures on undertakings as soon as possible,  
15 and we will make the order for the confidentiality ring tomorrow morning. Is that right?

16 MISS DAVIES: Sir, I think we have all signed it on the basis that it will be made today, so it  
17 ought to be referred, and I am also instructed that in light of the ruling on forum we may  
18 have some Scottish lawyers we wish to add to the confidentiality ring, so arrangements will  
19 have to be made for that.

20 THE PRESIDENT: I think the problem is we need the undertakings before we can make the  
21 order, we need to sign the undertakings. We are happy to make it if we can make it, as it  
22 were, so far as it goes today?

23 MISS DAVIES: Yes, I think those certainly in court have signed already so they can be handed  
24 up to the Tribunal.

25 THE PRESIDENT: So all that we need to do then is add people by order?

26 MISS DAVIES: Yes.

27 THE PRESIDENT: So we will make the order then in respect of those who have signed today.  
28 Is that all right? Mr. Green is looking worried?

29 MR. GREEN: Yes and no – yes, that is right and, no, I am not worried. (Laughter)

30 THE PRESIDENT: Anything else? So we will meet on Monday, 8<sup>th</sup>.