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**IN THE COMPETITION
APPEAL TRIBUNAL**

Case No 1051/4/8/05

Victoria House,
Bloomsbury Place,
London WC1A 2EB

13th December 2005

Before:
SIR CHRISTOPHER BELLAMY
(President)

MARION SIMMONS QC
PROFESSOR PAUL STONEMAN

Sitting as a Tribunal in England and Wales

BETWEEN:

SOMERFIELD PLC

Applicant

and

COMPETITION COMMISSION

Respondent

Mr. James Flynn QC and Mr. Aidan Robertson (instructed by TLT Solicitors) appeared for the Applicant.

Mr. John Swift QC and Mr. Daniel Beard (instructed by the Treasury Solicitor) appeared for the Respondent.

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MAIN HEARING

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1 THE PRESIDENT: Good morning ladies and gentlemen. We have three quick preliminary
2 remarks to make before we start to guide the hearing today. First, as at present advised we do
3 not think we need any more submissions on the standard of review and the intensity of review
4 and that sort of issue, everything has been fully argued in writing for which we are extremely
5 grateful.

6 Secondly, and perhaps we need a bit of help from both of you – Mr. Flynn and
7 Mr. Swift –if we may. We would like to see if we can get a clearer idea of the sort of shape
8 of the day, as it were, how much time you both think you are going to take and what are likely
9 to be the main headings of the issues. We have the certain impression at the moment that the
10 skeleton arguments do not quite meet each other very clearly and what we would particularly
11 like – and what would help us particularly – is to know from each of you when you come to
12 make submissions to us what the propositions are, what the submission is – “my first
13 submission is there is no power under section ..” whatever it is, or if there is “my second
14 submission is that it was wrongly exercised for this reason”, so we have a very clear summary
15 of how things are going to be presented when we get to that.

16 Thirdly – I think this is more a point for you, Mr. Swift – and I am not sure in the end
17 whether or not it is going to be determinative, but we are struggling somewhat with the exact
18 status and admissibility of the evidence that the CC has filed. Some of it at least seems to
19 relate to the thought processes of the group. It is quite difficult sometimes to relate what is in
20 the evidence to what is in the Decision, although there are some paragraph references at
21 various points. At various points various things are said – it is said that the group took this and
22 that into consideration – but it is not cross-referred back to the Decision, at least in any detail,
23 and one would perhaps have thought that in a Judicial Review proceeding of this kind the
24 material that we need to look at should, in principle, be in the Decision. If it is in the Decision
25 you do not need the witness statement, except so far as it is useful for cross reference purposes;
26 and if it is not in the Decision then it is rather hard to see how it comes in. We bear in mind
27 – I think it is s.38 – the statutory obligation to include the reasons and the information upon
28 which the Decision is based. We do, I think, need a bit of help on this because it is particularly
29 difficult for the Tribunal when we are trying to get a handle on the case to have a lot of new
30 stuff presented in a way that is not very closely related to what is in the Decision – and that
31 applies also to Mr. Davies’s at times somewhat theoretical description of various situations that
32 are not immediately linked back to a particular issue in the case.

33 MR. SWIFT: Good morning, Sir, members of the Tribunal. May I address that issue first of all?

34 THE PRESIDENT: I think just give us your position shortly and we will come back later in the day
35 and see whether it is actually going to be relevant.

1 MR. SWIFT: Well that is what I was proposing to suggest because this is an area on which there is
2 a great deal of case law already, and I was not proposing to take the Tribunal through the case
3 law. I make several points.

4 This has been a long inquiry, a six month inquiry, in which an enormous amount of
5 evidence has had to be collated and examined, and a report – however detailed – does not
6 necessarily cover everything after that inquiry. In order to comply with the statutory time
7 limits there has to be some self-discipline imposed in any public body including the
8 Commission, including regulators who are day to day involved in decisions of this kind as to
9 what actually goes into the report. Plainly the report has to be reasoned – there is plenty of
10 authority on that – and if the report is not fully reasoned then it is capable of being quashed,
11 that is accepted.

12 There appears to be a distinction, without going into the case law, between the
13 improper filling of gaps in the reasoning of a Decision or changing the basis upon which the
14 Decision was made and what I describe as statements which expand upon, elucidate, elaborate
15 or amplify, and we may have done the job imperfectly for which I apologise, but it was
16 certainly intended to fall within the latter category i.e. amplification of reasoning in the report.

17 The approach has been followed before – of course it is not a matter that plainly binds
18 this Tribunal – it was followed in the very lengthy proceedings in the T-Mobile case
19 – *T-Mobile v Competition Commission* in the High Court in 2003 – when to my recollection at
20 least two witness statements went in from the late Chairman of the CC, who was the Chairman
21 of that Panel, and they were not objected to by the court. On a practical matter, the Defence
22 and the witness statements were served on 11th November. They are in a sense now woven
23 into the material which is before the Tribunal insofar as points are made by my learned friend
24 in his skeleton as a result – let me give you an example – of a point made by Mr. Davies in
25 respect of the proximity of one or more existing stores to the acquired store. Without getting
26 into the detail here in opening, and I am not sure now whether or not this is confidential, it
27 relates to a store beginning with “M” followed by “L” and there appears to be some kind of an
28 admission that yes, that is correct as a result of what Mr. Davies has said if the matter were to
29 be remitted to the Competition Commission that another exercise would have to take place,
30 and that is a response to a matter in the Davies witness statement.

31 In addition, the points have been made – essentially in Mr. Ridyard’s witness
32 statement – attacking the reasoning in the report in respect of which it appeared to us (and it
33 was our submission) that we needed in order to exercise our own rights of defence in front of
34 this Tribunal to supplement (in the sense of amplify) that reasoning. Now, plainly – and I take
35 the responsibility for this – we have not established to the satisfaction of this Tribunal the

1 appropriate nexus, but that was certainly the intent. We stand on the reasoning of the report.
2 That is not a quashable report. On the other hand, we are a public authority; we are under
3 a duty to assist this Tribunal. If the Tribunal considers in respect of some passages of
4 Mr. Clarke's witness statement, or Mr. Davies's witness statement, that they are not helpful or
5 indeed that in a sense they are not admissible, then plainly that is a decision which the Tribunal
6 should take. But, since you have asked me to be short on this matter, my submission is that
7 they should be in as part of the record, they are there to amplify and they are in my submission
8 relevant to the way in which we can exercise our defence in this case.

9 THE PRESIDENT: Yes, thank you for that, Mr. Swift, I think we will come back to it and see
10 whether there is anything in the witness evidence that you want to rely on that you cannot get
11 at by simply referring us to the report, but the kind of problem that arises for the Tribunal, if
12 you just glance, for example, at Mr. Clarke's witness statement, para.19 – I am sure it has been
13 done in good faith and with the desire to help and all the rest of it – but that is a passage that
14 starts by saying that the Group considered that Somerfield was motivated by various factors.
15 From the point of view of the Tribunal the first question that enters its head, when it is invited
16 to read something like that is: is this something that is in the report or is it not in the report? If
17 it is not in the report what is it doing there? There is no cross-reference to it being in the report
18 so one immediately thinks well, look, we are reviewing the report, we are not reviewing this
19 extraneous material. It is going to slow down the proceedings of this Tribunal very markedly
20 if in every case we have to work through a whole lot of evidence as to what the CC may or
21 may not have thought, in addition to reading the report.

22 MR. SWIFT: Well it was intended to be little more than a statement of the self-evident, that the
23 interests of a party in hearings before the Competition Commission, when there was a finding
24 of an SLC, will seek naturally and rationally to profit maximise any decision which it is asked
25 to take. It is very little more than that, to distinguish the commercial interests of a party
26 subject to the jurisdiction of the Competition Commission, and the duties of the Competition
27 Commission as a public authority to look at what if I may call more generally the 'public
28 interest'. It says little more than that.

29 MISS SIMMONS: Can I just ask you, the T-Mobile case that you referred to, was that decided when
30 s.38 was in existence, or was it before s.39?

31 MR. SWIFT: Before s.38.

32 MISS SIMMONS: What was the previous section?

33 MR. SWIFT: There was an equivalent obligation on the Commission to state the reasons.

1 MISS SIMMONS: But did it have to state such information as the Commission considers
2 appropriate for facilitating proper understanding of those questions and of its reasons for its
3 Decision?

4 MR. SWIFT: Madam, I will have to pass on that because I cannot give you the precise quotation
5 from legislation which has now been repealed, but may I come back to you on that?

6 MISS SIMMONS: Yes, because I think the authorities – and I have looked at some of these
7 authorities – distinguish between cases where you have to have a report in this form on
8 whether it is a Decision with reasons which are summary reasons, where you can therefore
9 amplify.

10 MR. SWIFT: We will look at it and come back, yes.

11 MISS SIMMONS: Yes.

12 MR. SWIFT: Thank you very much.

13 THE PRESIDENT: Thank you, Mr. Swift. Yes, Mr. Flynn, how do you see your part of the day
14 unfolding?

15 MR. FLYNN: Good morning to members of the Tribunal. I was intending, Sir, to cover that point
16 actually as one of a couple of housekeeping points in opening and then to deal with the issues
17 pretty well in the order in which we had laid them out in our skeleton, and I hope I will give
18 signposts as I go through – whether they will comply with your requirements ----

19 THE PRESIDENT: Well the more signposts we have the easier it is, obviously.

20 MR. FLYNN: I will do my best on that, Sir.

21 THE PRESIDENT: And how long do you anticipate, matters being fairly fully argued already?

22 MR. FLYNN: They have been pretty fully argued, and perhaps I can make one of the points I was
23 going to make in opening?

24 THE PRESIDENT: Yes, please.

25 MR. FLYNN: We have something of a problem with confidentiality it seems to me in this case. My
26 own view is that it arises particularly on the LADs issue and I felt constrained to follow the
27 skeleton so that we had it in front of us and so I could say “You see what it says in para.80 ...”
28 or whatever.

29 THE PRESIDENT: Quite.

30 MR. FLYNN: I think that might slow up that part rather more than it might have done. In respect of
31 the first substantive issue, the choice of store, I have tried to abstract that and I hope that can be
32 relatively quick because the points have been argued quite fully.

33 In terms of timing I would not like to commit myself but I would hope, and of course
34 I am in your hands for questions and so forth, but I would have thought something like an hour
35 and a half should cover it particularly if we are not going in any detail into standard of review.

1 So that is the sort of thing I have in mind and I hope you will give me a certain amount of
2 leeway either way on that.

3 THE PRESIDENT: Yes.

4 MR. FLYNN: In respect of confidentiality since I have raised that, Sir, in an attempt to simplify
5 things I have done what I have called “A key to some confidential terms” which I propose to
6 use. It is a very simple document and I will have it handed up to you so that we have an agreed
7 code because this session is obviously I believe in public although apparently there is a notice
8 outside saying that the Tribunal is sitting in private.

9 THE PRESIDENT: This is a public hearing as far as I know.

10 MR. FLYNN: Then that is indeed what I was expecting.

11 THE PRESIDENT: Perhaps the usher could kindly go and check.

12 MR. FLYNN: It may have been moved but as we came in it said that the Tribunal was sitting in
13 private.

14 THE PRESIDENT: No, we are not sitting in private.

15 MR. FLYNN: I do see a certain number of people at the back who are not from one side or the
16 other. So other than confidentiality, Sir, the housekeeping points I was going to mention
17 briefly were first, in relation to your observations at the last case management conference on
18 the approach that the Competition Commission took, and the comments that had been provided
19 by Somerfield and subsequently a clarificatory letter has been provided by the Commission.
20 Simply so that I can put it on the record and get it out of the way I must make it clear that of
21 course Somerfield does not agree with everything that is said in that letter, and the fact that
22 Somerfield is no longer pursuing ground one does not mean that those matters are accepted, or
23 that it would agree with that clarification should one day when this matter is all over we all
24 discuss it over a drink or something of the sort – if I can just put that on the record.

25 On admissibility of the witness statements of Mr. Clarke and Mr. Davies, we take the
26 Tribunal’s point on s.38 and the nature of this report, but the approach that we were going to
27 suggest to the Tribunal was that indicated by Lord Justice Carnwath at the end of the *IBA*
28 *Health* decision where he says, and it is true he does distinguish it from a case where there is
29 a statutory obligation to set out everything, but he says that it is not unusual particularly if it is
30 a short period – and we can have a debate on whether or not this was a short period, but it was
31 certainly pretty compressed for the scope of the exercise. In my submission, sir, the witness
32 statements have been put in. We have, of necessity responded to them. Where Mr. Clarke
33 says, for example, that the group had in mind certain matters which Mr. Swift has already
34 referred to, we consider that we are entitled to have it noted in front of the Tribunal that those
35 were indeed in the group’s mind.

1 THE PRESIDENT: Well the evidence is now there, Mr. Flynn, so there is nothing really to stop you
2 making whatever point that arises from your point of view on it, but I would not have thought
3 myself that Lord Justice Carnwath's comment on the kind of short form decision that the OFT
4 produces is apposite or transposable to the report that the CC is producing.

5 MR. FLYNN: Particularly, as he says, where there is a statutory test.

6 THE PRESIDENT: By parity of reasoning you could draw the opposite conclusion.

7 MR. FLYNN: I entirely take your point on s.38, but in this particular case that evidence is there.

8 We have of necessity responded to it and, in my submission, where we see inconsistencies
9 between what is in the report and one or other of the witness statements we are entitled to draw
10 that to your attention ----

11 THE PRESIDENT: Yes.

12 MR. FLYNN: -- and with your leave I would propose to do so. In relation to standard of review,
13 Sir, then I will not take you to the authorities as I was proposing to do. Everyone is in
14 agreement that this is a Judicial Review subject to the ordinary principles of Judicial Review.
15 Our submission is that what the Tribunal had to say in the *Unichem* case is a fair description of
16 those principles and since you, Sir, and Professor Stoneman were sitting on that Tribunal
17 I would leave Mr. Swift to try to persuade you otherwise, but I would point out two particular
18 features of this case just so that it colours the rest of the submissions and that is that here, we
19 are dealing, of course, with a final decision, and a final decision which makes orders which
20 dispose of Somerfield's property ---

21 THE PRESIDENT: Divestment orders, yes.

22 MR. FLYNN: -- divestment orders, and those are interferences with legitimately acquired property
23 and therefore the standard of review indicated by Lord Steyn in the *R(Daly)* case also be borne
24 in mind and that is a point which the Commission has not sought to deal with in its writings
25 before this Tribunal.

26 If I can move on to the choice of store heading then, Sir?

27 THE PRESIDENT: Yes.

28 MR. FLYNN: Perhaps I could just make a point to start with as to what our case is not, because it
29 has been said I think now three times that we have changed our case. The case has never been
30 -- Somerfield's position has never been -- that in no circumstances could the Commission
31 stipulate which store had to be sold, and that was clear throughout the procedure and also in
32 our Notice of Application where you saw a footnote, and Mr. Swift did recognise this, having
33 described the point as one of no discretion, Mr. Swift did subsequently recognise in footnote
34 32 of our Notice of Application we did say that differential treatment on grounds of
35 divestment potential, speed and achievability was a consideration.

1 THE PRESIDENT: I think it would help us, Mr. Flynn, at some early point if we could actually start
2 with the statutory powers that they, the CC have exercised – the statutory provision in the Act
3 upon which the whole thing is based.

4 MR. FLYNN: I can of course take you to those, Sir, I was thinking the powers themselves were
5 those which we would be particularly familiar with and I was not proposing to deal with that in
6 great detail.

7 MR. SWIFT: Sir, may I just intervene on a procedural point. It is really a point of being able to be
8 heard. I was conscious that I appeared to be shouting at the Tribunal before, which I did not
9 intend to do ----

10 THE PRESIDENT: You did not give that impression to us, Mr. Swift. We are used to being
11 barracked and harangued in various ways.

12 MR. SWIFT: Well to put it delicately, even I find it difficult to hear my learned friend, and I am just
13 three yards away. If there is any way that either the officials could turn up the acoustics
14 – if that is the appropriate verb – or if Mr. Flynn could, without shouting, raise his voice.

15 THE PRESIDENT: Yes, try and keep your voice up, Mr. Flynn, or speak close to the microphone.

16 MR. FLYNN: I will try to do one or other of those things, Sir. I am afraid I am suffering somewhat
17 today. (After a pause) Sir, I was also staying off the statutory powers because of course we are
18 not any more challenging the basis of the SLC. Once the SLC has been found ----

19 THE PRESIDENT: It is 41, is it?

20 MR. FLYNN: I am looking at s.35. It is a completed merger, s.35, and if it decides that there is an
21 anti-competitive outcome, having found SLC, the Commission has to decide whether action
22 should be taken for the purpose of remedying, mitigating, preventing the lessening of
23 competition or any adverse effect which has resulted from or may be expected to result from
24 the SLC and so forth, and under subsection 4, in deciding those questions ----

25 THE PRESIDENT: Yes, it is 3(a) and (c) and then 4 – “... as comprehensive a solution as is
26 reasonable and practicable ...”

27 MR. FLYNN: Any adverse effects resulting from it. It has to consider customer benefits, but I think
28 it is agreed that does not arise here.

29 THE PRESIDENT: That does not arise here.

30 MR. FLYNN: As far as I can recall I do not think subparagraph 6 is in point either.

31 THE PRESIDENT: Then s.41(2), which 35(3) takes us to, “duty to remedy effects”.

32 MR. FLYNN: Yes.

33 THE PRESIDENT: 41(2) – “The Commission shall take such action under section 82 or 84 as it
34 considers to be reasonable and practicable.”

35 MR. FLYNN: “... to remedy, mitigate or prevent” the SLC or the adverse effects.

1 THE PRESIDENT: And (3) “The decision ... shall be consistent with its decisions as included ...”
2 so it has to be consistent with the report “unless there has been a material change of
3 circumstances.”
4 MR. FLYNN: Yes.
5 THE PRESIDENT: And then there is the comprehensive solution in (4). Right, so does that take us
6 on to 82 or 84?
7 MR. FLYNN: I think it does. 82 is undertakings and 84 is final orders. Under 82 the Commission
8 may accept “... undertakings to take action specified or described ...” in them, and then it can
9 make orders if the undertakings are not fulfilled – I think that is the point of 84.
10 THE PRESIDENT: 84(2)(a) “anything permitted by Schedule 8.” So that takes us through to
11 schedule 8.
12 MR. FLYNN: Page 301 in my copy.
13 THE PRESIDENT: Yes. So which bit would this be under?
14 MR. FLYNN: I think it is probably an acquisition or division.
15 THE PRESIDENT: 12 and 13 – it looks like 13.
16 MR. FLYNN: It is a division, “An order may provide for ----”
17 THE PRESIDENT: “(a) the division of any business ...”
18 MR. FLYNN: Yes.
19 “... the division of any business (whether by the sale of any part of the undertaking or
20 assets or otherwise);
21 (b) the division of any group ...”
22 I think (3) ----
23 THE PRESIDENT: Gives a whole list of things you can do, including at the end the appointment of
24 a trustee and so forth.
25 MR. FLYNN: Yes, it is pretty broad.
26 THE PRESIDENT: Separation, etc.
27 MR. FLYNN: Those, I think, may be the relevant provisions.
28 THE PRESIDENT: Yes, thank you.
29 MR. FLYNN: And, as I recall, they are set out in the Commission’s Defence and there is nothing
30 controversial between us.
31 THE PRESIDENT: So within that framework
32 MR. FLYNN: Within that framework I was saying we do not say, and we never have, that there is
33 no power to stipulate which store should be sold. That is an Aunt Sally we can leave to one
34 side. What we do say is that, all things being equal, the choice should be ours; for a

1 proportionate interference with our property rights, all things being equal, the choice of which
2 store in an affected market should be disposed of is for the acquirer. The problem ----

3 THE PRESIDENT: If you put that round in the negative, they have the power but, according to you
4 – how do you put it – they should not exercise the power?

5 MR. FLYNN: In the circumstances of the case ----

6 THE PRESIDENT: In a manner which is disproportionate or unreasonable, or perverse, and that in
7 deciding whether it is disproportionate or perverse, according to you you start with what you
8 say is a presumption that you should be left to get on with it unless there is some reason for
9 starting from some other starting point?

10 MR. FLYNN: Yes, in principle, if the problem has arisen because two businesses have come under
11 single ownership in the relevant market, the acquirer should have the choice of which of those
12 two to dispose of if divestment is the appropriate structural remedy, in a case where
13 behavioural remedies have not been found.

14 THE PRESIDENT: Yes, and that principle, that at first sight the acquirer should have the choice,
15 comes from where?

16 MR. FLYNN: I infer it from proportionality of interference and that there is no reason in principle
17 and nothing in the Statute that would prevent an owner of one business in a relevant market
18 acquiring an overlapping, but say larger and better business in that market, on condition that he
19 disposes of the smaller one.

20 THE PRESIDENT: Because the opposite view might be that in parallel with other situations that
21 arise in litigation you start with the status quo ante and you put things back to what the status
22 quo ante was, which would involve disposing of that which you had acquired.

