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**IN THE COMPETITION**

Case No. 1185/6/8/11

**APPEAL TRIBUNAL**

Victoria House  
Bloomsbury Place  
London WC1A.2EB

Tuesday, 6<sup>th</sup> December 2011

Before:

THE HON. MR. JUSTICE SALES  
(Chairman)

WILLIAM ALLAN  
JOANNE STUART

Sitting as a Tribunal in England and Wales

BETWEEN:

**BAA LIMITED**

Applicant

and

**THE COMPETITION COMMISSION**

Respondent

Supported by

**RYANAIR**

Intervener

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**HEARING - DAY TWO**

## **APPEARANCES**

Mr. Nicholas Green QC and Mr. Martin Chamberlain (instructed by Herbert Smith LLP) appeared on behalf of the Applicant.

Mr. Daniel Beard QC and Mr. Alan Bates (instructed by the Treasury Solicitor) appeared on behalf of the Respondent.

Mr. Paul Harris QC and Miss Sarah Love (instructed by Nabarro LLP) appeared on behalf of the Intervener.

1 THE CHAIRMAN: Yes, Mr. Green.

2 MR. GREEN: I should like to start by taking you to the investigation we did overnight about the  
3 CAA's issues. We have got the relevant document and we have produced a note of it. It  
4 does in fact demonstrate that the CAA's analysis was assuming that there would be new  
5 capacity, not that there would not be capacity. What we have done is to take the document  
6 and the document that it refers to, and I am going to hand that up now with the note.

7 (Handed)

8 THE CHAIRMAN: Does that mean you are going to change your submission?

9 MR. GREEN: I reserved my position yesterday and said that in the light of the analysis we would  
10 come back and explain what our position was.

11 THE CHAIRMAN: Yes. So are you going to change?

12 MR. GREEN: Yes, indeed. I did not want to push it yesterday. You were right to say there was  
13 ambiguity in Appendix 5.1 and Appendix A, and I did not want to say anything until I had  
14 actually checked the document.

15 THE CHAIRMAN: I am not sure if I did say there is ambiguity, but at all events --

16 MR. GREEN: Yes.

17 MR. ALLAN: Where in the bundle shall we file this? In the additional documents?

18 MR. GREEN: That would probably be sensible. I think it then becomes tab 7.

19 THE CHAIRMAN: Do the two things live together? We seem to have a note and two  
20 documents?

21 MR. GREEN: That is right. You should have the CAA's document and then, because that  
22 submission related to an earlier Competition Commission document, we have simply  
23 provided the relevant parts of the earlier Competition Commission document.

24 THE CHAIRMAN: So we file them together?

25 MR. GREEN: File them together, yes. We have not provided the totality of the earlier  
26 Competition Commission document because it is 290 pages. If, at some point, you will find  
27 it helpful we can of course print that off, but we rather doubt you will. It is there essentially  
28 for completeness.

29 THE CHAIRMAN: Yes.

30 MR. GREEN: I will go straight to the note. We have identified in the first two paragraphs what  
31 happened yesterday. In para.2 we explain that in our submission some of the evidence  
32 relied on by the Competition Commission in Appendix 5.1 does appear to have been  
33 predicated on an assumption that there would, in the future, be no artificial constraints on  
34 capacity imposed by (for example) government policy.

1 In para.2 of Appendix 5.1 the Competition Commission recites BAA's submission that "so  
2 long as Heathrow and Gatwick are capacity constrained and subject to price caps that result  
3 in excess demand at these airports, there can be no scope for material competition on price  
4 or quality between any of its London airports."

5 At para.3 the Competition Commission notes, by way of response, the CAA's view that  
6 "the combination of capacity constraints and regulation would not necessarily or materially  
7 limit the scope for additional competition between BAA's London airports." Five types of  
8 competition are then specified.

9 At para.4 the Competition Commission records its view as follows: "We agree with the  
10 CAA that competition to invest and innovate, even in the short term, could be intense."

11 Could you please mark by para.5 a cross reference to para.113 in the 2011 Report (and I do  
12 not ask you to turn it up now) where the Competition Commission says, under the following  
13 heading, "Conclusions on the benefits and scope for competition absent new runway  
14 capacity" as follows: "In the 2009 Report we found that competition to invest and innovate,  
15 even the short term, could be intense." So in the 2011 Report they have interpreted 2009 as  
16 a reference to competition absent new capacity and we submit that that is a misdirection.

17 Indeed, we submit it is an important one because the Competition Commission was relying  
18 upon the views of an expert regulator, and expert sectoral regulator, the CAA, and its views  
19 would, in the ordinary course, be entitled to great weight.

20 THE CHAIRMAN: So is this then a new ground of challenge? It seems to be distinct from the  
21 grounds that you have given us so far. I am not saying you cannot raise it, but if you are  
22 going to raise it, it ought to be properly pleaded.

23 MR. GREEN: Mr. Chamberlain tells me it is pleaded. We can find the reference for that.

24 THE CHAIRMAN: It would be helpful just to have the reference.

25 MR. GREEN: Yes. In oral submissions on 5<sup>th</sup> December 2011 BAA made the point that these  
26 benefits appeared, at least in part, to be predicated on the anticipation of new capacity. The  
27 Tribunal suggested that, if such a submission were to be pursued, it would be necessary to  
28 examine the CAA's submission to the Competition Commission in context. This has now  
29 been done.

30 The context of the CAA's evidence: In its submissions to the Competition Commission  
31 during the consultative process leading to the 2009 Report, BAA had argued that there was  
32 no scope for short-term competition between its London airports because Heathrow and  
33 Gatwick were both capacity constrained and subject to binding price caps.

1 In its Provisional Findings report, on 20<sup>th</sup> August 2008, the Competition Commission  
2 recorded that submission at para.6.2 and at para.6.4 it rejected it in the following terms:

3 “We do not accept BAA’s view that there is no scope for competition between  
4 BAA’s London airports because we consider that there is scope for some short-  
5 term competition at the margin and scope for long-term competition.”

6 The CAA’s submission to the Competition Commission: In September 2008, the CAA  
7 produced *The Civil Aviation Authority’s response to the Provisional Findings and Remedies*  
8 *Notification* (that is the note which is attached). The CAA supported the Competition  
9 Commission’s view that BAA’s common ownership gave rise to an AEC and that there was  
10 a strong case for divestment. It submitted, however, that “the potential benefits of  
11 competition between BAA’s south-east airports in the short term are likely to be much  
12 greater than stated by the Competition Commission in its provisional findings”.

13 The reasons for that were set out in para.6:

14 “While the Competition Commission correctly recognises that there is a shortage  
15 of runway capacity in the south-east of England, the Competition Commission has  
16 not clearly demonstrated that any such shortage is an *artificial* shortage. In other  
17 words, the Competition Commission --

18 THE CHAIRMAN: Sorry, that is para.6 of the CAA paper?

19 MR. GREEN: Yes, the CAA paper.

20 THE CHAIRMAN: It does not seem to have a pure para.6. Do you mean in the summary?

21 MR. GREEN: Yes. The word “artificial” is in the original.

22 THE CHAIRMAN: Let me just read this. (Pause) Right, yes.

23 MR. GREEN: If you have read it, I do not think I need to read it, unless you wish me to.

24 THE CHAIRMAN: No.

25 MR. GREEN: Paragraph 13: So, the CAA was making a distinction between (a) natural capacity  
26 constraints - which arise in any capital intensive industry, and which drive (rather than  
27 inhibit) competition by encouraging investment, which in turn leads to new capacity; and  
28 (b) artificial capacity constraints - such as those resulting from abusive behaviour on the  
29 part of an operator, or Government policy, or planning restrictions - all of which do inhibit  
30 competition.

31 The CAA’s view was that, if capacity constraints are natural, one can rely on competition to  
32 address them. If they are artificial, economic regulation is needed.

33 The significance of economic regulation is explained in para.9: it involves “the regulator  
34 determining the price, service quality and investment of airports, effectively ‘crowding out’

1 the potential for competition”. (That is the reference in footnote 2 to Appendix 5.1).  
2 However, the point has already been made that, if capacity constraints are natural (rather  
3 than artificial), they are more appropriately addressed by competition than by economic  
4 regulation. In that case, “the intensity of economic competition” can be “adapted” by taking  
5 into account “the potentially deadening impact of competition on the emergence of  
6 competition”.

7 Then one gets the important paragraphs -- (*sotto voce*) Yes, thank you. I am sorry,  
8 competition should be regulation in the last line. That is a misquote.

9 At paras.10 and 11 the CAA said this:

10 “It therefore appears to the CAA that the Competition Commission has not made a  
11 convincing case that BAA has artificially restricted capacity in the past, although  
12 capacity may have been artificially restricted as a consequence of the planning  
13 regime or from economic regulation. There is, however, no reason to believe that  
14 the factors that might have served artificially to restrict capacity in the past will  
15 continue to do so in the future.” (our underlining)

16 Then one gets the word “Accordingly”, which makes it clear that it is following on from  
17 that proposition. Then one sees the passage which is set out in Appendix 5.1:

18 “Accordingly, the CAA would see significant scope for competition between  
19 separately owned airports in the short term. In particular, the CAA would see  
20 scope for competition on [and then the five matters are identified which are in  
21 both the 2009 and 2011 Reports].

22 The underlined passages, read in context, make plain that: (a) the short term competition  
23 benefits identified by the CAA were predicated on an assumption that [quoting from 10]  
24 “there is no reason to believe that the factors that might have served artificially to restrict  
25 capacity in the past will continue to do so in the future”; (b) if the CAA had envisaged that  
26 Government policy would change so that airport expansion was ruled out, it would have  
27 regarded that as an artificial capacity constraint.

28 One gets the same conclusion from para.5.12 of the CAA’s submission.

29 THE CHAIRMAN: Sorry, just on that, I am looking at para.11. They do not seem to be referring  
30 to competition to increase runway capacity.

31 MR. GREEN: In the fourth bullet point: “Investment in facilities, including ways to improve or  
32 increase” --

33 THE CHAIRMAN: The emphasis there is on terminal capacity.

1 MR. GREEN: I think the important point is that the CAA is saying that all of these aspects of  
2 competition are aspects one would expect to see in a market where there is no artificial  
3 constraint on capacity.

4 THE CHAIRMAN: So you say the word “accordingly” in effect governs what the CAA is saying  
5 about it.

6 MR. GREEN: Yes, it does. Read in context, that is all it can mean. These are all the benefits you  
7 get in a market which is not capacity constrained and if you do not have capacity you then  
8 need (in the CAA’s view) economic regulation which the CAA is of the opinion would  
9 deaden competition.

10 THE CHAIRMAN: At their para.12 they seem to be supporting what they have said at 11 by  
11 reference to historic information about Gatwick.

12 MR. GREEN: Yes, I think that is correct.

13 THE CHAIRMAN: That has a tendency against what you are submitting.

14 MR. GREEN: With respect, if one simply reads the words --

15 THE CHAIRMAN: I am inviting you to comment on the words.

16 MR. GREEN: Yes. It does not, in any way, undermine the force of paras.11 and 12. I will come  
17 back to what this signifies in judicial review terms in a moment, because we are not saying  
18 that the whole of Appendix 5.1 was --

19 THE CHAIRMAN: I am so sorry to interrupt but the last sentence of para.12 says:

20 “It follows that an airport would still have strong incentives to compete with other  
21 airports through price and/or service quality so as to retain and attract what it sees  
22 as the most valuable custom, even when it (and rival airports) might be regarded  
23 as ‘full’.”

24 MR. GREEN: Yes, that is consistent with the position they were adopting in paras.11 and 12  
25 because in their view, absent artificial restraints, it would not be full for long; there would  
26 be a substantial incentive to create new capacity which would then generate the benefits  
27 which are referred to in para.11. So that is the natural reading, we would submit, of para.12  
28 in the context.

29 MR. ALLAN: Mr. Green, could we just go back. I appreciate we should not apply an  
30 excessively precise textual interpretation to this, but if one were to look at the fourth bullet  
31 in para.11 which is the one quoted in Appendix 5.1, “investment in facilities, including  
32 ways to improve or increase terminal, or other capacity, which may have relatively short  
33 lead times”, if you were thinking about investment in capacity including pre-emptive  
34 competition related to runway capacity, would you not expect to see some reference to that

1 in para.11? To my mind (it may be I am wrong about this) I would not have thought that  
2 runway capacity is captured in that bullet point.

3 MR. GREEN: It may not be, but look at the first bullet point: the duration of contracts. The  
4 duration of contracts is very much the point which the Competition Commission and the  
5 CAA were making about the sort of long term relationship that would be entered into with  
6 new capacity. That was a key point which is relied upon by the Competition Commission  
7 as a major advantage of the way in which the relationship survives.

8 MR. ALLAN: Where does the CAA make that point?

9 MR. GREEN: The first bullet point.

10 MR. ALLAN: You said that is a point made by the CAA.

11 MR. GREEN: Appendix 10.1 para.34.

12 MR. ALLAN: Sorry, I thought you were going to show me something in this document. What  
13 we are looking at here is a summary, so presumably there is something in the body of the  
14 document which supports these bullet points? The whole of Section 5 concerns capacity in  
15 the short term. A separate aspect of that is capacity in the long term.

16 THE CHAIRMAN: At the title of Section 5 it says "Scope for competition given current capacity  
17 constraints".

18 MR. ALLAN: Exactly.

19 MR. GREEN: It is common ground that until 2017 there are capacity constraints where two types  
20 of competition can arise. One is contemplating new capacity and the other is without. 5.8  
21 is helpful to the construction that we place upon this document. It says:

22 "Accordingly, the combination of capacity constraints [in other words, pro tem  
23 constraints] and regulation would not necessarily or materially limit the scope for  
24 additional competition... There could be significant scope for competition ... in  
25 the short term".

26 When they refer to capacity constraints they are talking about those which apply pro tem,  
27 but their essential premise is, and the submission they made to the Competition Commission  
28 was, that capacity constraints induce and encourage new investment in capacity. That  
29 comes in para.11.

30 THE CHAIRMAN: Paragraph 5.6 says: "Even if it could be demonstrated that runway capacity  
31 has been artificially constrained, airports could still be expected to compete to a significant  
32 degree postdivestment". So that seems to be accepting that there is no anticipatory effect of  
33 new runways because this is predicated on there being an artificial constraint and then they



1 say: but you still get competition. The end of 5.6, interestingly, seems to correspond with  
2 the summary at the end of para.12 to which I drew your attention before.

3 MR. GREEN: That is simply a reference back to the point they are making in paras.9, 10 and 11.  
4 There are capacity constraints, but capacity constraints themselves - the big difference  
5 between the CAA and the Competition Commission was that the CAA submitted that if you  
6 have capacity constraints, that stimulates investment in new capacity to overcome the  
7 obstacles. So their starting point is there is a capacity constraint and it can generate  
8 competition.

9 THE CHAIRMAN: That seems to be addressed in the next section of the Report starting at 5.9  
10 "Competition in the Long Term". They say: "In addition to competition on price and  
11 service quality it would be possible for airports to compete through major investment  
12 projects and bringing investments in new runway capacity." This is the structure in Section  
13 5 which is the body of the report (we were looking at a summary before) and it seems to be  
14 competition in the short term, ie accepting artificial restraints, which seems to exclude  
15 anticipation of new runway capacity. That is how I am reading it at the moment. And then  
16 competition in the long term from 5.9 to 5.11 which builds in the anticipatory competitive  
17 effects of the anticipated possibility of expanding runway capacity.

18 MR. GREEN: If you look at para.10, the last sentence of para.10 --

19 THE CHAIRMAN: I am happy to go back to the summary in a moment. This is the body of the  
20 report. Summaries sometimes gloss over the detail in the body of a document. Can you just  
21 address us on the body first, and then by all means take us back to para.10.

22 MR. GREEN: Yes. If you turn, please, to p.31 under the heading "Will capacity be artificially  
23 constrained in the future?"

24 "It is also relevant to consider whether the factors that might have served to  
25 constrain capacity artificially can be expected to continue in the future.

26 "The CAA's views on this issue are as follows:

27 "whether or not BAA's conduct (as a result of common ownership) has  
28 contributed to the existence of artificial capacity constraints, here is no *a priori*  
29 reason to assume that separate owners of BAA's south east airports would  
30 artificially restrict capacity expansion in future, although the risks of abuse of  
31 dominance in future may vary between the airports, and may be greater at  
32 Heathrow than at either Stansted or Gatwick."

33 So again the assumption is no restriction in the future.

1 “The planning regime is currently being reformed, and there is good reason to  
2 believe that reforms will help major airport projects to gain planning permission  
3 more quickly and efficiently than in the past;  
4 “Any potentially adverse effects on competition arising from Government policy  
5 could be easily remedied by the Government clarifying that the location,  
6 sequencing and timing of the developments identified in the White Paper was only  
7 indicative, and that Government policy is therefore essentially permissive in  
8 character; and  
9 “Finally, there is scope - even within the current statutory framework - for  
10 economic regulation to be adapted to market circumstances, minimising any risk  
11 that economic regulation itself would give rise to material capacity constraints.  
12 Indeed, the CAA has previously indicated that it may revisit its assessment of the  
13 market circumstances obtaining at designated airports if market circumstances  
14 were to change significantly.”

15 Then 5.5 Competition in the short term:

16 “In the CAA’s view the Competition Commission has significantly understated  
17 the scope for competition in the short term for two reasons. First, the Competition  
18 Commission appears to have accepted too readily BAA’s argument that capacity  
19 constraints substantially reduce the potential for competition. As noted in the  
20 previous chapter, the Competition Commission has not demonstrated that capacity  
21 has been artificially constrained (with the potential for harmful effects on  
22 consumers) rather than resulting from natural constraints. Moreover, there is no *a*  
23 *priori* reason to believe that runway capacity would be artificially constrained  
24 post-divestment, assuming appropriate remedies to any adverse effects arising  
25 from planning, Government policy and current economic regulation.”

26 That is short term.

27 THE CHAIRMAN: No it is not, because you then read on 5.6 “However”, so there is a break in  
28 the reading: “However, even if it could be demonstrated that runway capacity has been  
29 artificially constrained”. So it seems to me that in the passages you showed me at the end  
30 of Chapter 4 you are right to suggest that the CAA is saying: actually, for the future there  
31 may not be these restraints, which they view as artificial, but in the section that we are now  
32 looking at in Chapter 5, whilst they note that there may be up scope in the future, at 5.6  
33 there seems to be a break in the reasoning and they make a different point denoted by the

1 word “however” that “even if it could be demonstrated that runway capacity has been  
2 artificially constrained”, and then they go into a separate set of reasoning.

3 MR. GREEN: The only two examples they give are price and service quality, which are the two  
4 in Appendix 5.1 which, on our reading, seem to be genuinely absent new capacity.

5 THE CHAIRMAN: I had understood you to be saying that the Competition Commission, when  
6 one goes to Appendix 5.1, had misunderstood the CAA’s evidence. But here, the CAA has  
7 identified competitive effects which would arise even if you strip out of the scenario  
8 anticipated expansion of runway capacity.

9 MR. GREEN: The submission we make and we set out --

10 THE CHAIRMAN: Accordingly, 5.8 seems to follow on from a separate train of reasoning from  
11 5.6. I think the bullet points in 5.8 are then swept up into the summary that you are showing  
12 us?

13 MR. GREEN: Yes, and I think they are identical. We, in a sense, rely upon that because in the  
14 summary, which is where they are actually stating their big, bold proposition, that  
15 immediately follows the sentence which says:

16 “No reason to believe that factors might have served artificially to restrict capacity  
17 in the past will continue to do so in the future. Accordingly, the CAA would see  
18 significant scope for competition ... in the short term.”

19 In the circumstances (b) follows (a). That is their summary and that is the position they  
20 adopted as their high statement of principle. 5.8 is, if you like, following both 5.5 and 5.6.

21 THE CHAIRMAN: You are reading 5.8 where the bullet points seem not to be directed at  
22 additional runway capacity, in particular the fourth bullet as was already pointed out. I  
23 think you accepted it is not concerned with runway capacity. In the context of Section 5 it  
24 reads much more naturally as a list of competitive effects which arise even if you accept  
25 artificial constraints.

26 MR. GREEN: With respect, that does not follow from paras.10 and 11. The high water mark  
27 would be that 5.8 is the consequence of 5.5 and 5.7.

28 THE CHAIRMAN: You say look at the summary and you say that should be taken to be in some  
29 way to have priority over a close reading?

30 MR. GREEN: If you like, read the summary, the last paragraph in the section “Competition in the  
31 short term”. So if it is a wrapping up of everything, it is accordingly in the light of 5.3  
32 through to 5.7.

33 THE CHAIRMAN: If it is wrapping up of everything. But that is why I was saying that the  
34 significance of the bullet points as appearing not to be concerned with additional runway

1 capacity, that does rather make more sense and take its colour from the section beginning  
2 from 5.6. But I think we have your submission that you say the summary is what we should  
3 look to.

4 MR. GREEN: Yes. If you look at the bullet points, the first bullet point which gives us an  
5 example of short term competition, “the price terms of access including the duration of the  
6 contract”. The question of duration of contract I made submissions about yesterday.  
7 Duration is the example which the Commission gives of the benefit of new capacity.

8 THE CHAIRMAN: Yes, but the reason we were taken by you to Section 5 was because I had  
9 asked you whether the CAA give a similar explanation of duration of contract that  
10 unequivocally links that as a factor with the prospect of expansion of capacity. That is what  
11 I thought you were going to show us. If they do not, just say so.

12 MR. GREEN: All right. Someone behind me may just check and see.

13 THE CHAIRMAN: If they do not, then it is very difficult for you to say, in relation to the first  
14 bullet point, there they are talking about a situation in which there is anticipated additional  
15 capacity, because this will be a general point, will it not?

16 MR. GREEN: With respect, we would disagree when one reads 10 and 11 of the summary  
17 together.

18 MR. ALLAN: To me there seems to be something of a difference between the significance one  
19 attaches to “accordingly” and 11 of the summary and in 5.8 of the body. If we look at  
20 para.11 of the summary saying “accordingly” which you link back to, logically enough, the  
21 final sentence at para.10, so the premise appears there to be that there is no reason to believe  
22 that there will be a persistence in artificial constraints, whereas if we look at 5.8 what it is  
23 saying is accordingly the combination of capacity constraints and regulation would not  
24 necessarily or materially limit the scope for additional competition. That might be read as  
25 suggesting that we are talking about a world in which there are constraints on runway  
26 development, but still there is scope for short term competition.

27 THE CHAIRMAN: Just to add to that, if I may, one could read the sentence just referred to at the  
28 beginning of 5.8 as the combination of capacity constraints - that is what has been addressed  
29 in 5.6 - and regulation - that is what has been addressed in 5.7.

30 MR. GREEN: The logic of the section in Chapter 5 under the heading “Competition in the short  
31 term” is that you do not get the benefits in 5.8 unless there is a lessening of economic  
32 regulation which is what is said in 5.7. You do not get that unless there is the competition  
33 which is referred to in 5.5 and 5.6. If you follow the logic through, you would not read 5.8  
34 as saying that there was a consequence and when they referred to capacity constraint they

1 were talking about something which is permanent. That is not the logic which one can read  
2 by taking 5.3 to 5.7.

3 THE CHAIRMAN: I am afraid I do not follow that at the moment. At 5.7, the discussion of  
4 regulation is not tied to anticipated future capacity. Indeed, at the end of 5.7 they give a  
5 historic example. They are just making a general point that to the extent that you get  
6 effective competition arising, you can pull back from regulation. This was something we  
7 talked about yesterday. That may be true, even if you still experience constraints, ie no  
8 anticipated new runway capacity, if you can have competition and they say that you can at  
9 5.6.

10 MR. GREEN: I am going to ask Mr. Chamberlain who drafted the note. He says he will better  
11 explain the point.

12 THE CHAIRMAN: Very well. Yes, Mr. Chamberlain.

13 MR. CHAMBERLAIN: I am not sure I said that, Sir, but I will do my best. Sir, if you go back to  
14 para.6 of the introduction ----

15 THE CHAIRMAN: The introduction – you call it an “introduction”, in fact it is a summary.

16 MR. CHAMBERLAIN: You are right, Sir, it is called a summary. What that does is, it explains  
17 what the relationship is between capacity constraint and economic regulation. So in para.6  
18 we see the distinction between natural capacity constraints and artificial constraints. At the  
19 end of para.6 they say this ----

20 THE CHAIRMAN: Sorry, just let me read that again. (After a pause) Yes.

21 MR. CHAMBERLAIN: At the end of para.6 there is this statement:

22 “To the extent capacity constraints currently – and importantly, in future –  
23 derive more from the natural investments cycle in a capital intensive industry  
24 that artificially from operator behaviour or policy and institutional constraints,  
25 the more completion can be relied upon to resolve them relevant to regulation.”

26 Then in para.9 of the introduction, one has ----

27 THE CHAIRMAN: Just on that sentence at the end of para.6, that seems to be making a general  
28 point. If you can get effective markets to that extent, or effective competition, you do not  
29 need regulation so much.

30 MR. CHAMBERLAIN: Correct.

31 THE CHAIRMAN: They seem also to draw a distinction between current capacity constraints  
32 and, importantly, what might be the constraints in the future?

33 MR. CHAMBERLAIN: Indeed. What they are saying is that if those are natural constraints in  
34 the sense that they are related to the economic cycle so that the airports are, as was said in a

1 later part of the report, simply full, then that is a driver of competition rather than an  
2 inhibitor of it, because airports will invest to increase capacity.

3 THE CHAIRMAN: In the sentence they are saying that, to the extent that capacity constraints  
4 currently derive more from a natural investment cycle, the more competition can be relied  
5 upon. So they are not making an absolute statement, or do not seem to be, they just seem  
6 to be noting a relationship between competition and the extent to which regulation is  
7 required.

8 Then you want us to go para.9 – is that right?

9 MR. CHAMBERLAIN: At para.9, one can see -----

10 THE CHAIRMAN: I do not think we have looked at 9 before, so let me read that, please. (After  
11 a pause) Just help me again: RAB-based price control regulation, what is that?

12 MR. CHAMBERLAIN: RAB is “regulatory asset base”.

13 MR. GREEN: Regulatory asset base, it would be the identification of the assets.

14 MR. CHAMBERLAIN: Over which one is permitted to make a return.

15 THE CHAIRMAN: I see, so is that a form of price regulation where you look at the capital base  
16 and you say you are permitted a certain rate of capital

17 MR. GREEN: Yes, that is right.

18 THE CHAIRMAN: Just so that I am clear in my mind, is this different from SQR type  
19 regulation, which is service control?

20 MR. GREEN: Yes, that is right.

21 THE CHAIRMAN: Thank you. I am just trying to understand, RAB-based price control would  
22 involve the regulator effectively determining the price. That, I understand. Then it says,  
23 “service quality and investment of airports”. I am not immediately clear why ----

24 MR. CHAMBERLAIN: I think that may be a rather telescoped sentence. It would be the SQRs  
25 that determine the service quality. The point is that there is regulation of all these factors  
26 and it is the regulation that determines the outcome rather than competition. That is what is  
27 being said there. That is why the CAA refers to these aspects of regulation as potentially  
28 crowding out competition or deadening competition.

29 THE CHAIRMAN: In fact they say “crowding out” rather than “deadening”.

30 MR. CHAMBERLAIN: They say “deadening” later on.

31 THE CHAIRMAN: Let me finish reading para.9. (After a pause) In fact, in the sentence you  
32 have just mentioned, they are back to talking about price caps. They do actually seem just  
33 to be talking about RAB-based price control not the SQRs.

34 MR. CHAMBERLAIN: In that sentence, that is correct.

1 THE CHAIRMAN: And again in the last sentence. In fact, at the moment it seems to me that is  
2 all talking about, as they say explicitly in the first sentence, RAB-based price control  
3 regulation. Is that a fair reading of it?

4 MR. CHAMBERLAIN: It is a fair reading except that in the first sentence there is reference to  
5 service quality and investment in airports.

6 THE CHAIRMAN: It may be that where you have a regulatory asset base form of regulation,  
7 that, in effect, has an effect of squeezing what you are prepared to invest. So, separate from  
8 SQRs, it may have an impact on service quality, and so on.

9 MR. CHAMBERLAIN: I agree.

10 THE CHAIRMAN: So, in fact, it is not about SQRs, it is just about RAB-based price control.  
11 That is what it says, it makes sense, and the second and third sentences also talk about price  
12 control.

13 MR. CHAMBERLAIN: I will not go behind that.

14 THE CHAIRMAN: All right, yes.

15 MR. CHAMBERLAIN: Then in 10 one can see what conclusion is drawn from that. Paragraph  
16 10 draws together what has gone before in 6 and 9.

17 THE CHAIRMAN: Can I just ask, 6 through to 10 appear, although I have not read the whole of  
18 chapter 4 of this document, to be a summary of conclusions from chapter 4. Is that correct?  
19 Chapter 4, I am just looking at it, "Development of airport capacity", it talks about natural  
20 and artificial capacity constraints. That seems to be the bit in the body of this document that  
21 talks about those matters.

22 MR. CHAMBERLAIN: I think 4 and 5, but we will come to that in a moment. I will try and pick  
23 up in 5 where those conclusions appear, if I may.

24 In para.10 one can see:

25 "It therefore appears to the CAA that the CC has not made a convincing case  
26 that BAA has artificially restricted capacity in the past, although capacity may  
27 have been artificially restricted as a consequence of the planning regime or from  
28 economic regulation."

29 Then this sentence, which we say is important:

30 "There is, however, no reason to believe that the factors that might have served  
31 artificially to restrict capacity in the past will continue to do so in future."

32 One potential artificial constraint on capacity, according to the CAA, is government policy.

33 One sees that from para.6. Then one gets the "Accordingly".

1 So the question that I think you were asking, Sir, is what does one read into that  
2 “accordingly”, what are the factors?

3 THE CHAIRMAN: I can see you have got this textual argument on the summary from the  
4 “accordingly”.

5 MR. CHAMBERLAIN: I want to go beyond the textual argument, because I think that was the  
6 question which taxed Mr. Green on which I was hoping I could cast a bit more light, and  
7 that is if one looks back to the regulation point, the point that is being made is that if you  
8 have natural capacity constraints you can rely on competition to get rid of that. If you have  
9 artificial capacity constraints, and that point is made at the end of para.6, then you are going  
10 to need to rely to a greater extent, and of course it is a matter of degree, on regulation. If  
11 you have regulation that, itself, crowds out competition, or deadens it – two words the CAA  
12 uses. So the economic benefits which one sees listed here, and also in section 5, are  
13 benefits which at least to some degree are dependent on the scenario in which one can  
14 lessen the extent of competition.

15 I think that is the answer to your question, which is how the logic of this section appears to  
16 fit together, doing the best I can with the logic of this.

17 THE CHAIRMAN: Going back then to the logic of the body of section 5.

18 MR. CHAMBERLAIN: If we go back to section 5, one sees the reference to RAB-based price  
19 control regulation in 5.4.

20 One sees in 5.5:

21 “In the Court of Appeal’s view, the CC has significantly understated the scope  
22 for competition in the short term for two reasons.”

23 We are talking about the short term here. I think that the construction which you were  
24 initially putting to Mr. Green, which is that “new capacity related matters are long term  
25 only” cannot be, with respect, correct,. If f one looks at section 5.5, under the heading  
26 “Competition in the short term”, one can actually see that the fact that there is no *a priori*  
27 reason to believe that runway capacity would be artificially constrained post divestment, is  
28 one of the two reasons given as to why there would be greater scope for competition than  
29 the CC originally thought in the short term.

30 Then one gets:

31 “... even if it could be demonstrated that runway capacity has been artificially  
32 constrained ...”