23 MR. FLYNN: The status quo ante is the two businesses in question were competing under separate
24 ownership and that status quo ante can be reversed by the sale of either business.

25 PROFESSOR STONEMAN: Can I pick that one up? There seems to be an issue here of whether
26 we are talking about an isochrone in which there are after disposal still two businesses owned
27 by Somerfield, or whether after disposal there is only one business owned by Somerfield. Do
28 you recognise that distinction?

29 MR. FLYNN: Yes, sir. I was coming on to the caveats that we have, what I would say is the general
30 rule applies, all things being equal, that is what I said, and one of the things I had in mind was
31 this situation of what we call multiple proximity stores. So where there is more than one, and
32 will be after divestment more than one Somerfield-owned retail business, then particular
33 consideration may have to be given to that isochrone.

34 PROFESSOR STONEMAN: We are talking basically about four isochrones. How many of those
35 would have more than one Somerfield business after disposal – is it two?

1 MR. FLYNN: Yes, it is two of that four.

2 PROFESSOR STONEMAN: So your special circumstances apply to two, and your general
3 argument applies to two.

4 MR. FLYNN: Yes, but if you recall we are not just talking about four we are actually in dispute
5 about seven. I think we can leave out of account, and we probably do not have to talk more
6 today about the two isochrones where Somerfield had already closed its existing store, I think
7 there is no dispute about those, and that its Littlehampton and Kelso. Then there are three
8 locations where Somerfield was given a choice, and they are Johnstone, Peebles and Yarm.

9 THE PRESIDENT: Just keep your voice up, Mr. Flynn, I know it is difficult.

10 MR. FLYNN: I am sorry, I am losing it, is my problem. The three in which Somerfield was given
11 the option are Johnstone, Peebles and Yarm. We have the four that you have described where
12 we have been ordered, against our will as it were, to sell the acquired store, and you have those
13 four in mind. Then there are three where we proposed divestment of the acquired store, and
14 that is where our argument that in principle we should be given the choice rather than being put
15 to our option applies, and those again Filey, Poole Bearwood and Whitburn. Of the 12 I think
16 we are really talking about seven, but also, in my submission, the three where we were given
17 the option are relevant just as a way of structuring.

18 THE PRESIDENT: In relation to going back to the status quo ante point, is it or is it not relevant
19 that this is a completed merger – that is to say, it is not a merger that had prior clearance before
20 it took place, but seems to have been referred after it was completed?

21 MR. FLYNN: No, Sir, it is not relevant in my submission.

22 THE PRESIDENT: Do you not take a certain risk if you go ahead with a merger and then you find
23 that it is not cleared completely?

24 MR. FLYNN: You take a risk, yes. You take a risk of a reference. You take a risk that remedies
25 will be ordered, but when there is a choice of remedies there is no reason, and it would not be
26 justified as a matter of proportionality to impose the heavier, more costly or less attractive
27 remedy simply on the grounds that this was not a notified merger. As the Tribunal is well
28 aware there is no statutory obligation to notify. Somerfield was perfectly entitled, as anyone
29 is, to complete a merger with out in advance negotiating with the Office of Fair Trading, and
30 there is no basis for, as it were, harsher treatment on that ground.

31 MISS SIMMONS: Mr. Flynn, you may be coming on to this and I do not want to take you out of
32 order, so you can tell me you are not going to answer it at the moment. How does the
33 Competition Commission decide whether this is a case where it should be left to you or
34 whether it is a case where they should intervene, unless they have decided or looked at which

1 store or whether there is a difference between the two stores, and a difference between the
2 consequences on timing and reasonable purchaser? It seems to me the whole thing is circular.

3 MR. FLYNN: I do not intend at all to duck the question, madam, but that I think is precisely the
4 issue on which I would be spending most of my time. So I have it in mind, and if later on you
5 think I have not answered it then please put it again, but that is precisely the point. I say all
6 things being equal it should be our choice. There may be special circumstances in which that
7 ordinary rule would not apply.

8 THE PRESIDENT: Right, so that being the starting point are all things equal in this particular case?

9 MR. FLYNN: Could I just point out that, of course, that was what was done in the Safeway
10 mergers' case as well, and we do not see reason for a distinction there.

11 So, all things being equal, what might not be equal? Well we have said throughout
12 that the Commission is entitled to be assured that the SLC would be remedied within
13 a reasonable timescale and by sale to a suitable purchaser, and I will take you to the record on
14 that. In answer to Professor Stoneman, we have always accepted that the situation of multiple
15 proximity called for special consideration because of the basis on which SLC was found, these
16 diversion ratios. The idea of a disposal of a store other than the acquired store is to ensure that
17 the diversion ratio will get down below the threshold, and so the location of the store proposed
18 for divestment may be relevant to that issue. It is accepted (Mr. Clarke's witness statement,
19 para. 79) that that did not arise in the Decisions the Competition Commission took in this
20 particular case. What we do say is that it might fall for reconsideration if the matter is remitted
21 in a particular case which my friend has already referred to, but I am not sure it is confidential
22 in any event, where the store that we would propose is not actually the closest Somerfield
23 owned store. But that would be a matter for reconsideration. We would have to persuade the
24 Commission that the diversion ratio would be appropriately reduced.

25 So if I might just try to establish the record on this. Somerfield has consistently
26 argued that the first position is that subject to those particular features it should be given the
27 choice of divestment store. I think in the report you see that at para.11.8(a). I think this is not
28 going to be controversial but I should just point it out. It is the opening sentence in the section
29 on structural remedies. It is our argument, I am simply arguing that that has consistently been
30 our position, and that is relevant for the challenge in relation to the three where our fall back
31 position was that we would offer the acquired store and that was accepted. That is why I am
32 establishing this point. It is said how can we now challenge a decision when they gave us what
33 we wanted? What I am seeking to establish is it was not what we wanted, it was the second
34 best. What we wanted was to be given the choice. You will see also at tab 29 in our annexes,
35 p.510 ----

1 THE PRESIDENT: I am sorry, Mr. Flynn, para. 11.8(a):
2 “The only issue that was relevant in the context of remedies was whether a suitable
3 purchaser could be found ...”
4 Is it implicit in that sentence that the saleability of the store is relevant in the context of
5 remedies?
6 MR. FLYNN: Let me take you, as I was going to, Sir, to the Somerfield submission on which that
7 summary is based.
8 THE PRESIDENT: Mr. Flynn, if you look on the side of the mic. you might just find a volume
9 control.
10 MR. FLYNN: I think it is the volume control in my throat I am probably looking for.
11 THE PRESIDENT: It might help a little.
12 MR. FLYNN: Does that make any difference, one way or the other?
13 THE PRESIDENT: Perhaps a slight difference, I do not know.
14 MR. FLYNN: I cannot hear it myself.
15 THE PRESIDENT: If you want a break at any point do let us know. I have been in a similar
16 situation from time to time myself.
17 MR. FLYNN: I do apologise to all listening – or not listening – as the case maybe.
18 PROFESSOR STONEMAN: What tab are we looking for, Mr. Flynn?
19 MR. FLYNN: I was now taking you, Sir, to tab 29 in our annexes. I think it is tab 29 of annex
20 3 formally. If you look at bundle reference p.510, para. 5.2:
21 “Somerfield considers that, in principle, as long as divestment in the terms required
22 can be achieved within the same time period ...”
23 now that does imply – a divestment that can be achieved – saleability is recognised to be
24 a relevant issue.
25 “... it should be entitled in all cases where a divestment is ordered to choose to
26 dispose of a Proximity rather than the Acquired Store.”
27 and so forth. 5.3 is the “suitable purchaser” point. Of course I think it is implicit, to answer
28 your question, and Somerfield would not suggest that an unsaleable store, as it were, is
29 a suitable candidate for divestment. It is almost self-contradictory, which is not to say that
30 every store – whether an acquired store or a proximity store in this case – is going to have
31 people queuing up around the block to buy it, but doing the best we can.
32 THE PRESIDENT: Yes.
33 MR. FLYNN: The same point was made at several instances at the remedies hearing, which is tab
34 40 and I will not trouble you with those references unless you would like them. The point was

1 introduced, and I think it was simply explaining those paragraphs in our response at p.1018 of
2 tab 40 for your note.

3 Mr. Clarke's witness statement (para. 46) recognises that that argument of principle
4 was made and was rejected. So my first point on that is that it is that rejection of the argument
5 of principle that we should be given the choice, absent any other factor, that we characterise as
6 perverse or irrational in respect of the three stores where we were given the choice. We do say
7 ----

8 THE PRESIDENT: I am sorry, Mr. Flynn, say that last point again? In relation to the three stores
9 where you accepted that you would be prepared to get rid of the acquired store?

10 MR. FLYNN: Where our secondary position was if we are put to our option, the one we would like
11 to sell is the acquired store, but we still think that our primary argument should have been
12 accepted and unless there are good reasons why ----

13 THE PRESIDENT: How could it be perverse of the CC to accept your acceptance that you would be
14 prepared to get rid of the acquired stores in those locations?

15 MR. FLYNN: Sir, they should have given us the choice unless there was a particular reason to
16 suggest ---

17 THE PRESIDENT: Well the fact that you did not mind might be a reason, might it not?

18 MR. FLYNN: No, Sir, it is a fallback position. In each case we were asked what would your
19 divestment proposal be?

20 THE PRESIDENT: Okay, well no doubt Mr. Swift will take us to the relevant paragraph in due
21 course.

22 MR. FLYNN: No, doubt he will take the obvious point on that, Sir, but it was consistently
23 Somerfield's position that it should be at its option, unless there was a particular reason why
24 that should not be, and multiple proximity is the basic case where further consideration was
25 needed.

26 In our submission it is all the more perverse – and this is where I am going to refer
27 you for the first time to my little key of code terms – where the procedure that the Commission
28 devised, in relation to those isochrones where it did give us the choice, well in fact across the
29 piece it has laid down a procedure with what I have called “feature A” – if you are with me, on
30 that page – and indeed has proposed in the draft final undertakings, which the Tribunal has
31 seen, that feature B might also be included in the final undertakings to be given by Somerfield.
32 With that kind of guarantee that disposal will be ensured. In our submission, it is particularly
33 perverse not to have accepted that we should have had the choice. It is a further basis, and yet
34 further -----

1 THE PRESIDENT: And this is part of your application and skeleton, is it, this particular feature of
2 the terms of disposal?

3 MR. FLYNN: Yes, I believe it is. As I said in opening, I tried to abstract from the skeleton rather
4 than follow it in detail on these points.

5 THE PRESIDENT: Just going back to the three stores where there was no disagreement – 11.14 was
6 the paragraph I had in mind in the report, where the CC does not really think about those three
7 stores in Filey, Poole Bearwood and Whitburn.

8 MR. FLYNN: No, I can come back to that.

9 THE PRESIDENT: Yes. So particularly tough because of the proposed terms of disposal?

10 MR. FLYNN: Yes. With those terms in mind then they could be assured that at the end of the
11 period laid down, an appropriate divestment would have taken place. I am sorry, I have not on
12 a quick flick found the paragraph in the skeleton argument but I am sure that point is referred
13 to.

14 MISS SIMMONS: Perhaps somebody could, at some point give us the paragraph in the Notice of
15 Application and in the skeleton?

16 MR. FLYNN: Yes. I think para.21 is what is being pointed out to me of the skeleton. The Notice of
17 Application, madam, is – what shall I say – a thin document which does not rehearse the full
18 detail of the argument here, it is a concise statement of our grounds for review which are spelt
19 out in the skeleton. I do not believe that point specifically appears in the application but if I am
20 wrong I shall be corrected.

21 THE PRESIDENT: It is a bit elliptical. It is true that there is a point to that effect in para.21 but it is
22 the sort of point that the reader can easily miss without being referred to the terms of
23 divestment and things of that kind. But thank you for drawing our attention to it.

24 MR. FLYNN: I apologise if it is not clear, Sir, but those are the terms.

25 THE PRESIDENT: Yes.

26 PROFESSOR STONEMAN: Mr. Flynn, just before we move on from there, and I am not quite sure
27 whether we are strolling into confidential areas in this, was there any associated commitment
28 with respect to the future of the non-divested stores?

29 MR. FLYNN: Let me take instructions on that?

30 PROFESSOR STONEMAN: There was no requirement that the non-divested stores should continue
31 to operate ----

32 MR. FLYNN: No, sir.

33 PROFESSOR STONEMAN: -- as middle range supermarkets?

34 MR. FLYNN: I think not.

35 PROFESSOR STONEMAN: Thank you.

1 MR. FLYNN: We offered, of course, a certain number of behavioural undertakings but the
2 Commission decided that they were not an appropriate solution to their finding of SLC and we
3 do not challenge that in these proceedings.

4 The further basis that I was going to remind the Tribunal of is the famous, or
5 infamous symmetry argument, which is to be found in the Notice of Application and also in the
6 skeleton at paras. 19 and 20, responding to a couple of points made in the Defence in that
7 respect. Essentially the SLC was found on the basis that the diversion ratios would be
8 symmetrical as between an acquired and a proximity store in a situation of single proximity,
9 but I think I probably do not need to develop that point given the emphasis that the case has
10 now come to have because of the witness statements and the way the Defence and the my
11 friend's skeleton is put on saleability.

12 In our submission, saleability as such – pure saleability – does not seem to us to have
13 been the driver of the Commission's determinations in those cases where Somerfield proposed
14 the divestment of a proximity store.

15 THE PRESIDENT: "Saleability as such not the driver of the Commission's determination". This
16 rather acutely raises the point that we were on at the beginning as to what considerations the
17 Commission did have in mind.

18 MR. FLYNN: Yes. We suggest, sir, that if you read essentially paras. 11 to 11.23, if you read them
19 as a whole, the Commission's concern was essentially with whether the proximity store
20 proposed for divestment was – if I can say it in inverted commas – "as good as" the acquired
21 store in terms of its size, condition, profitability and so on.

22 THE PRESIDENT: Just so I can follow the argument, Mr. Flynn, sorry to interrupt, from the point
23 of view of deciding whether disposal of that store would restore effective competition or
24 eliminate the reduction of effective competition according to you, and not – so your argument
25 runs – from the point of view of deciding whether the store in question would be easier to sell
26 or not?

27 MR. FLYNN: Yes, they were not essentially looking at the ease of sale. I will explain what I mean.
28 You have already pointed out, Sir, para. 11.15, where we proposed and they accepted the sale
29 of an acquired store i.e. Filey, Poole Bearwood, and Whitburn, there is in fact no consideration
30 of saleability at all. The Commission does not address its mind on the face of the Decision to
31 the issue of saleability.

32 THE PRESIDENT: Well we do not know what they would have said if it had not been agreed.
33 They may well have had a view had you not agreed it.

1 MR. FLYNN: Well, Sir, I am now going to hand up, if I may, another table which my friends have
2 seen, which collects on a single sheet per store various relevant characteristics and they are
3 arranged in alphabetical order, as you will see. (Document handed to the Tribunal)

4 MR. SWIFT: Just for the record, I received this document at 9 o'clock this morning. We have had
5 an opportunity of looking at it and it appears to be putting into a more legible form the
6 Somerfield spreadsheet which is found as an annex to Mr. Clarke's witness statement. It forms
7 part of a very detailed paper that Somerfield submitted after the Remedies hearing and, so far
8 as I have been able to work out in the brief time available, the only difference between that and
9 the paper currently being handed in is the inclusion of the size of the store, but I have not been
10 able to check that.

11 THE PRESIDENT: Anyway it seems to be based on material that was before the Commission at the
12 time?

13 MR. FLYNN: Yes, I think – and again I will be corrected – it is pretty precisely that. It is in legible
14 form and dealing only with stores that we essentially need to talk about today, of information
15 which was in front of the Commission and it has on the same page, which you do not get in the
16 annex to Mr. Clarke's statement, it has the size of the acquired and the proximity stores.

17 THE PRESIDENT: Yes.

18 MR. FLYNN: If you look at Filey, which is on the first page, you will see that the acquired store is
19 smaller – I will not put a “materially” or otherwise on it – but it is quite a bit smaller than
20 the ----

21 THE PRESIDENT: The acquired store is the right hand one?

22 MR. FLYNN: The acquired store is in bold in each case, Sir.

23 THE PRESIDENT: Yes, the left hand one, sorry, I am there.

24 MR. FLYNN: It is the left hand one and that runs through. So in each case you get the acquired
25 store in bold and you get proximity stores in ordinary type as we have worked through. You
26 will see that in Filey the sizes there are given, and this is plainly a smaller store. If you turn to
27 the last but one, Whitburn, which is also on this 3, you will see that it is considerably smaller.

28 THE PRESIDENT: Yes.

29 MR. FLYNN: And if you look down on the condition level, you will also see a contrast, that is the
30 last but one box on that page.

31 THE PRESIDENT: But it is also suggested that it is more marketable than the other one. If you
32 look right at the bottom.

33 MR. FLYNN: Yes, it is marketable, but I am saying that the conditions that might go to saleability
34 or might, in my submission, mean those that the Commission applied in other cases do not
35 necessarily apply, shall we say, consistently to these stores.

1 THE PRESIDENT: Just in relation to Whitburn this document itself says that the acquired store is
2 more marketable, so I am not clear what point is being made about the Whitburn store at the
3 moment.

4 MR. SWIFT: Sorry to interrupt, but just to remind – this is the submission from Somerfield ----

5 THE PRESIDENT: Yes, we know, Mr. Swift, thank you very much.

6 MR. SWIFT: -- this is not a provisional conclusion of the CC.

7 THE PRESIDENT: Yes.

8 MR. FLYNN: In relation to Poole, which is in the middle, one might make the point that I have
9 described as “feature C” on my key. The point I am making, Sir, is that the pure saleability,
10 and the other factors which go to the Commission’s assessment in respect of those cases where
11 we proposed the proximity were not gone through in relation to these acquired stores, and
12 certainly in relation to Poole I think that is pretty stark.

13 What I wanted to draw from the size point is that it gives the lie to the idea that the
14 Commission did not believe that the SLC could be remedied by the sale of a smaller store and
15 in certain cases a much smaller store, or indeed the worst store in terms of condition. So in my
16 submission the focus on comparability – comparability of the acquired and proximity store
17 – in those cases where Somerfield proposed proximity store is a mis-direction. This is, in our
18 submission, what did underlie its consideration of those stores, and you can see that from the
19 discussion at the remedies hearing, which is tab 40 in our annex 3.

20 THE PRESIDENT: There are two stages in the argument. According to you it was comparability
21 that underlay the CC’s Decision; and secondly, that is a mis-direction, I think you said,
22 because?

23 MR. FLYNN: Because in the cases, as you can see, where we proposed and they accepted the sale
24 of the acquired store and by that acceptance they must be taken to have taken the view that that
25 would adequately remedy the SLC, you will see smaller or worse stores.

26 THE PRESIDENT: Yes.

27 MR. FLYNN: We put it in the skeleton that what they were essentially trying to work out was
28 whether the proximity store proposed for divestment had equal competitive weight – that is
29 what we called it in the skeleton, objection has been taken to that but that, in my submission, is
30 a fair summary of what they were looking for. We gave some references in the skeleton, and
31 I do not know if you want me to take you to those bits of the transcript ----

32 THE PRESIDENT: Just tell me where the references are to be found in the skeleton.

33 MR. FLYNN: The references are in footnote 18 of the skeleton. Shall I take you to a couple for the
34 flavour?

1 THE PRESIDENT: Just before you do that, Mr. Flynn, just let me be clear. I am on para.32 to
2 which 18 is referred. In the middle you have sentence that says:

3 “Thus, it appears that the CC’s real concern was not with saleability but with
4 establishing that, if an existing store was to be sold, it could be regarded as of broadly
5 comparable competitive weight with the acquired store. That is an irrelevant
6 consideration to which the CC should not have had regard.”

7 That is to say “comparability” was an irrelevant consideration, or “saleability” was an
8 irrelevant consideration? Which is it?

9 MR. FLYNN: Comparability, Sir. If the proximity store were proposed for divestment the
10 Commission should not have been concerned with whether it was of equivalent size or
11 condition to the acquired store – the competitive weight point.

12 THE PRESIDENT: Because?

13 MR. FLYNN: Because the SLC can be remedied by the sale of either store in an isochrone, and that
14 is what is accepted by the Commission in respect of those three cases that I have just referred
15 you to where we proposed divesting the acquired store. The CC is not, in those cases, troubled
16 by the size or condition of the store.

17 PROFESSOR STONEMAN: Can I pick something up from earlier? You said the only time it really
18 matters which store is divested is when there is multiple proximity. Now, the three that we
19 have here, which are Filey, Poole and Whitburn, only one of those has multiple proximity.

20 MR. FLYNN: Sir, if I said it that way that is not exactly what I did mean to say. I meant to say that
21 is a particular case – multiple proximity stores will require particular consideration if ----

22 PROFESSOR STONEMAN: I thought your argument earlier was that if you did not have multiple
23 proximity then it did not matter which store was sold?

24 MR. FLYNN: Subject always to being able to get rid of the store in a reasonable time and to an
25 appropriate purchaser. In my submission, what the Commission actually looked at was
26 whether the divestment store was broadly equal to the acquired store, and what it did not look
27 at in the way that it now says it did was its saleability. It looked to see whether they were
28 broadly equal. If it thought that they were I am anticipating myself a bit, but if it thought that
29 they were broadly equal then it gave us the choice. If it thought they were not, i.e. if it thought
30 that the proximity was worse, using that term as a compendious term, then they ordered us to
31 dispose of the acquired store.

32 THE PRESIDENT: I am still struggling a bit on this point, Mr. Flynn. If you look at Poole, Poole is
33 considerably larger than the other two?

34 MR. FLYNN: I cannot make the exactly the same point about the same ----

35 THE PRESIDENT: No, but it is a bit difficult – how much detail are we expected to go into in

1 a case like this? This is Judicial Review after all. The fact that on a matter that was agreed
2 there may be one or two points of inconsistency you can point to does not necessarily
3 undermine the general approach that in deciding whether you can get rid of a substantial
4 lessening of competition you look at the characteristics of the stores, which is basically what it
5 comes down to. I can see you say “Well, they did not do this, they did not do that in the cases
6 that were agreed” but that may not take you that far down the line.

7 MR. FLYNN: My point on that is that characteristics which were held to make the proximity stores
8 unsuitable for divestment were not so held in relation to acquired stores which were proposed
9 for divestment.

10 THE PRESIDENT: Yes.

11 MR. FLYNN: If I can put it like that. I was asking you whether you wanted me to ----

12 THE PRESIDENT: Yes, I think we would like to look at a couple of examples, I think that would be
13 useful, but I think there is still floating around in the back of our minds as to whether on
14 a question of what the Commission did or did not take into account, whether we are entitled to
15 look beyond what is in the report – which takes us back to the question of whether we can look
16 at the witness statements of such fundamental importance. You are basically saying that they
17 took into account what is in the report, not what Mr. Clarke says they took into account.

18 MR. FLYNN: I am essentially saying that, Sir.

19 THE PRESIDENT: So it does not matter to you – you want us to go on the report, basically, that is
20 your position?

21 MR. FLYNN: Indeed, and I think looking at one or two of these examples will show you how they
22 got to what is in the report. If I take a couple in order, the first one is on p.1033, tab 40 of our
23 annex bundle. It is the transcript of the remedies hearing. At the bottom of that page – this is
24 the part of the hearing that was a store by store discussion – this one relates to Middlesbrough
25 as you will see.

26 THE PRESIDENT: Yes.

27 MR. FLYNN: Towards the bottom one member of the Commission says:

28 “Q. In Middlesbrough, you are proposing to sell a proximity store which is much
29 smaller than the acquired store. Less than half the size? A. Yes.

30 “Q. Do you think that will properly address the SLC selling a small store in place of
31 a big one?”

32 THE PRESIDENT: Yes.

33 MR. FLYNN: One can read the whole exchange but we say these are the straws in the wind which
34 explains where they were coming from.

35 THE PRESIDENT: Which is that?

1 MR. FLYNN: The issue is basically, is it as big as the acquired store, that is what they wanted to
2 know.

3 THE PRESIDENT: The issue is whether it will properly address the SLC.

4 MR. FLYNN: Yes, and in order to answer that they are asking themselves whether it is of equal
5 competitive weight in my submission. Is it as big? It is not as big, so how can you say it will
6 remedy the SLC? Whereas our submission is that separating ownership of the two stores is
7 what is needed to restore what was there before, competition between those stores in separate
8 hands.

9 MISS SIMMONS: Mr. Flynn, so that I can understand where the submission is going, do you accept
10 saleability would have been an appropriate criterion?

11 MR. FLYNN: Yes, madam, as I have said to the President, it is implicit in what Somerfield says that
12 if we propose a store for divestment it has to be ----

13 MISS SIMMONS: Appropriate.

14 MR. FLYNN: -- divestible.

15 MISS SIMMONS: And, as I understand your submission, what you are saying is that the Decision
16 does not deal with saleability, it deals with comparability?

17 MR. FLYNN: The focus was on comparability. If we put up an equal store that was accepted.

18 MISS SIMMONS: And in Mr. Clarke's evidence, he is trying to justify the Decision on the basis of
19 saleability?

20 MR. FLYNN: Yes.

21 MISS SIMMONS: So what you are saying is that Mr. Clarke's evidence goes outside the Decision?

22 MR. FLYNN: I think that is right. I believe that is right. The focus in the Decision is on
23 comparability and I propose to say more about that.

24 MISS SIMMONS: So when, as the President keeps saying, it is in our mind as to where
25 Mr. Clarke's evidence goes and whether it is admissible. If it is a Judicial Review and one is
26 looking at whether the Decision is an appropriate decision within the Judicial Review
27 principles. You say that the Decision is on comparability, it is not appropriate to look at
28 Mr. Clarke's evidence because Mr. Clarke's evidence is outside that Decision?

29 MR. FLYNN: We say that you do not find in the report that the Commission knew whether these
30 differences went to the saleability of the proposed divestment store.

31 THE PRESIDENT: Have we got a somewhat back to front situation here, because as I understand it
32 you are submitting that saleability was a relevant consideration, in fact, that was the principal
33 consideration that Somerfield was putting forward?

34 MR. FLYNN: Not only, Sir.

35 THE PRESIDENT: A legitimate consideration for the Commission to have regard to.

1 MR. FLYNN: Somerfield would have had to accept, if the Commission said “Well that is all very
2 well but you are never going to be able to sell that” Somerfield would have had to accept that
3 that was not going to do the trick. As I have said, with the particular features of the divestment
4 process laid down. Any concerns the Commission had about saleability could have been
5 addressed, or indeed are addressed. A period is stipulated in which divestment has to be
6 achieved and certain terms and conditions are attached to that.

7 THE PRESIDENT: It would not be inconsistent with Somerfield’s case if the Commission now tells
8 us that it thought quite hard about saleability and took that into account as a factor.

9 MR. FLYNN: Sir, we say if you look at the report that is not how it seems.

10 THE PRESIDENT: Let us press on, I think it may become a bit clearer.

11 PROFESSOR STONEMAN: I was just going to go over the page to 1033a, and lines 7 to 15. Does
12 that section not conflate characteristics of saleability – store size and saleability?

13 MR. FLYNN: Well, of course, Somerfield wanted the Commission to be assured that they were
14 sellable, and where the Commission was saying “hang on, that is rather a small store is it not?”
15 the answer from Mr. Hull is “Well, on your own findings stores at the smaller end of the range
16 may be attractive to the majors”, because the evidence of course is that they are in the one-stop
17 end, and have expanded into the convenience and lower end.

18 PROFESSOR STONEMAN: So we do not know whether discussion about the size is really
19 a reflection of saleability or a discussion of store characteristics?

20 MR. FLYNN: Ultimately, sir, you have the passages in the report where they reached their
21 conclusions and those are ultimately what one has to hang one’s hat on. But I do think it is
22 illuminating that the starting position in that and other cases was “Oh, but that is rather a poor
23 store”, or “It is not a very big store, you want to seem to want to hang on to the better one.”
24 None of those, in my submission, are relevant considerations. The Commission should not
25 have taken those into account. I think I have probably made the point from the transcript and
26 we have put in other references – you will see one about Poole specifically on p.1043 to
27 answer your point earlier, Sir, about the size of Poole. The other reference that we make in
28 footnote 18 of the skeleton is to the preparatory material, the presentation that was made to the
29 members of the group. The particular quotation I can read rather than take you to it, if that
30 would be helpful; the Commission staff have a bullet point on that page, 25, which says:

31 “At least six of the proximity stores are significantly smaller than the Acquired Stores
32 so are unlikely to be equivalent.”

33 To what, one might ask rhetorically.

1 THE PRESIDENT: Maybe we are nearly there, Mr. Flynn, but at some point do you not need to
2 come to 11.22 in the report and dissect it for us with a view to showing where it has gone
3 wrong.

4 MR. FLYNN: Yes, we are I think nearly there, actually – you will be glad to know. I did want to
5 make the point and, since it is in the witness statement, and para. 19 of Mr. Clarke’s statement
6 has already been specifically drawn to the Tribunal’s attention, I would say to the extent that it
7 is not apparent from the report but on Mr. Clarke’s evidence, the group were influenced by, or
8 disposed against Somerfield’s desire to get a good price, or to be left with the better store, or to
9 dispose of a Kwik Save rather than the acquired store, which is particularly acute in the four
10 “conflict locations” – if I can call them that, where in three of the four the proximity store is
11 a Kwik Save and in the other one it used to be a Kwik Save. In our submission all those
12 matters which are referred to in para.19 are reasonable and should not be held against
13 Somerfield, and if the Commission did intend to prevent Somerfield from achieving those
14 legitimate objectives I would submit that was a disproportionate interference with their
15 property rights.

16 I think I am coming now to the conclusions in respect of those cases. What the
17 Commission did on the face of the report is to evaluate the proximity store against the acquired
18 store and where in three cases (those set out in 11.19) it came to the conclusion that there was
19 little material difference in the characteristics, and that is what para.11.20 says, then it gave
20 Somerfield the choice. I would stress that these are store characteristics and not local market
21 characteristics. There is a lot of emphasis in Mr. Clarke’s witness statement to characteristics
22 of the local market. I have noted in my notes para. 73 is an example of that. But in reality the
23 consideration was all about characteristics of the store. I think one would accept, as a matter of
24 intuition that if the stores are not materially different you might expect that they are broadly
25 equally saleable. But where there are possibly material differences, or you cannot say that they
26 are broadly equivalent in that way it does not follow that the store which comes off worse in
27 the comparison is necessarily unsaleable, or difficult to sell.

28 THE PRESIDENT: When we get to 11.22, if we have now got to 11.22 ----

29 MR. FLYNN: Can I just before that – because I was just checking – say it does not follow that you
30 get to the consequence set out in para.32 of the Defence, and I am told that that is to be
31 regarded as confidential, but it is set out in para.22 of our skeleton – I am sorry this is very
32 tortuous.

33 THE PRESIDENT: Paragraph 36 of the Defence cannot possibly be confidential, it is a statement of
34 fact. Did you say 36 of the Defence?

35 MR. FLYNN: The footnote reference is to para.32.

1 THE PRESIDENT: Sorry, 32.

2 MR. FLYNN: I am just doing as I am told on confidentiality, and I am working from the
3 confidential version of the skeleton as I understand it to have been agreed between the parties.
4 I rather agree, Sir.

5 THE PRESIDENT: In 11.22, where they deal with the stores that are principally in issue, the report
6 states that:

7 “... divestment of the existing store would be significantly inferior to divestment of
8 the acquired store in remedying the SLC as these have a significantly greater risk of
9 not attracting a suitable purchaser able to offer comparable PQRS to that which was
10 offered before the acquisition.”

11 Is that not saleability – not attracting a suitable purchaser?

12 MR. FLYNN: Our submission on that, Sir, is that the conclusion was reached on the basis of
13 comparability, they exhibit a material difference and the Commission assumes from that that
14 there is a significantly greater risk of not attracting a suitable purchaser and that in our
15 submission is a leap. Those differences do not lead you inexorably to the conclusion that there
16 is a significant risk of not attracting a purchaser, particularly given the type of divestiture
17 arrangements which are in place in this case.

18 THE PRESIDENT: It is a suitable purchaser able to offer comparable PQRS.

19 MR. FLYNN: Sir, those stores are offering ----

20 THE PRESIDENT: Comparable to what? Comparable to that which was offered before the
21 acquisition.

22 MR. FLYNN: Which in principle is what they are offering now. Bear in mind also, Sir, that if
23 Somerfield had been given the choice of where it was in those other three cases, para.11.34
24 says that the divestiture trustee will have the power to sell the other store if it is not achieved in
25 the initial period.

26 THE PRESIDENT: The problem is, as identified in 11.22, that if you sell off the existing store there
27 is a risk that you would not get a suitable purchaser able to offer PQRS equivalent to what that
28 existing store is currently offering effectively, or was offering before the acquisition which is
29 presumably the same thing – close to it.

30 MR. FLYNN: Yes, which is what it is doing, so in principle what those stores are doing now.

31 MISS SIMMONS: Do you accept that comparability may be a feature of saleability?

32 MR. FLYNN: Of course in an extreme case, madam, and an extreme case is given to you in para.35
33 of the Commission’s skeleton. There you have a sort of polarised example of store A, which is
34 a sort of alpha store – large, profitable, in excellent condition, it has reasonable rent, good car
35 parking facilities and so forth; and store B which is definitely a beta or gamma store – small,

1 loss making, poor condition and so forth. Obviously in cases like that the extreme comparison
2 may mean, and probably would mean in that case, that one of them would be more difficult to
3 sell than the other, but it does not mean that without more there is a material risk that it will not
4 attract a purchaser in the time frame, particularly given the conditions which have been
5 attached to this divestiture programme. As I have just said the option is also there in all cases
6 to have the feature described at para.11.34 where the divestiture trustee can order the
7 divestment of the other store should Somerfield fail to get it off its books in the stipulated
8 period. So it does not necessarily follow, and that polarised example is not what you find in
9 practice.

10 If you look at the cases set out in 11.22 itself they are not that extreme. Probably the
11 least extreme contrast and the one where it is in my submission completely impossible to
12 understand how the Commission could have reached the conclusion that it was a significant
13 risk that Somerfield could not divest the proximity store is Pocklington. If you look at what is
14 said about Pocklington there, and perhaps have side by side the table that I handed up a while
15 ago you will see that the stores are more or less exactly the same size. You will see that this
16 case exhibits what I have called “feature D” on my key. You see what is said in 11.22(c) about
17 the financial performance of the stores. You will see that nobody is suggesting that this store is
18 in bad condition at all – on the contrary. You will see the point that Somerfield made to the
19 Commission in the bottom right of my table, based on feature D. What on earth, one might
20 ask, were the factors in that comparison which could possibly have led the Commission to the
21 view that divestment of the existing store would be significantly inferior because there was
22 a significantly greater risk that it would not attract a suitable purchaser. All the more so, but
23 not only, given the features of the divestiture programme which have been included in this
24 case, and where we have contrasted those with what was done following the Safeway report.

25 THE PRESIDENT: Just help me a moment, Mr. Flynn, so I can try and clear my mind of the basis
26 of the whole thing. The basis of the whole thing is that one is seeking to remedy the SLC, that
27 is the overall objective.

28 MR. FLYNN: Yes.

29 THE PRESIDENT: There seem to be two concepts floating around, one is comparability and the
30 other is saleability, but they seem sometimes to get quite close together and overlap and may
31 not always in everyone’s head be entirely distinguished from each other. From that point on,
32 the next question is whether (a) comparability or (b) saleability are relevant to remedying SLC,
33 and if one or the other is then whether they have been correctly applied. I think your point
34 about Pocklington is that if saleability is taken into account as 11.22 might suggest, and

1 Mr. Clarke's evidence certainly does suggest, they have simply got it wrong as a matter of
2 applying that criterion because there is no real basis, so you would say, for imagining that the
3 existing store would be any more difficult to dispose of than the acquired store, especially
4 given Somerfield's own view on the matter, and there is no real basis for adopting a different
5 opinion. Is that right? What are you saying on this particular point? On the Pocklington point.
6 Are you saying that they mis-apply the saleability criterion or are you saying they took the
7 wrong criterion, or are you saying it is simply impossible to understand what criterion they did
8 apply and how their reasoning supports the conclusion that they came to? Just break it down
9 for me a little.

10 MR. FLYNN: I have tried to break it down. I think the way I put it is this: they in fact performed an
11 exercise of comparison. They looked for comparability.

12 THE PRESIDENT: Comparability in terms of PQRS, would that be right?

13 MR. FLYNN: Well the factors they were looking at were size and condition and financial
14 performance and so forth.

15 THE PRESIDENT: Right, okay, but the comparison here is not between the two stores, but between
16 each of the stores as they were before the acquisition and each of the stores as they are after the
17 acquisition, is it not?

18 MR. FLYNN: I think not, Sir, I think they have been comparing the two stores, but the way I was
19 going to put it is that they carried out an exercise of comparison, they looked for comparability
20 and where they found that the proximity store came off worse in that comparison they leapt to
21 a conclusion that it would not be saleable, or there was a significant risk, to pick up their
22 words, that you could not get a purchaser for it, and that we say is an invalid inference, and
23 they had no basis for that, and to address ----

24 THE PRESIDENT: So you are saying that they looked at ----

25 MR. FLYNN: May I just say comparability as such is not relevant to addressing the SLC. You have
26 two stores and you sell one of them, and it should not in principle matter whether it is the
27 larger or the smaller.

28 MISS SIMMONS: I think I may have understood what you are saying.

29 MR. FLYNN: Well I am glad, madam.

30 MISS SIMMONS: But I want to make sure that I think I have understood what you are saying.

31 I want to be very careful that I do not give out any confidential information. If one looks at
32 11.22(c) there is a discrepancy between the comparability that Somerfield put forward and the
33 comparability that the Competition Commission considered was appropriate. Does that make
34 sense to you from reading it – I am trying not to say what it says?

35 MR. FLYNN: Yes.

1 MISS SIMMONS: Now I think what you are saying is that those factors do not address saleability.
2 They may address saleability in some cases but in this case they do not address saleability.

3 MR. FLYNN: In the extreme case, I have read para.35 of the skeleton, the gamma store may be
4 unsaleable.

5 MISS SIMMONS: So that these criteria may be criteria which one would include in saleability but,
6 having regard to these criteria in the particular case, you say that the Competition Commission
7 could not conclude that it was unsaleable?

8 MR. FLYNN: Yes. Yes, their error is to make the comparison and say that if it comes off worse it is
9 less saleable, or it is not saleable, there is a significant risk as to its sale. The comparison is
10 irrelevant to that point, I mean a house in Belgravia and a house in Neasden may have many
11 different characteristics and when you compare them for all I know the house in Neasden may
12 be much nicer, you cannot tell which is ----

13 MISS SIMMONS: We have two houses in the same area in this case, we do not have two houses in
14 different areas, so if we take a house ----

15 MR. FLYNN: Take Belgrave Square ----

16 MISS SIMMONS: -- you have two houses next door to each other. One has four reception rooms
17 and one has three reception rooms and a garage. What you are saying is the fact that one has
18 four reception rooms and one has three reception rooms and a garage does not – or may not
19 – affect saleability, one has to look at that in a different way?

20 MR. FLYNN: Yes. You ask your estate agent “This is my house, is it saleable?” In setting the price
21 he may say well the one next door is a bit bigger, it has got other features.

22 THE PRESIDENT: If I have two houses next door to each other, Mr. Flynn, and one of them is
23 pretty broken down and needs a lot spending on it and all the rest of it, and the other has just
24 been done up and looks very smart and so forth, and you are asking the question whether one is
25 more saleable than the other, does it not just depend on the price? The one that is decrepit
26 might go tomorrow for nothing, if you price it cheaply enough?

27 MR. FLYNN: That is why the comparison is not strictly relevant to saleability, Sir, yes, precisely.
28 The saleability of the store proposed for divestment is something to look at in isolation and not
29 by means of a comparison with the acquired store in this particular case. That is the error.
30 They made a comparison, as I have said, if the proximity came off work they then leap to the
31 conclusion that there is likely to be a significant problem selling it, and that is something on
32 which they did not address their minds to the saleability as such, and they did not have the
33 evidence to conclude that it was unsaleable.

1 PROFESSOR STONEMAN: Can I take this example a little bit further. Let us say that everybody
2 else there wants to buy a house with four bedrooms except for a couple of people who are
3 interested in two bedroom flats in the City. Now, could you not then say that if you have
4 a house with four bedrooms it is going to be more saleable than a two-bedroom flat in the City
5 because that is what everybody wants? So if the potential buyers want high quality stores in
6 the best locations with car parks, it may well be the case that there is a price, a very low price
7 at which they take something else, but it would be much easier to shift a high quality store in
8 a good location with a car park.

9 MR. FLYNN: It all depends on the circumstances. You have already made your investigation and
10 you know which is going to shift and which is not, but that is not to say still that the two
11 bedroom flat is not going to shift.

12 MISS SIMMONS: Mr. Flynn, I think where this is taking us is it is all very well talking about
13 “comparability” and “saleability” as terms, but what features are included in those terms,
14 because you do take into account car parks, etc. as to whether something is saleable, the
15 question is which would be more saleable within a time frame? What criteria do you say the
16 Competition Commission should have taken into account which they failed to take into
17 account?

18 MR. FLYNN: Yes, I will address that, madam, let me just first remind you that within a time frame
19 at the end of which other arrangements – failsafe arrangements – could be put in place. But in
20 that period one particular feature which Somerfield pressed on is that which I have described
21 as feature D. That feature you find in three of the four conflict cases, if I can call them that.