33 THE CHAIRMAN: No, you get “however”, so there is a break in the reasoning. As I am reading  
34 it at the moment, 5.5, you are right, is an acknowledgement that actually talk about artificial



1 constraints is a little bit by the by because we are operating – this is 2008, I think,  
2 2008/2009 – against an expectation that there will be additional capacity.

3 MR. CHAMBERLAIN: What follows “however”, is not even if capacity has been artificially  
4 constrained and would continue to be, it is simply:

5 “... even if it could be demonstrated that runway capacity has been artificially  
6 constrained ...”

7 Then the footnote, we do not think that it has been adequately established that it has been:

8 “... airports could still be expected to compete to a significant degree post  
9 divestment.”

10 Then there is the reference to the fact that one can still see the scope for competition when  
11 airports are full. One has to read that back in context and in the light of the CC’s own  
12 statement and prediction that there is no *a priori* reason to believe that there will be artificial  
13 constraints in the future, even if there have been in the past.

14 One then sees at 5.6 and 5.7 admittedly a separate argument that could be read as stand-  
15 alone, and then at 5.8 “Accordingly”. That “accordingly” must be read in the light of, when  
16 looking at it with the summary, at least the two reasons given above.

17 THE CHAIRMAN: I see, yes, thank you. What was being pointed out to me, just so that we tie  
18 this document into Appendix 5.1 of the 2009 report, is that it does seem in para.3 of  
19 Appendix 5.1 that the specific cross-reference is to 5.8. You see from the text in para.3:

20 “The CAA, on the other hand, told us that the combination of capacity  
21 constraints and regulation would not necessarily or materially limit ...”

22 And then they go on. You accept that. They seem to be referring directly to the body, not  
23 to the summary.

24 MR. CHAMBERLAIN: It is, but the CAA were obviously saying one thing or another, and if it  
25 was saying what we are saying then it was wrong to rely on it for the purpose that it was  
26 relied on in Appendix 5.1. So I think I will sit down and let Mr. Green continue.

27 THE CHAIRMAN: Thank you very much for that submission. I think, Mr. Green, you were  
28 going to show us where this point is already pleaded?

29 MR. GREEN: Yes, indeed. This is in our notice of application, which is bundle A, paras.65 and  
30 66.

31 THE CHAIRMAN: I do not see a reference to the CAA’s evidence and failure to understand that  
32 evidence.

33 MR. GREEN: There is not there, but our analysis ----

34 THE CHAIRMAN: That is what I thought was the new point.

1 MR. GREEN: The point we were making was that 5.1 appears to be either a mix of contingent  
2 and non-contingent, or at least there is evidence that it is contingent upon new capacity.

3 THE CHAIRMAN: You accepted yesterday that if you just read 5.1 by itself, it is talking about a  
4 situation in which there is no anticipation of new capacity. You have now, and I am not  
5 saying that this was improper or inappropriate in any way, taken us to the CAA document,  
6 and my understanding is that your submission now is that, in fact, the Competition  
7 Commission misunderstood the CAA evidence and made inappropriate use of it.

8 MR. GREEN: I hoped I had reserved my position.

9 THE CHAIRMAN: You did. I am not being critical of you for that, but that seems to be a new  
10 and distinct point from this. Again, we are not going to shut you out from this, but it needs  
11 to be pleaded, it seems to me.

12 MR. GREEN: If you would like us to set it out more precisely, we would be very happy to do so.  
13 That is probably the quicker way to do that.

14 THE CHAIRMAN: All right.

15 MR. GREEN: Unless one treats the note effectively as particulars of the pleading. We are happy  
16 to do whatever is convenient for the Tribunal.

17 THE CHAIRMAN: Let me ask Mr. Beard. Mr. Beard, it seems to me that this is a new and  
18 distinct point.

19 MR. BEARD: As it has been put by Mr. Green this morning, yes, undoubtedly.

20 THE CHAIRMAN: Would you be satisfied with the note standing as an amendment to the  
21 grounds of claim?

22 MR. BEARD: I think I will probably need to just take instructions, because I put down a marker  
23 yesterday that the further evidence, additional, late material, now new further material, new  
24 ground, is part of a pattern that we are seeing here and the Commission does object to these  
25 matters, which was I put down the marker yesterday. I will need to take instructions in  
26 relation to it. I anticipate one of the concerns will be that it is all very well turning up with  
27 the CAA's material now.

28 In order for the Commission to give a proper account of how it took those matters into  
29 account, how it fed into Appendix 5.1, it would need to go away and look at what actually  
30 occurred, not least because the CAA turned up for a hearing before the Commission back in  
31 2008 and commented on these sorts of matters. In those circumstances, it may well be a  
32 matter that the Commission would have to take away, if it is going to have to do that sort of  
33 thing, why was this not raised sooner? These are documents that are sitting on a website,

1 that are well available to BAA, and in those circumstances there really is no excuse for this  
2 late submission.

3 THE CHAIRMAN: The position appears to be that this is an attempt to introduce a new  
4 argument which does require, in my view, to be pleaded.

5 MR. BEARD: Yes.

6 THE CHAIRMAN: You are reserving your position at the moment as to whether you will object.

7 MR. BEARD: I must take instructions.

8 THE CHAIRMAN: That is perfectly fair. We will need to hear from you fairly promptly  
9 whether you are going to object and, if so, what the grounds of objection are, because we  
10 will have to have an argument as to whether an amendment should be permitted or not. I  
11 will not press you on whether the note is, in itself, sufficient. In fact, since the note clearly  
12 was designed to be argumentation rather than, if you like, setting out the point, my own  
13 feeling is, since we cannot resolve this now for the reasons that you have given, that it  
14 would be better to have a properly crafted pleading and amendment to the grounds.

15 MR. BEARD: The reason why I place the caveat is because although I indicate what my broad  
16 instructions are in relation to this pattern of further material, having heard what has been  
17 said and having looked at the material, it does not appear at first blush that it amounts to a  
18 row of beans, and in those circumstances precisely how it is going to be pleaded may be  
19 something that the CC is not going to stand on ceremony about. That is why I would like to  
20 take instructions.

21 THE CHAIRMAN: You are obviously entitled to take instructions. We will leave that there.  
22 Really it is a matter for Mr. Green how he wants to plead his case. I have given an  
23 indication that, since we cannot resolve it now, it probably would be better to have  
24 something properly formulated as an amendment to the grounds. Strictly, you would need  
25 to see that before you formulate your position. So Mr. Green is at liberty to invite me just  
26 to treat the note as an amendment and, if he does, then we will have the argument on the  
27 basis of that. Mr. Green, is that a -----

28 MR. GREEN: That is perfectly sensible. We will provide, I think it is the sensible thing, an  
29 amendment.

30 THE CHAIRMAN: That needs to be done soon.

31 MR. GREEN: Absolutely, I understand that. That goes without saying. Can I simply point out  
32 that in their defence the Commission dealt with this fully. They did not misunderstand the  
33 point that we were making. I do not want that to get in the way ----

1 THE CHAIRMAN: If I am making a mountain out of a molehill tell me, because if it is already  
2 pleaded and understood as a pleading of a misunderstanding of what the CAA's evidence  
3 was then tell me.

4 MR. GREEN: Bundle E, para.38 and onwards, where they join issue with our description in our  
5 pleading, saying that the Commission has misunderstood what the CAA said, and they deal  
6 in paras.38, 39 and 40 of their defence with the question of the CAA's submission. They  
7 say we have misread it. I do not want this to take time. If it helps to have it absolutely  
8 clarified then I am very happy to do so and we will do so quickly.

9 THE CHAIRMAN: I do not think that they are referring to the CAA document that you have  
10 taken us to in order to make your point.

11 MR. GREEN: In para.38 in the sentence before the quote:  
12 "Instead, the CC preferred the opposing view put forward by the Civil Aviation  
13 Authority ..."  
14 and then they say what their view is of it. They then challenge our description of their  
15 findings about the CAA as wrong.

16 THE CHAIRMAN: None of this is by reference to the CAA's 2008 document, which is what you  
17 are basing your argument on now.

18 MR. GREEN: I understand that. That is correct. This was their potted version of it in the 2009  
19 and 2011 reports, not the underlying document.

20 THE CHAIRMAN: They have not understood you to be making a point based on the 2008 CAA  
21 document.

22 MR. GREEN: I think it would be helpful if we plead the point out.

23 THE CHAIRMAN: I think it would be, yes. As I said, that needs to happen soon because  
24 Mr. Beard needs to have an opportunity to consider actually what you are going to plead.

25 MR. GREEN: We will try and do that before the end of the day. It should be possible to start  
26 drafting something at lunch time or during the break.

27 THE CHAIRMAN: We will treat your submissions as having been made *de bene esse* at this  
28 stage. I think that we have understood them, unless there was anything you wanted to add  
29 to them.

30 MR. GREEN: No, thank you, save only that when you do come to read it at leisure and have a  
31 chance to think about it more closely, we would particularly refer you to the summary parts  
32 of chapter 4.

33 THE CHAIRMAN: Which parts are they?

1 MR. GREEN: In particular paras.4.45 to 4.47, which is the in the chapter “Development of  
2 airport capacity”, and you will see that there is no suggestion in their summary there that  
3 analysis depended upon there being any permanent capacity constraints. Again, I do not  
4 want to take more time now on this issue since you have our point, and no doubt you will  
5 have an opportunity to read the document fully later. It is consistent with the submission  
6 we make.

7 THE CHAIRMAN: I think it is in the light of that that I was suggesting to Mr. Chamberlain that  
8 in the summary at the start that paras.6 to 10 seemed to be summarising the position arrived  
9 at in chapter 4. He did not seem happy with that, he said it was chapters 4 and 5.

10 MR. GREEN: He said it was chapters 4 and 5, yes.

11 THE CHAIRMAN: He did not actually point me to bits in chapter 5, but you say that if I read  
12 chapter 5 it will be obvious. Let us press on, and you can come back to me and give me  
13 additional reading references for that as well.

14 MR. GREEN: I think the only paragraphs there are in chapter 5 of relevance are those from 5.3  
15 through to 5.8. That is all the text there is on competition in the short term, and those are  
16 the ones that Mr. Chamberlain read to you.

17 THE CHAIRMAN: Where are we going from there?

18 MR. GREEN: At the end of the day yesterday I was addressing the Tribunal on the scope of the  
19 benefits absent new capacity contained in the 2011 decision. We were dealing with service  
20 as a benefit. I think we had close to the end of our submissions on that, but I had not taken  
21 you, as I said I would, to the 2008 report so that you can see the relevant paragraphs there.  
22 There are a number of points in both 2009 and 2008 which bear upon the point of what  
23 benefit there is going to be over and above regulation and how effective that regulatory  
24 regime is going to be in respect of Stansted. I will take you quickly to identify the relevant  
25 parts of 2008, and there are a few paragraphs which are relevant.

26 The 2008 report is in bundle D, tab 2.

27 THE CHAIRMAN: This is the Q5, and I am sorry, you did explain ----

28 MR. GREEN: The quinquennial review of charges at Heathrow.

29 THE CHAIRMAN: The reason we are going to this document is?

30 MR. GREEN: This the justification for introducing an SQR regime in the first place. There had  
31 been no SQR regime at Stansted until this review, but there had been at Gatwick and  
32 Heathrow.

33 THE CHAIRMAN: Yes. The relevance of why the choice was made to introduce an SQR  
34 regime at Stansted to the argument is?

1 MR. GREEN: It is the starting point for the submission that the Competition Commission has not  
2 conducted any further analysis of SQR problems at Stansted either in 2009 or 2011 but what  
3 the Competition Commission has recorded in 2009 is an improvement in SQR performance.  
4 So you have an improvement at Gatwick without common ownership; you have  
5 improvement at Stansted with common ownership. It puts into context what we say is a  
6 leap of logic in the 2011 Decision that the change of ownership results in an improvement  
7 and say that you cannot simply assume that change of ownership does that as opposed to the  
8 natural pressure brought about by the regulatory regime.

9 THE CHAIRMAN: Right. All right, I think I understand where we are going. So after we have  
10 looked at this, you are going to take us back (is this right?) to the 2011 Report to show us  
11 where they say there have been --

12 MR. GREEN: I will briefly show you, this is a paragraph in the 2009 Report in which the  
13 Competition Commission concludes that the SQRs address the AEC. In other words, they  
14 view it as, if not a total solution, a very substantial solution. Then I will just simply wrap up  
15 the points I want to make about service.

16 THE CHAIRMAN: What you specifically just said to us was that since 2009 there had been an  
17 improvement in the SQRs at Stansted even though there had been common ownership. I  
18 was just asking where you are going to take us to make that proposition good. Would that  
19 be in the 2011 Report?

20 MR. GREEN: It is in the 2011 Report and 2009.

21 THE CHAIRMAN: It will not be in 2009. You said since 2009 there has been an improvement.

22 MR. GREEN: You are right. I think it may be in 2011 that there is an acceptance of that.

23 THE CHAIRMAN: All right.

24 MR. GREEN: May I just start by identifying the scope of 2008, para.13.25. I am not going to  
25 read you many paragraphs. I am going through identifying what is in it because the point  
26 that I draw from this is simply that a very extensive, detailed regime was put in place.

27 THE CHAIRMAN: Presumably, that was on the footing that the regulator - is the regulator here  
28 CAA?

29 MR. GREEN: The Competition Commission makes recommendations to the CAA that  
30 implement the recommendations.

31 THE CHAIRMAN: Right, so presumably that is on the footing that the Competition Commission  
32 was unhappy with service.

33 MR. GREEN: Yes. 13.25: "Unlike Heathrow and Gatwick, there is no SQR scheme in operation  
34 at Stansted through which airport revenue is at risk if the airport fails to meet certain quality

1 standards.” The Competition Commission then record the history of BAA entering into  
2 service level agreements with airlines from 13.26. At 13.27 they say they have received  
3 strong criticisms from airlines regarding service quality and that a more detailed account of  
4 the analysis with regard to service quality is in Appendix N.

5 Appendix N is just a few pages further on and it is 38 pages of detailed analysis of a variety  
6 of facets of service quality. Going back to the Commission’s findings at 13.29 they say  
7 they examined service quality. They applied a variety of tests, performance measures on  
8 asset availability, security queuing, customer satisfaction survey data, international survey  
9 data to enable benchmarking, and then they refer to the evidence and they conclude there  
10 are difficulties. Then recommendations are at 13.39:

11 “Given our public interest finding in this area, we recommend that an SQR  
12 scheme should be imposed at Stansted, which establishes queue standards, backed  
13 by penalties in the event that the standards are not met.

14 “140. We considered what standards would be appropriate. We concluded that  
15 the current standard in Stansted’s SLA (95 per cent of passengers queuing for less  
16 than 10 minutes) was both reasonable and practical: until recently this standard  
17 existed at both Heathrow and Gatwick, and recently, Stansted had been hitting this  
18 target consistently. We were not convinced that the benefits of requiring a shorter  
19 queue standard, say eight minutes, would be significant and we were told that the  
20 costs of moving to a shorter queue target would be substantial. We also concluded  
21 that we should set an effective maximum queue length as we had seen that, when  
22 the 10 minute target was missed, it could be missed by a considerable margin. We  
23 concluded that a target which required 98 per cent of passengers to queue for less  
24 than 15 minutes would be appropriate at Stansted.”

25 Then they made recommendations about the manual method of measuring queues and then  
26 made a recommendation about that. At para.13.42 they conclude that if an SQR scheme is  
27 introduced it would have beneficial effects. In 13.43 they say that there should be standards  
28 based on what they call QSM scores, and they make an observation about the validity of  
29 that and whether it is excessively subjective or not. They refer to BAA not having made a  
30 firm proposal about the amount of revenue it would be prepared to put at risk and they then  
31 conclude that BAA’s proposal for an SQR scheme included provision for bonuses in the  
32 event that the airport outperforms its targets.

33 “We concluded that such arrangements would not be suitable at Stansted, just as we  
34 had concluded at Heathrow and Gatwick. However, we do recommend that the

1 incentive schemes for individual BAA executives at Stansted should be aligned with  
2 the Stansted SQR scheme, such that excellent performance on service delivery is  
3 recognised financially.”

4 So they identify problems, they identify a regime, and then impose it for the first time.

5 THE CHAIRMAN: Does the detail matter?

6 MR. GREEN: No, it does not really.

7 THE CHAIRMAN: Shall we press on?

8 MR. GREEN: I was not going to take you to Appendix N. I do not think the detail does matter.

9 An important point is there was a regime that was introduced.

10 In para.10.268 of the 2009 report bundle C tab 12 para.10.261 "Quality of service" - again, I  
11 do not want to read this because the points I draw from it are fairly limited. In para.10.262  
12 the Competition Commission considers the SQR regime is an important means of  
13 incentivising customer service where there is a lack of adequate competitive rivalry to  
14 ensure satisfactory service provision. They refer to evidence from Gatwick and Heathrow  
15 and the extent to which it has resulted in rebates to users.

16 THE CHAIRMAN: When you say rebates to users?

17 MR. GREEN: To airlines.

18 THE CHAIRMAN: Is that the way the penalty is administered?

19 MR. GREEN: Yes, the penalty is a percentage of the airport charge which is remitted back to the  
20 airline because they failed to meet the target.

21 They make various recommendations about the regime but then at Para.10.268:

22 “We consider that the above recommendations are sufficient to address the  
23 adverse effects identified in the area of quality of service and that the CAA, as the  
24 airports regulator, is the appropriate body to take responsibility for  
25 implementation. It is consistent with its objectives and duties and we do not  
26 consider that it is appropriate to add a further layer of regulation.”

27 Then in the 2011 Report which is bundle A. I am just checking that I have got the right  
28 reference in my notes. I am now on the speaking note at 155.

29 THE CHAIRMAN: Mr. Green, just on the speaking note, we are assuming that you are going to  
30 take us to the relevant bits of it in the course of your oral submission. We are not treating it  
31 as a stand-alone document that we have got to read on top of the grounds, the skeleton  
32 argument and everything else.

33 MR. GREEN: In fact, you are right, it is an elongated version of the skeleton. So use the  
34 skeleton.



1 THE CHAIRMAN: As I say, we are expecting you to take us to the relevant bits of it as  
2 necessary. So para.155 of it.

3 MR. GREEN: This address the Competition Commission's position at para.52 of the 2011  
4 Appendix A.

5 THE CHAIRMAN: Should we have that open?

6 MR. GREEN: Yes, please. That is in bundle A tab 2A, Appendix A, paragraphs 52 and  
7 following. You have in mind the submissions we made yesterday, particularly about 5.1  
8 and I am not going to repeat those, but the first point to make is that they cross-refer to  
9 Appendix 5.1 para.19. We made submissions about the words in parenthesis, that even  
10 separately-owned price-capped airports do not necessarily have the incentive to spend on  
11 improving service quality. We had a discussion about whether there were non-cost-related  
12 or non-price-related investments that might arise. We rely upon the Competition  
13 Commission's own finding that the SQR cures the AEC or addresses it, whether 100 per  
14 cent is perhaps open for debate.

15 THE CHAIRMAN: Strictly, what they say is they are sufficient to address the adverse effects  
16 identified in quality of service. So they seem to be the effects where they are just falling  
17 below any acceptable standard and have to be brought up, as distinct from the possibility of  
18 improvement through competition. This is to go back over.

19 MR. GREEN: Correct. The Competition Commission's point is there is a supplementary force  
20 which might be generated by divesting Stansted airport, yes correct.

21 THE CHAIRMAN: And which might improve quality of service in ways which are not  
22 addressed by the SQR.

23 MR. GREEN: That is separate. The SQR is designed to substitute for competition. They are not  
24 the minimum; they are designed to do what competition itself would do. So it is not meant  
25 to be a minimum standard to be adhered to in the same way that professional standards  
26 might be an acceptable minimum. They are designed to do something different which is  
27 mimic to the best of their ability (which may be imperfect) what competition would do. But  
28 I accept the Commission's point is that divesting Stansted might generate incremental  
29 benefits which supplement the SQRs. The point we make is that given that the Competition  
30 Commission itself believes that the SQRs, if not 100 per cent perfect, do a pretty effective  
31 job. Then the starting point is the scope for incremental pressure is likely to be modest, at  
32 least certainly without any further evidential analysis it is likely to be modest. It is  
33 theoretically possible that the Commission could conduct a new analysis and find that it is  
34 very substantial but they have not done that.

1 What the Competition Commission has done (and rather than read my speaking note I am  
2 going to summarise the points I have made) is to say: we have looked at Gatwick and we  
3 have concluded in relation to Gatwick that there is evidence that since it came under  
4 separate ownership it has improved its service quality record. That is para.57 of its  
5 reasoning.

6 THE CHAIRMAN: It is 55 I think.

7 MR. GREEN: In 55, 56 and at 57 what they said is there is evidence that since Gatwick came  
8 under separate ownership, there was action to improve customer experience and encourage  
9 airlines to use Gatwick. "The evidence is encouraging although Gatwick has not been  
10 under separate ownership very long", etc.

11 To that we say that there is no necessary logic in connecting the improvement to the  
12 separation of ownership. It may be, but it may not be. It could be that the reason why  
13 Gatwick's performance has improved is simply because there was a tightening of the SQR  
14 where it is more incentivised to improve its position.

15 THE CHAIRMAN: Where does it say there had been a tightening?

16 MR. GREEN: Sorry, it is the submission I am making that the Commission itself is assuming that  
17 the improvement is due to the separation of common ownership. That is the point they are  
18 making, that after Gatwick came into separate ownership their performance improved. We  
19 say it is a leap of logic to say that separation of ownership is the cause.

20 THE CHAIRMAN: You said that the cause is that there had been a tightening of the regime. I  
21 have not been shown that.

22 MR. GREEN: It could be.

23 THE CHAIRMAN: Is your case that it is, that there was a tightening of regime at Gatwick?

24 MR. GREEN: My submission is on the basis of the analysis of the court in *Tesco* they have to put  
25 themselves in the position to be able to prove causally what it is that divesting Stansted  
26 would bring to the party. If you have got strong regulation, which they themselves accept  
27 *prima facie* is adequate (I am not saying it is 100 per cent adequate), then you have got to  
28 ask yourself as they did in 2009 whether regulation is in fact an adequate remedy or is the  
29 cause of an improvement, or whether in fact separating ownership would add more. That is  
30 not an analysis which they have carried out.

31 THE CHAIRMAN: Sorry, just on that. Will not the Competition Commission know whether  
32 there has been a tightening of SQR at Gatwick? You told me they are the people that --

33 MR. GREEN: It is not about that, it is whether the improvement is simply due to the SQR.

34 THE CHAIRMAN: When was the SQR introduced at Gatwick?

1 MR. GREEN: At Gatwick it was before. It was before Stansted. April 2008 it was introduced at  
2 Gatwick and it came into force later at Stansted. They are not symmetrical regimes; they  
3 are similar but they are not exactly the same.

4 THE CHAIRMAN: All right. Two things on that. If it is April 2008 then the experience of the  
5 change in connection with change of ownership appears to take place after there had been a  
6 reasonable period within which BAA had been operating it.

7 MR. GREEN: Yes, I accept that.

8 THE CHAIRMAN: So that rather makes it look as though it might be a legitimate inference to  
9 draw.

10 MR. GREEN: I accept it might be an inference; I do not accept it is necessarily legitimate  
11 because you have got two potential forces applying to it. One is regulation and the other is  
12 separate ownership. Separate ownership means what? It means competition. The  
13 Competition Commission accepts that there is, within the SQR regime, an incentive to  
14 better the performance. So the SQR regime itself creates an incentive to improve standards  
15 beyond the SQR. That is accepted.

16 The Competition Commission has got to differentiate between the regulatory regime being  
17 effective and Gatwick simply getting its act together, and separate ownership. If one goes  
18 back to the Chapter 3 analysis that would suggest that separate ownership provides modest  
19 competitive pressures.

20 THE CHAIRMAN: The other point I wanted just to invite your comment on is para.53 at the top  
21 of the page, second line: "There is already significant evidence that a number of service led  
22 initiatives over and above those expected when Gatwick was part of BAA have been  
23 introduced." So there seems to be reference to two things that would support an inference  
24 that it is change in ownership, which has indeed driven service improvement. One is that  
25 there was an expectation of where BAA was going to get and things have gone beyond that.  
26 Secondly, that BAA was in control of Gatwick with an SQR regime from April 2008 to the  
27 end of 2009, so a reasonable period of time, and then there is a change of ownership and it  
28 is from then that you get the improvement. Is that a fair summary of what is being said?

29 MR. GREEN: What Gatwick did was to give the Competition Commission a list of changes it  
30 had made after ownership, and that is at para.53 which they cross refer to here. It is a list. I  
31 am not suggesting that it is not a material list. Given their Chapter 3 analysis one would  
32 have to ask how separate ownership brings this about because Chapter 3 suggests that the  
33 competitive constraint is limited.

1 THE CHAIRMAN: So in para.53, is this right, the evidence of a number of service led initiatives  
2 over and above those expected when Gatwick was part of BAA, an airport which is subject  
3 to SQR has to give some sort of explanation to the regulators how they will meet the SQR  
4 targets?

5 MR. GREEN: They have a reporting obligation to the CAA.

6 THE CHAIRMAN: Right, so is this right, that BAA reported certain steps that they were taking  
7 at Gatwick, and then new owners of Gatwick report additional initiatives that they were  
8 going to take?

9 MR. GREEN: In order to comply with the SQR.

10 THE CHAIRMAN: Correct. So when you get the reference “over and above those expected  
11 when Gatwick was part of BAA”, it is a reference to what BAA were proposing to do  
12 compared with what the new owners were proposing to do?

13 MR. GREEN: One does not know what BAA would have done.

14 THE CHAIRMAN: No, I follow that. I just want to make sure that I have understood the Report.

15 MR. GREEN: That is how I understand the Report. That is how I understand the Commission’s  
16 submission.

17 THE CHAIRMAN: Yes, thank you. All right.

18 MR. GREEN: This is the totality of their evidence for suggesting that breaking up Stansted  
19 would generate service quality improvements. There are two issues which have to be  
20 addressed. Since we have addressed so far whether there would be any increment over and  
21 above regulation, let us assume for the sake of argument there is an increment over and  
22 above regulation. One then has to have some idea of its extent. Given that the Competition  
23 Commission accepts that there is no incentive to spend money, if this is going to be one of  
24 the only things the Commission relies upon to justify divestiture, we would have expected  
25 an analysis of extent. We have a description of what they say is scope for competition.  
26 They have identified that maybe there are benefits in their view which occurred after  
27 separate ownership, but they have not quantified them. We do not know how material they  
28 are in overall terms. You need to have that because you are then going to put that into the  
29 proportionality analysis and measure that against the need to adopt a draconian remedy.  
30 So there are two things: scope for competition on the one hand, and then having a valuation  
31 of its extent. In 2008 the Competition Commission was perfectly able to get a very clear  
32 handle on extent. They conducted a very detailed analysis which they did not re-conduct in  
33 2011.

1 THE CHAIRMAN: But from what you have shown us they did not conduct analyses of what  
2 competition would be likely to produce. As I understood Q5, they look at the customer  
3 experience at Stansted and say in certain respects - lengthy queues and so on - it falls below  
4 what was reasonable to expect.

5 MR. GREEN: In 2008 the Q5 review was not about competition, it was about regulation. But in  
6 2011 they are looking at the impact of divesting Stansted and the competitive pressure it  
7 then exerts. They accept that the starting point is regulation is pretty good (it may not be  
8 perfect, but that is their view, it is pretty effective), then you get the incremental effect they  
9 say arises. So you assume for the sake of argument that they are correct and it is causally  
10 connected to separate ownership rather than regulation (which is our first point), then we  
11 say there is no analysis of how important this is in the overall scheme of things. You can  
12 take a molehill and turn it into a mountain, and you can say this is very significant, very  
13 substantial. But they have not done any quantitative analysis. They accept that.

14 THE CHAIRMAN: When you say they accept that, they give reasons why they could not be  
15 expected to.

16 MR. GREEN: They say they have not done any quantitative analysis. That is common ground.  
17 They say the analysis is qualitative. This is the only qualitative analysis there is in relation  
18 to service. We do not accept that they say they could not, because they did in relation to  
19 this in 2008. They have the tools to measure service. They are very well established and  
20 they conducted a very detailed --

21 THE CHAIRMAN: Sorry, that is why I was asking what they did in 2008. They did not  
22 quantify, in 2008, benefits to be expected from competition. You have just accepted that.

23 MR. GREEN: I see your point, but you can use those same techniques. When one talks about  
24 measuring the benefits, you can do it in a precise mathematical way theoretically, and often  
25 that is not possible because the exercise just does not facilitate mathematical precision.

26 THE CHAIRMAN: Yes. Forgive me, just so we are clear what we are debating here, in para.53  
27 they say: "too short a period from which to draw definitive conclusions" and at the end of  
28 57 they say: "These benefits are difficult to quantify reliably". So that seems to reflect that  
29 we do not have very much practical experience because Gatwick's divestiture is a relatively  
30 recent phenomenon, but they go on at the end of para.57 to say: "But in aggregate over the  
31 assessment period, we consider that the present value of these service improvements will be  
32 substantial." Let me finish the point and then you can comment. That seems to be giving  
33 reasons why you could not expect a detailed quantitative analysis, but they give a

1 qualitative analysis drawing on their overall assessment and experience and extrapolation  
2 from what they have already seen at Gatwick.

3 MR. GREEN: We rely upon the limitations they accept, that if you are actually going to use this  
4 as a justification for the draconian remedy and you accept you cannot draw definitive  
5 conclusions and something is difficult to quantify, then certainly the approach adopted by  
6 this Tribunal in earlier cases indicates that you must conduct a more detailed qualitative  
7 analysis to understand extent. If you cannot do that, you need to be very cautious about  
8 saying it is substantial. There is no evidence contained in these paragraphs that it is  
9 substantial, either now or over a long period of time. That is simply an inference drawn  
10 from limited evidence that they accept they cannot draw definitive conclusions about and  
11 that it is difficult to quantify.

12 THE CHAIRMAN: But is it not a fair inference? They do seem, in paras. 53 to 57 to note that  
13 even in the short term there have been significant improvements. Is it not a fair inference to  
14 say if you then magnify the competitive effect and magnify the period of time that is likely  
15 to be a substantial benefit to consumers over time?

16 MR. GREEN: They do regularly quantify these benefits because they calculate the extent to  
17 which the rebate is given back to an airline. There are ways of measuring that.

18 THE CHAIRMAN: You are going back to the SQR.

19 MR. GREEN: Yes, but that provides techniques, it gives examples of techniques which are  
20 translatable; they are techniques which could be applied to determine, in relation to each of  
21 the listed matters which are referred to in para.53: What is the improvement you are  
22 referring to? How much does it cost? How big a benefit is each one of those fields? The  
23 Commission has referred to a specific list of matters that they have identified as essentially  
24 the evidence.

25 MR. ALLAN: I am sorry, Mr. Green, I do not mean to interrupt you but are you saying there is a  
26 direct correlation between the scale of the rebate and the scale of the benefit? I rather  
27 understood the scale of the rebate to be effectively a penalty.

28 MR. GREEN: It is simply a means of assessing performance. I am not saying there is a  
29 correlation; the answer is no. For example, the advantages they give in para.53 of the 2011  
30 Report: introduction of Assistance Lane security screening.

31 THE CHAIRMAN: The body of the Report, right.

32 MR. GREEN: These are all very specific lists of changes which are being posited and it is  
33 possible to identify and analyse them and have at least some understanding. I accept it may  
34 not be possible to do something quantitative, but you can analyse each of those. For

1 example, the introduction of Assistance Lane security screening, you could have survey  
2 evidence to demonstrate how important that was and you could analyse how much cost it  
3 was going to incur to introduce that and whether it was substantial. You could begin to  
4 have an understanding of whether these were really substantial benefits.