22 MISS SIMMONS: Can we just have a look?

23 MR. FLYNN: I am really not sure whether this is a confidentiality point or not. I do not think any
24 of us have any encoding for the stores.

25 MISS SIMMONS: If we page this document then you could refer to it by page number.

26 MR. FLYNN: That would probably give the game away, madam. I can hand up a note. (Document
27 handed to the Tribunal)

28 THE PRESIDENT: Mr. Flynn, just picking up Professor Stoneman’s thought – Mr. Swift will put us
29 right in a moment – what the CC seem to be driving at is the following. If we take Pocklington
30 they are saying to themselves “We have two stores there, we want to make as sure as we can
31 that one of them is sold to another supermarket chain that will offer equivalent PQRS, so we
32 want to make sure that it is bought by an Asda or a Waitrose or a Tesco” ----

33 MR. FLYNN: Someone in the set.

34 THE PRESIDENT: Someone in the set. So we ask ourselves which of those two stores are likely to
35 be most attractive to someone in that set? We look at the car parking and the condition of the

1 store, and its profitability and all that sort of thing, and we say that one store is likely to be
2 more attractive than the other, and we do not want to take any risk on this so we think that that
3 is the one that should be divested. There are three questions:

4 (i) is that broadly speaking the approach they adopted?

5 (ii) if it is the approach they adopted, is there anything wrong with it in principle?

6 (iii) when you get to the specific case of Pocklington can you actually on the facts of
7 Pocklington say that they went wrong on the facts – nothing wrong with the
8 principle, just a question of not applying the principle to the facts?

9 Is that one way of looking at it?

10 MR. FLYNN: I think it is, and taking it in turn I think that is what they did do. They said “Let us
11 find the more attractive, let us give that on a plate to Tesco, rather than the less attractive”,
12 I think they did that.

13 THE PRESIDENT: “Because we want to be as sure as we can be that somebody in the set will come
14 in” and when they come in they will operate it in a way that is as attractive as possible?

15 MR. FLYNN: If you get Tesco in you get Tesco, so that is no doubt a delightful thing. You said
16 secondly, is there is something wrong with it?

17 THE PRESIDENT: Yes.

18 MR. FLYNN: Well we say yes, there is. This is sort of micro-management, which is completely
19 unnecessary and disproportionate. Given the arrangements in place the task of the CC is to find
20 a proportionate remedy for correcting, shall I say, the SLC.

21 THE PRESIDENT: But it is wrong because of proportionality not because it is irrelevant or ----

22 MR. FLYNN: What they are asking themselves is Somerfield suggests sale of a divestment store, is
23 it going to go to someone in the period? They do not actually know whether or not it will.
24 What they say is that the other one is more likely to.

25 THE PRESIDENT: That, I think, is saying and I do not want to miss something important in the
26 argument, I think that is primarily saying that if that is the CC’s objective, and one can see why
27 they were driving at that objective, they simply did not have the material to go on when it came
28 to Pocklington in the face of Somerfield’s own views as to which was more saleable, in the
29 face of the principle, you say, that you should leave it up to Somerfield. In those
30 circumstances they really needed strong evidence to show that Somerfield’s views were wrong,
31 or that they should be deprived of that choice, and it simply is not there in the case of
32 Pocklington. Is that how you put it?

33 MR. FLYNN: They are saying in all of these cases there is a significant risk that it will not go in the
34 period.

35 THE PRESIDENT: We are just discussing Pocklington for argument’s sake at the moment.

1 MR. FLYNN: On Pocklington ----

2 THE PRESIDENT: It is particularly clear.

3 MR. FLYNN: -- it is particularly clear the stores are pretty well equivalent and, insofar as there are
4 differences they are differences, we say, play in favour of disposing of the proximity, insofar
5 as there are differences at all. It is hard to pick between them.

6 THE PRESIDENT: But this argument really invites to look at these four stores and say whether the
7 Decision was perverse in those four cases?

8 MR. FLYNN: I have already made the point that we should be given the choice given the divestiture
9 arrangements. They have the fall back position in place, but this is the most characterised of
10 the case where the stores, as you see from that table, are pretty well equivalent. What possible
11 basis is there for saying that there was a significant risk that the proximity would not be
12 saleable?

13 THE PRESIDENT: Is it convenient to you for us to quickly look at Newark?

14 MISS SIMMONS: Can I just ask something?

15 THE PRESIDENT: Please, carry on?

16 MISS SIMMONS: Can we assume for the moment that we are taking a store – and I am not going
17 mention which store – where the only difference is feature D. Now, are you saying that there
18 was no evidence before the CC that in relation to feature D as to saleability, because it could
19 make a difference – it could be a difference the opposite way to the way that you are
20 suggesting.

21 MR. FLYNN: The evidence before the Commission was that in the case of feature D, in a feature D
22 case the proximity store will be easier to dispose of and that ----

23 THE PRESIDENT: That is the footnote on the right hand side of the Pocklington page, at the
24 bottom.

25 MR. FLYNN: Yes. The terms, if you like, in the second box relating to the acquired store may in
26 particular cases be relevant.

27 MISS SIMMONS: So are you saying that they ignored what is in the bottom box?

28 MR. FLYNN: It is not in the report, they knew about it. For reasons which I cannot explain they did
29 not put it in the report.

30 PROFESSOR STONEMAN: You say in 11.22(c) that there is no clear statement of the difference
31 between these stores. I think there is, is there not? Observe that one is in poorer condition and
32 in your detail here you have the acquired store is good, the other store is average, and that said
33 to me “poorer condition”.

34 MR. FLYNN: Yes.

1 PROFESSOR STONEMAN: Less car parking, the difference between 100 spaces and 50 spaces.
2 "More constrained site and store lay out", I cannot say because it sounds as if somebody has
3 been to look at it. Then there is some query about the performance of the stores in the previous
4 accounting period. So surely what they say there about the difference between these two stores
5 is very much reflected in your sheet here, is it not?

6 MR. FLYNN: I am not saying there is absolutely no difference. I would say that in relation to
7 condition for example, nobody is saying that the proximity is in hopeless condition.

8 PROFESSOR STONEMAN: No, but they do not say that. You yourself, the Somerfield documents
9 gives the difference and ----

10 MR. FLYNN: It is not contested, what is being said is that that does not go to its saleability as such.

11 PROFESSOR STONEMAN: You do not think 100 versus 50 car parking spaces is relevant?

12 MR. FLYNN: To whether it will sell?

13 PROFESSOR STONEMAN: Yes.

14 MR. FLYNN: No.

15 MISS SIMMONS: Do you go that far? I thought you would say that it was relevant, but that the
16 feature D was a feature which had to be balanced against it.

17 MR. FLYNN: No, feature D is important – feature D is important. The other matters where the
18 proximity comes off worse, if I can put it that way, do not go to its saleability. They may only
19 go to its relative saleability, to pick up the President's point.

20 MISS SIMMONS: Well they all go to relative saleability, even feature D?

21 MR. FLYNN: Yes, and the question for the Commission is, is this store going to be disposed of to
22 someone suitable in the time frame, given all the other features of the divestiture programme,
23 and we say there is nothing in the features in which the Pocklington proximity comes off worse
24 in comparison with the Pocklington acquired store that allows you to reach that conclusion that
25 there is a real risk that it will not be got rid of.

26 MISS SIMMONS: Does Mr. Clarke in his evidence deal with Feature D?

27 MR. FLYNN: I will have to check on that, madam, I am sorry I cannot give you an answer offhand.
28 I do not recall it, but I cannot give you a categorical answer on that.

29 THE PRESIDENT: Would it be an unfair inference to draw, Mr. Flynn, if one said to oneself, well
30 Somerfield knows these two stores very well. Somerfield actually wants to keep the acquired
31 store, the inference is that in Somerfield's view that is more of a commercial proposition than
32 the other one, and that a competitor of Somerfield in Somerfield's shoes would be quite likely
33 to take the same view, so if we want to attract a competitor into Pocklington we want to put up
34 for sale the one that is likely to be most attractive to them.

1 MR. FLYNN: Sir, if there were genuine concerns about the sale of the other one, then the SLC
2 would not be remedied. In my submission it is perfectly open to Somerfield to say “I was the
3 owner of ...” if you like “... the poorer store in this isochrone. I bought the better one and
4 I want to be top retailer in that isochrone. If I can persuade the Commission that the other one
5 is saleable, that should be good enough.”

6 THE PRESIDENT: You say that number two is a bit behind number one, but there is still no real
7 reason to suppose that somebody else will not buy number two and, having bought it, provide
8 from number two an equivalent PQRS that number two was providing before the acquisition.

9 MR. FLYNN: That is the proposition. Sale of either of these stores will restore the status quo as it
10 should properly be seen, and if Somerfield ends up with the better one then so be it. What is
11 wrong with that in a competitive market? Otherwise, why should Somerfield – unless there is
12 a real problem with saleability – be relegated to be the inferior retailer?

13 THE PRESIDENT: Well that is where they were before, and that is the status quo ante point.

14 MR. FLYNN: Well it depends how carefully you describe the status quo ante. It is true that is how
15 it was before but from the competition perspective, the point is that a problem has been caused
16 and SLC has been found because Somerfield was not content with being just the poorer retailer
17 in that isochrone, it has gone and bought another store, and the issue is what do you do about
18 that overlap?

19 THE PRESIDENT: Right. Is it worth looking at Newark and Middlesbrough, Linthorpe and South
20 Shields, just so we can get a feel for the point while we are on this sort of point?

21 MR. FLYNN: Well I have made the feature D point insofar as it is applicable and in our submission
22 there is still no evidence in relation to these other three locations that justifies the conclusion
23 that the Commission has apparently reached, and reached, as I say, on the basis of comparing
24 rather than looking specifically as to whether the stores are saleable.

25 MISS SIMMONS: Mr. Flynn, what you handed up to me, that applied to feature D, is that right?
26 **This** piece of paper?

27 THE PRESIDENT: I do not think we have got what you have got.

28 MR. FLYNN: I am sorry, I have not got a photocopier on my desk – my writing is bad enough.

29 THE PRESIDENT: In three out of the four.

30 MISS SIMMONS: Those three are feature D?

31 MR. FLYNN: Yes, unless I have made a mistake, madam, yes.

32 MISS SIMMONS: No, and that is what you say the difference is in those three?

33 MR. FLYNN: No, I have made that point and then insofar as there are other differences between – it
34 is accepted in these cases that in the comparison made by the Competition Commission, the
35 proximity store came off worst as I put it. The question is, or should be, whether it can be

1 sold, and the fact that it has come off worse in those particular features does not lead one to
2 that conclusion. If I may say so one is also looking at those three, and I make the size point
3 again – I have already made it once – that insofar as what the Commission was doing was
4 trying to find a suitable divestment outlet for one of the majors, saying “These are too small” is
5 somewhat contradictory with the findings in the report that the major multiples had moved into
6 the bottom end of convenience and mid-size and not into what one might call true mid-range.
7 If you look at the size of the stores proposed for divestment in Middlesbrough, Newark and
8 South Shields you will see that they are at the lower end of a scale which is measured on
9 3-11,000 sq.ft, and where I believe the average might be 8000 – these are at the lower end of
10 the scale.

11 MISS SIMMONS: Are they?

12 MR. FLYNN: If I have noted them down correctly, madam, yes, they are. If you take
13 Middlesbrough, the store proposed for divestment in Middlesbrough is the one on the extreme
14 right. I am sorry, the way this table works is that the bottom line is Somerfield’s bottom line,
15 if I can put it that way. It is what Somerfield proposed, and it comes under the relevant store.
16 So you see on that one, you see what Somerfield’s proposal was in the bottom right box, and
17 you see the store to which it relates, and the same for Newark over the page, and the same for
18 South Shields.

19 THE PRESIDENT: Middlesbrough is quite a striking example, because although there are
20 apparently some comparabilities between the various stores in terms of size and maybe in
21 terms of condition and other matters, indeed the one there proposed for divestment has not
22 actually got a car park according to this.

23 MR. FLYNN: For example on that, the point is you do not have to have a car park to have one of
24 these stores, it will depend on the location – the lack of a car park does not say that it is
25 unsaleable.

26 THE PRESIDENT: But according to 11.22 (a) the critical difference between these two stores is that
27 the one proposed for divestment is apparently much more profitable than the other. So
28 Somerfield is saying “We would like to keep the more profitable store” and the CC is
29 apparently saying “The more profitable store would be easier to sell to another equivalent
30 supermarket able to offer an equivalent PQRS.” If we just put up for sale the second store, the
31 existing store, well that is not making much money and we are not so sure that one of the
32 competitor set will come in for that store, it is a judgment.

33 MR. FLYNN: It is not a judgment which they are entitled to come to on the basis of what the knew.
34 There is nothing to say that that store should be disposed of.

1 THE PRESIDENT: Are you saying that that is not a judgment that in principle they were entitled to
2 make, or are you saying it is a judgment that they could not have made on the facts that they
3 had, i.e. they went wrong on the facts rather than on the principle?

4 MR. FLYNN: Certainly they went wrong on the facts; they did not have the material on which to
5 come to that conclusion. Secondly, it would only be in the case that Somerfield was proposing
6 something that they could be confident would not sell, so that it would be a proportionate
7 reaction to say "You cannot have a go at selling it".

8 THE PRESIDENT: Yes.

9 MR. FLYNN: Given, as I say, the point of principle that the sale of either will remedy the SLC.
10 Obviously we were on Middlesbrough there and that is the particular case because of multiple
11 proximity, but that is the one which we have identified.

12 THE PRESIDENT: We have looked at Middlesbrough, now what is going on in Newark?

13 MR. FLYNN: It is a feature D case.

14 THE PRESIDENT: Yes.

15 MR. FLYNN: And really, as I have already said, although in comparison with the acquired store it
16 may come off worse in that comparison, in the features that are there compared, it does not
17 mean that it is not a saleable store.

18 THE PRESIDENT: One seems to be more profitable than the other, though that does not quite
19 surface – oh, yes it does, yes, 11.22(b).

20 MR. FLYNN: But who is to say that given these details that the divestment obligation will not be
21 achieved and furthermore, given the fall back possibilities which are there SLC could be
22 remedied one way or the other. Somerfield's judgment is that the proximity store is divestible
23 in the period, but it should, in our submission, have been given the choice. I think, really, Sir,
24 I am just going to make the same points in respect of South Shields, and I do not know if I can
25 take ----

26 THE PRESIDENT: I am just glancing at South Shields.

27 MR. FLYNN: The comparison there may in some ways be less stark than with the one we were
28 looking at previously, but really it is the same point. That really brings me to the end of what
29 I wanted to say on the choice of store point.

30 THE PRESIDENT: Yes, and I think we have the main bones of that submission, thank you.

31 MR. FLYNN: Their conclusions are not supported by the evidence, they are not logical and they are
32 inconsistent and perverse. We would not say they are not inside its margin of appreciation and
33 that in any event is not the right test as *Daly* shows, and so that determination should be set
34 aside in respect of the seven stores that I have identified.

35 THE PRESIDENT: Yes. Now, we get on to the LADs, do we?

1 MR. FLYNN: Now we get on to the LADs, Sir, and I am sorry this has taken ----
2 THE PRESIDENT: That is all right, it is our fault for asking too many questions.
3 MR. FLYNN: It is a good job I am not a betting man. I am half wondering, Sir, I just make this as
4 a suggestion, whether it might assist the Tribunal as well as my voice if we break now and
5 came back early and I will then try and organise what I have to say – I raise that only as
6 a possibility.
7 THE PRESIDENT: I think that is a good idea, Mr. Flynn. Shall we rise now and come back at 10 to
8 2?
9 MR. FLYNN: Thank you, Sir.
10 (The hearing adjourned at 12.45 p.m. and resumed at 1.50 p.m.)
11 MR. FLYNN: Good afternoon, members of the Tribunal. I cannot pretend ----
12 THE PRESIDENT: That you are any better.
13 MR. FLYNN: -- that anything very much has happened over lunch, but I will endeavour to comply
14 with technical instructions which have been given with me and no doubt you will remind me
15 once in a while.
16 Sir, as I said first thing this morning, I think, that really with the confidentiality it
17 would be best if I skip through the skeletons so as to make sure I do not say anything
18 inadvertent, so I am starting at para.41 of our skeleton, and I have by me my learned friend's
19 skeleton open at para.39, but I will tell you when I propose to pick that up, Sir.
20 THE PRESIDENT: Yes.
21 MR. FLYNN: So the point in brief is that the fact that the LADs were excluded from the competitor
22 set at stage 1 is not a good enough reason for excluding them from the set of approved
23 divestees, if I can put it that way; and that the basis on which they are excluded is completely
24 an illogical one because the Commission examined on the basis of data supplied by
25 Somerfield, which they reworked, and actually I am told we cannot deconstruct, they have
26 carried out their own exercise which we accept as a valid exercise, they have found
27 – using that data – the point that is made in full at para.6.43 of the report, and perhaps it would
28 be as well just to have a look at that.
29 THE PRESIDENT: Yes.
30 MR. FLYNN: One reads the paragraph as a whole, and we will come back to the issue of range and
31 so forth.
32 THE PRESIDENT: Yes.
33 MR. FLYNN: But the conclusion at the end – I am reading from the version that is attached to the
34 application ----
35 THE PRESIDENT: Yes, we are there.

1 MR. FLYNN: -- which shows what is and is not confidential, we note particularly what is said at the
2 end of that paragraph just above para. 6.44, that the impact of an opening by what I have
3 described as "competitor X" in my key, is similar. Once you have found that and made that
4 comparison in respect of a competitor who, on any view, has to be included in the competitor
5 set, one almost wonders what else there is to say. So the point we make overall is I think
6 summarised in para. 45 of our skeleton. They refer to five pieces of evidence, one being that
7 competitor impact assessment that I have just referred you to, and the other four being matters
8 that we will just cover as briefly as I can in a moment. We say of those only one of them is in
9 any way a real piece of evidence, a serious piece of worked material and to come to a view
10 balancing all those together or allowing those other four to outweigh the main one is perverse.
11 It is an irrational and indefensible conclusion of the Commission to have reached, and the fact
12 that the cases suggest that weight of evidence is a matter for the decision maker is uncontested,
13 but of course those cases always have a proviso in relation to *Wednesbury* unreasonableness or
14 perversity. If you need a reference for that, the first case in the bundle is the *Tesco* planning
15 case in the House of Lords, which my friend relies on, but on p.7.164 of that, the judgment of
16 Lord Keith, with which all the members of the House agreed, makes it clear that *Wednesbury*
17 irrationality, perversity, whatever one calls it in the modern parlance, remains in place. So yes
18 they can attach the weight but they ultimately have to reach a conclusion which is not perverse.
19 What are those five items of evidence?

20 The first is the point with which para. 6.43 opens, the fact that the LADs offer less
21 than 20 per cent. of the range of most other retailers. Somerfield had submitted to the
22 Commission, provided evidence that nonetheless that limited range represented a significant
23 proportion of total grocery sales, and references are given in their Notice of Application to that
24 evidence. That, of itself, one might have thought was evidence of a potential for significant
25 competitive impact. But the real point that we make here is the fact that they had a limited
26 range is, of course, one of the empirical facts which is already included, taken into account in
27 the competitor impact assessment. It is just one of the facts of life which is of necessity taken
28 into account in that assessment, and they have the impact shown in the competitor assessment
29 despite the limited range. It is not, as it were, an additional piece of evidence that is being
30 relied on here, it is a fact among many which is an observable fact which is already catered for
31 and not in some way extraneous to ----

32 THE PRESIDENT: Well it was of more limited impact, was it not, according to the evidence?

33 MR. FLYNN: We will come to the actual impact in a moment, but I am just saying the fact that they
34 have a lower range is not an additional piece of evidence, it is not something extraneous for
35 which you have to in some way adjust to get a proper view of the competitive impact

1 assessment, it is already in there, the limited assortment discounters, that is their name, they
2 have a limited range and they are discounted. Nevertheless, they have the impact that is shown
3 in the assessment. I have already taken you to the paragraph in the report where that
4 conclusion is made. The impacts themselves are shown in appendix B, and graphically in
5 figure 1, which is on p.B3 of the report. Again, I am looking at the confidential version, of
6 course, that whole table is excised from the public version.

7 THE PRESIDENT: Yes.

8 MR. FLYNN: The headings are in the public version, so Panel A is the effect on Somerfield's sales,
9 and Panel B is the effect on Kwik Save sales, Kwik- Save being the other fascia under the
10 control of Somerfield plc. Really, however you cut it, wherever you draw a line there, taking
11 the two together, you cannot draw a line and include those that the Commission has included in
12 the competitor set without embracing the LADs, if I can put the point that way.

13 THE PRESIDENT: If I just look at Panel A to understand what is going on, is the most impact at the
14 bottom, and the least impact at the top, or is it the other way around? Or is it neither of those?