5 Given that there are a small number of benefits said to justify the divestiture of Stansted –  
6 and compared to the 2009 report it is a vastly diminished list of benefits, our submission is  
7 that in relation to those benefits you cannot just simply do a little bit of updating. In  
8 relation to those five benefits, they only really have a few instances of how Gatwick  
9 operates, but they, themselves, accept that you can draw definitive conclusions about it, and  
10 some of these things, in their view at least, are not easy to quantify. If that is the case one  
11 needs to exercise the greatest degree of care and caution in saying this justifies a draconian  
12 remedy.

13 THE CHAIRMAN: Yes, thank you.

14 MR. GREEN: The only other point I want to make about service quality is a point about the logic  
15 of their argument in para.57, where they seem to ----

16 THE CHAIRMAN: Which document are you going back to now?

17 MR. GREEN: I am sorry, this is back to Appendix A of the 2011 report. It is their final  
18 paragraph, their concluding paragraph, in relation to service. I had got to effectively  
19 paras.159, 160, 161 of the speaking note. The point that is made in those paragraphs is  
20 simply this: in para.57 they assume that benefits at Stansted in relation to service would  
21 only arise “once it is independently owned”. That is, with respect, illogical, given that  
22 Gatwick has been in separate ownership. If, in fact, it is the Commission’s case that it is  
23 competition driving benefits at Gatwick, then given that Gatwick is the strongest competitor  
24 to Stansted, one would have expected Stansted already to be under that pressure, which  
25 would generate equivalent savings or efficiencies in service quality, or improvements in  
26 service quality. It is not logical to say that you only for the very first time get any benefit  
27 once Stansted is divested. It is a point we make that they have consistently ignored the  
28 impact of Gatwick as an extant force on the market place.

29 THE CHAIRMAN: Would that be a convenient moment to have a five minute break?

30 MR. GREEN: Yes, certainly.

31 (Short break)

32 THE CHAIRMAN: Yes, Mr. Green.

33 MR. GREEN: Just to close out service quality, can I just, given the observation made about the  
34 speaking note, I do not want to read something simply for the sake of it. The summary

1 submissions that I have made are encapsulated in paras.162, 164, 165 and 166, but I was not  
2 proposing to just read them out for the sake of it.

3 THE CHAIRMAN: If you have made the basic points, that is fine.

4 MR. GREEN: Turning to capital expenditure, yesterday ----

5 THE CHAIRMAN: That is the end of service quality?

6 MR. GREEN: Yes.

7 THE CHAIRMAN: I thought you were going to show us how Stansted had improved its service  
8 quality after 2009?

9 MR. GREEN: I have it clearly in mind and I have asked them to hunt down the reference. I  
10 thought I had it in my notes. If I find that I am wrong I will just explain that I am wrong.

11 THE CHAIRMAN: All right.

12 MR. GREEN: Capital expenditure: yesterday you had a look at para.10.110 which was in the  
13 original 2009 report. That gives examples of capital and operating expenditure in relation  
14 to all of the plans, including new capacity related plans. There were two sub-paragraphs of  
15 10.110 which relate one to capex, one to opex, and in relation to capex the CC refers to  
16 potential savings of £25 to £40 million over the Q5 period over five years, which is £5 to  
17 £8 million per year. That was the identified benefit for capital expenditure which then the  
18 Commission relies upon in the 2011 decision. They deal with this at paras.58 onwards in  
19 their 2011 Appendix A reasoning. In our speaking note it starts at 167. I dealt with this in  
20 part yesterday and again I will simply very briefly explain the points I made yesterday  
21 without going into them to avoid repetition. The first point we made yesterday, which is  
22 dealt with in the note, was that this was not a benefit identified in 5.1, though it is in 10.110.  
23 The submission we made was that 5.1 was the place where material or significant or  
24 discernible benefits were identified, and we submit that it follows that, we say, for very  
25 good reason, the Competition Commission was of the view that this was not a sufficiently  
26 significant advantage in 2009 of divestiture to be worthy of mention absent new capacity.  
27 The reason for that in 2009 was their substitutability analysis which they accept in their  
28 pleadings is important in this regard, which suggests that Stansted and Heathrow are weak  
29 constraints on each other. It is not an inference that can be drawn from chapter 3 that there  
30 would be strong constraints. There may be some, but given their analysis, if there is not an  
31 inference that can properly be made there would be strong or material constraints one upon  
32 the other. Again, I took you at some length to chapter 3 to show you that in relation to  
33 Heathrow it was really, in substantial part at least, not subject to competitive pressures, but



1 less so Stansted. Stansted could be subject, in principle, to the potential for competition  
2 from Heathrow. We went through that yesterday.

3 We say that the inference to be drawn from that is that since you are only dealing with  
4 something which is a cost which would be reflected in charges and in prices, and that they  
5 have already found that passengers are price insensitive, this is not something which is  
6 going to be material. It has now been analysed as material in 2011.

7 As to the scale of capex now, we are dealing with the CC's ----

8 THE CHAIRMAN: Just on that, might it not be said that that is double proportionality in action.  
9 In 2009 it was not, in the end, critical to depend upon that aspect of the case precisely  
10 because of the expectation of a future increase in runway capacity, but in contrast in 2011 it  
11 does become very important to analyse that carefully and so we get a much expanded  
12 section on this in the 2011 report?

13 MR. GREEN: I certainly do not demur from the analysis – I do not say it was impermissible for  
14 them to introduce new material in 2011. I accept that.

15 THE CHAIRMAN: When you say “new material”, they seem to delve more intensely into  
16 analysing that aspect.

17 MR. GREEN: They delved in considerable detail into capex in 2009, and I think we are entitled  
18 to draw the conclusion that if it was not in 5.1 it had been considered but it was not  
19 considered to be sufficiently substantial.

20 THE CHAIRMAN: I have got that argument.

21 MR. GREEN: There is no criticism for delving in greater detail into it in 2011 *per se*, but one  
22 starts with the proposition that the scale of the capex benefits are very, very substantially  
23 reduced from something which may be in tens of billions to something which is now, on  
24 their own analysis, at Stansted calculated as between £5 and £8 million per year. So the  
25 scale is very different, and this is the point which we made in para.172 to 178 of the  
26 speaking note. I did take you to this yesterday.

27 The next point is that in 2008 the CC addressed capex – this is para.179 – in relation to  
28 BAA's discretion over this residual capex. This is the residual capex left out of  
29 para.10.110, £25 to £40 million on SG1 over Q5. In relation to that the CC recorded that  
30 the discretion was subject to regulatory supervision which was:

31 “... designed to compensate for the absence of competitive pressures on airports  
32 to deliver efficient outcomes in capital expenditure.”

33 The sum which was identified in para.10.110 was the figure that had been cured in 2008,  
34 because in 2009 they were simply referring to their recent airport charges review where they

1 had identified the £25 to £40 million, and then they had adopted a remedy. So the position  
2 in 2009 was that this was not a potential to be remedied in the future, it was an identified  
3 issue which they had already grappled with. That is the point made at 180.

4 THE CHAIRMAN: As I understand it, you are saying that para.10.110(c) and (d) in the 2009  
5 report, where they talk about potential savings – or perhaps it is just (c) you are talking  
6 about – that is something that they thought would be achieved in some way as a result of the  
7 Q5 report?

8 MR. GREEN: Yes.

9 THE CHAIRMAN: How?

10 MR. GREEN: I will read on in para.180, the final MCC decision ignores the CC's prior findings  
11 that, in relation to the alleged capex gains of £25 to £40 million on BAA's SG1 expenditure  
12 programme, the CAA and the CC had already adopted specific regulatory steps to ensure  
13 that those efficiency gains were achieved. The CC made recommendations to the CAA to  
14 reduce BAA's proposed SG1 capex by 6 per cent and to impose upon BAA a long series of  
15 requirements governing how it should assess capital projects in the future.

16 THE CHAIRMAN: So what were the specific regulatory steps?

17 MR. GREEN: Can I give you a summary of them. I can take you to them or I can summarise  
18 them.

19 THE CHAIRMAN: Summarise them and give us the references and we will not take up more  
20 time on it.

21 MR. GREEN: I think these are in the 2008 report, para.8.102. I am just asking someone to check  
22 but I think that is correct. The additional recommendations included as follows: first of all,  
23 improvements in the way project specific costs were defined and quantified,  
24 recommendations were made as to the adoption of a rule that costs were to be calculated  
25 either using historic project performance information or on a time based assessment,  
26 recommendations were made that additional percentage risk allowances should not be  
27 applied in the absence of sufficient detail to justify the allowances, recommendations were  
28 made that risk allowances should be held at a portfolio level which would require clear and  
29 robust procedures, training processes, and rigorous control of the process of estimation to  
30 ensure that risks or contingency allowances were not retained within project costs.

31 THE CHAIRMAN: Perhaps you should turn it up. None of this is making any sense, as you put  
32 it like that.

33 MR. GREEN: This is bundle D, tab 2, and in particular para.8.100 to 8.104. In particular, 8.102  
34 is the proposed reduction in SG1 capex, 8.103 is ----

1 THE CHAIRMAN: Who is C&B?

2 MR. GREEN: These are consultants who were instructed by the Competition Commission to do  
3 an analysis of capex and they provided a report back to the CC, and those recommendations  
4 were accepted after they had been consulted on. So there was a financial limit on capex,  
5 there were a series of detailed recommendations about processes and then there was a  
6 reporting obligation in 8.104 upon BAA to demonstrate quantitatively to the CAA the  
7 efficiency benefits which had resulted from these improvements at the end of Q5.

8 THE CHAIRMAN: Out of interest, does that result then in some sort of order against BAA to  
9 make those changes?

10 MR. GREEN: I think the CAA in due course either accepts or rejects the recommendations and  
11 imposes, I think under the Airports Act, requirements. They have statutory powers under  
12 the Airports Act to impose a regime upon a licensed or regulated operator. I am told that is  
13 correct, so it becomes statutory regime. If you would like, I can certainly chase down the  
14 references, it would help.

15 THE CHAIRMAN: No, unless anyone disagrees with that we will take it from you.

16 MR. GREEN: In the light of that there was no capex problem extant in 2009, and certainly not in  
17 2011, and it had not been re-examined, and there was in place a detailed regime which was  
18 intended to supplement or replace competition, and there is no suggestion it was effective.  
19 Once again, I accept that it may not be 100 per cent perfect, but our submission is it was  
20 pretty good.

21 The Competition Commission's attack upon this is in para. 63 to 67 of appendix A of the  
22 2011, if I can take you back to that. I think we can close bundle D and go back to the main  
23 decision, bundle A.

24 In these paragraphs one finds the Commission's analysis. First of all, in para.63, they seek  
25 to identify whether or not regulation is a partial substitute for competition. They refer to a  
26 report produced by the CAA in February 2011, which published an assessment of capital  
27 expenditure at Heathrow and Gatwick in the first two years of Q5. For your note, that is  
28 April 2008 to April 2010. This contains the findings of C&B, the independent consultant,  
29 Currie & Brown, the same people who did the Stansted review.

30 THE CHAIRMAN: Sorry, in the first two years of Q5, April 2008 to?

31 MR. GREEN: April 2008 to April 2010. The report does not examine capital expenditure at  
32 Stansted, for which the current price control runs to a different timetable.

1                   “The purpose of this review was to inform the Q6 review for Heathrow and  
2                   Gatwick and offer each airport’s management pointers for improvement that  
3                   could be made during the remainder of Q5.”

4 THE CHAIRMAN: This is a tiny point of detail. Is the significance of Q5 and Q6 that it is  
5                   quinquennial 5 and quinquennial 6?

6 MR. GREEN: Yes. So the purpose of this was actually to improve the regulatory review. It was  
7                   not actually to demonstrate that there was a gap in regulation. The purpose of these reports,  
8                   as explained here, and indeed it is evident from the report itself, was to improve regulation,  
9                   to identify whether there was any need to catch up because there was capex inefficiency at  
10                  Heathrow and Gatwick, and then introduce a modified regulatory regime. They made the  
11                  point that the review took place after the change of ownership but it considered issues pre-  
12                  dating the divestiture. They identify findings made by the consultants. The consultants say  
13                  there is evidence that there could be greater efficiency in capital expenditure. My point is  
14                  simply that this was designed to improve regulation and it does not necessarily tell you that  
15                  regulation is failing or there is a gap, on the contrary.

16 THE CHAIRMAN: Does not the first sentence of 63 tell you that, that at least in the opinion of  
17                  the Commission there is evidence that economic regulation is only a partial substitute for a  
18                  competitive airports market?

19 MR. GREEN: Yes.

20 THE CHAIRMAN: It seems to be a theme which comes in at various points that effective  
21                  competition is better than regulation if it can be achieved.

22 MR. GREEN: I do not think there is any dispute on our side with that. My point is simply that  
23                  they deduce from this, that this is evidence of the daylight between regulation and what  
24                  might be achieved, whereas we say that the evidence they are referring to is evidence  
25                  designed to improve regulatory intervention.

26 THE CHAIRMAN: I am not sure that they do say that. If you look at para.64 they say:

27                   “These findings indicate that there is scope for improvement in capital  
28                   expenditure efficiency at each of the regulated airports, even in the absence of  
29                   new runway capacity. Independent ownership would increase incentives to  
30                   deliver more efficient outcomes.”

31                  So the process of reasoning seems to be, if on a review of capital expenditure it can be  
32                  shown by consultants looking at a regulated environment that there are improvements, how  
33                  much the more one would expect such improvements to be forthcoming in a competitive  
34                  environment.

1 MR. GREEN: If they are not cured by regulation, because we are dealing with the supplementary  
2 effect.

3 THE CHAIRMAN: The first sentence of para.63 says one would not expect them to be fully  
4 cured by regulation.

5 MR. GREEN: As with service quantity, there are two questions. One, is there potential for  
6 competition to supplement regulation? Secondly, if there is potential, what is its scope?  
7 We say that the CC has to have an idea about both of those before you can make a sensible  
8 analysis of proportionality.

9 MR. ALLAN: Can I just ask also: you mention (a) of the consultants' findings. There is also (b)  
10 which talks of the indications and positive impact of change of ownership. I wondered  
11 whether you had any comments to make on that?

12 MR. GREEN: It is somewhat ambiguous as to what it means. What one can say about the report,  
13 - and I am reluctant to introduce any new evidence, but I did check overnight to see what it  
14 said, and we can certainly produce it, if it is another document which would help you to see  
15 it - what they did say was that capital expenditure at Gatwick had been put on freeze during  
16 the sale process. I think they used the expression "had been put into abeyance", so there  
17 was a period of about 12 months when, effectively, nothing was happening because vendors  
18 and purchasers did not want to affect the status quo or potentially commit purchasers to  
19 investment or capital expenditure which they might not wish to engage in. That is an  
20 important part of the finding of Currie & Brown. So quite what one deduces from that, it is  
21 hard to know, and certainly I would have to go back and check the report to see precisely  
22 what was meant in para.2.18. It may well be that once the ownership was established they  
23 were then free to make new decisions about capex which had been in abeyance for 12  
24 months. But I do not know the answer without checking the report.

25 THE CHAIRMAN: Yes, thank you.

26 MR. GREEN: Paragraph 64 suggests that there is scope for improvement in capital expenditure,  
27 even in the absence of new runway capacity. They say: "Independent ownership would  
28 increase incentives to deliver more efficient outcomes." The same point as in service: if  
29 you have got a very detailed and intrusive regulatory regime one has to have an idea of that  
30 daylight and they just have not scoped the daylight, if you like. How big is it? Is it really  
31 significant? Is it so significant that it justifies the draconian remedy of divestiture?  
32 Paragraph 65 is a place where they do try to understand more about the evidence. They say:

1 “We spoke to the new owners of Gatwick and to airline users. Gatwick told us that  
2 it inherited a capex programme of £985 million from BAA and its challenge was to  
3 achieve efficiency savings.”

4 Then it gave examples of what it was currently considering which would involve greater  
5 efficiency in relation to that capex programme. They give two examples: (a) and (b): (a)  
6 concerns the budget for Pier 7 which was equivalent to £400 million. The new owners  
7 explained that they had reviewed the project with the assistance of [external assistance] and  
8 in close consultation with airlines and were close to agreeing an extension of Pier 6. They  
9 do not say they had actually concluded anything; they were simply in the process of  
10 negotiating the capital expenditure improvement.

11 “(b) BAA had proposed a baggage system investment costing around £120  
12 million. Following review, Gatwick is now consulting with airlines upon an  
13 alternative scheme which will combine the renovation of Pier 1 and the  
14 installation of a new baggage hall.”

15 So there is consultation on something. So you have got two examples: one, an ongoing  
16 negotiation; secondly, a consultation. That is the evidence that the Competition  
17 Commission then relies on for its position in para.66:

18 “We considered that the initiatives the new owners have taken with respect to the  
19 capital expenditure that it inherited from BAA provide tangible evidence that  
20 independent ownership can result in immediate benefits to airport users.”

21 We submit that is not an inference. It is too hard and too firm an inference from anything  
22 which precedes it, certainly in the context of a frozen capex programme which suddenly  
23 springs back to life after ownership. It is, in our submission, not a reasonable inference to  
24 draw without much further and more detailed analysis that capex is going to be substantially  
25 improved simply by the divestiture of Stansted. Once again, we made the point that what  
26 they had to ask themselves was not just whether there were supplementary forces beyond  
27 regulation, but what impact an independent Gatwick would have on Heathrow and Stansted,  
28 which is not examined, because that is the closest substitute for both airports and it is the  
29 most potent force which is now operating. So regulation plus Gatwick produces, we  
30 submit, a very strong force and one has to ask: what is it over and above that? There is not  
31 an analysis of that. They talk about scope, potentiality, but given these are all that they are  
32 relying upon, we submit that is not enough. That is the point made in paras.182 and 183 of  
33 the speaking note.

1 We submit at para.183 that in view of the submissions I made, the Competition  
2 Commission's conclusions in para.61 and 67 are hypothetical. This is the Appendix A  
3 decision.

4 "The existing system of economic regulation is designed to compensate for the  
5 absence of competitive pressures on airports to deliver efficient outcomes in  
6 capital expenditure. The review of BAA's capital expenditure plans and  
7 efficiency that was carried out in the Stansted Q5 price control review forms part  
8 of this regime. Given the significant scale of the capital expenditure programme  
9 at Stansted, relatively modest efficiency improvements over and above the  
10 outcome achieved under regulatory settlement are material in relation to the net  
11 relevant costs of divestiture."

12 They are not therefore saying here that they would necessarily get something more than  
13 what they would describe as "relatively modest". Their view is that would be material.

14 THE CHAIRMAN: Sorry, where were you just reading from?

15 MR. GREEN: Paragraph 61 Appendix A. There are two conclusions about capex. This is the  
16 nearest one comes to an assessment of what the scope or scale of the benefit would be of  
17 divesting Stansted. They say that all they need to establish is something which is relatively  
18 modest, and they net that off against the relevant costs of divestiture.

19 THE CHAIRMAN: That is where they are setting out the analysis. Their conclusion is that it is  
20 relatively modest.

21 MR. GREEN: Then:

22 "67. In our judgement, therefore, independent ownership of Heathrow and  
23 Stansted would result in greater efficiency in capital expenditure over and above  
24 that resulting from the existing system of economic regulation. We think that  
25 independent ownership of Stansted would deliver the same, or greater, outputs  
26 from an equivalent or lower investment."

27 That is a statement, if you like, of principle not really of quantum.

28 THE CHAIRMAN: Yes.

29 MR. GREEN: Indeed, the evidence they rely upon simply identifies scope for improvements  
30 (para.64). Again, we submit that if they had said it was substantial or large or used that sort  
31 of quantum you would have asked, in the light of the weaker competitive constraints  
32 relative to Gatwick, how does removing Stansted from Heathrow generate a mechanism  
33 which will draw out these benefits?

1 MR. ALLAN: If we are moving on from capex we probably just ought to draw to your attention  
2 para.62 which seems to be the part in this section of the report which deals with the  
3 reflective competitive pressure coming back from Stansted.

4 MR. GREEN: Yes. That is essentially the last point I am going to make about this. They say  
5 that the benefits of competition are not confined to Stansted but would extend to capex at  
6 both Heathrow and Gatwick. But they then refer to the fact that the regulatory regime  
7 introduces a margin of discretion about the size, timing and nature of investments. They  
8 refer to the scale of capital expenditure at Gatwick and Heathrow. They simply, in 62,  
9 come to a conclusion that is substantial - that is a quantification; it is just identifying figures  
10 in the first part of 62 on that page. Turning over:

11 “When combined with the estimated capital expenditure for Stansted over its Q5  
12 period, it is evidence that even relatively small percentage savings in total capital  
13 expenditure in relation to such large investment programmes represent very  
14 significant benefits when compared with the estimated costs of divestiture. As  
15 noted in the 2009 report paragraph 10.110, we would expect savings to be  
16 delivered more quickly and to a fuller extent in a competitive environment. We  
17 recognize that some gains across the three airports may be expected to arise from  
18 the divestment of Gatwick in December 2009. However, it would only require a  
19 small proportion of the benefits to be due to the additional divestment of Stansted  
20 for these benefits to outweigh the costs of divesting Stansted.”

21 What one has in that paragraph is first just an identification of the size of the capex, and  
22 then it is not a submission about triangulated competition, or that somehow three players  
23 provides commensurately more than two players; they are simply saying scale --

24 THE CHAIRMAN: Sorry, I think they are saying you have got three players in competition and  
25 that is a greater competitive effect.

26 MR. GREEN: With respect, that is not how we would read the first paragraph. “We noted that  
27 the benefits of competition are not confined to Stansted but would extend to the capital  
28 expenditure programmes at both Heathrow and Gatwick” which is there would be  
29 competitive constraints because you have got them all competing with each other. So it is  
30 three sides of a triangle and you are now separating the last limb, yes.

31 THE CHAIRMAN: This is looking at the triangle overall, is it not, because they seem to say in  
32 the first sentence that one could expect benefits of competition at all three legs of the  
33 triangle, and then at the top of the next page, they add together all the capital expenditures  
34 across all three airports and say:



1 “Even relatively small percentage savings in total capital expenditure in relation to  
2 such large investment programmes [ie at all three airports] will generate very  
3 significant benefits.”

4 As I have said, they do seem to be looking here at the trilateral competitive effects.

5 MR. GREEN: I do not think I am disagreeing with you. If it is suggested in a sense that there is a  
6 competitive pressure between three parties when you divest Stansted, then of course you  
7 just get back to the Chapter 3 analysis and you ask to what extent that is the case, because  
8 that is the place where they examine the pressures. It is suggested that there is, as it were,  
9 an incremental bolstering effect of three which is somehow over and above the impact  
10 which you can get from two. You do get these chain of substitution type analyses in some  
11 cases where you can get a greater or disproportionately greater effect because of an increase  
12 in numbers. But I do not think that is the point they are making here. I absolutely accept  
13 that what they are saying here is you have got three poles, the management competing with  
14 each other and capex with three levels of efficiency. So they are quantifiable.

15 THE CHAIRMAN: So are they not saying that it is not just the benefits that they perceive in  
16 relation to Stansted’s capex; it is the benefits which could come through in relation to both  
17 Gatwick and Heathrow?

18 MR. GREEN: We have got to remember that the position as it stands now is that Gatwick is  
19 already subject to pressure from BAA on its capex. That exists now. They have not here  
20 established that by breaking Heathrow and Stansted you are going to increase that pressure.  
21 It does not address this or explain why or how that would be the case.

22 THE CHAIRMAN: Going back to the 2009 Report, they say, when they address the question:  
23 should we stop at divestment of Gatwick or go on to Stansted as well? The benefit of  
24 divesting Stansted as well is that you do get these trilateral competitive effects and that  
25 intensifies competition.

26 MR. GREEN: In the context of new capacity, which is plainly true in the context of new  
27 capacity.

28 THE CHAIRMAN: I do not have clearly in my mind the reference that confines the trilateral  
29 effect just to new capacity. Perhaps that is in the references you have shown us already.

30 MR. GREEN: I do not want to read every single paragraph in Appendix 10. In the note, which I  
31 will certainly adhere to, we have done a summary of the points. We think when you read  
32 those paragraphs it is clear that every paragraph which does not differentiate between  
33 capacity and non-capacity is in the context of an assumption about new capacity. There are

1 one or two paragraphs which are quite explicit about non-capacity, but everything else is  
2 really about capacity.

3 THE CHAIRMAN: But this is not, this paragraph 62?

4 MR. GREEN: No. This is explicitly on the basis of no new capacity.

5 THE CHAIRMAN: Yes.

6 MR. GREEN: Yes.

7 THE CHAIRMAN: So it does seem from this that the Competition Commission thinks that you  
8 get this trilateral intensification in competition even if there is no new capacity.

9 MR. GREEN: We simply say how? If you have got BAA competing with Gatwick and Gatwick  
10 is the strongest competitor of both those two, why would separating Heathrow from  
11 Stansted (this is what we say they needed to analyse) generate more competitive pressures  
12 than it does now, particularly in the context of the Chapter 3 analysis? There is no  
13 explanation here of why breaking common ownership between those two airports is going  
14 to incrementally increase the pressure on Gatwick. It is strong now. Gatwick is the  
15 strongest competitor to both of those two; Stansted is in fact a second level competitor.  
16 Why is it mechanistically in causal terms that that would be the case? If that is their  
17 submission then we are entitled to know why that is the case because it is not explained.

18 THE CHAIRMAN: Yes, thank you.

19 MR. GREEN: I think that is everything I want to say about capex. Again, I adhere to my  
20 speaking note. I think I have made all the conclusions which are set out in para.184 and I  
21 rely upon them.

22 THE CHAIRMAN: Yes, thank you.

23 MR. GREEN: In relation to opex, this is paras.68 to 72 in the 2011 Decision. We deal with this  
24 in the speaking note at paras.185 to 195. I am going to start with the logic of the paragraphs  
25 in the Decision. They first of all cross refer to 10.110 and they refer to the operating  
26 inefficiencies concerning absenteeism and pay. The point that I made about capex (which  
27 was this was identified in 2008 and addressed in 2008) is exactly the same point. It is not  
28 suggested that there is potential for inefficiency now. They are referring to a historical  
29 position.

30 In para.192 of the speaking note we say as follows. A brief review of the analysis of the  
31 Competition Commission and CAA in the Q5 2008 Review shows that this was a perfectly  
32 possible exercise to conduct, namely the analysis of opex. Paragraph 193: an example  
33 relates to the commissioning by the CAA in 2006 of a detailed employment analysis at  
34 Stansted. The Competition Commission instructed the same expert to update the 2006 CAA

1 analysis for the Competition Commission's purpose in 2008. This found that operatives  
2 (the job grouping which included security staff) were paid above the upper quartile for  
3 similar jobs within the relevant regional labour market; that engineering technicians were  
4 paid at or above the upper quartile; that middle managers were paid between the median and  
5 upper quartile; and that administrative-type support staff were paid at or below the median.  
6 The consultant noted that although major airports not owned by BAA also paid above the  
7 median for security staff in their region, Stansted had the highest differential to the median.  
8 The consultant found further that the average number of days lost per employee owing to  
9 sickness was above the national average, particularly for security and fire service staff, and  
10 that staff turnover was below average. The 2008 Q5 Review identifies a number of  
11 additional reports commissioned in relation to BAA's Opex. The Competition Commission  
12 concluded in the 2008 Q5 Review that, based upon evidence in these reports, a 1.5 per cent  
13 per annum efficiency improvement was reasonable. The Competition Commission applied  
14 this efficiency adjustment to the baseline level of costs for 2006 to 2010 and to the  
15 adjustments to the baseline from either 2009/10 or 2010/11. The Competition Commission  
16 recorded that this efficiency adjustment was additional to the implicit economy-wide  
17 improvement in efficiency incorporated in the RPI.

18 In 2011, in the Final MCC Decision, the Competition Commission recorded that Stansted  
19 had published in its annual report for the year ended 31 December 2009 a statement that  
20 BAA had achieved efficiency savings and operational costs including a saving of 11.7 per  
21 cent in employee costs. This evidences that regulatory intervention imposed on BAA's  
22 opex at Stansted had already had a very significant effect.

23 So the starting point of analysis is that what they are referring to here is an old problem  
24 which was cured, and there is no analysis in 2011 if it is a recurring problem.

25 THE CHAIRMAN: Sorry, what is the paragraph reference in the Final MCC Decision?

26 MR. GREEN: To the improvement?

27 THE CHAIRMAN: Yes. Is it para.70 Appendix A?

28 MR. GREEN: Yes, you are quite right; it was not inserted. Could I just ask someone to check  
29 that? Yes, I am told it is.

30 One now turns to the reasoning in the Decision. It is, we respectfully submit,  
31 unsatisfactory. Starting at para.68 of Appendix A:

32 "In the 2009 report, paragraph 10.110, we identified potential benefits from  
33 reductions in operating costs at Stansted through reducing relative pay costs by at  
34 least 20 per cent and scope for reducing absenteeism and its related costs.

1 “69. The existing system of economic regulation is designed to compensate for  
2 the absence of competitive pressures on airports to deliver efficient outcomes in  
3 operating costs. The current price control for Stansted includes an assumption for  
4 annual efficiency savings. During the Stansted Q5 price control review, three  
5 independent assessments of BAA’s cost efficiency were undertaken [they then  
6 refer to them]. These assessments examined a range of issues including staff  
7 costs, rostering, absenteeism and management costs and concluded that there was  
8 scope for reductions in operating costs through efficiency savings in several areas.  
9 “70. Under economic regulation, Stansted has a commercial incentive to exceed  
10 the efficiency savings assumed in the price control because it retains the benefit.  
11 [We submit that is important because there is an incentive to better the regime, not  
12 just meet it.] We noted that subsequent to the price control review and the 2009  
13 report, Stansted has published its annual reports for the year ended 31 December  
14 2009, and this included a statement that BAA had achieved efficiency savings in  
15 operational costs, including a saving of 11.7 per cent in employee costs. The  
16 Stansted annual report also indicated that the airport was subject to a cost-plus  
17 arrangement for services purchased from BAA, and that there was a fall in intra-  
18 group charges through reduced reliance on such services.”

19 So they are recording an improvement in performance and then at 71:

20 “We also discussed IT-related costs with the new owner of Gatwick. It told us  
21 that 143 IT systems were inherited and were originally included in the Transitional  
22 Service Agreement. However, following completion of the acquisition, 53  
23 applications were categorized as obsolete and could be switched off with no  
24 significant impact. We considered that this represented supportive evidence of  
25 scope for efficiency savings in IT-related costs at BAA-owned airports, and the  
26 benefits that new ownership can bring to reviewing the costs associated with  
27 operating airports, but we consider it possible that IT investments that BAA  
28 proposes to make may address legacy system issues at the airports it still owns.”

29 So they are not therefore saying that there was necessarily a benefit due to severance of  
30 ownership because they accept that BAA might itself have introduced improvements to the  
31 legacy systems. Then they jump to a conclusion which we say is unsupported by the prior  
32 paragraphs:

33 “72. Under conditions of competition that would stem from independent  
34 ownership of the London airports, the commercial pressures on airport operators

1 to review expenditure and to reduce costs would increase, and it is our view that  
2 this would deliver efficiency savings over and above the current economic  
3 regulation regime.”

4 One can put effectively a full stop there, because the remainder is a little bit of catch up  
5 analysis about the benefit compared to the cost. But the conclusion in the first sentence of  
6 72 is not one borne out by either 69, 70 or 71. Indeed, 70 is a statement that Stansted has a  
7 commercial incentive to exceed efficiency savings because it retains the benefit. Again, if  
8 that is the case, why will divesting Stansted increase that incentive? In relation to 71 and  
9 the example of IT costs in Gatwick, the Competition Commission concludes that it is  
10 possible that IT investments that BAA proposes to make may address legacy systems. So it  
11 is not evidence that you do better from independent ownership than common ownership.  
12 That is the sum total of their analysis of opex efficiency.

13 There were no outstanding extant opex problems in 2011. It was subject to a regulatory  
14 regime which had bitten and bitten hard. There was evidence that it was effective and  
15 improved. There is no evidence that in separate ownership necessarily there is going to be  
16 an improvement because BAA is incentivised to continue to improve its performance.

17 The next advantage which the Commission identifies is in relation to comparative  
18 competition which is dealt with in our speaking note at para.196. This does not, in this part  
19 of the report, loom large. It is quite fair to say that in the context of new capacity for  
20 regulators to have comparative data from three different airports which give them an  
21 advantage in regulating those three airports for such period of time as regulation exists. But  
22 as you know, the assumption in 2009 was that regulation would, over time, be withdrawn as  
23 competition evolved. It would not last for 30 years, but during the period of time it  
24 subsisted comparative data would be of advantage.

25 Absent new capacity, the scope for regulation manifestly is much smaller, because it is  
26 going to range over a much smaller range of activity. It ranges over the status quo, not over  
27 the 47 per cent increase in capacity that was contemplated. So the scale of the benefit is, by  
28 definition, reduced and is limited to such advantages as can flow from the status quo.

29 They say in para.73:

30 “In the 2009 report, paragraphs 6.64, 6.65 and 6.72, we noted that under separate  
31 ownership the CAA would be able to collect three sets of accounts produced by  
32 independent operators, allowing it to benchmark their performance through a  
33 process known as comparative competition. We note (in paragraph 6.72) that this  
34 had the potential to reduce the costs of regulation significantly and that the

1 improvements in service quality as a result of comparative competition could also  
2 be significant:

3 ‘We anticipate that the improvements in service quality as a result of  
4 comparative competition could be significant. This is because the CAA  
5 will be more confident in setting stricter performance targets at Heathrow  
6 and Stansted if it sees improvements in outcomes at Gatwick. As stated  
7 above, a diversity of managerial approaches means that innovations in  
8 service delivery are more likely to occur with Gatwick under separate  
9 ownership’.”

10 So the evidence they rely upon is something that already exists, namely evidence from  
11 Gatwick. Gatwick is the strongest competitor for Heathrow and Stansted, and they have  
12 that comparative data to hand already.

13 The points made in paras.6.64 and 6.65 and 6.72 are effectively incorporated by reference  
14 here. Would you please turn those up, just to see what they are relying upon from the 2009  
15 report.

16 “One of the current costs of regulation is the degree of scrutiny of BAA’s accounts  
17 and performance that the CAA must undertake at the beginning of each  
18 quinquennial review period in order to determine the likely scope for  
19 improvements in operating cost and service quality outcomes over the five years  
20 in question. We recognize that separate ownership may not result in enough  
21 comparators for robust estimation of efficient cost levels, or even the meaningful  
22 use of league tables, and so will not remove the need for regulatory scrutiny.”

23 Indeed, I think there are a number of potentially limiting factors. They are quite candid  
24 about the relatively low level of benefit they are going to get from having two additional  
25 comparators. They are not over-playing their hand here. We have set out and extracted the  
26 limitations in speaking note para.204. They go on to say:

27 “However, it will allow the CAA to identify and challenge the regulated airports  
28 on any areas of their business where rival airports submit lower cost estimates or  
29 outperform them on quality of service measures or introduces innovative  
30 processes or services and vice versa. This has the potential to reduce the costs of  
31 regulation significantly, as it is likely to reduce the burden on the CAA of  
32 establishing that an airport is underperforming if it believes this to be the case. It  
33 also increases the likelihood that the CAA will set appropriate targets for

1 efficiency improvements and service quality standards by improving the  
2 information on which it bases these decisions.”

3 I should have started with 6.64. That is the first paragraph referred to:

4 “Under separate ownership of the three regulated airports, the CAA would be able  
5 to collect three sets of accounts produced by independent operators, allowing it to  
6 benchmark their performance through a process known as comparative  
7 competition. We expect that, under an enhanced regulatory regime in line with  
8 that envisaged by the DfT, this may be expected to enable the regulator to: (a)  
9 reduce regulatory costs through a reduction in the required level of scrutiny by the  
10 regulator and an increase in the likelihood that an appropriate regulatory  
11 settlement will be made; and (b) improve service quality outcomes and operating  
12 expenditure and capital expenditure efficiency.”

13 Then they explain again in fairly broad terms what the benefit is. Then the other paragraph  
14 referred to is 6.72:

15 “We anticipate that the improvements in service quality as a result of comparative  
16 competition could be significant. This is because the CAA will be more confident  
17 in setting stricter performance targets at Heathrow and Stansted if it sees  
18 improvements in outcomes at Gatwick. As stated above, a diversity of managerial  
19 approaches means that innovations in service delivery are more likely to occur  
20 with Gatwick under separate ownership.”

21 What does this add up to?

22 THE CHAIRMAN: Just so we do not lose sight of it, I think also the succeeding paragraphs: 6.73  
23 and 6.74 are relevant as they refer to other regulatory regimes where they say: having a  
24 number of sources for comparative purposes in relation to regulation is very beneficial.

25 MR. GREEN: Indeed. I think the reason that they do not refer to those in this section of the 2011  
26 Decision is because they recognise that there are limits to what they would get from these  
27 three airports. The extent to which having comparative data is really valuable depends upon  
28 the extent to which the assets are comparable because we are dealing with comparables.  
29 Could I take you to our speaking note para.203 in which I have just extracted the limitations  
30 inherent in all of these paragraphs:

- 31 (1) the divestiture of the three London airports might not result in a sufficient number  
32 of comparators for robust estimation of efficient costs levels;  
33 (2) the divestiture of the three London airports might not result in a “meaningful use of  
34 league tables”;

1 (3) comparative benchmarking was not new and therefore the benefit of increased data  
2 sources following divestiture was its incremental value only;

3 (4) the CAA expected the gains to be had from one or two new sets of comparative  
4 data "... to be somewhat limited";

5 (5) airports are heterogeneous and this "... limited the degree to which statistical  
6 benchmarking techniques could be usefully deployed at the airport level";

7 (6) benchmarking is relevant in relation to such opex matters as staff costs and  
8 pensions, etc. However the CC concluded that comparative data was not needed in relation  
9 to labour related issues since "abundant data exists" on matters such as local wages rates,  
10 unemployment figures, etc. That this is so is evident from their Q5 review on opex;

11 (7) the benefit of going from two to three independent comparators is not as great as  
12 going from one to two. Therefore the "incremental benefit" of divesting Stansted as well as  
13 Gatwick is less than that of a first divestiture of Gatwick from Stansted/Heathrow; and

14 (8) Stansted is a "less similar comparator for Heathrow than Gatwick".

15 So, to be fair to the Commission, they do not overlay it.

16 What one can say about para.73 is that, if one applies the double proportionality test, there  
17 is nothing evidentially in para.73 which the Commission relies upon to demonstrate its  
18 conclusion in 2009 - that this was not something which should go into Appendix 5.1 - has  
19 changed. Indeed, the evidence they do refer to in the quotation is a benefit which already  
20 exists, namely having Gatwick as a comparator. It is not an advantage, we submit, which is  
21 of any great materiality on their own reasoning.

22 Again, just so I do not miss out a point, if we can just track back in the speaking note to  
23 198, and I think I have made the points but I would just like ----

24 THE CHAIRMAN: When you say it is not of great materiality on their own reasoning, they say  
25 at 6.72 improvements in service quality, so that is leaving aside savings in costs for  
26 regulators, which could be significant.

27 MR. GREEN: That is because they refer to having the benefit of Gatwick. That is the only  
28 evidence they have referred to. The paragraphs they refer to in the 2009 report are really  
29 general statements of principle, they are not actual evidence. They have not identified ways  
30 in which comparative data is going to be of great benefit to them, or incremental benefit,  
31 simply by having Stansted separately, which is the issue. Having Stansted, what does that  
32 really add?

33 In relation to the opex figures, they have identified quite plainly they do not need it, because  
34 there is a mass of employment related data around which they have effectively used. So



1 what is it that, by having Stansted in separate ownership, is going to lead to a great  
2 improvement, which is why we think the limitations which they quite rightly accept are  
3 important.

4 THE CHAIRMAN: In fact, they say there are two significant benefits – 6.65, the bottom of  
5 p.153, and over to the top, where they talk about availability of the three sets of accounts  
6 which have “the potential to reduce the costs of regulation significantly”. That is where  
7 they talk about costs of regulation. Then 6.72 is where they talk about significant  
8 improvements in service quality.

9 MR. GREEN: Those are the ways in which it might conceivably help. The question is, is it going  
10 to help in any material sense, given, for example, their acceptance in 6.65 that separate  
11 ownership may not result in enough comparators for robust estimation of cost levels, or  
12 even meaningful use of league tables, so will not remove the need for regulatory scrutiny.  
13 There is a proposition that there are limits to it, then there is a “however”. I accept that  
14 there is “however”, but one starts with the proposition that these may not be very  
15 meaningful. Those are other limitations which they accept exist, which I have identified in  
16 the speaking note. In a sense, it speaks for itself, they have said what they have said. There  
17 is no focused analysis on precisely how this is going to operate in relation to Stansted, and  
18 Heathrow is in separate ownership. These are very abstract benefits which they have  
19 identified and they are now relying upon to force the divestiture of Stansted.  
20 I was going to make sure I had covered the points in the speaking note. At para.198, this is  
21 an indirect benefit of competition, it goes to the quality of regulation, not the conduct of  
22 market actors. I have made the point about it not being in Appendix 5.1.

23 THE CHAIRMAN: The point you are making in 198, you do seem to accept that it is a benefit of  
24 competition, albeit indirect.

25 MR. GREEN: It is capable in an appropriate circumstance. I am not suggesting it is of any  
26 materiality on the facts of this case.

27 THE CHAIRMAN: You are not suggesting that that is an irrelevant consideration?

28 MR. GREEN: No. It is comparative competition, which applies in many different sectors, as  
29 they point out. In principle, it is something which could theoretically arise. The question is,  
30 how important is it?

31 I have made the point in 199.

32 Paragraph 200, in so far as the CC, and it may be that the criticism I made here is unfair. If  
33 the CC is saying that we just simply adopt the 2009 reasoning then we would say that is  
34 illogical because it depended heavily on capacity. I think, to be fair, since they are relying

1 only on very limited paragraphs, one should limit the criticism to those paragraphs only.

2 They are not suggesting that exactly the same reasoning applies.

3 THE CHAIRMAN: Are you inviting us to put a line through your para.200?

4 MR. GREEN: I think you should put a line through 200.

5 THE CHAIRMAN: Yes, we are happy to do that.

6 MR. GREEN: Paragraph 201 is a point I have already made about the benefit of having Gatwick  
7 in separate ownership already. It is not something which is going to be of benefit in the  
8 future, they have got that.

9 Paragraph 202, the circularity point: this is not a benefit which can necessarily endure for  
10 30 years, because the CC's assumption, although it is a much weaker assumption – again, I  
11 absolutely accept that at some point in time regulation might be diminished through a  
12 divestiture – the basic premise of the 2009 report was that you get rid of regulation fairly  
13 quickly, or as quickly as you possibly could; the premise of 2011 is that it is going to persist  
14 for a much longer period of time. They do not necessarily say it will last for 30 years, but  
15 they are obviously not in a possibility to predict how long it will go on for.

16 THE CHAIRMAN: I do not have in mind the references in either the 2009 report or the 2011  
17 report.

18 MR. GREEN: I will deal with duration in a moment.

19 THE CHAIRMAN: Just so we are clear, from what we have read in the 2009 report so far, I do  
20 not think that it was said that there was an expectation that there would be an absence of a  
21 need for regulation, just an expectation that to the extent that one could generate a  
22 competitive environment, the need for regulation might be reduced, not necessarily  
23 eliminated.

24 MR. GREEN: I think that is correct. In a sense, they could not hypothesise about what would  
25 happen to regulation, because you do not know exactly how competition is going to unfold.  
26 I think they say in a footnote in relation to RAB that you might actually get rid of some  
27 price control even before the first ----

28 THE CHAIRMAN: That is the footnote you showed us. Here the CAA recognised that, to the  
29 extent you get better competition, you might pull back from ----

30 MR. GREEN: I think that is the paragraph. I am not saying it would be eliminated.

31 THE CHAIRMAN: In either the 2009 report ----

32 MR. GREEN: Or 2011, no. It will diminish over time, and it may diminish at a different rate. In  
33 the 2011 context it may go on for 30 years.

1 MR. ALLAN: Is it not fair to say that they also distinguished between Heathrow and Gatwick  
2 and Stansted? Regulation might persist at Heathrow given its unique characteristics?

3 MR. GREEN: Yes, that is right. Indeed, and it is probably not relevant, there is at the moment an  
4 ongoing review of the three airports in relation to their SMP (significant market power) to  
5 determine precisely how long regulation goes on and in what nature. I am not saying it  
6 would be eliminated, but the hypothesis is that in 2011 it is going to go on for longer than it  
7 was in 2009. That is probably about as far as one can go.

8 The fifth benefit, price competition, which was one of the principal starting points for 2009  
9 – this is para.74 and 75 – they say:

10 “The existing system of economic regulation limits prices by allowing regulated  
11 airports to generate a return on the RAB. As the price is set as a cap (not a floor  
12 for prices), there is scope for price competition with the existing regulatory  
13 regime and existing capacity constraints. In Appendix 5.1, para.6 we identify  
14 ways in which the airports could compete on price within existing capacity  
15 constraints, for example, using rebalancing charges to encourage use of off-  
16 peak capacity. Ryanair told us that there was no evidence of any price  
17 competition since the sale of Gatwick, and that Gatwick had communicated its  
18 intention to charge up to its regulatory price cap in 2011/12. Gatwick told us  
19 that it had introduced an incentive scheme, in the form of a rebate on airport  
20 charges, to provide marketing support for the development of long-haul routes  
21 and promote better use of available capacity without additional runway  
22 construction. This appeared to us to be an example of Gatwick seeking to win  
23 airlines and their customers using price competition.”

24 Then there is Stansted’s forecast aeronautical revenue, which they set out. They try and  
25 then make an assessment of the benefits per passenger of price competition and the extent to  
26 which it would need to exceed a certain limit for the benefits to outweigh the costs of  
27 divestiture. I will come back to costs of divestiture later. The point to be made here is that  
28 they still rely upon the two categories of price competition identified in 5.1, off-peak price  
29 competition between Gatwick and Stansted, and then charge rebalancing, which was  
30 Heathrow effectively trying to use its power to suck in passengers for terminal capacity  
31 utilisation purposes from Stansted and Gatwick.

32 In our speaking note we have identified our points on both of those: para.205 in relation to  
33 price competition. The first benefit, which is off-peak competition between Gatwick and  
34 Stansted is an irrelevance because it exists at the moment. It cannot be a benefit of

1 divestiture if it exists at the moment. It has never been suggested that there is any off-peak  
2 capacity competition between Stansted and Heathrow. That is consistent with their chapter  
3 analysis, that there is limited scope for airline price competition between Heathrow and  
4 Stansted. When it boils down to the very essence, it is not what the Commission says.  
5 So, to the extent that they are now relying upon off-peak competition between Gatwick and  
6 Stansted, the CC's analysis is illogical. It never explained how or why that could be  
7 relevant in the present case. That is the point we make in 207 and 208.

8 In relation to the second way in which they say competition could arise, charge rebalancing,  
9 as we pointed out in relation to the 2009 report, they identify effectively five different  
10 obstacles for that competition to come into being. Those are set out, just for your note,  
11 perhaps to cross-refer in the speaking note, at paras.74, 75, 76, indeed right the way through  
12 to 82. They have identified all sorts of restrictions relating to the yield management  
13 systems, the extent of the rebalanced charge that would be needed to persuade an airline to  
14 move to a larger aircraft or induce more people to travel with it on a smaller aircraft, the  
15 impact on volume risk, observable conduct on the part of BAA, and the fact that Heathrow  
16 was terminal capacity constrained for some years because of its work on T2. There is no  
17 further analysis in 2011 to suggest that those obstacles can be overcome. I submitted in  
18 relation to 2009 that, frankly, one ought to discount this as a benefit to pretty much zero.  
19 In 2011 it is an even weaker benefit because you cannot possibly say that off-peak  
20 competition, capacity competition between Gatwick and Stansted is relevant to divestiture  
21 of Stansted from Heathrow, and they do not make that point.

22 That is price competition. Then one gets to the summary of likely areas of benefit  
23 beginning in the near future, 76 of appendix A:

24 "In summary, we consider that there are many sources of long term benefit  
25 likely to begin in the near future from the divestiture of Stansted even in the  
26 absence of any new runway development. Service quality improvements,  
27 capital cost efficiency savings, operating cost efficiency savings and price  
28 competition are likely to be significant sources of benefit and these benefits are  
29 likely to be developed and sustained for at least 30 years."

30 So the summing up is the justification for divesting Stansted. It is the benefits which you  
31 get from divesting Stansted. There are many sources, they are long term, they are all  
32 significant and they are going to be developed and sustained for at least 30 years. Since  
33 there are a very small number of benefits and you are dealing with a much reduced benefit  
34 now, if they make errors in relation to even one of those that would be viewed as material.

1 If there are gaps in the logic, if they fail properly to analyse something, if they have jumped  
2 to a conclusion, this is the sum total of what effectively justifies the draconian remedy of  
3 divesting Stansted.

4 THE CHAIRMAN: Just on that, what is the estimate for the costs of divestiture?

5 MR. GREEN: That is a big issue between us. It is our ground four. They say it is £36.2 million  
6 maximum. That is all they have to net off.

7 THE CHAIRMAN: Sorry, can you give me that figure again?

8 MR. GREEN: I think it is £36.2 million. That is what they say is a conservative estimate that  
9 works in BAA's favour. We say they have failed to take account of a relevant cost.

10 THE CHAIRMAN: Which is selling into a depressed market?

11 MR. GREEN: Yes.

12 THE CHAIRMAN: So what do you give as the cost of divestiture?

13 MR. GREEN: We have put forward an expert who gives an indicative range. It is a confidential  
14 figure.

15 THE CHAIRMAN: Is it Mr. Thum?

16 MR. GREEN: Yes, and that is an indicative range of, as you see, many multiples of this figure.

17 THE CHAIRMAN: All right. I should indicate that, since I understand there is an argument  
18 about admissibility of Mr. Thum's evidence I have not read it yet. Perhaps someone could  
19 just give me the paragraph number in his report where I get the figure at some point. Do not  
20 give me what the figure is because we are in open court.

21 MR. GREEN: I can probably just give you the speaking note, which has got a confidential  
22 reference to it. It is para.3 of his summary, which is at ----

23 THE CHAIRMAN: I will find it, do not worry.

24 MR. GREEN: I want to make three sweeping up points now, and I will take them from the  
25 speaking note, because I think one has gone over the report sufficiently. I do not think there  
26 is any additional paragraph I need specifically to identify or take you to.

27 THE CHAIRMAN: Just on the point you were making that if there is an error in any one of the  
28 benefits identified by the Competition Commission, as I understood it, you were saying that  
29 would show that decision could not stand. If one did the maths and, let us say, three out of  
30 the four were supportable reasons and the maths showed that they exceeded the costs of  
31 divestiture put forward by the Competition Commission and we are against you on ground  
32 four, would that not be a basis on which we could uphold the decision?

33 MR. GREEN: With respect, no, for this reason, and in a sense it is a common sense point about  
34 proportionality: it is common ground that requiring a company such as BAA to divest

1 Stansted is a draconian and extreme remedy. If, in fact, you find that there are small  
2 benefits or modest benefits and you have not quantified them over and above, as it were, a  
3 quantified physical cost of separation point, the CC's point is, "Because we can do it, we  
4 ought to do it, the benefits only have to exceed £36 million and therefore we can". We do  
5 not think that is logical in terms of the proportionality test. There should be a natural break  
6 upon a regulator interfering in a market place unless there are really substantial good  
7 reasons to do so. You do not just say, "We will because we can, or because we have  
8 quantified the benefits and they exceed £36 million". That would be, in our submission, an  
9 absolutely extraordinary position for an economic regulator to take. I just do not think that  
10 is logical from the broadest possible perspective of, what happens if it was very cheap?  
11 Even if it would only cost £5 million to divest the company in a particular case, and they  
12 said, "Oh, the benefits are really very meagre but they exceed £5 million, therefore it is in  
13 the public interest we should divest it" – that is effectively what they are saying and I do not  
14 think that is remotely appropriate for a regulator to say.

15 THE CHAIRMAN: Yes, and I think you can say that nowhere do the Competition Commission  
16 analyse and say, "Even if this item stood alone that would be sufficient in our view".

17 MR. GREEN: I will not take you to it, but we have referred at the beginning of the speaking note  
18 to the cases on materiality where the Tribunal has said ----

19 THE CHAIRMAN: The usual JR principles.

20 MR. GREEN: The usual JR principles, but in the context of these sorts of cases saying a Tribunal  
21 is not a fact finder and it is very difficult for us to say it is not material.

22 Duration of benefits, and I will take this from the note and I am going to try and take all the  
23 remaining points really quite briefly. It is standard CC practice only to impose a remedy if  
24 it will bring about the required benefits in the short term. That is a reference to the CC's  
25 market investigation which they, themselves, endorse in the 2009 report.

26 In the 2009 report the CC adopted a long reference period. Divestiture was premised upon  
27 the long term benefits which would flow from competition over new capacity. The question  
28 of duration was inextricably linked to the MCC. In relation to Appendix 5.1, the analysis  
29 was short term and related to the period prior to 2017.

30 In 2011, without any analysis, the CC asserts that the benefits will last for "at least 30  
31 years". The reasoning is set out in para.43 of Appendix A to the final decision, and there  
32 are three facts and three aspects to the Commission's reasons: first, BAA did not challenge  
33 the choice of a 30 year duration ----

1 THE CHAIRMAN: Just before we get to that, are you making some sort of distinct point on your  
2 para.213? It stands there, I have read the words, are you saying that they have somehow  
3 gone wrong because they have not assessed it in the short term. So what point are you  
4 making in 213?

5 MR. GREEN: It is the benchmark against which one would expect a proper level of reasoning  
6 and analysis. If you are saying, “We are not going for a short term benefit, we are going for  
7 a very long term benefit”, almost inevitably the regulator, and it is perfectly entitled to do so  
8 in a proper case, is engaging in a degree of hypothesis, speculation as to what will happen in  
9 the future, and that would suggest that you need much better reasons, and a more detailed  
10 analysis. I am making no point other than that. I am not saying they are bound in all cases  
11 to adopt a short term remedy.

12 THE CHAIRMAN: If it is legitimate to look at a long term remedy, any quantitative analysis  
13 becomes more difficult, and it is hard to tell the future.

14 MR. GREEN: And qualitative analysis becomes more important.

15 THE CHAIRMAN: Yes, but there will be a degree to which, in qualitative analysis, a regulator  
16 will say, “Well, say we have got experience of how markets work, how competition works,  
17 in our expert view, looking far into the future where people cannot be absolutely sure what  
18 is going to happen, we would expect these processes to go on creating benefits even though  
19 we cannot point a finger and say that will definitely be the benefit”.

20 MR. GREEN: If there was a proper evidence base for the speculation, sensible and legitimate  
21 speculation.

22 THE CHAIRMAN: Is this right: you accept that that is a legitimate way for a regulator to go  
23 about the analysis?

24 MR. GREEN: If they have a proper evidence base.

25 I was just identifying the three reasons adopted by the CC for its 30 year plus analysis in  
26 para.43. First of all, we did not challenge a 30 year duration period in the judicial review  
27 following the 2009 report; secondly, BAA has not advanced any reason for a “change of  
28 circumstance to change this analysis”.

29 THE CHAIRMAN: Sorry, para.43?

30 MR. GREEN: This is para.215 of the speaking note, and para.43 of Appendix A.

31 THE CHAIRMAN: Yes, let me re-read para.43. (After a pause) Yes, I have read 43.

32 MR. GREEN: Three reasons therefore: one, that we did not challenge; secondly ----

33 THE CHAIRMAN: Sorry, three reasons for what?

1 MR. GREEN: Which I have summarised in para.215. For reasons why the benefits will last for  
2 30 years. I have just purported to summarise or extract the three reasons from those two  
3 paragraphs, which is 215 of the note. We submit those reasons are flawed. First, the  
4 obvious point, the fact that it was not challenged, it ignores the MCC.

5 THE CHAIRMAN: That is not the primary reason.

6 MR. GREEN: Point two, the 30 year analysis was conditional upon new capacity. To say that  
7 the reasoning has not changed is, we submit, simply wrong. It ignores the fact they have  
8 identified an MCC. What they have got to then do is to strip out everything to do with  
9 capacity and look at the residual non-capacity related benefits and ask whether they  
10 specifically will endure over 30 years.

11 THE CHAIRMAN: And that is what they say they have done?

12 MR. GREEN: That is what they say they have done, and the reason they give is, the third reason  
13 we have identified in 220, because airports are long term infrastructures this automatically  
14 means the benefits will be long term. We submit it is a *non sequitur*. Take, for example,  
15 absenteeism and pay, there are many very long term organisations and companies that may  
16 subsist for decades, they do not have an absenteeism and pay problem which necessarily is  
17 connected merely to the fact of their long term infrastructure. There is no necessary  
18 connection between the two. You cannot say "it is a long term infrastructure, automatically  
19 all the benefits will endure for 30 years". They may or they may not, they may have some  
20 non-severable connection with the infrastructure, but they may not. Opex is a classic  
21 example when you are dealing with things like pay or absenteeism. Indeed price  
22 competition is unrelated to the infrastructure. Off-peak capacity is, on the Commission's  
23 own reasoning, a dwindling resource because it is accepted that the demand over 30 years is  
24 going to increase. So such off-peak capacity as now exists is not dependent upon the  
25 longevity of the infrastructure, it is dependent upon demand.

26 THE CHAIRMAN: I thought some demand had gone down.

27 MR. GREEN: Temporarily demand at Stansted has gone down, and probably one of the reasons  
28 is because of the recession. There are two factors which impact upon the nature of demand.  
29 One is the recession, and in the fullness of time we all hope the recession will disappear and  
30 demand will be restored; but secondly, just general incremental year on year increases in  
31 demand. The CC in one paragraph, I think in the 2008 report, talks about a £6 to £7 million  
32 – I will give you the exact reference so I do not get it wrong – it talks about an increase in  
33 demand in terms of passenger numbers per year which is really quite substantial. So you  
34 would expect that spare capacity at Stansted and Gatwick, such as it is, simply to be eroded



1 over time. Indeed, the basic premise of the 2009 report was that you needed not just one  
2 round of new capacity, but potentially two or three rounds of new capacity over 30 years.  
3 They talk about the ebb and flow of demand and supply. The fundamental premise of 2009  
4 was that demand would erode and then you would need new capacity.  
5 By definition, on their own thinking, they are not saying it is something which would  
6 endure over 30 years. There is no quantification of that level of capacity and no analysis of  
7 it. I simply give those as illustrations of why they are not necessarily going to endure for 30  
8 years. You cannot make the assumption that all these benefits will endure.

9 THE CHAIRMAN: Just on that, para.43(a), they say:

10 “There is no reason why the remaining benefits of competition from separation  
11 will dry up after just five or ten years. We consider that the stream of benefits  
12 from competition will continue to accrue and develop throughout the separation  
13 period.”

14 That seems to be an echo of the general point that they have made in, I think, both the 2009  
15 and the 2011 report, that you cannot be absolutely sure where the pressure of competition  
16 drives you and be exact about what benefits you get, but you can see competition does drive  
17 benefits for consumers and one can expect that to continue, particularly in light of the fact  
18 that they say they have got some evidence of that happening so far. They do not seem to be  
19 saying, “We can embark upon a quantitative analysis and say pay rates will go down  
20 indefinitely over 30 years or price competition will drive prices down indefinitely over 30  
21 years”, but they point to a number of ways in which there seems to be evidence of  
22 competition having an effect on behaviour, and then they say that justifies an assumption  
23 that there will be, in ways that cannot be fully predicted, advantages flowing from  
24 competition into the future.

25 MR. GREEN: Two points in response. First of all, let us take pay as an example. Assume for  
26 the sake of testing the argument that you have pay and absenteeism problems which arise  
27 and they go along at a happy and efficient level and then they spike. Then they are cured  
28 through regulation because, on this hypothesis, regulation will continue. It will continue  
29 until competition is adequate, by definition, on the Commission’s own thinking. It spikes  
30 and it is cured. It then goes along happily and it spikes, and it is cured. That is not an  
31 example of a benefit enduring over 30 years.

32 THE CHAIRMAN: Not that specific benefit. Just on that, even for the reasons you have given,  
33 in the example that you are giving now it seems to me that you may be attributing too much  
34 weight to the specific example of pay. When one goes back to what they say about pay in

1 the context of opex, they seem to be treating that as an illustration that BAA has gone along,  
2 while not subject to competitive pressures, being rather relaxed about things, such that  
3 regulation had to be introduced. I am not sure one would read that as then identifying a  
4 specific benefit in terms of pay rates to be derived from competition. They seem to be  
5 illustrative of a general approach.

6 MR. GREEN: Yes, but I do not think is an approach for the Commission to take. Again, we are  
7 talking about the adoption of a draconian remedy. They have identified a problem, they  
8 found only issues in relation to two pretty minor things, pay and absenteeism, and they have  
9 cured them. The regulatory regime is they create incentives to better performance. That is  
10 going to persist for as long as regulation persists.

11 Why is competition, given particularly the chapter 3 analysis, the invisible hand? Why is  
12 Adam Smith's invisible hand going to be waving all over this, pushing things down, given  
13 the Competition Commission's own analysis suggests that there is a limited degree to which  
14 that hand can move? It is substantially shackled as between Stansted and Heathrow.

15 The hypothesis for 2009, I absolutely agree that Adam Smith's hand is going to wave all  
16 over the place, over car parks and toilets, runways and design, and so on and so forth.

17 Without capacity Adam Smith's hand is pretty much shackled to the bench – not entirely  
18 but pretty much so – in which case why is that they can simply assume with what is a  
19 modest competitive force, that it is going to work some magic over 30 years of regulation,  
20 which, on this hypothesis, will continue? It cannot achieve. These are high falutin'  
21 assumptions and assertions. They may or may not be correct, but you cannot identify the  
22 particular examples, the high water mark examples that they have given of benefits. Even if  
23 one assumes they are examples, this is the best they have got to justify breaking up BAA. If  
24 you look at those and take those as the examples they cannot be said to be long term.

25 Take pricing, for example, para.285 of the decision only is able to arrive at a firm  
26 conclusion that capacity in relation to pricing will be of a short term benefit.

27 Paragraph 285, under the heading "Does the remedy produce adverse effects which it is  
28 proportionate to the aim pursued", and I will come back to this later because it is relevant to  
29 another ground, but if I can just pick up the last sentence of 285, the main reasoning:

30 "This suggests that the scope for competition based on spare runway capacity  
31 within existing constraints between Gatwick, Stansted and Heathrow has  
32 increased."

33 .THE CHAIRMAN: I am sorry, where are you – para.285, in the body of the 2011 report?

1 MR. GREEN: Yes. I read from the wrong bit. I am going to come back to that paragraph later,  
2 but just the very last sentence:

3 “In our judgment, this increased scope for competition is an additional aspect of  
4 the benefit of divesting Stansted which could be expected to deliver benefits in  
5 at least the short term.”

6 So they accept that it could be short term benefit, they do not actually make a finding that it  
7 could necessarily go longer than that, and there are very good reasons for that conclusion.

8 They accept it is short term. They cannot say for certainty that it goes beyond that. That is  
9 the reason they have given you that capacity may erode over time.