15 MR. FLYNN: The most impact is at the bottom.

16 THE PRESIDENT: Right.

17 MR. FLYNN: So from there you can see our closest competitors.

18 THE PRESIDENT: You argue at least one of the LADs for example is ahead in terms of impact of
19 1 to 3?

20 MR. FLYNN: If you take the two as a whole you will see that no LAD is beyond the competitor set,
21 even if that were the way to draw the line, you would not see that.

22 THE PRESIDENT: Yes. So if you look at the Kwik Save stores for example, you see on this table
23 that the impact of one LAD as compared with at least one well-known supermarket is roughly
24 the same?

25 MR. FLYNN: Yes, you do.

26 THE PRESIDENT: Yes.

27 MR. FLYNN: And somewhat ahead of another well known supermarket.

28 THE PRESIDENT: Yes.

29 PROFESSOR STONEMAN: In terms of Panel B you talked about, the impact there are both
30 positive of the LADs. Is that the point you wanted to make?

31 MR. FLYNN: I will be corrected but I think what these tables show is our rankings. These are the
32 summaries of a number of observations and the impacts – whatever they may say in Panel B
33 – are higher ----

34 PROFESSOR STONEMAN: They go from 8 to minus 16, and that is percentage impact I assume,
35 and the square brackets is the number of openings?

1 MR. FLYNN: Yes.

2 PROFESSOR STONEMAN: So that the two LADs that we are talking about, both of those impacts
3 are above zero in the scale, and therefore when they opened Kwik Save's sales went up?

4 MR. FLYNN: However you draw the line you do not get a line that you can draw and exclude those
5 who were included in the competitor set if you look at Panel B.

6 PROFESSOR STONEMAN: So if you follow the logic of these numbers, the LADs are
7 a complement to Kwik Save and not a substitute.

8 MR. FLYNN: And if you follow that logic so are others who have been said to be competitors.

9 PROFESSOR STONEMAN: And so are others who are said to be included.

10 MR. FLYNN: It is true that so are others who have been included, and I think that is our point on
11 that. What the Commission then seeks to do, and this is by way of the supplementary witness
12 statements and Mr. Davies's in particular, is to try to explain that data and its significance, and
13 I do not ----

14 THE PRESIDENT: We had better just have a look at the paragraphs you are trying to refer us to.

15 MR. FLYNN: They are referred to in para. 52 of our skeleton

16 THE PRESIDENT: 75 – 82 of Mr. Davies.

17 MR. FLYNN: There, what I think Mr. Davies is trying to do is to undermine what I would say – and
18 will probably be corrected by economist – is the optical conclusion from the tables that
19 wherever you position the line the LADs are below others who have been in the competitor set.
20 He makes statements, and of course my copy of Mr. Davies's statement is not confidentialised
21 but if I follow the skeleton then I see that various names cited in those paragraphs probably
22 should not come out. But you will see that he says that there is only one observation in respect
23 of one LAD, and in respect of the other two LADs you will get actual average impact of two
24 competitor openings on Somerfield's being substantially higher.

25 THE PRESIDENT: How do we relate this to what is set out in figure 1 of appendix B to the report?
26 No doubt Mr. Swift will come to it but if I take para.79 where he identifies two LADs and says
27 they are the least effective competitors together with another store, how do I get that from the
28 report? I think that is probably Panel A, is that right?

29 MR. FLYNN: If you look at Panel A he is drawing a line there, smack between a LAD and another.

30 THE PRESIDENT: And then he is saying that the other LAD, who is a bit higher up the scale we do
31 not need to worry about because it is only one observation.

32 MR. FLYNN: That is right.

33 THE PRESIDENT: So that is what he is doing there?

34 MR. FLYNN: That is what he is doing, and if I can make a general point, I think everything that he
35 says and everything that is said in the skeleton now relates solely to the left hand Panel.

1 THE PRESIDENT: I was going to ask whether we were on a Kwik Save or ----

2 MR. FLYNN: So it is Somerfield impacts rather than Kwik Save impacts. We would say that is
3 a pretty seriously flawed way of looking at the matter, not least because of two things: in
4 a number of the SLC areas, the proximity store or stores which Somerfield will be left holding
5 if, say, we did not win on ground 1 would be Kwik Saves, and in any event the LADs, and
6 presumably this is not controversial not least because of what would be shown here, are going
7 to be closer in offering – similar to Kwik Save ----

8 THE PRESIDENT: At a quick look it is South Shields, Newark and Middlesbrough are Kwik Saves.

9 MR. FLYNN: Yes, they are Kwik Saves and in South Shields and Middlesbrough it is two Kwik
10 Saves. Pocklington is a former Kwik Save.

11 THE PRESIDENT: Does that matter?

12 MR. FLYNN: I don't know that it matters – it is the subject of some comment.

13 THE PRESIDENT: Yes, I can see how you might try to bring it in.

14 MR. FLYNN: It has been converted. We were discussing the condition of it earlier.

15 THE PRESIDENT: Anyway you say of primary relevance would be a Kwik Save.

16 MR. FLYNN: Well it is certainly pretty strange to ignore all that.

17 THE PRESIDENT: Yes.

18 PROFESSOR STONEMAN: Mr. Flynn, can I return to your paras. 52, 53 and 54 in your skeleton,
19 where you are suggesting that Mr. Davies' approach of averaging that LAD with three fascia
20 openings and that LAD with 22 fascia openings gives you a misleading impression because we
21 have another LAD with one fascia opening that has much greater impact. You then go on to
22 approve the fact that you should treat all three together.

23 MR. FLYNN: Yes.

24 PROFESSOR STONEMAN: Without actually working it out, if you add in the one with one fascia
25 opening and calculate the average impact, any extra impact is being spread over 26
26 observations and so the average impact is going to be minimal if you include that in the LAD
27 set. So I cannot see quite what your point is unless you are saying that one LAD should be
28 included in the competitor set?

29 MR. FLYNN: If you take the observation at face value it says that that particular LAD is capable of
30 having a pretty significant impact.

31 PROFESSOR STONEMAN: LADs on average – no.

32 MR. FLYNN: I accept that one observation is not going to affect the average very much. We say
33 that there is no valid reason and it is an odd thing to do statistically to discard a valid
34 observation.

1 PROFESSOR STONEMAN: I accept that point, but you accept that the one observation on its own
2 is not statistically significant. You also accept that the average is. What I am saying to you is
3 that if you include that one observation in the average of the LADs the impact is minimal.

4 MR. FLYNN: One more observation is not going to make a big difference to the average and I think
5 our economists are not going to question that. This is anticipating somewhat – carrying that
6 out comes in in the table in their skeleton above para.74.

7 PROFESSOR STONEMAN: Your skeleton 52-55?

8 MR. FLYNN: Yes. But I say that if you do an average for LADs including the single [C] data
9 point ----

10 PROFESSOR STONEMAN: I was not going to mention it!

11 MR. FLYNN: I am very sorry – neither was I! (Laughter)

12 THE PRESIDENT: No harm has been done so far, nobody has a clue what we are talking about.

13 MR. FLYNN: Yes, well there we are.

14 PROFESSOR STONEMAN: Well you know that the number is going to be very close to minus 9,
15 the average across the LADs?

16 MR. FLYNN: Well I am not for a minute going to challenge your mental arithmetic on that, sir.
17 I am sure you must be right, we just think it is a strange thing to do to disregard that valid
18 observation. If we pass straight on to that table, perhaps ----

19 THE PRESIDENT: In the witness statement?

20 MR. FLYNN: No, this is a table in their skeleton. The table itself is to be found just above para.74
21 on p.24. Again, as you quite rightly predicted it is not going to make a large difference. The
22 attraction no doubt from the Commission’s perspective is that this is the first time you see
23 operators who are not in the competitor set at the bottom of the table, if I can put it that way.
24 But let me observe three things.

25 THE PRESIDENT: Just let me remind myself – these are the Somerfield stores, are the not?

26 MR. FLYNN: Precisely, these relate to Somerfield stores and not at all to Kwik Save and I have
27 made that point.

28 THE PRESIDENT: Yes.

29 MR. FLYNN: The difference in the right hand column between the LADs collectively and the two
30 fascias named above it, we assume – I do not think we can positively assert but we assume that
31 is not statistically significant, and that would follow from previous workings of this data and
32 we assume that the Commission would say if it took the view that this was a statistically
33 significant difference.

34 THE PRESIDENT: So you would say ----

35 MR. FLYNN: I would say you cannot draw the line where you might ----

1 THE PRESIDENT: No particular reason to draw the line there, especially I suppose as you have
2 already drawn our attention to at least one specific effect in at least one of the bottom four, the
3 first one of those?

4 MR. FLYNN: Yes.

5 THE PRESIDENT: Is this still not a matter of judgment for the Commission, Mr. Flynn? It is a bit
6 difficult for us to come wading in and say you should draw the line somewhere else unless
7 there is no evidence to support where the line is drawn?

8 MR. FLYNN: Our submission essentially is that the competitor impact assessment sets out the
9 impacts and the Commission, having chosen itself, to draw the line at points which do not
10 exclude the LADs, they should explain why they did that, and that is what they are trying to
11 do. So it is not a question of you having to tell them where to draw the line.

12 THE PRESIDENT: Because they have drawn it themselves, so you submit. Yes.

13 MR. FLYNN: So the third point I would make on the table is that you have to remember that these
14 figures are based on the average size of store for each fascia, so that the impact of a Tesco is
15 based on the average size of Tesco stores, and the average size of LADs' stores.

16 THE PRESIDENT: Where does that take us?

17 MR. FLYNN: The point is, and I was going to come back to that, further criticism of Mr. Davies's
18 witness statement is that he seeks to place reliance on data which is not adjusted for factors
19 such as size, and that is why that is relevant to this table, and proximity and situation relative to
20 major retailers. The impact should be measured on an adjusted basis. What we are really
21 asking ourselves here, when it absolutely comes down to it, is if a divestment store – and they
22 have fixed sizes and locations – were operated by a LAD what competitive impact would it
23 have on the retained Somerfield or Kwik Save store in that isochrone? That is the question
24 which should be being asked. So this data is not adjusted for size on that basis, and so to draw
25 a distinction, as is sought to be done, between the LADs and competitor X on the basis of this
26 represented information in the table in this skeleton we suggest is invalid. That is the point we
27 are also making.

28 THE PRESIDENT: You think that they should have looked at the individual stores, the sizes of
29 stores, locations and so forth, and said "Is there any reason to suppose that this, shall we say
30 relatively small store in, say, Middlesbrough, would be a less attractive proposition for a LAD
31 than for a Tesco and, in either case, would it make much difference to SLC"? In other words
32 one could imagine a store in a relatively poor state, with a relatively small square footage being
33 perhaps more attractive to a LAD than to a Tesco's – I just do not know.

34 MR. FLYNN: It is perfectly possible, although as I was saying this morning in fact it would appear
35 that the majors, Tesco among them or those majors who have moved outside the OSS sector

1 have moved into the lower end, smaller range, but it may nevertheless be that a particular store
2 is attractive to a LAD at a particular size, and I did point out the size of being at the lower end
3 of this range of three of the four particular locations earlier on. Nevertheless, if you want to
4 measure impact and compare like with like in our submission you do have to adjust for size
5 and that is the point we are making in respect of Mr. Davies's statement, and we make it also
6 in respect of this table at para. 56 onwards.

7 As I say, the bottom line question is would the divestment store, which has
8 a particular size, if operated by a LAD provide a competitive impact? Would it restrain
9 Somerfield's freedom of manoeuvre, and the evidence suggests that it would, and one should
10 be systematic about these comparisons. There are points made there about size and distance,
11 and average size. I am in fact going to come back to that, although I think my friend and
12 I have a slight disagreement to resolve, because in response to points made in their skeleton on
13 the NOP survey, which also relate to size and distance, we hope to hand in – if the Tribunal is
14 prepared to see it – a note prepared by RBB which looks at that. It would not be sensible for
15 me to suggest that I had written that myself and clearly this is something Somerfield adopts by
16 way of submission. I am anticipating my friend's objection that he has only seen it this
17 morning, I think – the way things are going – he is likely to have an opportunity to consider it
18 overnight. Nonetheless, it is ----

19 THE PRESIDENT: Can we first of all find the passage in the CC skeleton argument that we are
20 talking about to which you want to reply?

21 MR. FLYNN: Just to be clear there are points made in our skeleton which are under the heading
22 relating to the competitor impact survey and they relate to distance and size, and I was saying
23 we have some further material on that which comes under the heading of the NOP survey, so
24 I was proposing to get on to that in a moment. But the answer to your immediate question is
25 that it is essentially intended to answer the points made in paras. 59 and 60 of the CC's
26 skeleton. You will see that those relate to average drive times of the respective store from the
27 acquired store and make some points about size

28 THE PRESIDENT: Yes.

29 MR. FLYNN: I was hoping in that way to pass over without going into detail then the rest of our
30 skeleton argument up to para.60 in relation to the competitor impact assessment, just to remind
31 you of the conclusion that we draw at para.60 that it is not right and you should take no
32 account of those paras. 80 and 81 of Mr. Davies's statement, because the CC has admitted that
33 the tables do not provide for any statistically significant basis for drawing the distinctions that
34 they would like to draw.

35 THE PRESIDENT: Yes.

1 MR. FLYNN: I am just going to check whether there was anything else that I needed to say in
2 response to their response to that, if you like, which is 64 to 74 of their skeleton. If we turn to
3 that – I am sorry we have to keep flipping back between the two. At the end of para. 64 it is
4 said that at no point in the Notice of Application or in the skeleton do we argue that the
5 competitor impact analysis supports the conclusion that the LADs exert a significant degree of
6 competitive constraint on Somerfield or Kwik Save. Well that is simply not right. What we
7 have done, and you will see it – I am afraid this is flipping back to footnote 23 of our skeleton
8 – we, with respect, take Mr. Clarke to task because he says that the quantitative evidence – and
9 I quote:

10 “... tended to confirm our initial view based on product range and nature of their
11 products that the LADs did not exert a significant degree of competitive constraint on
12 Somerfield Stores.”

13 We say this is wrong, and:

14 “The CC results show that the LADs’ effect is significantly smaller than that exerted
15 by Tesco but not that it is insignificant. If the impact analysis had shown that LADs
16 had an insignificant effect, Somerfield’s argument would be lost. In fact their impact
17 is as significant as that of other operators included in the competitor set.”

18 THE PRESIDENT: Where do we find the CC results to which you are referring now?

19 MR. FLYNN: Unless I am wrong those results will be those set out in appendix B of the report
20 which we have been looking at and in particular those two ladders.

21 THE PRESIDENT: Yes. So still significant, particularly in relation to Kwik Save I imagine?

22 MR. FLYNN: The more so, yes, but not insignificant. They are clearly not as big and powerful as
23 Tesco, but you do not have to be as big or as powerful as Tesco, or indeed others, to be
24 a viable and impactable competitor.

25 THE PRESIDENT: Yes.

26 MR. FLYNN: I think for the rest I have probably made the points I need to make in response to that.
27 So I am jumping back to para.61 of our skeleton. The third item taken into account by the
28 Commission.

29 THE PRESIDENT: Yes, the views of the supermarkets.

30 MR. FLYNN: The views of supermarkets as to who regarded whom as a competitor, and those are
31 summarised in Appendix C. We do not have much access to that data. We have the table in
32 Appendix C which shows whether particular other categories are regarded as high, medium or
33 low, but we do not know who exactly said what. But what that table does show is that the
34 mid-range operators, which includes Somerfield basically regard everyone as a high
35 competitor, including the limited range boys, the LADs, and that is the relevant issue. The

1 issue is what competitive impact would LADs have on Somerfield? I do not know – we do not
2 know – what the LADs would say if specifically asked, maybe they were specifically asked,
3 I do not know. But as to how they regard Kwik Save I do not know what they might say there.

4 Sir, if I move on to the NOP Survey, the heading at the bottom of p.17 has become
5 uncoupled from its paragraph over the page. We should be agreed – I think we are agreed
6 – that you cannot place too much weight (whatever too much weight is) on the opinion poll
7 survey results. When you have proper quantitative market data to place a great deal of weight
8 on an opinion poll, which was not designed to search out this particular point, is clearly
9 unwarranted.

10 THE PRESIDENT: I have the impression that the NOP Survey was the linchpin of the evidence in
11 the case in general for diversion ratios and matters of that kind?

12 MR. FLYNN: Yes, it was.

13 THE PRESIDENT: Well why is it suitable for that purpose and not for this purpose?

14 MR. FLYNN: Well without getting back into matters which are no longer challenged, it is one thing
15 to ask consumers where they would go if they could not visit the particular store they have just
16 come out of, it is another to estimate the competitive impact of rivals, which is where they
17 would go, and that we would suggest has to be a more scientific exercise, and does have to be
18 adjusted for the size and distance points that we are coming on to, because you cannot make
19 a great deal of valid extrapolations from people's choices expressed on that basis as to where
20 they would go. As we say, it is not like a statistically representative sample, like a political
21 poll, these were – as they call it – the next person available and in any case we are weighing
22 this poll evidence against actual market data which has been properly evaluated and properly
23 run.

24 THE PRESIDENT: Yes.

25 MR. FLYNN: So there we make points which you can read on the validity of Mr. Davies's critique
26 in respect of the numbers of stores around, and we say at 67 that when he does not like the
27 evidence he simply ignores it and proximity is an issue. But I think to shorten things what
28 I would like to do now is to go to where I said I was going to go to, which is their skeleton on
29 this point – it starts at para.55. What the Commission is trying to do in this skeleton is to
30 counter the points that we made on the relative numbers of LADs, and whether any results one
31 might draw from the poll should be adjusted for that factor, and also the issue of drive times,
32 the distances from the surveyed store of Co-op stores. At this point I would like to hand up the
33 note that I referred to prepared by RBB, but my friend has indicated that he may wish to say
34 something.

35 THE PRESIDENT: Yes, just before it comes up, Mr. Swift, what is your position?

1 MR. SWIFT: Well there is a serious point of principle, in my submission. This is a seven page
2 paper produced by RBB Economics, Mr. Ridyard. It is in response to points made in our
3 skeleton argument which were delivered on 2nd December, and it was produced to me by email
4 at 9 o'clock this morning on the day of the hearing. That is not, in my respectful submission,
5 consistent with proper management by Somerfield of their case, and I am reluctant to have it
6 admitted *de bene esse* or whatever the expression is I would like an explanation first. I believe
7 the Tribunal should have an explanation as to why it has taken 10 or 12 days for this document
8 to be produced. I have had the opportunity of Mr. Davies having a first look at it, and
9 Mr. Walters, but at the moment I am saying, as a matter of principle, this is not in accordance
10 with the efficient administration of justice in this Tribunal for yet another economic argument
11 to be put forward in what is apparent rebuttal of statements made by the Commission; and in
12 my respectful submission I would ask Mr. Flynn to be put to proof of why it has taken 12 days,
13 until 9 o'clock this morning, to produce this evidence.

14 THE PRESIDENT: Have you any specific comments on that particular point, Mr. Flynn?

15 MR. FLYNN: No specific comment, Sir. These things take time to produce, one gets ready for the
16 hearing regrettably close to the day for the hearing. We do not have the underlying data. The
17 paper has been worked on for a few days and it takes the time it takes before it can be approved
18 and I am sorry my friend did not have it earlier. I would suggest he is unlikely to be highly
19 prejudiced by it, and I can only assume that the points to which we were responding also have
20 the benefit of input from economists, so presumably Mr. Davies is happy with what is in the
21 skeleton so the fact that it comes under cover of a note, a note from RBB, I do not think is
22 a point which should weigh, and I think my friend will have an opportunity to consider it
23 overnight.

24 (The Tribunal confer)

25 THE PRESIDENT: Yes, we will let you put this note in provisionally, Mr. Flynn, reserving entirely
26 whether or not it is relevant and whether we are going to take any notice of it, but we will at
27 least look at it.

28 MR. FLYNN: I understand that. Obviously these are observations on points made in the skeleton
29 argument which ----

30 THE PRESIDENT: There is a law of diminishing returns on all this sort of thing.

31 MR. FLYNN: There is and, of course, what we are commenting on is matters in Mr. Davies's
32 statement and the skeleton which, of course, are not in the report.

33 THE PRESIDENT: Do you want us to read it overnight, or do you want to tell us what the main
34 point is so that we can just go away and read it knowing what the main point is? It is probably
35 quickest if you just tell us what the main point is and then we will go and read it for ourselves?

1 MR. FLYNN: The main point, and I hope it is not too indigestible, I suppose could be taken from
2 just above the heading to para.2 of it on the second page. The Commission is arguing that
3 there are no significant differences in drive time between LADs and Co-op Stores in their
4 skeleton, and that any bias is counteracted by larger average store sizes of LADs, and this
5 analysis addresses both those points.

6 THE PRESIDENT: Are we being dragged back into what I was hoping we did not have to ever get
7 into, which is diversion ratios and competitive impacts, and all that sort of thing?

8 MR. FLYNN: Well, this is to do with competitive impact, but it is not to do with diversion ----

9 THE PRESIDENT: Well why do we need to know that drive time is not a significant influence on
10 diversion ratios?

11 MR. FLYNN: The point that is being made is that the impact that a store will have essentially
12 depends on its proximity to the store on which the impact you wish to assess and points are
13 being made that there are differences between the stores under consideration in this note, and
14 the point is also made that if you take the nearest LAD's store, as opposed to the nearest other
15 competitor mentioned in this note, you will find on average that the LAD is bigger and the
16 point that is made in the note is that that does not really tell you anything when, in fact, if you
17 look at it isochrone by isochrone you will find that the total retail space occupied by that other
18 competitor is considerably greater on average. Those are the points that are being made.

19 THE PRESIDENT: So if you bring that competitor in, so you say, you should bring in the LADs?

20 MR. FLYNN: We say the points that are being made as further reasons by Mr. Davies and amplified
21 in the skeleton for drawing distinctions between the LADs and these other competitors are not
22 valid and are not borne out by the data in the NOP Survey, such as it is, and that is really what
23 this paper does. As I say, I hope it is comprehensible – perhaps we can come back to it in the
24 morning.

25 THE PRESIDENT: Does that take us through to the Mintel Report?

26 MR. FLYNN: Yes.

27 PROFESSOR STONEMAN: Just to drive the point home about this RBB paper – not wishing to
28 have more to read than I have to – all this paper is doing is establishing what you have in your
29 skeleton at para.59, the last two and a half lines, the numbers in those two and a half lines are
30 not statistically significantly different?

31 MR. FLYNN: I am sorry, let me just ----

32 PROFESSOR STONEMAN: Your skeleton para. 59 – I am sorry, the CC skeleton.

33 MR. FLYNN: The CC's skeleton.

34 PROFESSOR STONEMAN: Paragraph 59.

35 MR. FLYNN: It deals with the point made in para.59 and the point made in para.60.

1 PROFESSOR STONEMAN: Those numbers are not significantly different, but it has taken 10
2 pages to say it?

3 MR. FLYNN: It is incorrect to say that the distinctions drawn between the LADs and the other
4 competitor in those two paragraphs do not stack up when you look at them. I do not think it is
5 a statistical point, it is an empirical point. It is not statistically significant, a point of statistical
6 significance. It is actually a question of analysing the data that is in the NOP survey, and I am
7 not sure what the Tribunal has – I think the Tribunal has been spared the NOP survey itself, so
8 some of that will be new material to you.

9 THE PRESIDENT: But it is all material that was in the investigation before the CC?

10 MR. FLYNN: Yes, absolutely.

11 THE PRESIDENT: Right, the Mintel Report? I think we have the point you make on that.

12 MR. FLYNN: I think you have our point. It really does not add up to very much, and for displacing
13 what is actually a valid and calibrated exercise it should not have been given that weight at all.
14 Sir, I think the only other point that we wish to make in public, as it were, in relation
15 to LADs is actually one that is quite difficult to make in public, it is that which is set out at 74
16 and 75 of the skeleton which would seem, for reasons I do not really understand, to have
17 confidential elements. But when you bear in mind how a case like this, which involves an
18 effect on our property rights should be assessed, it is ----

19 THE PRESIDENT: Presumably you are claiming confidentiality for that, are you?

20 MR. FLYNN: I do not believe so, Sir.

21 THE PRESIDENT: Well nobody else can.

22 MR. FLYNN: I do not know the history. I am going to ask whether we are not, because if not we
23 might as well have it out. (After a pause) We do not think we are, Sir. We believe the
24 Commission may have.

25 THE PRESIDENT: You are?

26 MR. SWIFT: Yes.

27 THE PRESIDENT: How can you claim confidentiality for what you are telling them to do?
28 (Laughter)

29 MR. SWIFT: My understanding is it is all to do with these periods.

30 THE PRESIDENT: Well the period has been apparently confidential. Is that right, Mr. Flynn?

31 MR. FLYNN: Yes, and I have used words which avoid giving you the length ----

32 THE PRESIDENT: Yes, the period is confidential, but not the conditions which surround the period,
33 as it were, i.e. the point he is making is that it is not just a question of waiting till the end of the
34 period because the period might become extended as a result of various things that happen in
35 the period and that is not confidential.

1 MR. FLYNN: No, that is not confidential. What is absolutely clear from the report is that we cannot
2 immediately go out to the LADs, and we say that has adverse impacts on us which are
3 unjustified.

4 THE PRESIDENT: What you are saying is what is referred to in 11.28 as a stipulated period of time
5 actually becomes extended, or extendable depending on what happens before the expiry of that
6 period? That is the point you make?

7 MR. FLYNN: Precisely. Those are the two points we make. I am just simply not going to read it on
8 to the record.

9 THE PRESIDENT: No, we have got that point.

10 MR. FLYNN: We have got everything into the skeleton, including para.72 and 73 but we come to
11 that point at the end, so if I can assume that is taken as read, Sir, then you know also what our
12 conclusion would be on all of that.

13 THE PRESIDENT: Yes.

14 MR. FLYNN: Thank you.

15 THE PRESIDENT: Thank you very much. Yes, Mr. Swift?

16 MR. SWIFT: Sir, members of the Tribunal. You indicated at the outset that you would not wish to
17 have any extensive submissions in respect of the standard of review, and I was not proposing
18 even to move on to that until right at the end, if indeed it is necessary. There was a suggestion
19 in my learned friend's opening statement that we had failed properly to address statements by
20 Lord Steyn in *Daly*. More to the point, in my submission, my learned friend seemed to be
21 placing a great deal of reliance on what he has referred to as his property rights, and the whole
22 argument of proportionality; and that what the Commission has done in its Decision on
23 remedies is to in some way upset the balance against the legitimate interests of Somerfield.

24 This is not a Decision that raises issues of proportionality. This is a Decision which
25 goes directly to the point of how can the Commission consistently, within its statutory duty,
26 remedy the SLC? If it concludes, as it has done, that the appropriate means of remedying the
27 SLC is to specify the stores which Somerfield must divest then that is its application in the
28 exercise of its judgment of the means of satisfying the statutory duty.

29 There is something a "bit twitchy" – if I can use a colloquial expression – about this
30 suggestion, about some special rights of property that Somerfield has as a result of the
31 acquisition of Morrison's 115 stores in which it is abundantly clear that Somerfield took the
32 regulatory risk. Somerfield went into this acquisition with its eyes open recognising that if as
33 a result of the inquiry the Commission were to find an SLC and they were not to accept
34 behavioural remedies then there would have to be a structural remedy which would inevitably
35 involve the divestment of one or more stores. The result of the six month hearing is that in the

1 Commission's view there are only four outstanding local areas in dispute out of the original
2 115 the Commission had to consider. The points that you and other members of the Tribunal
3 were putting to my learned friend at that stage were "Are you saying that other things are
4 equal?" I can see that if my learned friend can establish on the facts that other things are equal
5 then there is a sense in which one has to look at very carefully whether we have properly
6 respected the rights. But it is abundantly plain, in our submission here, that the fundamental
7 error of the choice of store point is that we are not dealing with that kind of situation – other
8 things being equal. It is precisely because there was a perceived inequality – what is called
9 'a significant inferiority' – as between certain stores that in the Commission's clear judgment
10 there was a significantly greater risk of not attracting a suitable purchaser capable of providing
11 the appropriate PQRS. This is a case where careful study, careful comparisons by reference to
12 clear criteria have produced a situation which has led the Commission to exercise its judgment
13 one way or the other.

14 The principle of proportionality, as explained to the man on the Clapham omnibus, is
15 that you do not take a sledge hammer to crack a nut. If – and this is the big gap in my learned
16 friend's submission – if you take Somerfield's proposal they do not even crack the nut at all,
17 they do not in the judgment of the CC go near to remedying the SLC which has been found.
18 So those are, in a sense, provisional, preliminary comments I was going to make arising out of
19 the way my learned friend was stressing the importance in this exercise of his property rights.

20 You asked again, Sir, about the form and content of what I was going to say. I was
21 not intending to be anything like one hour and a half. I thought a lot would depend upon the
22 manner in which the Tribunal engaged in the questions to Mr. Flynn and that has – I say with
23 some confidence – assisted me in keeping my submissions down to a level. Having said that,
24 I well know that I am in the Tribunal's hands and therefore I cannot estimate the length of
25 time, but I was hoping that I would be able to finish – when was the Tribunal proposing to rise
26 today?

27 THE PRESIDENT: Good question. We might, subject to the shorthand writer in whose hands we
28 are, go on a little over time, say towards 5 o'clock or something of that kind in order to finish
29 today if we had a realistic chance of finishing today. We would certainly prefer to finish today
30 if we could, but I do not want anybody to feel under time pressure.

31 MR. SWIFT: I am much obliged. What I have in mind is this latest document that went in, which is
32 a rebuttal to – and I am coming out of my order now.

33 THE PRESIDENT: We have not taken it on board, we have glanced at it and can see what its drift
34 is.

1 MR. SWIFT: I would certainly have to ask for a brief adjournment to take instructions, but I do have
2 in mind how that might be ----

3 THE PRESIDENT: It is the sort of document you could reply to in writing if you felt it necessary to
4 reply to it, for example.

5 MR. SWIFT: Well that is an extremely helpful observation, if I may say so. I have to say, and this
6 is a submission rather than an opinion, I doubt very much whether the outcome of this Appeal
7 to this Tribunal is going to depend upon the three members of this Tribunal forming a view as
8 to whether they prefer Mr. Ridyard's view or Mr. Davies's view in respect of two paragraphs
9 of the skeleton. It is all to do with whether, as a matter I suppose of good economic principle,
10 one needs to translate an unweighted figure in the NOP result into a weighted figure.

11 THE PRESIDENT: I would have thought, Mr. Swift, on the choice of store point, a certain amount
12 of attention has been focused on para.11.22 and we would need to understand what your
13 essential submissions are on that? What the CC was driving at? Whether there is any real
14 difference between comparability and saleability? How saleability comes into it? What was
15 the mischief; and how the reasoning there set out meets what the mischief was thought to be.
16 That is all we need, I think, at this stage for you to concentrate on.

17 MR. SWIFT: If I may, and this is not simply for the sake of keeping to my original order, but the
18 starting point is that we have a finding of SLCs in 12 local markets, and the finding of an SLC
19 is not some abstract, theoretical concept. It means that consumers in each of 12 local markets
20 have been suffering the adverse effects arising directly from this merger since October 2004,
21 and there is no dispute that the Commission is under a continuing duty to find a reasonable and
22 practicable solution.

23 The Tribunal will also have seen in the extensive material appended to the Notice of
24 Application that from the end of July when the notice of possible remedies was first issued, to
25 the end of August, there was a very intensive, rigorous exchange of information as between
26 Somerfield and the Commission, and that is a matter which I would ask the Tribunal to take
27 seriously into account. By its nature it cannot be summarised save in respect of, for example,
28 11.22. But there is a mass of evidence there before the Tribunal which should leave you in no
29 doubt that in respect of each of these 12 markets the matter was exhaustively reviewed.

30 I mentioned the Remedies Notice and I would ask you to turn to that Remedies Notice
31 because that is the starting point and it is also referred to in that critically important para. 11.12
32 of the Report. The Remedies Notice is Somerfield tab 25, p273 in Annex 3, it is file 1 of 2.

33 THE PRESIDENT: Yes.

1 MR. SWIFT: At p.274, after an introduction, the Commission sets out, under the heading “Possible
2 remedies on which views are sought”. The initial views of Somerfield on divestiture of stores
3 in the relevant local markets as an appropriate remedy. They referred to three elements:

4 “(a) the stores to be divested in the relevant local markets will be those stores
5 acquired from Morrisons unless the Group considers that the divestiture of alternative
6 stores would satisfactorily restore competition in the local markets concerned;”

7 (b) is connected to (a):

8 “(b) each store will be divested to a suitable purchaser that is independent of
9 Somerfield and has the resources, expertise and incentive to maintain and develop the
10 divested store as a viable and active competitor to the stores in the relevant local
11 market, and would not be likely to recreate the expected adverse effects as a result of
12 the divestiture”

13 That is obviously as a result of the identity of those purchasers who could not be regarded as
14 buyers because of their existing interests in that market. Then (c), extremely important:

15 “(c) the CC will specify a period within which divestiture must occur (the initial
16 divestiture period) and will consider using a divestiture trustee to divest any stores not
17 divested within the initial divestiture period.”

18 Then para.7 on p.275 you will see the group referring to its statutory duty to achieve as
19 comprehensive a solution as is reasonable and practicable, and then the last sentence:

20 “Between two remedies which the Group considers equally effective, it will choose
21 that which imposes the least cost or restriction.”

22 which is a classic example of the application of the principle of proportionality. In terms of the
23 lawfulness of decisions taken by the Commission, and they are taken sequentially in this case,
24 my submission is that that starting point is plainly lawful and reasonable as a criterion to be
25 applied. Now, whether we are talking about hard edged criteria under the Enterprise Act, or
26 soft edged, that in my submission represents an appropriate starting point for the Commission
27 in considering the implementation of its duties.

28 THE PRESIDENT: What is the reason for choosing as the starting point the stores to be divested
29 will be those acquired from Morrisons? What is the underlying rationale for that?

30 MR. SWIFT: The one, Sir, that you pointed to initially. Here is a situation in which the stores have
31 been sold by Morrisons to Somerfield – a great deal of information about those stores. The
32 restoration of the status quo ante would achieve that immediately. It would deal with any
33 issues arising in respect of the multiple location of existing stores, and it was offered as an
34 either/or as things developed. Either they acquired or “... unless the Group considers the

1 divestiture of alternative stores would satisfactorily restore competition ...” which is the PQRS
2 point, as developed in the course of that intensive series of discussions during August 2005.

3 There is not in a sense a presumption, it is a starting point and the Tribunal will have
4 seen in our skeleton the emphasis that we attach to the proviso, the “unless”, this is a choice
5 available to Somerfield but the burden is on them because we do not accept the concept of
6 equality, whether arrived at as a result of the so-called symmetry of the methodology
7 which now appears to have gone by the board, or for any other reason.

8 THE PRESIDENT: Yes.

9 MR. SWIFT: So we start off with 12 local markets and it is undoubtedly the case, and the evidence
10 is in Somerfield tab 29, and the references are p.517 and 538 – I am not asking the Tribunal to
11 turn them up but that within a few days after the issue of the Remedies Notice on 25th July, by
12 8th August, Somerfield was already replying that it was prepared to divest the three acquired
13 stores at Filey, Poole and Whitburn, and that was its position, as the evidence shows
14 throughout the rest of those exchanges, and throughout the whole of the Remedies Hearing
15 which took place on the next day, 9th August. Somerfield then put in a supplementary note on
16 12th August. It put in a detailed response on 19th August, and it commented on the CC’s
17 further thinking on 24th August. That remained its position and my learned friend appears this
18 morning to be arguing that in some way that is inconsistent with the Decision which the
19 Commission took and which is referred to in 11.12 and 11.22. It is not, it is simply the
20 application of the either/or principle, offered to Somerfield, taken up by Somerfield. At no
21 stage did they say – and indeed, at no stage have they said to this Tribunal this morning “We
22 would like to sell the existing stores”. So this Tribunal may wonder what really is the weight
23 and the relevance of the argument you have heard this morning, unless it is some kind of rather
24 technical twist to suggesting that what the Commission was concerned about the whole time
25 was a secret agenda that we look at comparative weight and if one store was bigger than
26 another we would want that one to be sold, and I will come to that.

27 But as to the three agreed, in my strong submission, this Tribunal should not have any
28 hesitation in saying that is agreed, we are now moving to the outstanding four, to consider the
29 lawfulness of that Decision. It was lawful, it was arrived at in due process, and Somerfield this
30 morning has not offered you any proposal, any alternative, that could crack the nut or remedy
31 the SLC, other than the acquired store.

32 THE PRESIDENT: I think it is implicit – I do not know – it is implicit in the argument that you
33 would sell the other one is it not, Mr. Flynn?

34 MR. FLYNN: Our argument is that we should have been given the choice, and I have given you the
35 references ----

1 THE PRESIDENT: Oh I see, you get the choice and then you still sell one or the other?

2 MR. FLYNN: We would sell one or the other.

3 THE PRESIDENT: But we do not know which?

4 MR. FLYNN: I have no instructions as to what Somerfield's current position is. It should have been
5 given the choice as it was in relation to Johnstone and those others.

6 THE PRESIDENT: Yes.

7 MR. SWIFT: The answer to that is they were given a choice of process, they chose not to engage in
8 that process. As to Kelso and Littlehampton ----

9 THE PRESIDENT: Are they live issues now, Mr. Swift?

10 MR. SWIFT: Well they are footnote issues. We know my learned friend says "They are in
11 a footnote but I am not going to refer to them", I tend to get a bit worried – why? The reason
12 why Kelso and Littlehampton are relevant is that is a case where the Commission recognised
13 that divestment of the acquired store would create more problems for consumers than the
14 alternative, and that was a decision which it took on the facts. Whether or not Somerfield
15 agreed with that is neither here nor there. The fact is this was an exercise of judgment that
16 Somerfield, having decided, perfectly lawfully to close that store after the merger should not
17 itself be allowed the final choice in deciding which store is going to remedy the SLC. In that
18 case, the Commission concluded it was not in the interests of consumers for Somerfield to be
19 allowed the choice and that is why it specified the existing store. That is a point that I am
20 making. Again, a question for the judgment of the Commission as to whether it should allow
21 the choice or whether, in its view, the divestment of one rather than the other would remedy
22 the SLC, and that is the relevance of Kelso and Littlehampton.

23 Now, let us get on to what I call "the critical seven" which are the three stores in
24 respect of which the Commission concluded that they were indifferent as to whether
25 Somerfield should divest of the existing or the acquired and those four set out in 11.22 where
26 the Commission insisted that it had the duty to specify.

27 So my starting point is the report at 11.12, on p.62, the section starts at p.61 at 11.9,
28 having repeated Somerfield's arguments, which my learned friend has referred to this morning
29 at para. 11.8, and I do not need to read 11.12 into the transcript, it is set out fully in our
30 skeleton. The Tribunal will have seen that it is in two parts. The first part deals with the
31 location and I am not really proposing to say much on that, other than it is obviously connected
32 with my previous submissions in relation to the sale of the acquired store, and the need to carry
33 out a further exercise in respect of Middlesbrough, as my friend admits.

34 But when we get to the sentence beginning: "But secondly," here we have it:

1 “... it is important in order to address the SLC that the store offered for sale should be
2 attractive to purchasers, able to satisfy the criteria set out in the remedies notice”
3 and that is why I started with the remedies notice, and you will recall those are the purchasers
4 who looked to be capable not only of maintaining but developing a store in respect of its
5 competitive impact on the market place.

6 “They should also be able to offer a comparable degree of competition with
7 Somerfield on PQRS to that which existed prior to the acquisition.”

8 Then:

9 “Where an existing store is relatively unprofitable, or has a significantly smaller sales
10 are than an acquired store or has a disadvantaged store location, then there may be
11 a significantly greater risk of not attracting a suitable purchaser and addressing the
12 SLC.”

13 11.12 then reads across into the conclusions at 11.22 which has been looked at extensively this
14 morning, where in the judgment of the Commission:

15 “... divestment of the existing store would be significantly inferior to divestment of
16 the acquired store in remedying the SLC as these have a significantly greater risk of
17 not attracting a suitable purchaser able to offer comparable PQRS to that which was
18 offered before the acquisition.”

19 So of course we are dealing with comparison, we are comparing stores by reference to the
20 criteria, some of which are referred to in the specific subparagraphs of 11.22. Having
21 evaluated the facts in relation to those criteria, which we would describe as the characteristics
22 of the stores, we then form a judgment, taking the matters in the round, as to whether selling
23 the existing store would have a significantly greater risk of not attracting a suitable purchaser
24 able to offer comparable PQRS to that which was offered before the acquisition.

25 Now, going back to my submissions about the remedies notice, if that is lawful then
26 in my submission what is happening in the Commission’s reasoning at 11.12 and 11.22 is
27 a classic case of the implementation of those lawful criteria, and not leaving the matter to the
28 discretion of Somerfield whose position – though we found it difficult to follow – is not in any
29 way different from that when it started. It started with the position that condition is irrelevant
30 (para.104 of the Notice of Application) – as stark a statement as you would ever be likely to
31 get. “Condition of the stores is irrelevant” – by “condition” I mean characteristics, car parking,
32 condition, location, sales’ area, cost of sales, profitability, apparently irrelevant. The only
33 relevant matter appears to be that it is one of the alphabet that I cannot remember – is it “D”?
34 These are the characteristics that go to the test which is “Do they have a significantly greater
35 risk of not attracting a suitable purchaser?”