10 THE CHAIRMAN: Yes, thank you.

11 MR. ALLAN: Can I just understand further what you are saying. I am not entirely sure what  
12 your point on duration adds to your points on competition and regulation. If I look at the  
13 way in which the report approaches this, it is testing the potential for competition and  
14 improvement over regulation by reference to present, past and near term issues, which is  
15 probably the only way in which one could empirically try to test that. You obviously say  
16 that the Commission fails to make good its points on that, and if it fails on that then I am not  
17 entirely sure how the issue of duration adds anything to your case. If you do not prevail on  
18 those issues, are you then still saying that the Commission is not allowed to take into  
19 account the intuition, if you will, that has been substituted by the shorter term analysis but  
20 those competition benefits and those improvements over regulation will persist beyond the  
21 near term?

22 MR. GREEN: The relevance of it is this: it is an integral part of their analysis. If you like it is a  
23 multiplier. They say, “Even if we have got small benefits, if you multiply them by 30 plus  
24 they can be put under a magnifying glass and they get bigger and bigger. In one sense, if, in  
25 fact, the advantages in the short term are so sufficient that they justify, that answers the  
26 question. If, on the other hand, as they say, for example, in relation to capex, you only need  
27 a tiny bit of incremental capex, but multiply it by 30 and it looks huge, then it is an  
28 important part of their reasoning, and unless they can establish that this is going to be a  
29 durable benefit in all circumstances over 30 years you cannot just simply say it is X times  
30 30. It really goes to the scale or the magnitude of the benefit they perceive.

31 MR. ALLAN: If you have lost on competition and increment over regulation, why are they not  
32 allowed to advance some further multiplier? You can have an argument about whether 30  
33 is the right figure to choose. It seems to me that there must be some persistent benefit  
34 beyond the short term.

1 MR. GREEN: Because their case specifically is it is benefit times 30. One establishes some  
2 benefit, and let us say it is five or ten, but you cannot prove it is 30, then they have  
3 miscalculated or mis-assessed, even on a qualitative basis, the benefit which they rely upon.  
4 They say it is X times 30, or 30 plus, I do not think it really matters.

5 MR. ALLAN: In addition, you are challenging the selection of 30 as an appropriate figure?

6 MR. GREEN: I am simply saying they take 30

7 MR. ALLAN: Which is a limiting figure, if I recall it correctly, in the original.

8 MR. GREEN: They say it may be even longer, but if they cannot establish that in relation to these  
9 benefits they inevitably will flow over 30, or if there is doubt as to it and they have not  
10 properly justified their conclusion, then they have miscalculated the benefit. It is simply an  
11 aspect of getting the handle on the scale of the benefit.

12 MR. ALLAN: Thank you.

13 THE CHAIRMAN: We have had a long morning. I think we should break there and we will  
14 resume at five past two.

15 (Adjourned for a short time)

16 THE CHAIRMAN: Yes, Mr. Green.

17 MR. GREEN: Good afternoon. Can I start by dealing with housekeeping. I will hand up the  
18 proposed amendment in this application to deal with the CAA. (Handed)  
19 As I submitted earlier, we do believe this is covered by our pleading although we are happy  
20 to propose the amendment to clarify the matter. We do say that the Competition  
21 Commission understood the point. In fact, they criticised us for making the submission  
22 about the CAA in their defence, but no matter. We have sought succinctly to identify the  
23 point so that it is squarely in everybody's minds.

24 THE CHAIRMAN: Mr. Beard, I am not going to ask you for your reaction to this here and now,  
25 but would you be able to respond to the application to amend before you start your  
26 submissions?

27 MR. BEARD: I will take instructions.

28 THE CHAIRMAN: It may be that you will need overnight to do it.

29 MR. BEARD: Yes, it may be possible for us to respond to the submissions *de bene esse*, but I  
30 would need to take instructions on whether or not we are actually opposing it.

31 THE CHAIRMAN: Yes, thank you Mr. Green.

32 MR. GREEN: I would like to bring to a close my ground one submissions as swiftly as I can, as I  
33 said, essentially by reference to the note because I think the points which I am making have  
34 been articulated pretty extensively. We were dealing with the question of duration before

1 lunch. Can I pick it up at the speaking note at p.64. As I stated in my opening submission  
2 our principal objection is based upon the *Tesco* ground: failing to put themselves in a  
3 position whereby they were properly able to answer the statutory question.

4 I started my submissions by identifying what they say is their position. They say there are  
5 many benefits, they are significant, they are long-term, the benefits substantially outweigh  
6 the costs. The process that we have adopted is to explain to the Tribunal the Competition  
7 Commission's thinking in 2009 and 2011. The Competition Commission relies upon  
8 benefits to justify the remedies either in Appendix 5.1 or in 2011 Appendix A or both.  
9 Appendix 5.1 may (and that depends upon the submission we made earlier about the CAA)  
10 rely upon benefits that are in anticipation of new runways and to that extent cannot be relied  
11 upon now. 5.1 defined or quantified the benefits that it was relying upon as some scope for  
12 service competition and modest price competition. No reference was made there to capex,  
13 opex or comparative competition.

14 Attention is now given to a number of new features: service competition at which the  
15 starting point is that regulation does not leave very much scope at all for independent  
16 incentives beyond those which are generated to meet the SQR. The Competition  
17 Commission says that it has some evidence from Gatwick that independent ownership may  
18 have affected Gatwick's SQR performance. Our submission has been that Stansted is  
19 regulated, has improved its performance, at the same time as Gatwick has. The  
20 Competition Commission has not put forward evidence, other than an assertion, to justify  
21 that.

22 THE CHAIRMAN: Sorry, is this the improvement in Stansted from 2009?

23 MR. GREEN: Yes, it is. I think it was introduced a month or two before the final report in 2009.

24 THE CHAIRMAN: SQRs, I think, were April 2009 at Stansted?

25 MR. GREEN: That is my recollection as well.

26 THE CHAIRMAN: This is the thing that we have kept waiting for that you are going to show us.

27 MR. GREEN: I am sorry, yes you are quite right. I think I was in error. The reference to an  
28 improvement was in relation to the opex performance. I should have clarified that.

29 THE CHAIRMAN: So improvement at Stansted as result of SQR regime from April 2009.

30 MR. GREEN: The report is silent as to it.

31 THE CHAIRMAN: So you cannot show us that?

32 MR. GREEN: No, I cannot. It was my error. The improvement in performance at Stansted was  
33 in relation to opex, not service. I was thinking of a different paragraph.

34 THE CHAIRMAN: Let us go back and put a cross through that bit of your submission.

1 MR. GREEN: I do not think it is in the speaking note.

2 THE CHAIRMAN: No.

3 MR. GREEN: I am sorry, I meant to clarify that. So it has a series of benefits, these are the  
4 benefits which now justify divestiture. So far as service is concerned we submit that the  
5 duty of the Competition Commission was to identify such gaps as exist beyond the  
6 combined effect of Gatwick and regulation. Those are two operative forces. Stansted's  
7 divestiture stands third in the queue.

8 In measuring Stansted's independent ability to exert pressure one needs to take account of  
9 the Chapter 3 analysis because that tells you how potent a force it is. The Commission finds  
10 some degree of asymmetricality. The Competition Commission does not seem to respect or  
11 reflect that there is that asymmetricality between Heathrow and Stansted. There is no  
12 reflection of that in the analysis. If there is some incremental effect it works more strongly  
13 one way than the other, but there is no analysis in the Decision, in Appendix A, of that  
14 scope or that extent. They simply identify that there is a potential and they say because of  
15 analysis at Gatwick it may be (they said it is, to be fair to them) due to common ownership  
16 and the absence of common ownership. We say it is unproven and even if there is some  
17 effect there is no evidence that it would be more than *de minimis*.

18 Capex, the same thing. They identify as a potential problem something which existed in  
19 2008, was cured, an intensive regime came into play. There is no suggestion in 2011 that  
20 there is any residual existing capex problem. They accept that if there is any incremental  
21 effect it is beyond regulation. But there is no suggestion and no analysis of how that might  
22 operate by virtue of divesting Stansted from Heathrow, what the scope or effect or nature it  
23 will be.

24 The same in relation to opex. They actually accept that the opex regime would be the same  
25 for capex. The opex regime introduces an incentive to better the regime. So there is as  
26 powerful an incentive as one would have thought there could be because you can retain the  
27 profits if you better the regime. Again, Gatwick is operating and regulation, Stansted sits  
28 third in the queue. If there is any residual scope it would appear to be negligible, but  
29 nonetheless, there is no analysis of that scope. In relation to opex there is no analysis of any  
30 benefit which Gatwick would bring. Indeed, they say that BAA may be replicating the opex  
31 benefits in relation to IT.

32 Comparative Competition, they simply say it may be a benefit in the abstract, but we rely  
33 upon Gatwick. That is the bit they cite, in particular from their 2009 report. But Gatwick  
34 already as a benefit exists. They have not identified the incremental benefit of Stansted and

1 they themselves say that there are limits to the advantage you can get in terms of  
2 improvement to regulation, in particular from divesting Stansted. That is an acceptance by  
3 them that there may be a limited benefit. There is no quantification of that benefit.  
4 Price, off-peak capacity between Stansted and Gatwick. It exists already. It is an irrelevant  
5 consideration. They should not have thought about it at all.

6 Charge rebalancing. They have identified five main obstacles. Who knows? They may be  
7 insurmountable, but they have not analysed whether those obstacles can be overcome. That  
8 is the sum total of the analysis. They do not put themselves in a position where they can  
9 fairly make a sufficiently robust conclusion to justify what is an extreme remedy. The  
10 extent to which they are required to conduct a proper analysis involves the case law on  
11 double proportionality. This is the epitome of the extreme remedy, and we say required an  
12 extra level of effort on their part to conduct that sort of analysis. Without it, it is not fair to  
13 a company to say: we intend to break you up, when we are dealing with effectively  
14 speculation.

15 The point made in *Barclays* and *Tesco* is where you have a speculative outcome, that may  
16 itself require a higher degree of analysis. You should not speculate and you require a higher  
17 evidential base. That is the first point, pulling the various threads together. That covers the  
18 submissions from 224 to 230.

19 In 231, 232 and following the Competition Commission's failure to address a relevant  
20 consideration: the position of Gatwick. In a sense I have made that point already in relation  
21 to the first point that Gatwick exists. It seems to have been ignored in a number of different  
22 respects: price competition between Gatwick and Stansted is an illustration. The reasons  
23 why Stansted was ordered to be divested over and above Gatwick in the 2009 Report were,  
24 in our submission, absolutely squarely dependent upon new capacity. We set out in the  
25 speaking note the paragraphs where non-capacity related benefits are referred to, but read  
26 fairly it is a decision based predominantly on capacity. I hope I do not have to read this to  
27 you, we have set out all the various paragraphs in Appendix 10.1 with a summary. I do rely  
28 upon them. I understood the Tribunal to accept that I do not have to read them out for them  
29 to be relied upon.

30 THE CHAIRMAN: Give me the paragraphs you want to rely upon without reading out.

31 MR. GREEN: It is paras.99 through to 113 in which I have set out almost paragraph by  
32 paragraph what each of these paragraphs contains.

33 THE CHAIRMAN: That is paragraphs in your speaking note?

34 MR. GREEN: That is in the speaking note.

1 THE CHAIRMAN: That is on the alleged failure to consider the position at Gatwick?

2 MR. GREEN: It really is wrapped up in this question: that in order to decide whether you should  
3 divest Stansted you must first of all consider whether Gatwick and/or regulation is  
4 sufficient. The Competition Commission says that the reasoning in 2009 can be translated  
5 into 2011. We say no it cannot. When you conduct an analysis of the reasoning in 2009 the  
6 preponderant part of the reasoning (not all of it) was due to new capacity. Therefore, you  
7 cannot just simply say: we decided that the divestiture of Stansted over and above Gatwick  
8 was OK in 2009; you have got to do a further analysis which they have not done. They did  
9 it in 2009, they have not done it in 2011.

10 THE CHAIRMAN: 99 to 113 did not seem to be specifically directed to the allegation of failure  
11 to address the position of Gatwick.

12 MR. GREEN: The heading above 231 may actually be more pertinently described as the position  
13 of Gatwick and the relationship to the sale of Stansted. That is probably too telescoped a  
14 summary.

15 THE CHAIRMAN: Yes, thank you.

16 MR. GREEN: Specifically the additional paragraphs (and again, I have not read them to you and  
17 I am not sure if I gave you this number) p.30 para.107.

18 THE CHAIRMAN: You have given me a chunk of text to add in under your heading "The CC's  
19 failure to address a relevant consideration: the position of Gatwick". I have amended that to  
20 read "and its relationship to the sale of Stansted (see paras.99-113)".

21 MR. GREEN: Yes, I have covered that, thank you.

22 THE CHAIRMAN: So we will go and read that and see what relevance it has to the submissions.

23 MR. GREEN: Yes. The other reason which the Competition Commission gave for requiring the  
24 divestiture of Stansted is that it is an effective remedy. They place considerable store by  
25 this.

26 THE CHAIRMAN: Where in your note are we now?

27 MR. GREEN: Paragraph 237. The reasons given in the Final MCC Decision are as follows. I  
28 am going to take them slightly more systematically now, just to summarise them. (1) To the  
29 extent that Gatwick and Stansted are now competing, the Competition Commission expects  
30 competitive pressure on Stansted to increase and, for the reasons set out in paras.10.46 to  
31 10.54 of the 2009 Reports, there was still a need to divest Stansted. Those paragraphs, in  
32 large measure, are concerned with new capacity. It is not a proper or a logical read across  
33 to simply say paragraphs which are in substantial measure concerned with new capacity can  
34 be relied upon to justify the divestiture of Stansted absent new capacity. It may be helpful,



1 very quickly, to just pick up those paragraphs in the sections they rely upon which refer to  
2 capacity.

3 It is part and parcel of the detailed paragraph numbers I have given to you. It starts by  
4 saying:

5 “In the following paragraphs we set out our reasons for believing that BAA’s  
6 ownership of Heathrow and Stansted is a feature that has an AEC, even in  
7 circumstances in which Gatwick has been divested. It is our view that the  
8 evidence does not support BAA’s position on substitutability nor do we accept  
9 BAA’s view that excess demand at Heathrow would preclude continuing common  
10 ownership from giving rise to anti-competitive distortions in behaviour.”

11 They then refer to their evidence on substitutability. They refer to which are the close  
12 substitutes. Then in para.10.48 they refer to: “... substitution by non-transfer passengers  
13 that would [they are talking about the future here] influence the decisions taken by the  
14 operators of Heathrow and Stansted.” And they talk about the extent to which there would  
15 be competition for non-transfer demand. But there is no statement. It is ignoring capacity  
16 related competition but it is in the context of capacity related competition. At 10.49 they  
17 reject BAA’s argument and say at 10.50:

18 “We also disagree with BAA’s second point that excess demand at Heathrow  
19 precludes competition between Heathrow and Stansted from emerging. [So they  
20 are talking about potential competition in the future.] This view ignores the  
21 dynamic element of rivalry and the distortions that common ownership would give  
22 rise to in this respect. Specifically, in adopting this view BAA overlooks the  
23 constraint Heathrow could provide on Stansted. Our substitutability analysis  
24 indicates that initiatives at Heathrow such as capacity expansions and/or  
25 improvements in service quality would affect passenger numbers, airline  
26 performance and ultimately airport performance at Stansted. This view is  
27 supported by BAA’s own modelling which demonstrates that passenger numbers  
28 and profitability at Stansted would be reduced by prospect capacity expansion  
29 (mixed mode and a third runway) at Heathrow. We would therefore expect  
30 Heathrow to have a greater incentive to expand capacity and invest in productive  
31 capital if Stansted were divested in addition to Gatwick, with pro-competitive  
32 effects. For similar reasons, we would also expect Heathrow to face greater  
33 incentives to increase service quality or restructure prices so that it could  
34 outperform its passenger number forecast if Stansted were also divested, although

1 we accept that the effect of tariff changes within the price control is likely to be  
2 modest. This would also be expected to have a pro-competitive effect upon the  
3 terms offered by Stansted.

4 “10.51. This view of BAA also overlooks the possibility that, eventually, [in the  
5 long term, plainly talking about capacity here] competition from Stansted on  
6 short-haul feeder flights, which are vital to the profitability of long-haul services,  
7 could over time erode Heathrow’s position as a hub. This prospect provides a  
8 strategic incentive to Heathrow to offer better conditions (either in terms of price  
9 or service) to its established airline customers in order to protect the profitability  
10 of such services.”

11 Then 10.52 says that the government supports the development of a second runway at  
12 Stansted. Then 10.53, we suspect this is Adam Smith’s visible hand:

13 “... whilst we accept that the precise outcome of competition is uncertain, the  
14 evidence enables us to reach a clear expectation that competition will develop.  
15 Moreover, whilst we consider that regulation and certain aspects of government  
16 policy distort competition, we do not agree that the development of competition is  
17 contingent on changes to regulation or government policy. By supporting the  
18 development of two runways in the South-East by 2030, and identifying  
19 Heathrow, Stansted and Gatwick as suitable sites for development, current  
20 government policy generates scope for competition over the design, cost, timing  
21 and allocation of new capacity between Heathrow, Stansted and (to a lesser extent  
22 and possibly only in the longer term) Gatwick. The relaxation of regulation is  
23 itself contingent on the development of competition (rather than the other way  
24 around), and while Stansted continues to be subject to the full regime of economic  
25 regulation, its divestiture should improve regulation, in particular through an  
26 increase in the number of regulated management teams taking different  
27 approaches and revealing new information to the regulator [that is a point about  
28 comparative competition].

29 “10.54. We therefore consider that the divestiture of Stansted, in addition to the  
30 divestiture of Gatwick, is required to address the AECs we have identified.”

31 In para.103 of the 2011 Decision those are the paragraphs they rely upon to justify the  
32 continued divestiture of Stansted. We simply say you cannot read those paragraphs across.

33 “To the extent that Gatwick and Stansted are now in competition, we would  
34 expect the competitive constraint on Stansted to have increased, but this would not

1 have removed the need for Stansted and Heathrow to be under separate ownership.  
2 We set out in paragraphs 10.46 to 10.54 and Appendix 10.1 of the 2009 report  
3 why we believed that BAA's ownership of Heathrow and Stansted was a feature  
4 that gave rise to an AEC, even in circumstances in which Gatwick had been  
5 divested [then they summarise the points that I have just made].”

6 So the reasons for considering the divestiture of Stansted was appropriate in 2009 cannot be  
7 translated and adopted in 2011. I think that covers a number of the points I have made in  
8 para.237.

9 The next point I want to make is in relation to the effectiveness of the remedy the  
10 Competition Commission deals with this in para.267 of the 2011 Decision. In a section  
11 entitled “Is the remedy effective to achieve the legitimate aim in question?”

12 THE CHAIRMAN: I am sorry, where are you now?

13 MR. GREEN: Paragraph 267 of the main body of the 2011 Report. Let me identify the relevant  
14 bits and take you to it. They refer to 2009 where the divestment would be effective and  
15 they say:

16 “In doing so, we had regard to the purpose of divesting Stansted, which - as set out  
17 in paragraphs 67 to 70 - is to address the AECs of common ownership as they  
18 relate to Stansted and its interaction with Gatwick and Heathrow.

19 “268. Our guidance on market investigations sets out factors which bear on the  
20 effectiveness of remedies. We considered whether, given the change in  
21 government policy, divestment remained an effective remedy.”

22 Then I wonder if I could just ask you to read the remainder of that section: 268, 269 and  
23 270. (Pause)

24 THE CHAIRMAN: Yes, thank you.

25 MR. GREEN: The only point we would make is this. There is nothing in that which one would  
26 disagree with. Divestiture is an effective remedy. That begs the question as to whether it is  
27 justifiable in the first place. They say that this is an answer to the points made at para.44.  
28 That is BAA's submission saying that divestiture was not justified economically, not that it  
29 is not an effective remedy in technical or procedural terms.  
30 The cross reference to parts of the 2009 Decision that the Competition Commission justified  
31 divestiture by reference to capacity constraints, of course they did not have them in 2011.  
32 Paragraph 44, if you simply want to turn it up and skim it, is Appendix A of the main  
33 bundle of the report. That is addressing a different point.

1        Could I take you back to the speaking note para.240. I am not going to take you to these  
2        references here.

3        As to the competitive pressure which Gatwick was capable of exerting and which was hence  
4        key to the assessment of whether, in view of the massively diminished benefits, a second  
5        divestiture over and above Gatwick was now needed, GIP (the new owner of Gatwick)  
6        submitted evidence to the Competition Commission (which it accepted) that Gatwick was  
7        active in poaching airline business away from Stansted. It gave the illustration of Air Berlin  
8        which GIP had persuaded to transfer some of its business from Stansted to Gatwick.

9        This was important evidence since the Competition Commission also accepted that (i)  
10       Gatwick was the strongest rival to both Stansted and Heathrow; but (ii) because Heathrow  
11       was capacity constrained it was not such a strong rival to Stansted.

12       So there is evidence that Gatwick is an effective competitor. At the moment, it is using its  
13       ability to take away business from Stansted. That may be germane to the Competition  
14       Commission's conclusion that there can be some off-peak capacity competition between  
15       those two airports. But it was relevant because it is a potent force. As I say, Stansted is  
16       third in the queue.

17       The next part of our submissions is about the effectiveness of regulation, para.242 of the  
18       note. Again, it will not be disputed between the parties that the Competition Commission  
19       must consider what the appropriate remedy is, whether divestiture is proportionate or  
20       whether they should have adopted a lesser remedy such as regulation or regulation plus  
21       recommendations to enhance regulation, which is what they did in 2009. They have the  
22       ability to either conclude that regulation suffices, or that they should enhance it. This is  
23       something of a repetition of points already made, so I will take it briefly.

24       The calculation which has to be conducted in 2011 is different from that in 2009: (a) the  
25       benefits of divestiture are greatly reduced and therefore the relationship between regulation  
26       and the benefits may be different. A number of points arise.

27       First, in relation to service quality, the Competition Commission accepted that divesting  
28       Stansted would not necessarily create incentives on new management to invest beyond the  
29       SQR regime. It was for this reason that the Competition Commission accepted that the  
30       benefits of divestiture were only those which supplemented regulation. But on the  
31       Competition Commission's own analysis, regulation would be almost exclusively the  
32       constraint on BAA. I submit that is a fair conclusion, almost exclusively. It may not be  
33       exclusively, but that really is the question: to what extent is there scope for  
34       supplementation?

1 THE CHAIRMAN: Do you want to give us a paragraph reference? That does not accord with  
2 my recollection.

3 MR. GREEN: That is the words in parenthesis, para.19 of 5.1. In a sense, that is our submission.

4 THE CHAIRMAN: I follow that is your submission. I just want to know: it is your submission  
5 as to how we should read some particular thing, para.19 of 5.1. Right, that is the  
6 “necessarily” that has been debated.

7 MR. GREEN: That is right, yes.

8 THE CHAIRMAN: I do not want to go back over that, but I thought you had accepted that there  
9 can be competition and for that to create a distinct incentive to invest.

10 MR. GREEN: I have accepted there are two questions the Competition Commission needed to  
11 ask itself: (1) is there scope; and (2) how big a scope is it?

12 THE CHAIRMAN: Yes, all right. I can go back to my note of what you said. Thank you.

13 MR. GREEN: Secondly, in relation to price, the Competition Commission accepted in 2009 (see  
14 para.23 Appendix 10.1) that because of capacity constraints it would be regulation that  
15 determined average levels of airport charges.

16 Thirdly, more generally, there was scope for regulation under the Airports Act: “... for the  
17 intensity of economic regulation to be adapted to reflect the degree of competition airports  
18 face.”

19 Fourthly, regulatory mechanisms could be targeted with precision. So, for instance, in  
20 relation to capex the Competition Commission conducted that regulation was: “... designed  
21 to compensate for the absence of competitive pressures on airports to deliver efficient  
22 outcomes in capital expenditure.”

23 THE CHAIRMAN: Just pause so I can catch up with you. (Pause) There does not seem to be  
24 any recognition in this of those parts of particularly the 2011 Report but also the 2009  
25 Report and indeed the general proposition which I understood you to accept that if  
26 competition can be created which is effective, that is better than regulation. You do not  
27 seem to address that here.

28 MR. GREEN: As an abstract principle I accept that.

29 THE CHAIRMAN: Right, so you do not -

30 MR. GREEN: The Competition Commission has to identify to what extent regulation is the  
31 answer to this, or enhanced regulation. The point I am making is that these are its own  
32 findings about the qualities of regulation. Namely, it is adaptable, you can target it, you can  
33 create incentives through the regulatory mechanism for operators to perform better, and that

1 you can operate it on a prophylactic basis. You can guard against the risk of failure, which  
2 is the point which they identify in 249. Those are characteristics of regulation.

3 I think it is important to remember in this case that this is not an anti-trust case. We are not  
4 dealing with an undertaking that has abused its dominant position or entered into a cartel.

5 We are dealing with a company that has been subject to economic regulation on an *ex ante*  
6 basis for many years. Therefore, a great deal of experience has been acquired by the  
7 regulator, specialist regulator, in all the aspects of BAA's business. One would have  
8 expected them to arrive at a high degree of sophistication, accepting at all times that it may  
9 not be a perfect substitute for competition. Competition in the airport market is not perfect;  
10 it is very far from perfect, which is why you have to have this *ex ante* regulation in the first  
11 place. So you are never going to get perfect competition in the airport market in the south  
12 east and that is why you have regulation.

13 Regulation has, according to the Competition Commission's own analysis, been, if not  
14 perfect, pretty good. Those are the considerations which the Competition Commission  
15 should have taken into account in asking itself: is the divestiture remedy over and above  
16 regulation proportionate?

17 THE CHAIRMAN: Thank you.

18 MR. GREEN: That is all I want to say about ground one. I am going to move to ground four  
19 which is the other side of the equation, then deal with the two more finely tuned points:  
20 grounds two and three. Ground four is dealt with in our speaking note at para.287 onwards.  
21 In relation to ground four, our submission, as set out in the Notice of Application, was that  
22 the Competition Commission had failed to take account of a relevant consideration, namely  
23 the substantial impairment to shareholder value of the requirement to divest Stansted within  
24 a short, specified time. That is the way in which we framed. That remains essentially the  
25 issue: have they failed to take account of a relevant consideration?

26 In order to show you the points, what I am proposing to do is start with a very brief  
27 overview and then take you to the Tribunal's judgment in 2009 which lays the framework  
28 for analysis of this issue, and then explain how the issue has developed. In a nutshell, the  
29 point is simply this. That in determining what the cost to a company is you have to ask  
30 what it has given up, and the cost is relevant to the proportionality remedy. You balance the  
31 benefit of introducing the remedy against the cost to the addressee of the remedy. It is a  
32 cost benefit analysis.

33 So far as BAA is concerned, what it has given up, and what therefore reflects the cost, is the  
34 right not to sell Stansted. That is the economic freedom that it has foregone by the

1 mandatory divestiture order. That either means not to sell it at all and to retain a revenue  
2 stream, or it means to choose to sell it at some point in time of its own choosing in the  
3 future, or if it engages upon a sale process to pull the sale. All of those fall within the  
4 normal rights of an operator in relation to an asset: you either continue to enjoy it, or you  
5 sell it, or you try to sell it and then just pull the sale. That is what has been given up. What  
6 has been imposed in its stead is a divestiture order of sale within a fixed period of time  
7 subject to fairly tight sale conditions as to who may purchase (because there are threshold  
8 criteria that have to be met), certain limitations on finance, and so on and so forth.

9 THE CHAIRMAN: How do we address this question? What is the relevant period of time within  
10 which divestiture is to take place, so far as is relevant to our consideration? Of course, the  
11 picture has changed now.

12 MR. GREEN: The figures I can show you but they are confidential. They are set out in the  
13 Decision.

14 THE CHAIRMAN: My question is really do we just assess the timetable in the decision (which  
15 we can go back and have a look at)? Is that what we should be examining, or should we be  
16 examining the current position, in which case someone will need to tell me confidentially  
17 what it is.

18 MR. GREEN: It does not matter for our analysis. I have to be careful about what I say about  
19 what is in the public domain. It may be helpful if I deal with that point at the end because  
20 then it will be clear whether it is relevant or not.

21 THE CHAIRMAN: Right. If it does not matter, then it may be safest just to focus on the  
22 decision as it stood when it was promulgated. Can I just check with Mr. Beard whether he  
23 agrees with that or not?

24 MR. BEARD: I think the way it was being put in the defence is that clearly we defend the  
25 decision, we say ground four does not impugn the decision. But given that we are dealing  
26 with a judicial review here, we say in practice you would actually have to engage with the  
27 revised, flipped timetable as it has been referred to.

28 THE CHAIRMAN: So we actually have to do both?

29 MR. BEARD: If you think there is nothing in the ground you could start with the flipped  
30 timetable and then analyse it there. Strictly speaking, this is a challenge to this decision, so  
31 we are not backing away from this decision. We do recognise, however, that there is a  
32 longer period now in play because of the interim relief arrangements, and that must be  
33 material to the way that the Tribunal should consider any matter if it thinks timing is in any  
34 way relevant to value here.

1 THE CHAIRMAN: Right.

2 MR. BEARD: So it could be both, yes.

3 THE CHAIRMAN: Does it come to this: that we assess the timing as set out in the Decision. If  
4 we are with the Commission in relation to that, there is nothing which could be added to  
5 that by reference to what happened since then because the term has got longer, better from  
6 BAA's point of view. If we are against the Commission in relation to the timing and the  
7 Decision, I am not aware that there is any evidence or argument to say it is all made better  
8 now by what has happened, so we would simply quash that bit of the Decision?

9 MR. BEARD: It would not so much be a matter of quashing that part of the Decision, because we  
10 have undertakings in place to cover those matters now. But in the circumstances, if the  
11 Tribunal were to proceed on the basis of looking at the decision first and then revisiting  
12 matters if there were an issue further down the line --

13 THE CHAIRMAN: That is what I am trying to explore, what we would do. Just assume for the  
14 purposes of argument that we are against the Commission in relation to the timetable for  
15 divestiture, if that is to be an issue and I have understood that it is.

16 MR. BEARD: Certainly. It may help to look at our defence para.129 which sets out why we say  
17 that given the terms of what are now final undertakings, given that as a judicial review  
18 tribunal one always retains a discretion whether or not to exercise any remedial powers, it  
19 would be necessary to take into account what the situation now is in relation to timing. That  
20 is how we put the matter, and that is why I say deal with the decision first.

21 THE CHAIRMAN: So you would be seeking to maintain an argument that even if we are against  
22 you on the timing in the original Decision, that no relief should follow?

23 MR. BEARD: Yes.

24 THE CHAIRMAN: Do I have any evidence from the Commission showing their Decision in  
25 relation to that and that it is proportionate?

26 MR. BEARD: I think it would rather depend on what the conclusions were in relation to the  
27 points that were put forward. Obviously, you have a slightly unreal situation at the moment  
28 that material was put forward by BAA in respect of which they have not made a specific  
29 application to admit.

30 THE CHAIRMAN: But now we are addressing the defence that you would wish to advance.

31 MR. BEARD: If given the timing of this hearing, the Commission went to the lengths of ensuring  
32 that there was evidence in response if that earlier evidence were going to be admitted. Sir,  
33 you do have that from Professor Gregory.

34 THE CHAIRMAN: I have not looked at that.



1 MR. BEARD: No, I quite understand, and that is why I am very cautious in the way I phrased the  
2 point. But, Sir, when you talk about there being no evidence in relation to these matters,  
3 there is material there and there will be material in submissions.

4 THE CHAIRMAN: But does it come to this: that you can only maintain your alternative  
5 submission in para.129 of the defence if the Tribunal admits the additional evidence?

6 MR. BEARD: No, I would not go that far, because if the Tribunal were to reach a conclusion  
7 somehow that because of a period of divestiture in the decision itself there was some  
8 additional loss that had not been quantified, depending what was put forward and how the  
9 Tribunal assess that, you may well reach a conclusion that if they had had a couple more  
10 months, for example, there would not have been a problem here, and given the way that the  
11 flipping arrangement has occurred, that would afford you those extra couple of months. So  
12 it will actually be conditional on the way in which you reach a conclusion on those sorts of  
13 matters. It all becomes rather hypothetical because we have set out our case that we do not  
14 understand how this could possibly be the situation.

15 THE CHAIRMAN: So does it come to this: you say we do have to consider the divestiture  
16 timetable in the decision itself on any view?

17 MR. BEARD: Yes.

18 THE CHAIRMAN: Depending on how the argument is developed by Mr. Green, there may be a  
19 basis, even if one does not have regard to the new evidence, on which you would argue that  
20 even though there is no evidence from the Commission about the new period somehow it is  
21 as plain as a pikestaff anyway?

22 MR. BEARD: Yes.

23 THE CHAIRMAN: But short of that, then it might be conditional?

24 MR. BEARD: Yes, conditional.

25 THE CHAIRMAN: All right, I think I understand that. I am grateful.

26 MR. GREEN: I would like to start with the Tribunal's judgment in 2009 bundle 2 tab 28. The  
27 point starts at para.205. I would like to just identify the issue, and then I want to go straight  
28 to where the Tribunal analyses the nature of the particular problem which is after it has then  
29 summarised the parties' submissions. If anyone wants me to read anything else as I am  
30 going through, I am very happy to do that to ensure that the Tribunal has the fullest possible  
31 picture.

32 The issue is described in para.206:

33 "The issue raised by BAA in the Ground is whether, in setting the timescale for  
34 the divestiture of Gatwick, Stansted and Edinburgh/Glasgow airports, the

1 Commission properly applied the proportionality principles. BAA submits that,  
2 having recognised that the proposed divestitures would have a significant impact  
3 on BAA and that the timescale for divestment was a material consideration in the  
4 proportionality exercise which the Commission was bound to undertake, the  
5 Commission failed to conduct any analysis of the impact that the timescale would  
6 have on BAA, and failed to weigh that impact against any effect that a longer  
7 timescale would have on the effectiveness of the divestiture remedy and in  
8 particular on when the benefits of that remedy would materialise. BAA submits  
9 that if the Commission had considered these matters it may well have come to a  
10 different decision; for example, it might have decided that it was not proportionate  
11 to require BAA to divest three airports in such a short timescale.”

12 That is the issue. The Tribunal laid down a framework for the analysis of this issue, and I  
13 would like to pick that up at para.248. The paragraphs I am going to take you to are 248 to  
14 261. The Tribunal, at this juncture, has set out the *Tesco* test and it goes on as follows:

15 “We bear these principles in mind in considering what is essentially a relatively  
16 narrow albeit important point relating to the timescale imposed on the divestiture  
17 process. As seen, BAA asked for [...] for the sale of each airport. The  
18 Commission did not accede to this request, and the periods granted amounted in  
19 total to less than two years from the date of the Report. BAA’s complaint boils  
20 down to an allegation that in considering how long to allow for completion of the  
21 sale of each airport, the Commission did not give proper consideration to the risk  
22 that in current market conditions too short a period would impose a risk of loss of  
23 value through lower proceeds of sale. It did not ‘net off’ that risk against the risk  
24 that a longer period would affect the effectiveness of the divestiture remedy in  
25 addressing the AEC. To do this the Commission should have asked itself what  
26 was the extent of the possible loss, and whether reducing it by extending the  
27 period of divestiture would create unacceptable delay or prejudice to the benefits  
28 which were expected to flow from the remedy. Had the Commission asked these  
29 questions it might have arrived at a different conclusion. [Then this in para.249]  
30 “There is no doubt that on more than one occasion in the course of the  
31 Investigation BAA brought the risk of loss of value through timing issues to the  
32 Commission’s notice. It would have been extraordinary if the Commission had  
33 not taken that risk on board: it is obvious that in the context of a compulsory sale  
34 the shorter the period allowed for the disposal the less freedom the vendor has to

1 refuse a prospective purchaser's first offer or generally to attract suitable buyers  
2 into the market, and that this can clearly have an impact on the proceeds realised.  
3 Nor does the Commission dispute that the risk of such loss is a relevant factor of  
4 which account must be taken when considering the timeframe, and its  
5 proportionality. Did the Commission properly weigh these factors?"

6 We rely upon this for a number of reasons. First, the Tribunal's view that it is obvious that  
7 there is a cost which is contingent on time, if I may put it in those terms. We rely upon it to  
8 show that the Commission did not dispute that such a loss could arise. We rely upon this to  
9 show that the Commission accepted it was a relevant factor which "must" (it was common  
10 ground it was mandatory) be taken into account.

11 "250. The analysis of certain related issues in the Report is somewhat diffuse. A  
12 superficial reading could create the impression that in relation to the question  
13 (which is logically prior to the one of timing with which we are concerned)  
14 whether the remedy of *divestiture*, as opposed to an alternative remedy or package  
15 of remedies, was necessary and proportionate, only the quantified cost element  
16 (the costs of implementation and compliance, assessed at £63 million) are being  
17 put in the balance to be weighed against the anticipated benefits of remedying the  
18 AEC..."

19 Sir, you asked what the costs were earlier on and I think I gave you a figure of £36.2 million  
20 which is the equivalent now.

21 "If this were indeed the case it would represent a flaw in the Commission's  
22 approach to proportionality, similar to that identified in *Tesco*. [So we rely upon  
23 that to show that if the only cost which the Commission has taken account of is the  
24 severance cost, the £36.2 million, that would be a flaw similar to that identified in  
25 *Tesco*.] The cost side of the weighing scales would not contain all relevant costs:  
26 in particular they would be missing a certain element of the impact on the person  
27 on whom the remedy is to be imposed, namely the undisputed impact on its  
28 business.

29 "251. However, in our view such an interpretation of the Report is not justified  
30 when the section as a whole is read carefully and with the advice of Auld J. in  
31 mind (see *R v. MMC ex parte National House Building Council*, above). The  
32 Commission has not completed its proportionality analysis with the apparent  
33 conclusion in paragraph 10.112, and has not yet finished placing items in the  
34 scales. For example, it goes on to assess the speed with which the anticipated

1 benefits may be achieved. The conclusion on this aspect does not come until  
2 paragraph 10.117 where, in considering proportionality of divestiture of three  
3 airports, the Commission also takes into account the ‘significant impact on BAA’s  
4 business’ of such divestiture. [That is the paragraph which has the words that if  
5 there is a radical change in government policy that might undermine or  
6 theoretically could undermine the remedy.] The reference to this factor is a  
7 recognition that the remedy to be imposed will inevitably result in significant  
8 (albeit unquantified) damage to BAA’s business as well as the quantified costs of  
9 separation etc. [Again, we rely upon the Tribunal’s analysis that there is a  
10 significant cost of damage to BAA’s business which goes over and above the  
11 quantified costs of separation. We rely upon that in conjunction with 249 that the  
12 costs will vary with time.] When this section of the Report is read as a whole the  
13 burden of it is that notwithstanding the scale of these costs, and despite the  
14 uncertain extent and timing of the hoped-for benefits, the extent of the detrimental  
15 and longstanding effects of the AEC are such that only a structural remedy of  
16 divestiture will be effective in addressing them, and that the net benefits likely to  
17 arise from removal of the AEC will outweigh the costs identified, including the  
18 impact on BAA’s business.

19 “252. Of course BAA’s specific complaint is not in respect of the imposition of a  
20 remedy requiring divestiture of three of its airports as such; its complaint is a  
21 narrower one about the timing of that divestiture. It is therefore necessary to  
22 examine the Report again. At the outset of its analysis of the issue of timing the  
23 Commission describes the exercise which it is proposing to carry out in that  
24 regard. We have quoted this earlier but it is sufficiently important to be repeated:

25 ‘10.156 In determining an appropriate divestiture period, the CC seeks to  
26 find an appropriate balance between factors that would favour rapid  
27 disposal and factors that favour slower divestiture. The former include  
28 addressing the AEC promptly and avoiding deterioration of the business.  
29 The latter include providing sufficient time to attract and retain suitable  
30 purchasers to the divestiture.’

31 “253. This passage represents a summary of the kind of balancing exercise  
32 required for a proportionality analysis in the context of the issue which the  
33 Commission is considering.”

34 THE CHAIRMAN: Are you going to read this through to 261?

1 MR. GREEN: I am going to make submissions as I go along.

2 THE CHAIRMAN: All right.

3 MR. GREEN: I prefer it. I know it is slower.

4 THE CHAIRMAN: No, if you want to emphasise things, let us do it that way.

5 MR. GREEN: Thank you.

6 "253. This passage represents a summary of the kind of balancing exercise  
7 required for a proportionality analysis in the context of the issue which the  
8 Commission is considering. It also makes it clear that the Commission has well in  
9 mind, as a factor pointing to a longer divestiture period, the need to give BAA  
10 sufficient time to conduct an orderly and effective sale process."

11 Again, a recognition that on all sides of the court on that occasion there was an  
12 acknowledgement that cost was dependent and variable with time, something which the  
13 Commission now resiles from.

14 THE CHAIRMAN: The thrust of this seems to be they have got to have sufficient time to be able  
15 to market effectively, have a fair opportunity to realise the market value of the asset.

16 MR. GREEN: Yes, and indeed the Tribunal's conclusion here was they needed some form of  
17 what they described as an "accurate calibration" between the cost and the issue. For  
18 example, to eliminate the risk of loss. In principle, one can see a circumstance arising  
19 whereby they may balance some loss --

20 THE CHAIRMAN: I am sorry, I do not follow the submission you just made. They do not seem  
21 here to be saying they have to eliminate the risk of loss.

22 MR. GREEN: It comes later on. It is probably easier if I continue if that is acceptable. Reading  
23 on in 253:

24 "The Commission does not at this point expressly identify as a factor the need to  
25 avoid unnecessary loss of value by a too hasty sale in current market conditions.  
26 However, that factor is probably implicit in the paragraph quoted. In any event, it  
27 is clear from later passages of the Report that the Commission not only regards the  
28 risk of such loss of value as a relevant factor to be taken into account in deciding  
29 the timing of divestiture, but does take it into account.

30 "254. For example, in paragraph 10.157 BAA is quoted as urging the  
31 Commission to extend the time beyond the standard period of six months on the  
32 ground that 'specifying a shorter period than [...] or requiring the divestments [...]  
33 would create risks for the divestment process that could have a significant impact  
34 on the value achieved from the disposals'.

1 The Commission does not at any stage discount the possibility that such a risk  
2 could arise in certain circumstances. On the contrary, it expressly finds at  
3 para.10.179;

4 ‘... that the simultaneous market in BAA airports might in current  
5 conditions constrain the opportunity to sell to a suitable purchaser and  
6 restrict prospective proceeds. However, we consider that the marketing of  
7 one airport can overlap with preliminary preparations for the sale of  
8 another airport without impacting the pool of purchasers or the  
9 prospective proceeds.’

10 There the Commission is clearly recognising and taking account of the risk of  
11 loss of value to BAA by indicating that concurrent sales will not be required to  
12 take place. The Commission is seeking to structure the divestiture in a way to  
13 avoid the risk in question, which the Commission considers will not arise in the  
14 event that it is merely some overlap in marketing one airport and making  
15 preliminary preparations for sale of another. Thus, the Commission’s policy in  
16 relation to loss and value caused by timing of divestiture appears to be to  
17 *eliminate* the risk altogether.”

18 So there you see that was the Commission’s policy, and in 2011 they say they are adopting  
19 the same policy, at least in the 2011 report.

20 “That being so it would be surprising if the Commission had approached other  
21 aspects of the timing with a different aim, or had simply ignored the risk of loss  
22 of value. Nor would that be consistent with the Commission’s description in  
23 para.10.157 of the exercise which it states it is carrying out at this stage of the  
24 report.

25 Having carefully considered the relevant passages of the report it is in our view  
26 inconceivable that BAA’s representation and the risk of loss of value were  
27 ignored by the Commission. Further, we are satisfied that it took into account  
28 the risk of loss when fixing the stand alone periods within which each of the  
29 airports were to be sold, and also in the relationship of those periods to one  
30 another. In reaching these conclusions we have been assisted by the following:  
31 first, the matters to which we have referred in the previous paragraphs; second,  
32 the fact that the submissions of BAA on the timing issue are recorded in the  
33 report together with the juxtaposed conclusions of the Commission on the same  
34 matters; third, there is a fairly clear indication in the report that in the balancing

1 exercise being undertaken pursuant to 10.156, the Commission is leaning in  
2 favour of factors favouring *slower* disposal so as to ensure sufficient time to  
3 attract and retain suitable purchasers; this indication is to be inferred from the  
4 following: the Commission’s express acceptance that airports are unlikely to  
5 degrade as quickly as other assets, and its finding that current adverse financial  
6 conditions will entail a degree of difficulty for financing airport acquisitions  
7 (both these findings are in 10.160). This indication is consistent with an  
8 approach which seeks to eliminate or minimise the risk of any loss of value  
9 which might result from timing.

10 Although (unlike the case of concurrent sales) it is not spelled out in terms in  
11 the report, whose reasoning on these issues is at times somewhat exiguous, we  
12 are satisfied that, for the reasons we have mentioned, the Commission sought to  
13 structure the timing so as to avoid the risk of loss of value through time  
14 consultants on the sales. The fact that the Commission did not allow the periods  
15 requested by BAA does not indicate otherwise, let alone mean that they failed  
16 to have any regard to such risk. The Commission was, as indicated in  
17 paragraph 10.156 of the report, also bound to take account of the desirability of  
18 addressing the AEC as promptly as was reasonable, given that the sooner the  
19 remedy of divestiture took effect the earlier the benefits of competition would  
20 be likely to accrue (even if that would not be for a while in the case of some of  
21 the benefits).

22 Therefore, whilst the Commission might conceivably have expressed its  
23 reasoning in more specific and clearer terms when dealing with BAA’s  
24 submissions on timing issues, particularly given the emphasis which BAA had  
25 placed on some of these points in the course of Investigation, we do not  
26 consider that BAA has established a failure on the Commission’s part to take  
27 proper account of the risk of loss of value when determining the timing of the  
28 divestiture.”

29 Then it comes to two important paragraphs.

30 “259. If the aim of the Commission was to eliminate as far as possible the risk  
31 of depleted proceeds, as we have found, then it is not really surprising that the  
32 report does not contain a qualitative or quantitative estimate of the loss which  
33 might be sustained if the Commission’s objective had been different. For on  
34 this basis ...”

1 - in other words, they did have this aim in mind –

2 “... there would be no loss to put in the weighing scales ...”

3 and then these very important words –

4 “... assuming that the Commission has accurately calibrated the timing so as to  
5 achieve its aim ...”

6 Those are very important words, have they "accurately calibrated the timing" so as to  
7 achieve the aim of eliminating as far as possible the risk of depleted proceeds, bearing in  
8 mind that every party on that occasion recognised there was a significant cost dependent on  
9 time. That is very important. Going back to 259:

10 “Assuming the Commission has accurately calibrated the timing so as to  
11 achieve its aim; the latter assessment would be a matter falling within the  
12 margin of appreciation of the decision-maker unless the decisions were  
13 irrational or flawed on some other ground justiciable in judicial review.  
14 Equally, if the time already allowed was in the Commission’s view sufficient to  
15 avoid significant loss, it is not surprising that the Commission did not ask itself  
16 whether, if more time was allowed, it would cause detriment to the realisation  
17 of the benefits.

18 If we are wrong, and if that was *not* the Commission’s aim and approach, then  
19 there would be force in BAA’s submission.”

20 I rely upon that sentence, first, as to the aim of the Commission in 2009 being to reduce the  
21 risk of depleted proceeds recognising that it is a cost dependent on time; and secondly, that  
22 they did adopt the approach of accurate calibration. I am sure the Tribunal did not mean  
23 with clockwork precision, but it did mean that the Commission must have had in mind some  
24 indication of the loss which it accepted would arise and it was then operating a calibration  
25 exercise so as to eliminate it. One accepts that it cannot be done with absolute precision,  
26 but it had to be done in at least a qualitative way, if not a quantitative way.

27 “It is common ground that in the present case the Commission was not under an  
28 obligation to quantify in monetary terms the potential loss of value to BAA  
29 through a too hasty sale in a difficult market, in for example the manner of  
30 Mr. Falkner’s report. However BAA’s point is that no assessment of any kind  
31 of the scale of this potential loss is discernible in the report, and that at least a  
32 qualitative assessment should have been made in order to be in a position to  
33 balance that loss against the benefits likely to flow from the divestiture. BAA



1 seems to be right in its submission that the report contains no such qualitative  
2 analysis. On our find, however, none would be expected.”

3 The reason that none would be expected was because they had already done the balancing  
4 exercise in advance. They had accurately calibrated the loss dependent on time against the  
5 benefits, and come to a reasonable conclusion. It was for this reason that BAA’s  
6 submission failed – in other words, the CC had done the exercise, had identified the loss,  
7 had some indication of what it was and then had balanced it in relation to time with a view  
8 to eliminating it. Again, I accept it may not be to zero, it may be to something modest, but  
9 that was their aim and purpose, and within the realm of that exercise, that approach, they  
10 had a margin of discretion as to how to do that.

11 “261. In view of our main conclusion on this Ground it is unnecessary to deal in  
12 any detail with Mr. Green’s argument that paragraph 30 of the Commission’s  
13 skeleton argument is inconsistent with the Commission’s Defence, and supports  
14 BAA’s argument that no qualitative assessment was carried out. We agree that  
15 on one interpretation of paragraph 30 it could be read as arguing that even  
16 where some loss might be anticipated neither a quantitative nor a qualitative  
17 assessment of adverse effects of a remedy is required of the Commission.  
18 However when the whole paragraph is read it is fairly clear that its thrust is to  
19 deny the need to carry out a *quantitative* analysis of the kind carried out by Mr.  
20 Falkner.”

21 For that reason, they reject our analysis. In other words, contrary to our submission, they  
22 did do the analysis, a qualitative analysis, not a quantitative one.

23 It has been stated in the Commission’s defence at para.93 that there is no difference  
24 between the approach they adopted in 2009 to that which they adopt in 2011. I have given  
25 you the wrong reference. I will find the right reference in a moment.

26 Can you please go to the bundle of additional documents, the transcript of the hearing last  
27 time. You can put the Tribunal decision away.

28 It was not para.93, it is in the skeleton at para.98. I will just read it:

29 “The CC denies that there was any relevant difference between its approach in  
30 the 2009 Report and its approach in the 2011 Decision (as alleged by BAA at  
31 Skeleton, 139). BAA does not identify any passage of the 2009 Report on  
32 which it relies for contending otherwise. On the contrary, the approach that the  
33 Commission followed in arriving at its 2011 Decision was fully consistent with

1 the approach of the 2009 Report and on which the Tribunal ruled in the CC's  
2 favour."

3 In the transcript there are just two pages I would like to take you to to show you what the  
4 Commission's position was, p.36, line 25, through to the top of p.38. It is just under two  
5 pages, and I am going to take you through it to just identify certain points. Again, if my  
6 friend wants me to read anything else, I am very happy to do so, but this is the crux of the  
7 submission when challenged by the Tribunal itself as to what its case was. I think probably,  
8 instead of starting half way through the paragraph on p.36, I will start with Mr. Swift's  
9 submission. Before the heading, "The President", Mr. Swift, appearing for the Commission  
10 on that occasion, says as follows:

11 "Can I just turn to this question of cost on the company whose assets are  
12 divested?"

13 THE PRESIDENT: Loss of value type of cost or ----

14 MR. SWIFT: Not so much loss of value, the cost in the loss of competitors, and  
15 that is as a result of some decision taken by an external organisation it finds  
16 itself hypothetically without the resources it was expecting to fund capital or  
17 operating expenditure across a range of assets. Let us assume for the moment,  
18 probably wrongly, that that BAA could cross-subsidise as between Heathrow,  
19 Gatwick and Stansted, rather than treat them as separately regulated assets. One  
20 could understand in those circumstances a regulator would be very concerned  
21 about imposing a cost on a company whose assets required to be divested which  
22 had the effect of making that company less competitive. This applies in  
23 particular when you have competition as between airports within the London  
24 and the South-East structure. It is not in the interests of the Competition  
25 Commission to penalise the very airport which is continuing to own London  
26 Heathrow, the 'Jewel in the Crown', that airport where the Commission said,  
27 'No, we are not going to require you to divest of Heathrow; Gatwick and  
28 Stansted, yes, Heathrow, no'. It is plainly contrary to the effective functioning  
29 of an airport market if the Competition Commission were to impose such a cost  
30 on the BAA that Heathrow became less competitive than Stansted and Gatwick.  
31 That is all part of what I would call the 'balancing process' that the Competition  
32 Commission must undertake. In essence it is qualitative, it is an evaluation of  
33 how fitting a timescale balances the important benefits of bringing competition  
34 into the market against the possible detriments of forcing a sale too quickly so

1 as to disable one of the remaining contestants from competing with those  
2 companies to acquire the assets. That is the exercise that you will see, on a  
3 proper reading of the report, is being carried through.

4 THE PRESIDENT: I think, just to be clear about it, as I understand it, and I  
5 may have an imperfect understanding, the case that is being put is that the  
6 Competition Commission accepted that there would be financial implications in  
7 terms of loss of cost value realised, proceeds of sale, whatever one wants to say,  
8 dependent on the timeframe; or at least the timeframe could have a significant  
9 impact on the proceeds realised. That seems to be common ground. I think  
10 there is a paragraph in the report that says so. The case that is put is that there is  
11 no follow-through of that. One never sees that factor either quantified or  
12 weighed in the balance or assessed somehow as to what effect it might have on  
13 the proportionality as against the AEC or a delay in obtaining the benefits of the  
14 divestiture.

15 MR. SWIFT: If we leave aside quantification, and we said in para.30 of the  
16 skeleton that it would be such an imprecise exercise that would tell one nothing,  
17 if we look at the qualitative analysis, there is, in my submission, that analysis.  
18 The analysis is ultimately a judgment call on where you put the period of  
19 divestment, recognising that you want to bring competition into the market for  
20 the public interest as soon as it is practicable, but you do not want to impose  
21 some form of a penalty or cost.”

22 So the submission made by the CC was that there was a qualitative analysis balancing cost  
23 and benefit.

24 “In terms of the balance, the public interest is the overriding. It is the  
25 effectiveness of the remedies. Really what BAA is saying is, ‘we are not able to  
26 quantify what the effect would be on us in terms of a reduction in value on two  
27 bases, your timetable and our timetable, the Commission do it’. To my mind,  
28 the burden is still on BAA to establish why that would have been a material  
29 consideration, why the Commission would, in a sense, not have a sound basis in  
30 relation to the effectiveness of the divestments having gone for the 12 + 12 +  
31 12.”

32 That is months, a sequence of three airports.

33 “In my submission, that is precisely what you leave to the judgment of the  
34 Commission and the reasoning is there in the report.

1 LORD CARLILE: So it is a judicial review approach really, is it not? What  
2 you are saying is that the Commission could be wrong in the final analysis, with  
3 hindsight they might be proved wrong, but provided they have done the broad  
4 exercise and have done it conscientiously and reasonably that is enough?"

5 The broad exercise that is being referred to is that which was ultimately identified by the  
6 Tribunal as the accurate calibration.

7 "MR. SWIFT: Yes, on a judicial review approach, it is not the purpose of the  
8 Tribunal to substitute its judgment for that other decision maker – that is  
9 absolutely clear – but to interfere only on the established judicial review  
10 grounds. The only ground relied on by Mr. Green is not one based on lack of  
11 evidence, it is based on the failure to take into account some material  
12 consideration. My suggestion is, looking at the context, that consideration has  
13 been fully taken into account."

14 That is the variable element of cost over time.

15 "Looking at all the evidence the Commission has considered what the risk  
16 would be of abridging the timetable ..."

17 So again, time dependent cost –

18 "... and the risk has got to be, even if it is not spelled out ..."

19 his justification if it is not in the report –

20 "... in terms of some material, the unjustified loss of value to BAA. It does not  
21 make any sense unless one assesses risk in those terms. The Commission has  
22 concluded, "No, with this timetable that risk can be managed without any  
23 damage to the competitive process, without any damage to BAA ..."

24 That is where I finish the reading of that transcript. What it demonstrates is that the  
25 Commission submitted to the Tribunal that it had taken into account the time value loss to  
26 BAA and it had balanced that against the cost and it had effectively either minimised or  
27 eliminated the loss.

28 THE CHAIRMAN: I think it is just worth remembering that the loss identified by the Tribunal is  
29 loss of value.

30 MR. GREEN: Yes, and the value varies over time. If you have got a limited time to sell  
31 something ----

32 THE CHAIRMAN: If it is a fire sale that may not give you a fair opportunity to test the market to  
33 get the market value of the asset. If it is not a fire sale and you can properly test the market  
34 that indicates that you will get the market value of the asset.

1 MR. GREEN: There are two types of market value. It is not in dispute between us that the  
2 mechanics of the sale – it was never said, “You must sell this in a week”, for example,  
3 which would have been ludicrous. That would have been a ridiculous fire sale. There was  
4 sufficient time to conduct a sale, and you would get a market value which would depend  
5 upon the market at the time, and that would be reflected by the number of bidders that were  
6 available, their access to capital, and so on and so forth. That is “a market value”, but the  
7 relevant cost to BAA is what it has given up. That is what is recognised by the Tribunal in  
8 para.249, that it is obvious that there is a difference in value over time.

9 THE CHAIRMAN: I am looking at 249:

10 MR. GREEN: It says:

11 “There is no doubt that on more than one occasion in the course of the  
12 investigation BAA brought the risk of loss of value through timing issues to the  
13 Commission’s notice. It would have been extraordinary if the Commission had  
14 not taken that risk on board: it is obvious that in the context of the compulsory  
15 sale the shorter the period allowed for the disposal the less freedom the vendor  
16 has to refuse a prospective purchaser’s first offer or generally to attract suitable  
17 buyers into the market, and that this can clearly have an impact on the proceeds  
18 realised. Nor does the Commission dispute that ...”

19 THE CHAIRMAN: That seems to be directed to, “Have you had a fair opportunity to test the  
20 market to get a fair market price for the asset?”

21 MR. GREEN: Analytically, one starts by simply saying, “What has BAA given up?” That is the  
22 cost. BAA has given up freedom of contract. That is the loss and you have two market  
23 prices.

24 THE CHAIRMAN: That is not what the Tribunal here seems to be saying. That is why I drew  
25 your attention to them talking about loss of value. That seems to be to loss of value of the  
26 asset. If you have a fire sale I can see that you experience a loss of value.

27 MR. GREEN: Let us assume, and take hypothetical figures unrelated to Stansted – just for the  
28 transcript, these are not the figures in the decision, they are hypothetical, and they are quite  
29 different – let us assume that you are given six months to sale, and in those six months you  
30 test the waters and you find there is one buyer. You do not have the right to refuse to sell  
31 the asset, if the two bids which come in are less than you would like, or less than you think  
32 you would realise if you simply hung on to the asset and enjoyed the revenue stream for the  
33 next ten or 15 years. Because you are subject to a perfectly rational sale timetable, call it  
34 six months or nine months or 12 months, you will still get fewer purchasers, you are subject

1 to constraints because certain purchasers are not allowed to bid, you cannot sell 30 per cent  
2 of the shares and retain 70, you cannot lease it, there is a whole series of restrictions on  
3 what you can do, and the two buyers of course know this, because it is a forced sale that  
4 affects your ability to say no, to pull the sale, and then wait for six months or five years or  
5 ten years and hang on to the asset. That is the right that you have given up. It is the cost. It  
6 is what you have given up. You may get a market value by selling them in 12 months, and  
7 let us assume it is £1 billion. It is like loss of opportunity in a contract case, you would  
8 have the ability to say, “We would not sell for less than £1.5 billion normally, but we are  
9 now being forced to sell for £1 billion, ideally we would want to pull the sale and, let us  
10 say, re-enter the market in five or six years’ time”.

11 THE CHAIRMAN: Clearly the Tribunal was not talking about loss of that kind because they  
12 took the view that there had been a sufficient elimination of this aspect of cost in the  
13 Commission’s consideration which limited it to a much shorter period of time than five  
14 years.

15 MR. GREEN: There was a disagreement over the period of time over which it would be  
16 necessary to eliminate the loss.

17 THE CHAIRMAN: The only point I was seeking to put is that the Tribunal cannot have  
18 proceeded on the basis that there has been a full elimination of the sort of loss that you are  
19 talking about.

20 MR. GREEN: With respect, that is the case. Paragraph 249 talks about “the freedom the vendor  
21 has to refuse a prospective purchaser’s first offer”.

22 THE CHAIRMAN: But it is introduced in the first sentence talking about “risk of loss of value”.

23 MR. GREEN: Through timing issues, yes.

24 THE CHAIRMAN: That seems to be talking about a fire sale meaning you do not get the fair  
25 market value at the relevant time. You say not.

26 MR. GREEN: If that were the case then it would be an incorrect application of the notional cost.  
27 The question is, what is the cost? One has to start with the relevant counterfactual as that  
28 which you have given up. Let us assume that in the counterfactual world BAA simply  
29 decided not to sell the asset and just enjoyed the revenue for the next years. That would be  
30 what they had given up. So you are measuring that value against the value under a forced  
31 timetable. There may be no loss, but there may be a loss. That is the loss of value. It may  
32 be the difference between £1 billion or £1.5 billion or £2 billion.

1 THE CHAIRMAN: Yes, thank you. Mr. Green, that may be a natural point to finish. You will  
2 appreciate, we have given you a lot of latitude on timing, you really will need to finish by  
3 five.

4 MR. GREEN: Yes.

5 THE CHAIRMAN: Very well, we will rise then for five minutes for the shorthand writers.

6 (Short break)

7 THE CHAIRMAN: Yes, Mr. Green?

8 MR. GREEN: The answer to your question, Sir, lies in a combination of para.250 and the way in  
9 which we address the issue in the notice of application. Can I just read you 250 again:

10 “The analysis of certain related issues in the Report is somewhat diffuse. A  
11 superficial reading could create the impression that in relation to the question  
12 ...”

13 and the words in parenthesis –

14 “... (which is logically prior to the one of timing with which we are concerned)  
15 whether the remedy of *divestiture*, as opposed to an alternative remedy or  
16 package remedies, was necessary and proportionate, only the quantified cost  
17 elements [the £63 million] are being put in the balance to be weighed against  
18 the anticipated benefits of remedying the AEC. If this were indeed the case it  
19 would represent a flaw in the Commission’s approach to proportionality ...”

20 There are two issues which arise on any proportionality exercise: one, is the cost to the  
21 addressee of such magnitude that you must decide whether or not to impose that divestiture  
22 remedy at all. Then, secondly, if you decide to impose divestiture, how do you then take it  
23 into account in terms of timing? They are two quite distinct questions, one which the  
24 Tribunal identified as the “whether” question; and then secondly, the implementation  
25 question, implementation and compliance.

26 The Tribunal is saying that if the CC fails to take account of cost in relation to “whether”,  
27 the *a priori* question, that indeed would be an error.

28 The way in which we put the case in 2011 is precisely on the “whether” basis. That is  
29 expressly the pleaded point, and we rely upon 250. So the “whether” is whether or not there  
30 should be divestiture. It necessarily means that you are looking at a balancing but you must  
31 have some idea of the value and you must then weigh that against the remedies that you are  
32 seeking to adopt.