1 If I refer to Professor Stoneman’s question earlier on this morning, when the Tribunal
2 was using the analogy of residential property and houses in different areas I would ask you to
3 move back a bit and go to the real world which we have got here, which is supermarkets and
4 businesses; and when we are into the area of divestment we are talking about the market for
5 corporate control. We are not talking about the definition of relevant product markets any
6 more, or geographical markets, we are talking about how does the Commission seek to
7 influence that market of corporate control? What it is saying is “I cannot be indifferent when
8 I see on the ground such differences of characteristics as to make that sale to the suitable
9 purchaser critically important. I cannot be indifferent to it. If I am indifferent to it, that is fine
10 you can go ahead. But I cannot allow Somerfield to take for itself that judgment generally ...”
11 where Somerfield says through Mr. Flynn this morning – in our submission he said that the
12 SLC will be remedied one way or the other. It will not. It will not be remedied if the
13 Commission is not entitled to exercise its judgment in respect of the matters set out in 11.12.

14 PROFESSOR STONEMAN: Can I interrupt you there, in para.11.12 the characteristics of
15 saleability that concern you are whether it is profitable or not, the size of the sales’ area and the
16 location. They are what is in 11.12.

17 MR. SWIFT: Yes.

18 PROFESSOR STONEMAN: Now how does that then relate to car parking, condition of store
19 – where in the report or elsewhere is it spelt out that saleability includes all these other things
20 that you said are included in “condition”, but “condition” is not in that list?

21 MR. SWIFT: I would not say that the statements made at 11.12 are intended to be exclusive of other
22 considerations. This is why I referred back to the dialogue that went on throughout the whole
23 of August. It is quite plain that all aspects of these stores were hauled over. Somerfield would
24 not have been putting in the information which we have seen this morning had it not been
25 apparent that those were the criteria which the Commission regarded as irrelevant. So I would
26 say that 11.12 has to be read in the light of 11.22. In other words, that going into those extra
27 areas is not regarded as in some way introducing irrelevant material. The point in 11.12, the
28 most obvious examples of the characteristics considered to be relevant.

29 PROFESSOR STONEMAN: Let us take it then that they are the most obvious example of what is
30 relevant. What is the evidence that these are the factors, or where is the evidence that these are
31 the factors that determine saleability?

32 MR. SWIFT: The judgment of the Commission looking at those characteristics as set out in, for
33 example, 11.22, putting those characteristics together you have a greater opportunity of
34 attracting the purchasers referred to or, indeed, if you have a collection of characteristics that

1 make that store significantly inferior to divestment then that is a material consideration which
2 you take into account because it is not simply saleability in the abstract.

3 PROFESSOR STONEMAN: No, I am not worried about that. Upon what is that judgment based?

4 MR. SWIFT: The judgment of?

5 PROFESSOR STONEMAN: That these are the factors that affect saleability? Where is the
6 evidence that shows that the judgment on saleability that you made has got some underlying
7 empirical basis, is not a figment of people's imagination?

8 MR. SWIFT: I am not sure I can say it any more other than it is the judgment of the Commission
9 that if you take those criteria into account you are more likely to be able to effect a divestment.

10 PROFESSOR STONEMAN: But a judgment to me says on one hand we have this evidence, on the
11 other hand we have this evidence, and I come to a judgment that weighing up these two bodies
12 of evidence this is the conclusion. That is what a judgment means to me. Now, I am asking
13 you where do I find there exists a body of evidence on one side saying "these factors are
14 important"; and "there is this body of evidence on the other side that says they are not
15 important, and I have weighed these up and this is the conclusion I have come to."

16 MR. SWIFT: I do not think there has been any such, what I would call, with great respect,
17 mechanical weighting of attributing a particular value to any particular characteristic. It is
18 a matter of taking all these matters in the round, a judgment has been formed. It has not been
19 applying a particular formula to give a weighting to, for example, the difference in profitability
20 or difference in store size, or the difference in car parking. It is taking a view on the ground
21 based on this very detailed analysis of the 12 markets and the 4 markets that this is the way
22 forward.

23 PROFESSOR STONEMAN: Do any members of this group have experience in selling
24 supermarkets?

25 MR. SWIFT: Yes, they did and that is referred to in Mr. Clarke's evidence, it relates to Mr. Goodall,
26 who was a member of the Commission's panel in the Safeway inquiry, Mr. Roberts, who has
27 been advising the Commission, who is himself ex-Sainsbury's and who you will see was
28 assisting the Panel at the remedies hearing. That is the expertise which the Commission has
29 been relying on together with naturally, I would say, the collective wisdom which the members
30 of the group gathered together in the course of a lengthy inquiry.

31 PROFESSOR STONEMAN: Thank you.

32 THE PRESIDENT: Mr. Swift, just go around the track for me on the following example. Supposing
33 a situation pre-merger where you have a relatively successful Morrison's store, and you have
34 a relatively grotty Somerfield's store, where the paint is beginning to peel a bit and a few drips
35 coming down from the ceiling and all the rest of it. Somerfield's argument seems to be "We

1 have bought the Morrison's store. We, Somerfield's, can be expected to run that new
2 Morrison's store just as well as Morrison's did", so that stays the same. All you had before
3 was this rather grotty old store, and there is no particular reason to suppose that at a price – and
4 it may be a very low price, or even a nil price – somebody else will not come in and be able to
5 run that old store at more or less the same level that it was before, in which case you have just
6 got the status quo ante. You have got one rather good store, and one not very good store, but
7 they are both functioning as they did before, and you cannot really try and go beyond that.

8 MR. SWIFT: That is the point, take an extreme case like that, the extremely profitable attractively
9 acquired store, or the "grotty" store around the corner that just happens to be there as an
10 unwanted part of a portfolio. The whole point about 11.12 is it is for Somerfield to establish
11 that point in terms of significantly ----

12 THE PRESIDENT: But it is all relative, is it not? There are no absolutes in this, because it will
13 depend on a mixture of price and all sorts of things.

14 MR. SWIFT: If I may so, Sir, we are talking about an exercise that involves the specification or the
15 choice. Where the Commission is concluding that in this market for corporate control it is
16 more likely to get a suitable purchaser able to restore PQRS on Morrison's than going the other
17 route then in my submission it is entitled to take that route, because saleability is not just
18 a question of price, and even my learned friend admits ----

19 THE PRESIDENT: Yes, but the question you have to ask yourself is – well is it, I just do not know,
20 I am just trying to understand how the logic works at the moment – do you have to ask yourself
21 the question whether some other purchaser would run the acquired store better than Somerfield
22 is going to run it? Because if you do not have to answer that question you just assume that
23 Somerfield is a perfectly effective competitor in the acquired store. The only relevant question
24 is whether somebody else is going to run the grotty store at the same grotty level as it was
25 being run before, because that is the status quo ante.

26 MR. SWIFT: There is an interesting point about the status quo ante, if one is concerned about
27 competitive rivalry, and here we go back to what I describe as the legality, lawfulness and
28 reasonableness of the remedies notice, because past and present are capable of being observed
29 – the future is not. The future is a prediction, and it is the future competitive rivalry which is
30 a matter for consideration, remedying an SLC which, by its definition, is a continuing adverse
31 effect.

32 But in the four cases that we are talking about, my submission is that those criteria
33 were properly applied. You have put to me, and my learned friend has put to me, an entirely
34 hypothetical case of comparing the very attractive store A with the grotty store B, and on that

1 I would say the Commission would be perfectly entitled to draw the conclusion that it did.
2 This is set out in our skeleton at para. 35 by recollection – it may have changed in the course of
3 iteration – but it is ‘round there that we give the hypothetical example. Again, it is a matter for
4 the judgment of the Commission, rather than to be left to the discretion of the owner.

5 We also raise here what I call the interlocking points ----

6 THE PRESIDENT: I am only seeking to understand it. My questions are not, as it were, criticising
7 the line of reasoning that store A, in your example at para.35 of the skeleton, might be more
8 likely to attract a suitable purchaser. My question is if Somerfield is going to run the acquired
9 store as well as any foreseeable purchaser, does the comparison between the acquired store and
10 the proximity store really have the value you attach to it, because you are not entitled to get
11 more than you had before the merger, as it were, and before the merger you had one good
12 store, and one less good store, and after the merger, what is there really to suppose that
13 somebody will not buy the less good store and run it just as less good as it was before.

14 MR. SWIFT: In which case, that would be a matter entirely for Somerfield to argue on the facts of
15 each case and had it proved its case the Commission would have said “Yes, we are indifferent,
16 as we must be indifferent.” That is the purpose of 11.12. As to how or whether ----

17 THE PRESIDENT: You see if I just go back to the three stores where you said that these stores are
18 more or less equal – it was Johnstone ----

19 MR. SWIFT: Johnstone, Peebles and Yarm.

20 THE PRESIDENT: Yes, they were equivalent stores. It was a comparison of the stores and you are
21 saying “Okay, it is not going to matter who has which store”. But in a case where one store is
22 less good than the other store, that is still the status quo ante, and I am still struggling to see on
23 what basis one says that it is more likely that one store that is less good than the other store
24 will continue in the future if the good store is sold to somebody else rather than run by
25 Somerfield’s – if you see what I mean, I have not put it very clearly.

26 MR. SWIFT: No, no ---

27 THE PRESIDENT: I think they are arguing that you are trying to get something that you are not
28 really entitled to. You are trying to get something better than there was before, rather than just
29 go back to what there was.

30 MR. SWIFT: No, that is definitely not our position, and in my submission, para.11.12, which is the
31 governing paragraph here, cannot be read in that sense. If there had been some other criteria it
32 would have been expressed in an entirely different language.

33 One of the problems here, if I may say so, is that we are down to four stores, or four
34 plus two stores. You are dealing with a very, very small subset, and on each of these in my
35 submission the Commission’s judgment was impeccable – the significantly greater risk of not

1 attracting that purchaser within that timetable, the three elements are interlocking. So long an
2 SLC continues it is the duty of the Commission to find a remedy which is reasonable and
3 practicable. To say – I am putting it in the extreme case – almost anything is saleable at any
4 price however grotty, misses the point. But if it is grotty, once the price starts going down, you
5 could finish up in the worse position and that is it is left to a divestment trustee, and that is
6 what the Commission tried to argue against, “let us go for timely sale”. “Let us try and get
7 what we believe to be – to get the significantly inferior prospect out of the market ...” –
8 “inferior”, I put that badly; to try and make sure that we can do our best by specifying one
9 store rather than the other that we achieve those objectives in 11.12.

10 PROFESSOR STONEMAN: May I just have one follow-on question? Was any consideration given
11 to the fact that if Somerfield is left with, shall we call it the “rubbish” that Somerfield will pull
12 out of the market and therefore you have not corrected the SLC?

13 MR. SWIFT: That is not forming part of the reasoning but there was a point, Professor Stoneman, in
14 any market, any inquiry, that nobody can require anybody to carry on in business. Regulators
15 cannot maintain competitive markets unless and until they issue licences to ensure that once
16 you operate a store it must be operated as a grocery. That has a general application across the
17 whole of merger law, it is not just specific to this one.

18 PROFESSOR STONEMAN: So you could end up just replacing Somerfield’s by Tesco without
19 really affecting competition in that particular local market?

20 MR. SWIFT: No form of merger control or divestment is going to be perfect, because individuals
21 always have the freedom to decide that they will exit a market. In a sense it is the same
22 question you put to Mr. Flynn about where there are binding undertakings and the answer is
23 “no”. That might well have been regarded as disproportionate.

24 PROFESSOR STONEMAN: The difference in the question was I was asking whether there were
25 any constraints, and asking you whether any consideration had been given to that possibility.
26 I think that is slightly different.

27 MR. SWIFT: I cannot recall whether it is anywhere in the report, and I have no doubt there are eyes
28 burning in the back of my head, but I would have thought that that is the answer that you
29 cannot, even when you are applying a merger control regime, imply some kind of rule that you
30 must remain in existence for some period of time.

31 PROFESSOR STONEMAN: No, I was not implying that you should maintain that. I was implying
32 that when you decide upon this rule as to what will sell more quickly and what will sell more
33 quickly will be the better store, an implication of that might be by selling the better store you
34 drive the other – in this case Somerfield – out of the market and therefore you do not correct
35 the SLC, you just change it.

1 MR. SWIFT: Well I put it this way, I do not believe that in any of the August exchanges those
2 arguments were put by Somerfield.

3 MISS SIMMONS: Mr. Swift, in 11.12 in the sentence you read out: “But, secondly ...” it says the
4 “... sale should be attractive to purchasers able to satisfy the criteria set out in the remedies
5 notice.” If we turn to the remedies notice, and I think that is divider 25, is it?

6 MR. SWIFT: Yes, p.274.

7 MISS SIMMONS: And it will be criteria there at para.7, is that what is referred to? Is that what is
8 being referred to, para.7?

9 MR. SWIFT: Well I am speaking without instructions on it, I had read that as criteria with a small
10 “c”. It is referring to the paragraphs “4(a), (b) and (c), because those are the paragraphs to
11 which reference is made by Somerfield in the remedies hearing. It has got “Criteria” with
12 a big “C” at para.7.

13 MISS SIMMONS: Right, so it is (a), (b) and (c).

14 MR. SWIFT: It is (a), (b) and (c) of para.4.

15 MISS SIMMONS: Well on that basis when you look at 7:
16 “When deciding what is an appropriate remedy, the Group will consider the
17 effectiveness of different possible remedies and their associated costs and will have
18 regard to the principle of proportionality. Between two remedies which the Group
19 considers equally effective, it will choose that which imposes the least cost or
20 restriction.”

21 MR. SWIFT: Yes.

22 MISS SIMMONS: The two possible remedies are selling one store or selling the other store?

23 MR. SWIFT: Madam, I think you have to read that paragraph as a whole. You have to bring in the
24 last sentence, between two remedies which the Group considers equally effective. It will
25 choose that which imposes the least cost or restriction.

26 MISS SIMMONS: But it has to consider both remedies. How does that fit in with 4(a)?

27 MR. SWIFT: With 4(a)?

28 MISS SIMMONS: Yes, because the stores to be divested “will be those stores acquired ...”?

29 MR. SWIFT: I think they are entirely consistent. It is saying that if we get to, as it were, equal
30 effectiveness that is fine. Somerfield is given the opportunity. If they are not equally affected
31 it is not, because it does not remedy the SLC.

32 MISS SIMMONS: But in 7 it is saying that the Group will consider. Your submission on 4(a) is
33 that you start off with the store to be divested is the acquired store, and then it is for Somerfield
34 to provide the evidence, to show something else.

1 MR. SWIFT: It is still a matter for the Group to consider on the evidence which is submitted to it. If
2 Somerfield wishes to submit evidence then the Group will consider it. Somerfield did not
3 provide evidence in respect of Filey, Poole or Whitburn. I do not know if I have met the point,
4 but I cannot do any better than that.

5 THE PRESIDENT: Right, well I think we have the general thrust of that, Mr. Swift. Is it time to
6 turn to the particular examples and see whether there is anything in the points that are made in
7 relation to the particular examples. A certain amount was made about Pocklington, for
8 example, just to take an example?

9 MR. SWIFT: Well why not, Sir? I have not been there but that is of no relevance whatsoever to my
10 submission.

11 THE PRESIDENT: It is a very pretty little place!

12 MR. SWIFT: Let us take Pocklington and, if I may say so, I thought that Professor Stoneman's
13 questions and my learned friend's answers quite sufficient for me in whatever contribution
14 I could make.

15 THE PRESIDENT: Well just remind us.

16 MR. SWIFT: This is a classic case in which the Commission based its conclusions on its own
17 analysis of the relative characteristics and condition of two stores and it decided that it would
18 not accept the Somerfield proposition that the existing store was in average condition. That
19 tells you two things. First of all, it is extremely important for the CC ----

20 THE PRESIDENT: I am sorry, it did not accept it was in average condition? I see you observed it
21 was in "poor" condition, so someone had been and had a look.

22 MR. SWIFT: The tables that my learned friend, Mr. Flynn, passed up this morning, which are in
23 alphabetical order, so Pocklington is towards the end, reproduce a submission made on or
24 around 19th August as part of a process of iteration, in which Somerfield confirmed its
25 preferences in reply to questions from the Commission in respect of various aspects of
26 condition or characteristics. In Pocklington, George Street, Somerfield submitted that it was in
27 average condition, the outside recently redone, new signs, etc. Now, the Commission just does
28 not take that as read, it investigates and it disagreed with Somerfield. Mr. Flynn says: "That is
29 irrelevant anyway, you are going through an entirely irrelevant exercise, the condition does not
30 matter we should be entitled to sell it anyway." So he was saying effectively the entire
31 exercise is a complete waste of space and an extremely expensive time; that is his primary
32 submission. As you put, Sir, is the approach right? Have they applied the approach correctly?
33 Is there some perversity here? My learned friend is saying "No, the approach was wrong", and
34 in fact Pocklington was perverse. This is not a criticism of Pocklington itself – "Your decision

1 on Pocklington was perverse”. That is simply unsustainable. A perversity means, in the
2 language of I do not know if we cite *Wednesbury* these days, but I am citing *Edwards*
3 *v Burstow* in our statement, where Lord Radcliffe, before whom one bows, said it is perversity
4 where the only reasonable conclusion on the facts contradicts the determination. This is our
5 determination in respect of Pocklington, and my learned friend this morning was putting
6 himself up in substitutional mode to suggest that nobody in the position of the Commission
7 could ever have arrived at any conclusion that we should have been indifferent as between
8 Pocklington acquired and Pocklington existing, but it is all there in 11.22 at para.(c) including
9 the four lines that I cannot refer to. For Pocklington the same principles, same application as
10 for Newark, South Shields and Middlesbrough. Indeed, the Tribunal will see at para.11.22 (d)
11 that in respect of the confidentiality factor referred to by my friend as “D”, the Commission
12 take that into account in the last four lines of 11.22 (d). If the Tribunal were to turn to 11.34 of
13 the report, to which reference is made in 11.22, you will see that the Commission have sought
14 to provide for the next steps in the event that Somerfield were not able to do what it said it
15 could not do. That will be absolutely clear as mud to anybody sitting at the back of the room,
16 but when we are taking you through the confidentiality I think you can understand we are right
17 on that. That is my position.

18 Taking, Sir, the three points you put: was that the Commission’s approach? Yes, it
19 was. The approach is as stated in 11.12 which throws one back to the remedies notice. Was
20 that approach the one that we took? Yes, we did. We took it in respect of all of those stores.
21 Was it perverse? It plainly was not. Also, if one does want to go away and look at the 10
22 examples set out here – why 10 not 12? Because Kelso and Littlehampton are not here – it will
23 show that size appears to be up, down, medium, whatever it is, there are all kinds of
24 differences. You yourself pointed out, if we looked at the acquired stores two seem to be
25 bigger one seemed to be smaller. In answer to Professor Stoneman’s question one has to look
26 at the experience of the group in weighing all these considerations together. The alternative
27 proposal by my learned friend is the SLC will be remedied one way or the other. No, we say,
28 it is a matter of course for the Tribunal to conclude whether, as a matter of law, the criterion
29 we have applied is not the proper criterion under the legislation, but in our strong submission it
30 is the correct one, and the proposal put forward by Somerfield leaves one completely in the
31 dark as to whether SLC would be remedied at all, or within the relevant timetable.

32 THE PRESIDENT: Mr. Swift, can I just have another go at the conundrum I was trying to express
33 a few minutes ago, and I am probably going to appear extremely stupid, but sometimes one has
34 to expose one’s own stupidity in order to expose the debate. If we take Pocklington, for
35 example, we have two stores here and we notice that one seems to have an operating

1 contribution significantly above the other. So we could imagine, just for arguments' sake, that
2 one of these stores is worth 10 million on the open market and the other is worth, say, 5 million
3 on the open market. Why is it more likely that you will find a purchaser for the store at 10
4 million than it is that you will find a purchaser for the other store at 5 million?

5 MR. SWIFT: Because it is not, in my respectful submission, just a question of price. It is a question
6 of a competitive market.

7 THE PRESIDENT: Supposing the less good store is worth 3 million, why is it unlikely that
8 someone will pay 3 million for the less good store and run it as a less good store that 3 million
9 is a suitable price to pay for?

10 MR. SWIFT: One can take these hypothetical examples. My submission is if you just take one
11 aspect, which is profitability, that is fine. One can salami slice all the way down here in terms
12 of these characteristics. There is no one characteristic which is determinative, it is looking at
13 the matters in the round – having regard to the expertise of the Commission – is there
14 a significant risk of not attracting a suitable person? That is their call. The alternative is not,
15 in my submission, reasonable or practicable because you have less confidence that you can
16 remedy the SLC.

17 I respectfully say that I am very happy to continue with the dialogue until we finish,
18 but there comes a point at which I say to myself “I do not think I can put it more effectively”
19 and I am going to get a jab from Mr. Beard to say “You had better put it the following way” or
20 something like that, but that is as I see it. No one single characteristic, certainly not size, you
21 cannot look at profitability on its own. You look at all those elements that make up whether
22 a store is going to be more or less attractive to that group of purchasers that the Commission
23 regards as those, and only those, suitable for entering into this market.

24 THE PRESIDENT: Yes. I have the impression that we have covered quite a lot of ground now on
25 the choice of store point.