33 In our notice of application – I will give you the references, it is summarised in para.4(4),  
34 but then more thoroughly in paras.105 to 108 in bundle A, p.36, tab 1.

1 THE CHAIRMAN: And your skeleton references? It would be helpful to have your speaking  
2 note references as well, just so that I have got everything. Let us keep going and  
3 Mr. Chamberlain can dig out those references.

4 MR. GREEN: In the notice of application the point is stated:

5 “The damage to BAA’s business (which was the subject of detailed expert  
6 evidence before the 2009 Report was published) was relevant to the question  
7 ...”

8 THE CHAIRMAN: You want us to get this out, do you?

9 MR. GREEN: If it is quicker, and I need to be quicker, I will just summarise it and then give you  
10 the references:

11 “... was relevant to the question whether (and not just how) Stansted should be  
12 divested.

13 Although the CC recorded in para.12 that the benefits of the divestiture remedy  
14 outweighed ‘the relevant one-off cost of divestment, and the impact on BAA’s  
15 business’ [para.12 of the 2011 decision], it is plain from the analysis at  
16 para.281-284 that the costs taken into account in the proportionality analysis are  
17 limited to the immediate costs of divestment.”

18 That is quite plain from the decision itself, they take only account of the £36.1 million.  
19 There is no other cost put into the weighing scales whatsoever. They define them as the  
20 relevant costs. That is why, in the discussion we had this morning, some of the benefit they  
21 say only has to exceed the £36.2 million.

22 “At 281 the CC sets out its conclusions about the cost divestiture (which BAA  
23 estimated to lie in the range £36.1 million - £42.5 million). The CC noted that it  
24 considered BAA’s lower estimate (£36.1m) to be at ‘the upper end of what we  
25 expected the net relevant costs of the Stansted divestiture to be’. BAA’s higher  
26 estimate was, in the Commission’s view, ‘*a substantial overestimate*’. Nowhere  
27 in its analysis does the CC take into account [what it recognises to be] the  
28 ‘*significant impact on BAA’s business*’ of the divestiture remedy or of the fact  
29 (as it noted in 2009) the remedy ‘*will inevitably result in significant (albeit*  
30 *unquantified) damage to BAA’s business*’.

31 Thus, the CC appears to have made precisely the error that the Tribunal warned  
32 of in para.250 ... Moreover, now that the ‘main benefits’ of the divestiture  
33 remedy are no longer available, and the best that can be expected is that the  
34 remedy may produce ‘some competition’, it is difficult to see how the CC could



1 properly conclude, as the Tribunal indicated it must if it is to impose the  
2 remedy, that *‘the net benefits likely to arise from removal of the AEC will*  
3 *outweigh the costs identified, including the impact on BAA’s business’.*”

4 The position adopted by the Commission in this case, we submit is different to the position  
5 it adopted in front of the Tribunal on the last occasion. Can I just pick this up in the  
6 speaking note at para.310. Given the Tribunal’s criticism of the reasoning in the 2009  
7 report as diffuse and exiguous it might have been expected that the Commission would be  
8 more explicit as to how it ‘accurately calibrated’ the cost to BAA in 2011.

9 In 2011 the Commission calculated the ‘relevant’ cost as being only the cost of physical  
10 separation. It places an upper limit of £36.1 million on that. The Commission then only  
11 asks whether the benefits outweigh this specific cost.

12 As to the issue of sequencing and timing the Commission expressly relied upon the fact that  
13 the Tribunal had endorsed its approach in 2009 and it also relied upon the Tribunal’s  
14 finding of fact that the Commission had carried out a proper qualitative exercise. The  
15 Commission rejected BAA’s submission that it should conduct an analysis of ‘cost’.

16 “BAA [in our submission] is effectively asking us to revisit that analysis on the  
17 basis that since the report the value of Stansted has decreased, increasing the  
18 risk of depleted proceeds if it is requested to divest in the near future.”

19 The Commission is indicating that it did conduct an ‘analysis’ of loss of value. And the  
20 Commission goes on to reject BAA’s submission on the basis that the Tribunal approved of  
21 the Commission’s analysis in 2009 and this was sufficient.

22 It was only upon receipt of the Commission’s defence that BAA for the first time  
23 considered the possibility that the Commission had attributed no value at all to the fact of  
24 the forced sale.

25 The CC has adopted a new position in its defence at paras.118 and 119. The Commission  
26 now argues, in essence, that the value obtainable in a forced auction, including one at the  
27 depths of a recession, is a ‘market value’ and that there is no loss to BAA of being  
28 compelled to sell Stansted, i.e. there is a zero value to be attributed to the fact of the forced  
29 sale. In other words, no value attributable to time.

30 THE CHAIRMAN: Just on that, that was a necessary feature of any divestiture order, and in  
31 particular was a necessary feature, was it not, of the position which the Tribunal had to  
32 address in 2009?

33 MR. GREEN: When you say a “necessary feature”, what in particular is the “necessary feature”?

1 THE CHAIRMAN: That there would be a forced auction because there is a divestiture order, and  
2 they would be compelled to sell Stansted? If there is a divestiture order those things follow.

3 MR. GREEN: Absolutely. The first question is the “whether”, to take into account the cost of  
4 decide “whether” divestiture is appropriate. Let us take an extreme example. If the cost  
5 had been £20 billion – of course it was not – as against the benefit, you would say  
6 divestiture is disproportionate and you would apply some other remedy. So that is the  
7 “whether”.

8 Once you have decided – as you rightly say, if you decide – then of course you have got to  
9 factor in timing. You can give a longer period or a shorter period. You can adjust the  
10 remedies to, let us say, hypothetically give five years, plus behavioural remedies in the  
11 interim, or hold separate remedies for five years. You can flex a wide range of  
12 permutations.

13 THE CHAIRMAN: Yes.

14 MR GREEN: Paragraph 119 of the Commission’s defence:

15 “There is no good reason why obtaining market value gives rise to any loss on  
16 BAA’s part. A vendor of an asset might hope that the market would give a  
17 higher valuation to an asset but that does not mean that the vendor suffers a loss  
18 if his hopes or expectations are not met.”

19 The position is made clear also in para.123 where it is stated:

20 “Since the only effective remedy identified was divestment, the pricing of  
21 putative options ...”

22 in other words, time –

23 “... pertaining to the sale of Stansted are not relevant to any assessment of  
24 detriment to BAA.”

25 The CC goes on to state the value of options is simply part of the market price that the  
26 vendor can get at any one point in time.

27 In para.124 the CC states, as a matter of principle, that:

28 “It has never been suggested in any market or merger investigation that where a  
29 divestment is considered to be the effective remedy, it is necessary or even  
30 relevant to consider – for the purpose of any proportionality exercise – the value  
31 of the options to sell the asset which requires divestment.”

32 We were served with Professor Gregory’s report. I know you have not read this, but I  
33 would like to just refer you to two paragraphs of his report because they were relied on by  
34 the Commission and they indicate what their philosophy is about this. I know there is a

1 dispute between us as to the admissibility. You know that we put in Mr. Thum's report.  
2 We put it in on the same basis as we did Mr. Falkner's on the last occasion. It was accepted.  
3 We are not asking you to decide whether it is correct or incorrect, we rely upon it for very  
4 limited purposes, namely to show that an exercise in valuation is possible; but secondly,  
5 there is a material loss, a non-trivial loss attributable to time. That is all we rely upon it for.

6 THE CHAIRMAN: Why should we admit it, for even those limited purposes?

7 MR. GREEN: Because it demonstrates that the Commission could conduct an exercise in  
8 valuation, such as they said they did in 2009.

9 THE CHAIRMAN: Did BAA invite the Commission to conduct such a valuation exercise?

10 MR. GREEN: In our submission, an entirely new theory about valuation has come out of their  
11 defence. It is nothing we have ever contemplated before. It is not the exercise we believe  
12 the Commission did in 2009, and it is not the exercise which we understand they said they  
13 did in 2009. This led Herbert Smith to write a letter to the Treasury Solicitors asking what  
14 exercise was, in fact, conducted in 2009. It has been confirmed to us that the CC did not  
15 conduct a qualitative exercise in 2009. We were told it would be futile for them to have  
16 done so in 2009. The reason for that is set out here in their defence and explained in  
17 principle, in theory, by Professor Gregory, that the CC does not accept there is any impact  
18 on value over time.

19 THE CHAIRMAN: We will look at these two paragraphs of Professor Gregory *de bene esse*. I  
20 register that we are reluctant to do so in circumstances where we have not given you  
21 permission to adduce the evidence of Mr. Thum. At the moment you do not seem to have  
22 put forward very compelling reasons why we should. I appreciate you have not made a full  
23 submission on that yet. How do you want to deal with it? Do you want to make a full  
24 submission on Mr. Thum yet, or just look at Professor Gregory's two paragraphs *de bene*  
25 *esse*?

26 MR. GREEN: Since the Commission accepted there was a significant loss of value attributable to  
27 time in 2009 and in the decision that is, in a sense, all we have cited Mr. Thum for. He  
28 supports the proposition there is a value.

29 THE CHAIRMAN: That is a way of saying that Mr. Thum is unnecessary for our consideration?

30 MR. GREEN: He may be completely unnecessary.

31 THE CHAIRMAN: I can live with "completely unnecessary".

32 MR. GREEN: Of course the Commission does not accept now that there is any value attributable  
33 to time. Can I just show you Professor Gregory *de bene esse*?

1 THE CHAIRMAN: On that, as I have just understood the answer you gave me, you say that we  
2 do not need Mr. Thum for that. We get that from proper consideration of the Tribunal's  
3 decision in 2009?

4 MR. GREEN: Certainly, yes.

5 THE CHAIRMAN: And you have made those submissions. I just want to be absolutely clear  
6 about this: Mr. Thum seems to drop out of the calculation on that basis. You say, "Go back  
7 to the Tribunal decision in 2009, that is enough for our case"?

8 MR. GREEN: I think the position is this: since our analysis of the Tribunal's judgment is that the  
9 Commission was of the view last time that they were able to conduct a qualitative analysis  
10 to identify some scale of value which they put into the modulation exercise, the calibration.  
11 If they say and accept that that is an exercise they did do and can do then we do not need  
12 Mr. Thum. Our understanding of their case now is they say they did not do that in 2009,  
13 which is surprising, given what we have seen from the Tribunal's judgment.

14 THE CHAIRMAN: My question to you is: are you making an application now, which I  
15 understand to be resisted, that Mr. Thum's evidence should be admitted? Are you making  
16 that application?

17 MR. GREEN: I am going to make the application in order to admit it for the very limited purpose  
18 that it shows an exercise can be done.

19 THE CHAIRMAN: Are you making that application now? If you are making it, make it, and  
20 then I will need to hear Mr. Beard about it.

21 MR. GREEN: Can I make the application in this way: I would like to show you, in a sense, the  
22 evidence to support why it is relevant.

23 THE CHAIRMAN: Just so I am clear, you are making an application, you are going to develop it  
24 in a particular way – is that right?

25 MR. GREEN: Yes.

26 THE CHAIRMAN: All right.

27 MR. GREEN: I would like you to look at Professor Gregory's report, because it reflects what we  
28 say is the Commission's new theory.

29 THE CHAIRMAN: I think that you need to offer us a reason why Mr. Thum's report should  
30 come in first. On my understanding, Professor Gregory's report is only put forward against  
31 the possibility that Mr. Thum may be admitted. Logically it would seem that you have to  
32 make your application for Mr. Thum to be admitted.

33 MR. GREEN: He deals not only with Mr. Thum, but he articulates what we say is the  
34 Commission's new material.

1 THE CHAIRMAN: He does not articulate it in these proceedings yet, because it has not been  
2 admitted. You make your application for Mr. Thum. It rather looks as though we are quite  
3 lucky to have your speaking note because that is going to eat up your time, is it not?  
4 Anyway, we have got your speaking note, so let us do that.

5 MR. GREEN: Can I take you to the Herbert Smith letter and the Treasury Solicitor's letter.

6 THE CHAIRMAN: Where do we find them?

7 MR. GREEN: Those are in the additional documents' file.

8 THE CHAIRMAN: Out of interest, do we have an application notice? I am not going to  
9 complain if we do not, but I would just like to know.

10 MR. GREEN: We do not, no.

11 THE CHAIRMAN: But certainly the application was foreshadowed, I can see that.

12 MR. GREEN: It is volume D, tab 3. Herbert Smith wrote following the service of the defence,  
13 which included Professor Gregory, and they stated:

14 "We write in relation to the CC's defence to BAA's Ground 4.

15 In the defence it is stated that: '*... the CC carefully considered any relevant*  
16 *costs and detriments of divestment of Stansted and weighed them up against the*  
17 *benefits*' ... It is stated that the CC '*exercised its judgment and weighed up its*  
18 *assessment of the costs and detriments of divestment against the benefits and*  
19 *concluded that the only effective remedy was clearly proportionate*' ... Further,  
20 the CC states that, in addition to separation costs, the CC looked at economies  
21 of scale and '*alleged loss of unquantified benefits of common ownership*' ...  
22 From our reading of the defence, we now understand that the CC did not  
23 conduct any specific quantitative or qualitative assessment of the scale or scope  
24 of the loss which BAA might sustain as a result of being required to sell  
25 Stansted according to the divestiture timetable adopted. For example, the CC  
26 conducted no analysis of the sort carried out by Mr. Thum and had received no  
27 report or analysis such as is set out in Professor Gregory's report. The  
28 explanation for this given in the defence is at paragraph 119 viz., that there was  
29 no loss at all to BAA of being forced to sell under the conditions set out in the  
30 divestiture order.

31 We are of course conscious that the CC has given no disclosure of any of the  
32 analysis that it did in fact undertake in order to come to the assessment of costs  
33 set out in the decision. We assume that had there been analysis of any sort that

1 the CC would, in accordance with [its] obligations, have given disclosure since  
2 this is clearly a matter in dispute.

3 In the circumstances, can you please confirm that both (a) in 2009 and (b) in  
4 2011 no quantitative or qualitative analysis of the scale or loss which BAA  
5 might sustain as a result of being forced to sell Stansted according to the  
6 relevant divestiture timetable was in fact conducted.

7 We write to ensure that there can be possible room for doubt or  
8 misunderstanding between us on this matter during the hearing of our  
9 application for judicial review.”

10 The answer is at tab 4, 16<sup>th</sup> November:

11 “I refer to your letter of yesterday in which you raise a query regarding what is  
12 stated in the CC’s Defence in relation to Ground 4 of BAA’s Application. At  
13 14.51 today you sent a further letter, this time complaining that we had not yet  
14 responded to your letter of yesterday, and asking that we now respond  
15 ‘forthwith’.

16 Our response to your query is below. We note that you have had over 2 weeks  
17 to consider our Defence, but your letter raising your query was received only  
18 yesterday. You will appreciate that correspondence raising queries can be  
19 responded to only on the basis of client instructions and that relevant  
20 individuals may not be immediately available.”

21 Then they cite from our letter, and then they say:

22 “You ask that the CC confirm that your reading of the Defence is correct.  
23 The 2011 Decision set out the CC’s assessment of costs (or ‘detriments’) that  
24 BAA was likely to incur by reason of the divestment remedies. In particular,  
25 the CC considered both the likely costs to BAA of the divestment process, and  
26 the subsequent ongoing costs arising from a reduction in economies of scale.  
27 The CC decided that the requirement to divest Stansted remained proportionate  
28 in view of the anticipated competition benefits of that divestment. The CC also  
29 considered the timetable for the divestments and decided that there were no  
30 sufficient reasons for departing from either the divestment sequence or  
31 timescales specified in the 2009 Report, the conclusions of which were  
32 subsequently upheld by the Tribunal.

33 Insofar as BAA wishes to contend that the Commission’s 2011 Decision to  
34 maintain those timescales was legally flawed because those timescales gave rise

1 to 'loss' to BAA that the Commission did not (or did not properly) take into  
2 account, it was for BAA to, in its Application, identify what and how much  
3 'loss' should be thought likely to arise. BAA ought to have explained when and  
4 how it drew this alleged loss to the CC's attention in the consultation process  
5 leading up to the 2011 Decision, and if it did not do so, why it has chosen to  
6 raise the matter of that alleged loss only now, in the context of an Application to  
7 the Tribunal.

8 As we understand Ground 4 of BAA's Application, the only alleged loss which  
9 is being relied on is that which Mr. Thum claims to have identified in his report.  
10 In that report, Mr. Thum claims that there is a loss which can be deduced by  
11 comparing ..."

12 and then you have got a confidential figure –

13 "... with the shorter divestment periods which the CC selected in its 2009  
14 Report and adhered to in 2011 Decision. BAA provides no explanation of why  
15 it did not draw this alleged head of loss to the attention of the CC in the  
16 consultation process (whether in response to the Provisional Finds document or  
17 otherwise).

18 But in any event, as set out in the Defence, the CC does not accept that there is  
19 any detriment to BAA arising specifically from the divestment timetable. As  
20 noted above, the timescales confirmed in the 2011 Decision essentially  
21 replicated those selected in the 2009 Report. Those timescales had always been  
22 accepted by BAA as sufficient to enable it to market the divestment airports  
23 effectively. There was no good reason for anticipating that effective divestment  
24 processes conducted within commercially realistic timescales would not enable  
25 BAA to obtain market value for its assets at the times when they were sold.  
26 Accordingly, there was no 'loss' to BAA arising from the timescales laid down  
27 in the divestment timetable, and therefore the CC did not carry out an exercise  
28 of seeking to assess (whether quantitatively or qualitatively) the extent of any  
29 such loss, whether in the 2009 Report or the 2011 Decision. To seek to assess  
30 the extent of a non-existent loss would have been futile."

31 The Treasury Solicitors have thus confirmed on behalf of the Commission that in 2009 and  
32 in 2011 they did not did not conduct either a qualitative or quantitative assessment of the  
33 loss, because they say it would be futile.

1 The submission made to the Tribunal last time was that they had conducted a qualitative  
2 assessment and the Tribunal took that to mean that there was a sufficiently accurate  
3 calibration to eliminate the loss. We submit that if they have not got any understanding of  
4 the loss – we would have sought disclosure if the answer had been that there had been an  
5 analysis ----

6 THE CHAIRMAN: They have. According to this letter, they say those timescales had always  
7 been accepted by BAA as sufficient to enable it to market the divestment of airports  
8 effectively.

9 MR. GREEN: What they say is that there was no good reason for anticipating this was an  
10 ineffective divestment process. Effectiveness is the bare minimum to get a sale away,  
11 whatever market value you get at the end. Let us assume, because it is set out in the  
12 decision, that there are very, very few potential purchasers. You have got, let us say, X  
13 months, call it 12 months for the sake of argument ----

14 THE CHAIRMAN: Forgive me, just on what “effectiveness” means, why does it not mean  
15 “effective to realise the fair market value of the asset”?

16 MR. GREEN: Because they say “effective divestment processes conducted within commercially  
17 timescales would not enable BAA to obtain market value for its assets at the time when they  
18 were sold”.

19 THE CHAIRMAN: Does that not support the interpretation that I was just putting to you?

20 MR. GREEN: With respect, no, since they say they did not conduct a qualitative analysis in 2009  
21 or 2011. There is a contrast between what they are saying here about 2009 and what they  
22 said to the Tribunal and what the Tribunal assumed. The Tribunal assumed they had done  
23 sufficient assessment in order to be able to eliminate the loss. They said, “You did not do a  
24 quantitative analysis”, but the express submission was made, “We have done a qualitative  
25 analysis”, and that was accepted, and the Tribunal said if they had not done that they would  
26 not have been able to conduct the accurate calibration and there would have been a flaw.  
27 They have now accepted that in 2009 they did not conduct a qualitative analysis. What did  
28 they do? They accepted there was some loss attributable to time and they gave BAA a time  
29 – not sufficient, but an amount of time – to divest the three airports. They cannot possibly,  
30 having not done any qualitative analysis, have known that that would eliminate the loss.  
31 That is what they told the Tribunal in 2009. That is what the Tribunal has recorded as a  
32 fact.

33 THE CHAIRMAN: I think I and the Tribunal understand the submission. How is it relevant to  
34 your application to admit Mr. Thum’s evidence?



1 MR. GREEN: The submission is relevant in this way ----

2 THE CHAIRMAN: Just to put it clearly, you have made a submission, which we understand, by  
3 reference to the decision of the Tribunal in 2009 and what has been said in this  
4 correspondence. At the moment I am having difficulty in following why that should lead to  
5 us admitting Mr. Thum's evidence. (After a pause) While you are checking with  
6 Mr. Chamberlain, can I just check with Mr. Beard that there is opposition to Mr. Thum's  
7 evidence being admitted, because if there is not then we can truncate this?

8 MR. BEARD: There continues to be. We do not understand ----

9 THE CHAIRMAN: That is all I wanted to know.

10 MR. GREEN: The Treasury Solicitor asked what the relevance of Mr. Thum's expert evidence  
11 was on 29<sup>th</sup> September. We gave them an answer.

12 THE CHAIRMAN: This is in a letter you have not shown us yet.

13 MR. GREEN: It contains confidential data; it is not in the bundles.

14 THE CHAIRMAN: This is part of your submission; you must show us the document.

15 MR. GREEN: It is in the CMC bundles, I am told. Can I just explain what it says.

16 THE CHAIRMAN: We strongly prefer to see the document that you rely upon.

17 MR. GREEN: I happen to have it in the CMC bundle. I do not know if my colleagues do. It is a  
18 letter dated 30<sup>th</sup> September 2011.

19 THE CHAIRMAN: Yes, I think by good fortune we do. Which tab in that?

20 MR. GREEN: I am told try L. I do not have the bundle; I have just been handed the letter.

21 THE CHAIRMAN: L, letter from Herbert Smith's dated 30<sup>th</sup> September, that looks hopeful.

22 MR. GREEN: Yes.

23 THE CHAIRMAN: Good. Yes.

24 MR. GREEN: It says:  
25 "We refer to your letter dated 29 September 2011, relating to the expert report of  
26 Mr Nicolas Thum dated 16 September 2011 behind tab 3 of the claim bundle ("the  
27 Report")."

28 THE CHAIRMAN: That is another letter we have not seen. That is not the letter you just showed  
29 us.

30 MR. GREEN: That simply asks for the relevance of Mr. Thum's report.

31 MR. BEARD: Sir, if that assists, these letters are in fact behind the defence in the Commission's  
32 defence bundle.

33 THE CHAIRMAN: All right. That letter may be here as well.

34 MR. BEARD: I am sorry, I do not have the CMC bundle.

1 THE CHAIRMAN: We have got it in front of us. At H we have a letter from Treasury Solicitor  
2 to Herbert Smith 29 September 2011 headed "BAA Market Investigation". Is that the  
3 letter? "Your Notice of Application commencing these proceedings was accompanied by  
4 two expert reports of Mr Nicolas Thum,"

5 MR. GREEN: Yes.

6 THE CHAIRMAN: In the fourth paragraph they register their objection to fresh evidence.

7 MR. GREEN: Yes, that is the letter, and then we cite in the following letter. Perhaps you could  
8 just read that, tab 1 bundle E.

9 THE CHAIRMAN: We now, at your invitation, have taken up the CMC bundle. I think tab H is  
10 the 29 September Treasury Solicitor letter. That is the one you want us to read?

11 MR. GREEN: That is right. (Pause)

12 THE CHAIRMAN: Yes, that seems to be asking you the questions I have been asking you.

13 MR. GREEN: The reference to the well known case of *Lynch* in relation to new material is  
14 referred to in para.4.

15 THE CHAIRMAN: There is reference to a case called *Powis*. You invited us to read that letter.

16 MR. GREEN: Yes. Yes, they referred to *Powis*.

17 THE CHAIRMAN: Do you want us to read the letter of 30 September?

18 MR. GREEN: Yes, please.

19 THE CHAIRMAN: All right. (Pause)

20 MR. GREEN: The confidential figure in para.1 is an estimate by an expert in these sales of the  
21 extent of the difference between a market value or the valuation under the divestiture order  
22 and one which might be obtained over a five year period. So it is conservative. It does not  
23 operate against the fullcounterfactual which might be a sale in ten or a 15 years or never at  
24 all, but it is an indication that there is a significant loss. That was exactly the same position  
25 which everybody accepted in 2009, and upon which it was assumed that the Competition  
26 Commission had conducted at least a qualitative analysis if not quantitative analysis, in  
27 order to arrive at some sort of figure for putting into the modulation of the remedy in order  
28 to eliminate the loss.

29 THE CHAIRMAN: Is there an answer to this letter?

30 MR. GREEN: No, there is not.

31 THE CHAIRMAN: So the objection has been maintained.

32 MR. GREEN: The objection has been raised, we have given an explanation, they then served  
33 Professor Gregory.

34 MR. BEARD: I am sorry, there is a full answer in the defence at paras.24 through to 27.

1 THE CHAIRMAN: 24 to 27, let us look at that. (Pause)

2 MR. GREEN: Our submission is that on the basis of *Lynch* this simply clarifies the submission  
3 which was made by BAA, which is that there is a loss. It is not, of course, for the Tribunal  
4 to decide what the scope of that loss is. It is possible, on either a quantitative or qualitative  
5 basis, to get a handle on what the extent of the loss is to some degree, and therefore one can  
6 have a figure to put into the “whether” question and, if one gets into that, into the  
7 calibration question of timing.

8 THE CHAIRMAN: Where do we find *Lynch*?

9 MR. GREEN: *Lynch* is authorities bundle 1 tab 18.

10 THE CHAIRMAN: Did you want to take us to *Powis* to comment on that, or are you going to  
11 leave that to Mr. Beard?

12 MR. GREEN: Our reference is para.20 onwards. Could I ask you to read from para.19 onwards.  
13 We particularly rely upon para.24.

14 THE CHAIRMAN: 19 through to the end?

15 MR. GREEN: 19 gives you *Powis*, you see.

16 THE CHAIRMAN: Just so that we are clear, 19 to 39?

17 MR. GREEN: 25 really.

18 THE CHAIRMAN: We will read 19 to 25. Should we be reading the headnote to get the context  
19 for this, or does it appear from those paragraphs?

20 MR. GREEN: I hope it appears sufficiently from them.

21 THE CHAIRMAN: All right, I will just keep reading the paragraphs. (Pause) Yes, I have read  
22 those paragraphs.

23 MR. GREEN: It boils down to this: the Commission says that it would be futile now to conduct  
24 either a qualitative or a quantitative analysis. We submit that it would not be futile; it is  
25 possible and it would demonstrate that there is a non-trivial loss and that non-trivial loss  
26 may be that which exceeds the market value under the divestiture timetable. We rely on it  
27 not to establish it is correct, or for you to rule upon its correctness, but simply to  
28 demonstrate that it is not a futile exercise as is now stated to be the case in the Treasury  
29 Solicitor’s letter of 16 November; it is in fact something which can be done. It may not be  
30 an exact science, but it is not zero, the loss is not zero, which is the Commission’s present  
31 case. It is because you put a market value under a divestiture timetable that is sufficient;  
32 you are not entitled to any more. That is what it goes to. It does not go to more than that.  
33 That is our application.

34 THE CHAIRMAN: Yes. Mr. Beard?

1 MR. BEARD: The position of the Commission has been set out in the defence. What we have  
2 here is a position where the Commission, having taken a decision, is faced with a screed of  
3 new material being submitted in circumstances where there has been a Report, there has  
4 been a provisional finding after an invitation to comment, there has been an opportunity to  
5 comment on those provisional findings, then there is a final MCC decision. At that point a  
6 challenge comes in.

7 THE CHAIRMAN: Sorry, can I just get the order of events.

8 MR. BEARD: I am sorry, I am skipping through rather quickly. The 2009 Report, then plainly  
9 after the end of the legal challenge it is going through to the Court of Appeal, the  
10 Competition Commission conscientiously said: we are going to reconsider whether or not  
11 there are any MCC's (I will come on to the legal issues). It invited comments before it even  
12 produced its provisional report. It then produces a substantial and detailed provisional  
13 consideration of whether or not there are any material changes of circumstances.

14 THE CHAIRMAN: That is put forward before the further round of consultation?

15 MR. BEARD: Yes, absolutely, before the further round of consultation. We do actually have  
16 these documents in the bundles. I will not take you to them, but they are in bundle B.  
17 There is the BAA response to the invitation to comment, then there is the BAA response on  
18 provisional findings. Not a whisper of anything of this sort. Mr. Thum has never been  
19 mentioned, option pricing has never been mentioned, there is nothing there at all.  
20 The Competition Commission then takes its decision. It is ready to face judicial review  
21 challenges; it knows there is a public regulator dealing with well funded parties who are  
22 disappointed by the outcomes of decision and that it will face challenges. However, it is  
23 very concerned about late material and new material being submitted after a decision. This  
24 is, after all, a judicial review challenge, on ordinary judicial review principles. It is a  
25 challenge to the decision as taken at the time. It cannot be right conceptually that you can  
26 impugn a decision made at one time on the basis of material submitted subsequently. That  
27 is the essence of *Powis*.

28 THE CHAIRMAN: When is Mr. Thum's report first put forward?

29 MR. BEARD: It is attached to the Notice of Application. There are two Thum reports. One was  
30 in relation to interim relief. No issue is taken about that, that was separate. And this one  
31 which is said to go to ground four. Having received that Notice of Application, you have  
32 seen the letter that was written by the Treasury Solicitor saying: could you please explain,  
33 because you have given no reason why it is that you have produced this material now,

1           having never mentioned it previously. The response comes back, as you have seen, and that  
2           response is frankly inadequate. That response drifts through, touching on ground four.

3 THE CHAIRMAN: Just remind me where is that response?

4 MR. BEARD: That is the letter of 30 September.

5 THE CHAIRMAN: Just so long as I have got the right document.

6 MR. BEARD: It says the report is relevant to ground four. That is a very limited explanation  
7           why that is the case. In fact, it is a very substantial document. We say it is all wrong.

8 THE CHAIRMAN: I am sorry. It is in bundle 6 tab L.

9 MR. BEARD: The reason that the Commission takes this position is not because it has any  
10           concerns about Mr. Thum's report; it has actually done the work and it thinks he is all  
11           wrong. The point is much more a fundamental point of principle. In circumstances where  
12           you are a regulator taking decisions you should not be permitted to introduce wholesale new  
13           evidence in a challenge under judicial review. That is what the essence of the *Powis* rules  
14           are about. That is why they are so restrictive as to what fresh evidence can be put forward.  
15           There are only three categories: what material was before the decision maker; where the  
16           jurisdiction of the decision maker on a question of fact or where there is a central procedural  
17           requirement to be observed you can put material in (obviously, that is not relevant either);  
18           and where the proceedings are tainted by misconduct (obviously, not relevant). In each of  
19           those three cases you can see why you have the exception to the temporal limitation on  
20           evidence.

21           In *Lynch*, which Mr. Green now rather heavily relies upon we have a situation where what  
22           is being said is if you cannot understand the technical terms it is fine to admit expert  
23           evidence so you can understand the technical terms. What was going on there was an  
24           argument about whether or not an orthodontist should be struck off. When a panel is  
25           discussing whether or not an orthodontist has the relevant skills, even if they are relatively  
26           expert they may not know the niceties of the particular procedures that the person in  
27           question has been carrying out, and because they do not know that they may not be in a  
28           position to decide whether or not they should be struck off, retain their licence, or whatever  
29           else.

30           That is fine. This is different. This is not an explanation. Mr. Green has been able to put  
31           forward his case, such as it is, on the basis of the materials - whether it is the Tribunal  
32           materials or fishing back to the submissions from Mr. Swift and various other bits and  
33           pieces. He can put his case. This Tribunal can understand the case that is being put. You  
34           do not need Mr. Thum to turn up, having an extensive discussion about Black Schole's

1 option pricing for these purposes. That is not explanation. In fact, it is grotesque  
2 complication and it is precisely not what should be admitted in proceedings such as these.  
3 So in those circumstances, he does not fall within the scope of the exception to the  
4 exception that is set out in *Lynch*.

5 In fact, para.25 of *Lynch* is rather instructive in this regard. Although in *Lynch* they were  
6 extending the scope of fresh evidence that could be admitted beyond the *Powis* provisions  
7 they say at para. 25 tab 18 authorities bundle 1:

8 “This is, I appreciate, some extension beyond that recognised by *Ex p Powis* of the  
9 possibility of admitting fresh evidence. But its purpose is in reality to explain to  
10 the court matters which it needs to understand in order to reach a just conclusion.  
11 It is difficult to see why, where such need is established, that should not in  
12 principle be permitted. But a word of caution is appropriate. Where the tribunal  
13 or body is itself composed of experts or has been advised by an expert assessor  
14 (which can happen in appeals in cases such as the present), it will be virtually  
15 impossible to justify the submission of expert evidence which goes beyond  
16 explanation of technical terms since it will almost inevitably involve an attempt to  
17 challenge the factual conclusions and judgment of an expert. That is something  
18 which is inappropriate for a reviewing court.”

19 What is being stressed here, obviously you are an expert tribunal but you do not have expert  
20 advisers. Nonetheless, what is being noted is the limitation of the exception in *Lynch*. That  
21 is undoubtedly what should inform the Tribunal here.

22 As to Mr. Green saying: if the Competition Commission are saying the exercise is futile we  
23 need Mr. Thum in order to be able to show that it is not futile, it is worth recalling that Mr.  
24 Thum’s report was submitted with the Notice of Application. The letter that he is referring  
25 to is long after that. So it gets causation all the wrong way round.

26 In the circumstances, as I say, the Competition Commission is not concerned about Mr.  
27 Thum because it has a concern about the impact on the substance of this case. It does not.  
28 It has gone away and it has got Professor Gregory’s report. But more fundamentally, it is  
29 concerned about the way that it is being challenged in these proceedings and in other  
30 proceedings. That is why the marker is put down.

31 THE CHAIRMAN: Yes, thank you. Yes, Mr. Green.

32 MR. GREEN: Can I just ask my learned friend to clarify whether, if Mr. Thum does not go in, he  
33 is abandoning reliance on Professor Gregory?

34 THE CHAIRMAN: I think that is clear from the defence.

1 MR. GREEN: Is that right? Are you abandoning reliance on Professor Gregory?  
2 MR. BEARD: No, we do not seek to put it in. It is very clear from the defence that it is  
3 responsive and that is the only reason that it has been provided.  
4 MR. GREEN: That is helpful. What I propose to do, I am not going to add anything more to the  
5 submissions that I have made on that point.  
6 THE CHAIRMAN: Do you want to reply?  
7 MR. GREEN: I have made the point which is that he simply addresses a very limited issue.  
8 THE CHAIRMAN: Very well. If you want to say more by way of reply, we will need to retire to  
9 give a ruling on this.  
10 MR. GREEN: I am conscious of time.  
11 THE CHAIRMAN: You chose to make this application at this stage.  
12 MR. GREEN: I am not going to refer, in the circumstances, to Mr. Thum.  
13 THE CHAIRMAN: Does that mean you are not pursuing your application?  
14 MR. GREEN: I am going to proceed now, in order to make best use of my time, by reference to  
15 my speaking note. I am not going to refer to Mr. Thum's evidence.  
16 THE CHAIRMAN: I just need to understand: are you persisting with your application for Mr.  
17 Thum's evidence to be admitted? If you are not, that is fine, we do not need to deal with it.  
18 If you are, I think we need to clarify the position, not least because Mr. Beard will need to  
19 know where he stands.  
20 MR. GREEN: Yes. I am simply conscious of the fact that with 32 minutes left, I understand the  
21 point you make, I want to be able to use those 32 minutes effectively. If you rule upon it  
22 now I am simply going to end up with effectively no time to finish off.  
23 THE CHAIRMAN: That is the point. (Pause) The ruling is that we do not admit the evidence of  
24 Mr. Thum. I will give reasons for that when we draft the final judgment.  
25 MR. GREEN: Yes. What I would like to do now is to go to the speaking note and deal with the  
26 implications of the position that we are now in, namely that the Commission conducted no  
27 qualitative analysis in 2009 nor 2011, and it therefore cannot have had any idea of the scale  
28 of the loss in mind when it sought to either decide whether to order divestiture --  
29 THE CHAIRMAN: I just wonder - you have made that point now more than once. It might be a  
30 productive way forward if you give us the paragraphs in your speaking note so we can get  
31 the detail of it and move on to your other grounds.  
32 MR. GREEN: Yes. If you are content to do it that way, I am very content to do it that way. It is  
33 paras.329 through to 354.  
34 THE CHAIRMAN: We undertake to read those paragraphs.

1 MR. GREEN: I am very grateful. What I am going to do now is deal with the other two points.

2 They are, I hesitate to say, short points. The first point, which is our ground 2 --

3 THE CHAIRMAN: Just to reiterate, you will need to finish by 5. We have given you very  
4 considerable latitude by sitting long days. The case had two to three day estimates. We are  
5 at the end of the second long day and you are still on your feet.

6 MR. GREEN: Yes, I am aiming to finish by five.

7 THE CHAIRMAN: Thank you.

8 MR. GREEN: Additional spare capacity. This is a short but significant point. This is para.252 of  
9 the speaking note.

10 THE CHAIRMAN: Which ground?

11 MR. GREEN: Ground two.

12 THE CHAIRMAN: Thank you. And speaking note?

13 MR. GREEN: Speaking note 252. Can I ask you simply to take up the Decision 2011 para.113  
14 bundle A tab 2. This is under the heading "Conclusions on the benefits and scope for  
15 competition absent new runway capacity". There are three points referred to here.  
16 Fortunately, they can be taken shortly. First, 113, in the 2009 report they refer to  
17 competition to invest and innovate even in the short term being intense. You have seen that.  
18 I do not need to take you to that again. Then 114:

19 "In 2009, we also found scope for modest price competition. Moreover, we have  
20 found that the reduction in passengers and ATMs at Stansted since 2009 means  
21 that there is now significantly more spare runway capacity at Stansted. As a  
22 result, even without new runways being built, under separate ownership there is  
23 now significantly greater scope for competition for airlines and their customers  
24 between Heathrow and Stansted."

25 The first point to note there is that they are relying, as a matter of law, upon this so-called  
26 extra new capacity which has arisen. That is under the heading of their conclusions so it is  
27 something they rely upon. So they rely upon it for competition between Heathrow and  
28 Stansted. I point out that this is entirely new because they have never relied on spare  
29 capacity to do with Heathrow and Stansted in the past; it is only between Stansted and  
30 Gatwick. That is the only form of price competition ever referred to in this regard about  
31 off-peak capacity.

32 THE CHAIRMAN: Sorry, this does not seem to be talking about off-peak capacity.

33 MR. GREEN: It is talking about the increase in capacity at Stansted.



1 THE CHAIRMAN: Yes, but you seem to be saying that this is talking about off-peak capacity. I  
2 was just wondering where you got that from.

3 MR. GREEN: It is just capacity. Capacity is capacity whether it is off-peak. They refer in  
4 relation to Appendix 5.1 and Appendix A to capacity competition between Gatwick and  
5 Stansted. They are simply saying here there is an additional amount of capacity at Stansted.

6 THE CHAIRMAN: But they did also talk about competitive effects Stansted would have on  
7 Heathrow.

8 MR. GREEN: That is right, charge rebalancing in relation to passenger terminals.

9 THE CHAIRMAN: No.

10 MR. GREEN: I am sorry, terminal utilisation rates?

11 THE CHAIRMAN: No. 5.17 subparagraph (c), 3.123 subparagraph (a), 3.129 and 10.47 I think.  
12 I think it is all referring to the same thing, there being pressure from Stansted on short haul  
13 flights at Heathrow.

14 MR. GREEN: There are those examples. "In 2009 we also found room for modest price  
15 competition". That, I think, is a reference back to 5.1. I do not think it is a reference to  
16 anything else.

17 THE CHAIRMAN: Just on the logic of it, if there had been historic examples of effective  
18 competitive pressure from Stansted on Heathrow, one might expect that pressure to be all  
19 the greater the more spare capacity there is at Stansted?

20 MR. GREEN: Yes, that is a point they have made. The point I am going to make is a very simple  
21 one in a sense. They rely upon it here and this is effectively a finding. Going back to  
22 para.111. This responds to a submission made by BAA that in fact they had not  
23 investigated the cause of the new capacity. They say:

24 "Overall, even without new runways being built, there would now be a  
25 significantly greater level of competition for customers and airlines between  
26 Heathrow and Stansted if they were under separate ownership than there was at  
27 the time of the 2009 report. This is a result of the extra spare capacity at Stansted  
28 created by the decline in passenger numbers and ATMs since the 2009 report. In  
29 any event, we do not factor competition based upon this extra capacity into our  
30 decision on whether divestment of Stansted is proportionate; as noted in paragraph  
31 285, we simply note that this is an extra benefit which might be expected to arise."

32 This came in after the provisional decision. This was drafted in at the last moment, between  
33 the two. The reason is because they had not investigated the causes, and the submission  
34 was made that in fact this extra capacity may be of very limited value for three reasons.

1 One, it is recession-based, in which case it will simply disappear as the recession  
2 disappears. Secondly, it may just be eroded as demand increases. Thirdly, the capacity  
3 may in fact not be terribly valuable if it is the capacity that is being given up.

4 THE CHAIRMAN: Sorry, these points are you saying BAA made to them in their submission?  
5 Where have you just got your list of points?

6 MR. GREEN: If I take you to the provisional findings, these were points that we made. The most  
7 important point is the Commission has said that they do not rely upon it. That is the  
8 problem. Why they did not rely upon it is perhaps irrelevant, but they added this at the last  
9 moment and said they do not rely upon it and they have not needed to investigate the causes  
10 of the extra capacity. That is one of the reasons they have not relied upon it. It is not  
11 something which has been subject to investigation, yet in 113 they do rely upon it and it  
12 becomes effectively a material point at para.285.

13 THE CHAIRMAN: Sorry, you said that at 113 they rely on it?

14 MR. GREEN: No, I am sorry, 114. At 115 they say: "We find therefore" which I think is an  
15 indication that it is a fact which is being relied upon.

16 THE CHAIRMAN: But if they have said in terms they do not factor it into the proportionality?

17 MR. GREEN: Quite. There is an inconsistency between 113 and 114. In 115 "We find therefore  
18 that there are significant benefits that may be expected to accrue". They have relied upon  
19 the extra capacity as significantly increasing the scope for competition, yet they have said  
20 they do not rely upon it. There is an inconsistency on the one hand saying we do not rely  
21 upon it, and that is because they have not investigated the causes of it, and then actually  
22 relying upon it. They rely upon it on a second occasion at para.285:

23 "This conclusion is based on an assessment of the benefits that may be expected to  
24 accrue starting in the near future and continuing over 30 years. In addition, we  
25 note that Stansted has a significantly greater level of spare runway capacity than it  
26 did at the time of the 2009 report, and Gatwick told us that it saw scope for  
27 significantly increasing the number of passengers using the airport through better  
28 use of existing runway capacity (see paragraph 106). This suggests that the scope  
29 for competition based on spare runway capacity within existing constraints  
30 between Gatwick, Stansted and Heathrow has increased. As noted in paragraph  
31 114, it is clear that there is now significantly greater scope for competition  
32 between Heathrow and Stansted [and there is no explanation of that; it is just  
33 simply inserted there] if they were under separate ownership, for customers and  
34 airlines than there could have been with the level of spare capacity available in

1                   2009. In our judgment, this increased scope for competition is an additional  
2                   aspect of the benefit of divesting Stansted which could be expected to deliver  
3                   benefits in at least the short term.”

4                   In our submission, there are two important ways in which they have relied upon something  
5                   which they themselves say they have not relied upon and there has been no examination of  
6                   the causes of the extra capacity.

7   THE CHAIRMAN: Just on that, at 284 they seem to say: even if no new runways were built the  
8                   requirement that BAA divest itself of Stansted would still be justified. So that is the  
9                   conclusion to the train of reasoning down to there. At 285 they say “In addition, we note”.  
10                  That seems to be reflective of para.111 where they do not rely on the additional capacity at  
11                  Stansted but note it as something which they do not factor in but which gives comfort that  
12                  they have not gone wildly wrong, I suppose. It is being pointed out that is true of 286 as  
13                  well, which I have not yet read. Let us all just read 286 and then you can come back to us  
14                  on that. (Pause)

15                  Right, so 286 is saying government policy has changed once, it might change again. We do  
16                  not rely on that, but we note that there would be significant additional benefits. The  
17                  language seems to be the same as in 285.

18   MR. GREEN: They have not relied on that point in 113, 114 and 115.

19   THE CHAIRMAN: No, but the reason for drawing your attention to that is that their in addition  
20                  points are at 285 and 286, which they do not rely upon.

21   MR. GREEN: But they do at 114.

22   THE CHAIRMAN: It depends what you take from 114, whether you read 114 as just plain  
23                  inconsistent with 111, 284, 285 and 286, or you read it consistently with those. You say it  
24                  is inconsistent. Is there any more on this point than just that?

25   MR. GREEN: No, it is inconsistent; they have taken account of this consideration (except they  
26                  say they have not). If they had not taken account of it then the fact that they have not  
27                  investigated it is irrelevant.

28   THE CHAIRMAN: Right.

29   MR. GREEN: But if they are going to say that extra spare capacity is relevant to their analysis,  
30                  then they have not investigated and they have accepted that it is irrelevant and they should  
31                  not have taken account of it. But it does go to no more than that.

32   THE CHAIRMAN: All right. Let us go on to ground three.

33   MR. GREEN: Again, I rely on the speaking note. The points there are effectively points I have  
34                  just made. Ground three concerns the decline in profitability of Stansted. During the

1 administrative procedure in this case BAA submitted this was an MCC. Can I just show  
2 you bundle B tab 8 paras.102 to 106.

3 THE CHAIRMAN: What is this document?

4 MR. GREEN: This is BAA's submissions on material change of circumstance.

5 THE CHAIRMAN: Is this submissions after the provisional report, or is this in the consultation  
6 period before you get there?

7 MR. GREEN: This was in the consultation period, it was prior to the provisional which is at tab  
8 9, so it comes chronologically prior to that.

9 THE CHAIRMAN: Yes, thank you.

10 MR. GREEN: The submission was made that there was a material change of circumstance  
11 because Stansted had experienced a significant fall in the level of profitability. You will see  
12 there is a certain amount of confidential material here. They demonstrated that the  
13 passenger traffic had fallen very substantially from earlier levels - 23.8 million to 19.9  
14 million.

15 THE CHAIRMAN: I am so sorry, where are we in this?

16 MR. GREEN: Paragraph 102. Then it gives a number of forecasts and you will see there is a  
17 series of confidential figures set out there in para.105. Then the submission:  
18 "The significant fall in Stansted's current and forecast level of profitability  
19 represents a material change in circumstances since the publication of the Report."

20 THE CHAIRMAN: Just remind me, the period for Q5 is?

21 MR. GREEN: April 2008 until April 2013.  
22 The Commission rejected the submission that it was in fact a material change of  
23 circumstance in the provisional decision.

24 THE CHAIRMAN: Sorry, just on this topic, is any additional reasoning given by BAA why it is  
25 a material change in circumstances?

26 MR. GREEN: There is the response to the provisional decision.

27 THE CHAIRMAN: At this stage, 102 to 106 is all we get.

28 MR. GREEN: That is right. Then there is the provisional decision and then there is BAA's  
29 submissions on the provisional decision at tab 10 para.64 through to 74.

30 THE CHAIRMAN: Do you want to show us the provisional decision, then, so we know what is  
31 being answered.

32 MR. GREEN: It is p.44.

1 “We interpret the submission here as BAA has not proposed this factor should  
2 result in Stansted not being divested; its focus on this point relates to when  
3 Stansted should be divested and how long it should be given to effect divestiture.”

4 I am just trying to find the Competition Commission’s conclusions on this point.

5 MISS STUART: Could I just ask a point of clarification. On para.103 where it says in particular  
6 Stansted passenger traffic fell from 23.8 million in 2007 to 19.9 million, can I just confirm  
7 what the material change of circumstances that you are putting forward is? Is it the fall  
8 from 19.9 in 2009 to the current annual total of 18.7 million?

9 MR. GREEN: It is stated in para.106. It is the significant fall in current and forecast levels. So it  
10 is from the present state until the expected reduction over the course of Q5.

11 THE CHAIRMAN: So is para.115 that we just looked at the only point in the provisional  
12 decision?

13 MR. GREEN: No.

14 THE CHAIRMAN: They seem to deal with the MCC’s put forward by BAA earlier in the  
15 document. I am looking at para.20 for example.

16 MR. GREEN: I had this a moment ago. (Pause) Paragraph 78 p.28. The Competition  
17 Commission underlines it in the following way. They say:

18 “The second MCC put forward by BAA was that there had been a substantial  
19 decline in traffic levels at Stansted. We note first what BAA said were its cause  
20 and consequences. We then look at the evidence for a decline in traffic at  
21 Stansted. We go on to consider the implications of this for the constraint imposed  
22 on Stansted by non-BAA airports, and BAA’s argument that Stansted’s two  
23 largest airline customers have an enhanced level of buyer power as a result of the  
24 decline in traffic. Finally, we conclude on the implications of the decline in traffic  
25 at Stansted.”

26 They then set out BAA’s submissions in para.80: “Has there been a decline in traffic at  
27 Stansted?” and that goes on from 80 to 83. They then conclude in relation to the issue:  
28 “The constraint on Stansted imposed by non-BAA airports”. They accept that there is a  
29 reduction in numbers and ATMs which is the conclusion in para.83, and they then conclude,  
30 after setting out Ryanair’s submissions, in para.101:

31 “There has been a decline in traffic at Stansted since the publication of the 2009  
32 report. We concluded that this is not indicative of new or significantly enhanced  
33 constraint on Stansted from LCCs [which is one of the arguments but we are not  
34 concerned with it]. However, as noted in paragraph 69, the decline in traffic at

1 Stansted has significantly enhanced the possibility for greater competition  
2 between Heathrow and Stansted.”

3 They then deal with Heathrow’s position as a hub and then “Our analysis”. In fact, I think  
4 one can jump.

5 THE CHAIRMAN: This seems to show that there is some examination of why there has been the  
6 change because they say: “this is not indicative of a new or significantly enhanced  
7 constraint on Stansted and LCCs operating on a pan-European basis as proposed by BAA.”

8 MR. GREEN: May I short circuit this.

9 THE CHAIRMAN: Yes, please do.

10 MR. GREEN: The greater relevance is actually in the final decision where they actually explain  
11 their reasons for rejecting the analysis. The point is simply this. They have said that there  
12 is a decline, that it may be due to the recession, or some of it, but then they reject the  
13 submission that it is in fact material by adopting a comparables exercise by looking at the  
14 position of foreign airports from publicly available data. So the principal evidence, in fact  
15 the only evidence relied upon, in the relevant paragraphs of the Decision - it is easier to deal  
16 with this by going to the Decision itself.

17 THE CHAIRMAN: Yes, just as we pass through to the Decision can you give us the reference in  
18 BAA’s consultation response.

19 MR. GREEN: Yes. Bundle B tab 10 paras.64 to 75.

20 THE CHAIRMAN: Thank you. And then we get the 2011 report.

21 MR. GREEN: Then you get the 2011 report. I am going to take you there from the speaking  
22 note.

23 THE CHAIRMAN: Which are the relevant paragraphs?

24 MR. GREEN: The relevant paragraph in the Decision is para.245:

25 “We have considered the strength of Stansted’s financial position. We note  
26 BAA’s evidence that Stansted’s profitability has declined since 2009, but also note  
27 that it remains profitable. We would expect profitability to vary over the  
28 economic cycle so we did not think that this in itself was strong evidence of an  
29 MCC.”

30 I think in principle if it is no more than profitability ebbing and flowing over the economic  
31 cycle that is one thing, but BAA’s submission was that there was a very substantial loss in  
32 profitability and it could not be just simply attributed to the cycle.

33 “As noted in Appendix B paragraph 17 and Table 5, the profitability of Stansted  
34 compares favourably with that of several European airports (non-neighbouring

1 airports, along with Heathrow, Edinburgh and Glasgow), with higher earnings  
2 before interest, tax, depreciation and amortisation (EBITDA) and earnings before  
3 interest and tax (EBIT) margins than Amsterdam Schiphol and Aéroports de Paris  
4 in 2010, and higher margins than the forecast results for Frankfurt and Vienna.  
5 This indicates to us that, whilst it is still seeing a decline in passenger numbers, it  
6 is producing healthy financial results when compared with other airports.”

7 We rely upon that because this is the evidence the Competition Commission relies upon and  
8 the indication is that Stansted is healthy relative to European airports. It is a comparative  
9 analysis. They do that on the basis of their analysis of publicly available accounts.

10 “Moreover, in our judgment, a new owner would be free to make independent  
11 commercial decisions that may be different from those made by BAA, which also  
12 owns Heathrow, and Stansted’s future operational and financial performance,  
13 including its growth (taking advantage of its new incentive to compete with  
14 Heathrow), would not necessarily be in line with BAA’s projections.

15 “246. ... First, we note that BAA said that it saw the MCC in terms of Stansted’s  
16 profitability relative to other airports. It also said that the Q5 regulatory settlement  
17 was a readily available benchmark for assessing Stansted’s financial performance.  
18 BAA did not provide us with any analysis of Stansted performance relative to  
19 other airports; it said, however, that the margin analysis we had used as a basis for  
20 comparison was not sufficient for our purposes. Finally it said we should not seek  
21 to infer anything about Stansted’s profitability from the performance of other  
22 airports or from general market conditions but that we should consider Stansted’s  
23 profitability on its own terms against appropriate benchmarks.

24 “247. We note that the purpose of our assessment in this circumstance is not to  
25 determine a regulatory settlement or establish levels of profitability compared with  
26 cost of capital but consider the impact of Stansted’s profitability on the  
27 marketability of the airport. For this purpose, margin analysis and EBITDA  
28 performance does not provide a meaningful indication. We note that the board of  
29 BAA, when commencing the sale of Gatwick, considered a presentation that  
30 looked at EBITDA multiples for benchmarking likely disposal proceeds and did  
31 not consider other accounting measures such as replacement cost returns.

32 “248. In our judgment, we do not need to conduct a detailed assessment of  
33 Stansted’s current profitability, of the type suggested by BAA, in order to reach a  
34 view on whether there should be a delay in its divestment. Having noted that

1 BAA said Stansted's profitability had reduced, but that it was still profitable  
2 (despite having been through the low point of a recession and having had an  
3 ongoing disagreement over airport charges with its major airline for over three  
4 years), we conducted a simple comparison of publicly-available information. This  
5 showed that Stansted's EBIT and EBITDA margins were healthy compared with  
6 other airports, despite its recent decline in passenger numbers. We note that there  
7 is inevitably a limit to the amount of profitability analysis we can conduct on  
8 different airports based on publicly available information, and believe we have  
9 struck an appropriate balance to be able to conclude that Stansted's financial  
10 position should not be a barrier to its sale for a price which values its long-term  
11 prospects.

12 "249. We conclude that Stansted's profitability has reduced, but that its financial  
13 results are healthy when compared with other, non-BAA, airports."

14 So they did a simple analysis on their own acknowledgement, and they used publicly  
15 available data. We have set out in the speaking note a variety of ways, and we have  
16 annexed to our skeleton as Annex A, in which the analysis of those self-same public  
17 documents disputes and refutes the conclusions the Competition Commission has drawn  
18 from it.

19 THE CHAIRMAN: Which paragraphs in your speaking note?

20 MR. GREEN: In the speaking note 264 through to 286 and Annex A to the skeleton, which also  
21 is important.

22 THE CHAIRMAN: Yes, the Tribunal will read those documents carefully.

23 MR. GREEN: I am grateful. Can I just pick up the three main ways in which we have said there  
24 were inaccuracies in using foreign comparables. Indeed, the Competition Commission in its  
25 own defence in the footnote accepts that you cannot realistically or practicably disaggregate  
26 public accounts to get accurate information. Nonetheless, it has relied upon public accounts  
27 without the disaggregation which it accepts is necessary. We have three principal  
28 objections which mean that these are not valid comparables. First, in relation to the  
29 treatment of exceptional items which we have dealt with in both the skeleton and speaking  
30 note para.282 and annex to the skeleton. In particular, Stansted's EBIT for 2009 and 2010  
31 is represented as including exceptional items, namely a pension charge and pension credit  
32 respectively, but the EBIT for other European airports apart from Copenhagen has been  
33 reported on a pre-exceptionals basis. If Stansted's pre-exceptionals figure were used



1 Stansted would not be superior to the other European airports and would be the second  
2 worst performing.

3 THE CHAIRMAN: Would it still be profitable?

4 MR. GREEN: It would still be profitable, but the point the Commission is making was that it is  
5 more profitable, it is healthy "compared to". It is a relative, and they have come to the  
6 conclusion that it is not an MCC because it is more profitable, 'it is doing better than'. They  
7 have not actually analysed the alternative, namely if it was not quite as profitable or was at  
8 the lower end of the league of profitability whether that would alter their conclusion. That  
9 is not part of their reasoning.

10 The second point is para.283 of the note. In relation to the use of group results: the figures  
11 presented for Stansted comprise the financial results of Stansted airport only, whereas the  
12 figures provided for many of the other European airports in Table 5 of Appendix B to the  
13 Final MCC Decision (notably Aéroports de Paris, Schiphol and Fraport) are group results  
14 and they include income and profits from more than one airport which can potentially be  
15 misleading.

16 Thirdly (para.284) in relation to differing income streams: most of the other identified  
17 European airports derive income from revenue streams and business activities that Stansted  
18 does not undertake: ground handling, investment in properties, investment in or operating of  
19 other airports, etc. So we made those points. They are not refuted by the Competition  
20 Commission. We provided a much more detailed analysis which we have attached, just a  
21 forensic analysis of the Competition Commission's documents as Annex A to our skeleton  
22 argument. I would invite the Tribunal to read those.

23 THE CHAIRMAN: Can I ask, did BAA make these points to the Competition Commission  
24 before its final report?

25 MR. GREEN: You have seen, we made the point that using foreign comparables was not  
26 appropriate, and that what should have happened was that there should be a proper analysis  
27 based on the normal financial performance assessment of Stansted, the sort of thing that has  
28 been done in Q5.

29 THE CHAIRMAN: That is where?

30 MR. GREEN: I think it is in the comments to the provisional decision, and it is recorded here, 74  
31 of BAA's response to the provisional decision.

32 THE CHAIRMAN: We will not take up time now because we have come to 5 o'clock. When we  
33 look at para.74 of that response we will find your three points set out.

1 MR. GREEN: You will not find them in that level of detail, but you will find a submission that  
2 relying upon European comparables is not sufficient and the more standard profitability  
3 analysis which is carried out on a regular basis is what is required.

4 THE CHAIRMAN: Right. Since the case that was presented seems to turn on para.74 of BAA's  
5 response, shall we just quickly look at that, even though it is taking us over the time.  
6 Bundle B tab 10.

7 MR. GREEN: At para.72 you will see there is a "not" missing. But 74 and 75 deal with the  
8 criticisms that you should not look at the foreign comparables because they do not provide a  
9 suitable benchmark for considering the impact on shareholders of requiring divestment.  
10 Then 74: Assessment of profitability is central to Competition Commission's assessment of  
11 proportionality. Given its significance in the decision it is incumbent on the Competition  
12 Commission to conduct a proper analysis of profitability. Margin analysis is not sufficient.  
13 Will you please note that the relevance of this was not just on timing but also on alternative  
14 remedy. It is part of the "whether" question as well as remedy. It is not right to say it is  
15 purely and simply a modulation of a remedy. It is also: is divestiture or some other remedy  
16 appropriate?

17 THE CHAIRMAN: These paragraphs do not seem to make your EBIT point, your group results  
18 point.

19 MR. GREEN: No, they do not, they simply say foreign comparables are not adequate.

20 THE CHAIRMAN: The revenue streams point.

21 MR. GREEN: Certainly not.

22 THE CHAIRMAN: So it is that detail of commentary and criticism is something that has come --

23 MR. GREEN: Once we saw the decision and the evidence which was relied upon in the table  
24 which is set out in the decision, our criticism was that you should not rely upon that sort of  
25 data; you should do a proper profitability analysis. In a sense, the reasons are those which  
26 we picked up for the purpose of the JR.

27 MR. ALLAN: Was that table in the provisional findings.

28 MR. BEARD: I am told the answer is yes, so that would suggest that BAA had a full opportunity  
29 to make all these points previously but did not.

30 MR. GREEN: We made the point, which is effectively accepted in the footnote to the  
31 Commission's defence that it is impracticable to disaggregate public documents and there is  
32 a limited value in public documents. We said: do not look at public documents; do a  
33 proper analysis. They went ahead and looked at public documents and we then forensically  
34 analysed them.

1 THE CHAIRMAN: Sorry, you said do not look at public documents? I am sure I read it too  
2 quickly but I do not remember seeing that in the paragraphs you showed us.

3 MR. GREEN: It is effectively para.72, the provisional MCC document. It should read:

4 “... does not include an adequate analysis of Stansted’s recent performance relative  
5 to other European airports and as a consequence does not demonstrate that these  
6 airports provide a suitable benchmark for considering the impact on shareholders  
7 of requiring the divestment of Stansted.”

8 THE CHAIRMAN: But that does not say do not look at public documents.

9 MR. GREEN: It is simply saying foreign comparables are not adequate. That is all there is.

10 THE CHAIRMAN: Yes, thank you. Thank you very much, Mr. Green. I know it has been a bit  
11 of a marathon. As I say, we have given you a lot of latitude.

12 MR. GREEN: I am very grateful.

13 THE CHAIRMAN: We are sitting long days. We have had two days to open the case out of a  
14 two to three day estimate which we were given. That puts Mr. Beard under a certain  
15 amount of pressure. However, Mr. Beard, I would hope that we could finish if we sit a long  
16 day tomorrow, allowing a short period of time for response by Mr. Green. Yes, I have  
17 pointed out that Mr. Harris had liberty to address us for 30 minutes if he has got something  
18 useful to add.

19 MR. BEARD: Yes, certainly I would hope to ensure that that was not a problem on timing at all.  
20 Just two quick points. Just as a matter of notes, do not forget Mr. Green referred to Q5 as  
21 running from 2008 to 2013; it is not, it is 2009 to 2014. That is why the report was in 2008.

22 THE CHAIRMAN: Let me just make a note of that.

23 MR. BEARD: It may be minor, but otherwise when you go back and look at the Q5 report from  
24 the Competition Commission it looks a bit bizarre.  
25 Then you have got the application to put forward a specific amendment relating to the CAA  
26 material that was given to us at 2 o’clock. We do not have any objection to that going in  
27 and we will deal with it tomorrow.

28 THE CHAIRMAN: Very well. So I formally give leave for the grounds of application to be  
29 amended in the terms of the draft that was put in by Mr. Green.

30 MR. GREEN: Just in relation to Q5, it was extended by one year. It was originally 2008 and it  
31 goes to 2014. It was extended to bring it up with the Heathrow and Gatwick reviews.

32 THE CHAIRMAN: When one is reading references in, in particular the 2011 report, and they  
33 talk about Q5 shall I take that as going through to 2014? If you can both clarify it for  
34 tomorrow that will be fine.

1 | Good. I think we will need the full day tomorrow so we will resume at 10 o'clock.  
2 | (Adjourned until 10.00 a.m. on Wednesday 7<sup>th</sup> December 2011)