26 MR. SWIFT: I was hoping we had finished it.

27 THE PRESIDENT: Yes. Shall we go on to the LADs' point?

28 MR. SWIFT: May I just pause here because I was proposing to go on to the LADs, if that was
29 convenient.

30 THE PRESIDENT: Unless there are other points we ought to deal with.

31 MR. SWIFT: (After a pause) No. I said I was not going to refer to the principles of standard of
32 review until we were coming to the end, but without wanting to trespass into that area, you
33 know our position, we have acted lawfully, there has been no misdirection as a matter of law,
34 in the way in which we have approached our statutory duties, we have set them out in our
35 Defence – critically important s.35, s.36. We have not taken into account immaterial

1 considerations. We have taken into account a large amount of conditions, a large amount of
2 facts within the Commission's submission are relevant to the criteria (small 'c') set out in 4(a)
3 and the conclusions cannot be quashed as being diverse and there is no case for remittal on that
4 ground.

5 On the LADs, I am very much in the Commission's hands on this because in my
6 submission the Somerfield case on the LADs has, right from the beginning, fallen down on the
7 basis of a misunderstanding of the role of the Commission and the role of this Tribunal.
8 Applying the considerations of no material misdirection, taking into account immaterial
9 considerations ----

10 THE PRESIDENT: Well they are saying, roughly speaking, two things, that it was illogical to bring
11 the LADs in at stage 1 and not bring the LADs in at stage 2, or only bring them in in a sort of
12 second rank way. Secondly, that when you actually look at the various facts referred to in the
13 report it is quite difficult to see why the LADs are not in the competitor set for the purposes of
14 the remedies. Those are their two main points, putting it in very broad terms.

15 MR. SWIFT: The Commission's reasoning which, of course, was relevant throughout this process is
16 set out at para. 6.41 and follows at the report which is at p.23. I was not proposing to go
17 through that line by line.

18 THE PRESIDENT: Sorry, go through which line by line?

19 MR. SWIFT: This is our report at para.6.41 and p.23. This is the section that is headed "Competing
20 fascias".

21 THE PRESIDENT: Yes.

22 MR. SWIFT: And that section goes on to para. 6.45, then the Commission deals with Marks
23 & Spencer and Iceland, and then there are the conclusions at 6.48. The test is, and again my
24 starting point is, is the criterion that the Commission applied a lawful one? At stage 1 of our
25 analysis we need to identify those fascias that significantly constrain Somerfield's stores,
26 which we refer to as the "competitor set". As far as I understand it, the whole argument of
27 Somerfield is that in carrying out that exercise they say that the Commission acted irrationally
28 or illogically in not recognising that the LADs significantly constrained the Somerfield stores.
29 When we put that argument in the skeleton that Somerfield never said anywhere that the LADs
30 significantly constrain Somerfield stores – they still do not. All they say is "It is not
31 insignificant." Well any student of the English language will know that there is some
32 difference between "significant" and "not insignificant". They still fail to establish on the
33 evidence that the LADs provide a significant constraint.

34 Let me take another point ----

35 THE PRESIDENT: Just a moment. I am just trying to catch up for a moment, Mr. Swift. Where

1 I was – because it is quite useful from time to time to go back to the report that we are
2 supposed to be reviewing ----

3 MR. SWIFT: Well I am on the report at the moment, Sir.

4 THE PRESIDENT: I was on 11.26 to 11.28, which is basically where we are dealing with the
5 problem of the LADs.

6 MR. SWIFT: Yes.

7 THE PRESIDENT: Then 11.27 the opening line says “It was also suggested to us ... that at least
8 one of the LADs should be included in the competitor set ...” etc. Do I infer from that that it
9 was not actually suggested that all the LADs should be included in the competitor set, that it
10 was only suggested that one of them should?

11 MR. SWIFT: No, my understanding is that my learned friend is suggesting that they all should be.

12 THE PRESIDENT: No, but was it at the time suggested, in the course of the remedies proceedings
13 that they all should be or was it only one of them – or at least one of them?

14 MR. SWIFT: My understanding is that it was all and that comes out from the evidence at the
15 remedies hearing – not surprisingly, because my learned friend’s clients would want to be able
16 to market them to more than one LAD.

17 THE PRESIDENT: Right, then going on through 11.27, I think the basic argument, and it may be
18 a mixture of a reasoning argument and other factors, 11.27 goes on:

19 “... given the factors we have set out in paragraphs 6.43 to 6.45, including the very
20 much smaller range ... we do not at present consider they would be a suitable
21 purchaser for the reasons given above.”

22 I am not sure what the “reasons given above” are. Anyway, if you then go back to ----

23 MR. SWIFT: Well I would say the reasons at 6.43 to 6.45.

24 THE PRESIDENT: Right, okay, well if you go back to those reasons, putting it in very broad terms,
25 the drift of those reasons – let us have a look at those reasons. 6.43 says they should not be ----

26 MR. SWIFT: I think it is worthwhile just mentioning 6.42. That this was a matter that was
27 considered in considerable detail at the time of the Safeway report, when of course the
28 Commission was concerned not just with the one-stop shopping stores, the OSSs, but also with
29 the stores that Safeway had, which as we know included the MIFF stores, and they concluded
30 that the list should be effectively the same for mid-range as for one-stop, but they added
31 Iceland. Anyway, that was a starting point, that there had been a considerable review on what
32 appears to be an identical matter in the Safeway report. Then we go on to 6.43(a), (b), (c) and
33 (d). Appendix B is covered at (a), Appendix C is covered at (b) and that is, in a sense, the
34 subjective element of how the LADs see their competitors.

1 THE PRESIDENT: I just want to go back to the Notice of Appeal and remind myself of how all this
2 is put. Sorry, forgive me, Mr. Swift, for taking you out of your stride.

3 MR. SWIFT: It starts at 106, which repeats para 11.26, to which you have rightly drawn my
4 attention as the starting point. Then the allegation is that it is perverse – a very high statement,
5 “perverse”, where the only reasonable conclusion contradicts the determination. The only
6 reasonable conclusion that the Commission could have arrived at is that all the LADs should
7 have been included in the competitor set at stage 1 and therefore within that list of approved
8 purchasers for the purpose of divestment. That is a very, very high test of Judicial Review
9 bearing in mind the extensive reasoning set out at para.6.41 et seq., the extensive statistical and
10 economic evidence put in the appendices.

11 THE PRESIDENT: Well they say, and this may be one of the principle points, that if you look at the
12 statistical evidence in the appendices (at B3 fig.1) at least in relation to the three stores that are
13 Kwik Save stores there is actually quite a lot of evidence that the LADs are significant, and at
14 least as significant as at least one other, and possibly two other competitors.

15 MR. SWIFT: Well may I refer you to para. 6.45 of the report to which Mr. Flynn did not refer you
16 this morning.

17 THE PRESIDENT: Yes.

18 MR. SWIFT: 6.45 is at p.24, and if you read down to the bottom of the page. Then the sentence
19 begins:

20 “But we have also noted Somerfield’s conversion of many Kwik Save stores to the
21 Somerfield fascia: hence there are supply-side reasons to regard Kwik Save stores as
22 at least potentially equivalent to Somerfield stores.”

23 Then they go on about the NOP survey concluding:

24 “This suggests to us that the Kwik Save stores can generally be regarded as more in
25 competition with the acquired stores than are the LADs.”

26 Not referred to, highly relevant. It is the supply substitutability point that makes a great deal of
27 what was put to you this morning not relevant at all.

28 THE PRESIDENT: What do you make about the point – p.24 of the report, what is in fact a
29 continuation of 6.43, after (d) where there is a reference to the Mintel report, there is a sentence
30 that begins:

31 “Somerfield pointed out that under our competitive impact assessment, the impact of
32 a new [c] opening was similar to that of [c]”

33 MR. SWIFT: One piece picked out of a piece ignores what is stated as a qualification about the NOP
34 survey. That means they have to go one stage further and try and demolish the NOP survey. It
35 is just one piece of evidence. The fact is that if one looks at appendix B and not simply, if I

1 may say so, the tables in fig.1 but look at the figures in table 1. Again, this makes no sense to
2 anybody who does not have the confidential version.

3 This is the Somerfield and CC calculations, no reference was made to that in opening
4 this morning, just that if the Tribunal were to look at that and ask themselves the question: Was
5 the Commission acting in some perverse way by taking those figures into account? There it is,
6 and then the more detailed figures in the table right at the back of appendix B. “Competitor
7 opening impact analysis regression results, B40.

8 THE PRESIDENT: B39 actually.

9 MR. SWIFT: I am not proposing to address the Tribunal on regression results and analysis, but what
10 I am saying is that these form part of a coherent whole. Of important in the conclusions at
11 para.6.48 pointing in the same direction as all the others and pointing to one conclusion.

12 THE PRESIDENT: Yes.

13 MR. SWIFT: That has dealt with the Kwik Save point. I am not proposing to take the Tribunal
14 through the whole of appendix B, but that is the reasoning of the Commission to justify the
15 conclusion at 6.48. Once that conclusion was arrived at then the Commission went further,
16 they said “We are prepared to consider the position at the time of remedies, and we are
17 prepared to do it in two ways. First, if a grocery firm is prepared to come before the
18 Commission and say “We believe that we have the characteristics and the business to enable us
19 to be included as a suitable purchaser, then you will apply” and one firm did, and it is the back
20 of Mr. Clarke’s evidence, it is not in the report. There must come a point at which, as I think
21 you implied in one of your questions to my learned friend, the person who has the judgment on
22 this critically important matter says “I must be able to draw a line there.” It is not a question of
23 whether there is necessarily a statistically significant difference in one or two percentage
24 points. The fact is that when all the evidence is pointing in the same direction then the
25 Commission says to itself “What is the reasonable conclusion?” Putting it alternatively, “Can
26 I reasonably conclude that the LADs should have been included within the initial period?” to
27 which the answer is “no”. I am in the hands of the Commission as to how far one goes through
28 the detail that Mr. Flynn took you through in respect of the competitor impact analysis, the
29 NOP results, I am not proposing to say much about Mintel or the supermarkets’ views. But
30 when you have an intensive review of evidence, when you are an experienced Body dealing
31 with mergers these are matters which you take into account and you weigh them and that
32 enables you to form the appropriate judgment.

33 As I said, in relation to the paper put in on behalf of RBB Economics at 9 o’clock this
34 morning, I would prefer to take the opportunity of responding to that in writing, just as I would
35 prefer – on an entirely different matter – to address Miss Simmons’ point that she raised this

1 morning in relation to s.38 of the Enterprise Act, and the corresponding provisions in the
2 earlier legislation. In the brief adjournment Mr. Beard has done a splendid job and prepared
3 a note. I have read it, it seems pretty good to me, but I would rather review it again and put it
4 in, rather than read it into the transcript – and he reluctantly agrees with that.

5 THE PRESIDENT: (After a pause) We have the impression that we have got the nub of your case,
6 Mr. Swift.

7 MR. SWIFT: Yes, I am obliged, Sir, I am just looking at my opening. Just a couple of points.

8 Using the language of confidentiality. The initial period is set, in my submission, at a very
9 reasonable level. It leaves the rest of the period, and I cannot put it any more accurately than
10 that. It sounds a complete nonsensical statement, but that is where we are.

11 THE PRESIDENT: We have a picture of what we are talking about.

12 MR. SWIFT: We have a picture of what we are talking about there. There is another point I wanted
13 to raise – in a sense it is a final point – just as I raised Kelso and Littlehampton as matters that
14 were relevant going to judgment, in the Remedies Notice, para.4(c) the Commission reserves
15 the judgment to set the initial divestment period at whatever it thinks suitable. Its initial
16 thinking was to produce a figure which is less than the figure of the initial period. It then
17 listened to Somerfield and changed that. Somerfield then made further full representations
18 which the Commission concluded and decided that it would retain, as it were, the figure that it
19 moved to. That is not in the report, but it is an example of how, in the course of that long
20 period of discussing the remedies the Commission responded in a fair and reasonable way to
21 the arguments that Somerfield were putting to it, and only resisted where it felt that it had no
22 option other than to specify what indeed it did specify.

23 THE PRESIDENT: I think, Mr. Swift, what the Tribunal would like to do now, if you are more or
24 less finished, is to rise for five minutes to allow Mr. Flynn to collect his thoughts, for us to
25 collect our thoughts and then if you are in a position to reply this evening, Mr. Flynn, that
26 would I think be convenient.

27 MR. SWIFT: I am grateful. I have not finished with a coda, but I have finished.

28 THE PRESIDENT: Thank you, Mr. Swift.

29 (The hearing adjourned at 4.05 p.m. and resumed at 4.30 p.m.)

30 MR. FLYNN: Thank you, Sir. Brief reply points following the order that Mr. Swift followed. On
31 the standard of review it may simply be that matters got a little out of proportion – if I can use
32 that word – given that we did not really cover the topic today. You see the weight we give to
33 different matters in the skeleton and in the Notice of Application - this is a classic JR with
34 a twist. I am not trying to make it into some magnificent convention case, you see how we put
35 it.

1 THE PRESIDENT: It just has that dimension.

2 MR. FLYNN: It has that dimension to it. The point was extensively debated at various points in
3 Mr. Swift's opening remarks, in relation to the Commission's starting point – para.4(a) of that
4 Remedies Notice. His first response was that that had something to do with the fact that
5 Somerfield took the regulatory risk in completing this matter without pre-notification. I have
6 addressed you on that, that was plainly not a relevant consideration, and I repeat – I think it
7 echoed a point that I made earlier, but Miss Simmons fastened on the paragraph in that Notice
8 saying that when there was a choice of remedies the Commission would evaluate which was
9 the least costly, and that could plainly relate to choice of divestment store in a particular
10 locality. In fact, the Commission started from the other end of the glass, that the starting point
11 was divestment of the acquired store was to be the rule. We say that was fundamentally
12 wrong.

13 Contrary to Mr. Swift's submission we were not given a choice of process and
14 para.4(a) does not suggest that we would be given a choice of process, only in respect of those
15 three stores – Johnstone, Peebles and Yarm – were we given ultimately a choice otherwise we
16 were put to election. It was not an either/or, it was which do you nominate? If you like, the
17 only basis on either/or was we had to choose one or other but we did not have a choice of
18 process.

19 Professor Stoneman asked Mr. Swift what evidence the Commission had of the
20 relevance of those various factors listed, whether in 11.12 or anywhere else, to the saleability
21 of the store proposed, and we simply say they did not, they have made a leap from the
22 comparison they made to assuming that, as I put it earlier this morning, if the proximity store
23 came off worse it was less saleable. With the greatest respect we must question the experience
24 of the Panel in this matter. Mr. Swift said that Mr. Goodall was a member of the Panel in the
25 Safeway inquiry. Now plainly he was, but that with all due respect does not give you
26 experience of selling grocery stores. The Safeway inquiry did not look into those matters and,
27 of course, the actual conditions following that inquiry were a great deal less onerous than those
28 here.

29 Again, in our submission, why should it be for Somerfield to prove – positively prove
30 – that the disposal store is saleable? It really should be the other way around. If the
31 Commission is taking that starting point, the Commission itself should have been satisfied and
32 looked for evidence that the store proposed for divestment was not saleable. That did not
33 happen.

34 THE PRESIDENT: What do you say they should have done?

1 MR. FLYNN: They have concluded that the 3 million “grotty” store – to take your example – there
2 is a significant risk that it will not be saleable in the period. The evidence they had from
3 Somerfield is well actually these are saleable.

4 THE PRESIDENT: So they could have gone and found a valuer?

5 MR. FLYNN: They could certainly have done that. They went out to valuers for other points in the
6 inquiry as you will have seen, and they could have asked our competitors. In our submission
7 the 3 million turnover grotty store is perfectly likely to be saleable, and someone will come in
8 and think that they can make a good job of running it and probably pay 2 million and spend
9 1 million doing it up, or something of the sort. There is no reason, just because it is a worse
10 store, to suggest that it is not saleable. It has to be something pretty extreme to say that it is not
11 saleable.

12 THE PRESIDENT: What about timescale?

13 MR. FLYNN: Well the divestiture trustee arrangements once again provide an extremely strong
14 incentive on Somerfield to get the chosen store away in the period, because if they do not the
15 alternatives are pretty draconian, and I do not really have to spell them out again. But if
16 Somerfield takes the risk of spending [...] on an unsaleable store that is a strategy which would
17 blow up in its face.

18 On the specific stores, we discussed Pocklington and South Shields this afternoon,
19 firstly, I do not think it is right to read the report as the Commission disagreeing with
20 Somerfield’s assessment of the condition of the proximity store. It says it is in poorer
21 condition, so does Somerfield – it says one is in good and one is in average condition. It is
22 certainly not saying it is in such poor condition that it is not saleable – Pocklington, yes, I am
23 sorry, if I did not say “Pocklington” I should have done. Looking at that in the round, as
24 Mr. Swift encouraged you to do – and indeed as I would too – looking at the characteristics of
25 those two stores, and I am not substituting my judgment for the Commission’s, I am just
26 asking what is the basis? Where do you see in the report any basis for a conclusion concerning
27 those two roughly equal stores, with some differences, that there is a significantly greater risk
28 that the proximity store could not be got away in the divestment period. Mr. Swift really put it
29 very high. He essentially said that this is a matter for the Commission’s judgment and they can
30 make the judgment. He essentially made it sound as if it was unreviewable. We see that as
31 a very, very stark case. It is a profitable store, it is much the same size, its condition is not bad,
32 it has feature D and so forth.

33 South Shields I mention simply because feature D is an argument, in our submission,
34 normally for the sale of the proximity store. When feature D is present it will make the
35 proximity store easier to get away. Mr. Swift said, as was said in their skeleton – and I have to

1 say it causes us one or two wry smiles – that we did take that into account and we did so in
2 respect of South Shields, and that is in the way expressed confidentially at para. 11.34 and you
3 will see that that is actually pretty harsh on Somerfield. So it is certainly not accepting our
4 point on that.

5 If I may turn to the LADs, I thought I had made it clear by reading out footnote 23 of
6 our skeleton, but perhaps I had not, we do say that they are significant competitors. They are
7 less significant than Tesco, but they are just as significant as others who are in the competitor
8 set and that is all the significance they need. The Commission accepted that as a possibility in
9 para.6.43. I accept that in a short presentation such as one gets to make in this sort of hearing
10 you simply do not refer to everything, and I pulled out one particular point on that, but we have
11 covered this. If you look at 6.43(c) which is on p.23 of the report, you will see various
12 considerations set out. Three lines up from the bottom of the page a conclusion by the
13 Commission: “there are therefore a few areas where the LADs do seem effective competitors,
14 particularly Netto”. Just above that they look at some factors which might make it relevant, or
15 they look at locations where there were found to be effective competitors looking at proximity
16 and relative distance from other major stores. Those facts are to be found on the ground in
17 a large number of the SLC locations, specifically – so I am advised – Filey, Johnstone, Kelso,
18 Middlesbrough, Newark, Peebles, Pocklington, South Shields and Whitburn.

19 THE PRESIDENT: Those are all towns that have a LAD in them?

20 MR. FLYNN: Those are towns where the divestment store in the hands of a LAD would have the
21 characteristics described in 6.43 – close to the acquired store, the store we proposed for
22 divestment.

23 THE PRESIDENT: You mean you say in terms of things like range and size, and ----

24 MR. FLYNN: Not range, because a LAD obviously has a different range, but in terms of size,
25 proximity, presence in the isochrone of another major retailer, those factors in 6.43(c) which
26 seem to make LADs where they are recorded as effective competitors would be present in
27 those isochrones if the divestment store were taken over by a LAD.

28 THE PRESIDENT: What are we supposed to do with this, Mr. Flynn? Are you expecting us now to
29 go into all the facts of this, at least to the extent necessary to satisfy ourselves whether or not
30 the conclusion was unreasonable? Do we now have to re-open, as it were, the stage 1 analysis?
31 Where do we start?

32 MR. FLYNN: No, you certainly do not have to open stage 1. The point is that the Commission
33 excluded them from the competitor set whereas it included others in the competitor set which
34 had equivalent competitive impact, as they accepted. That is our starting point, and that is in
35 the report. We have explained in detail why that is.

1 THE PRESIDENT: That is in relation to one other.

2 MR. FLYNN: No, it is not in relation to one other, Sir, with respect. It is in relation to all of them, if
3 you look at Appendix B, "Ladder B", or "Panel B", whatever it is called. It applies to both if
4 you take the impacts across the Somerfield and Kwik Save fascias.

5 THE PRESIDENT: And more to Kwik Save than to Somerfield?

6 MR. FLYNN: As it happens, yes. That is our starting point, that is our simple case. The rest is
7 really rebuttal of points which have been made to us.

8 THE PRESIDENT: Our starting point is to look at what is in the report itself ----

9 MR. FLYNN: Absolutely.

10 THE PRESIDENT: -- and see whether, internally within the report there is some kind of
11 inconsistency or illogicality.

12 MR. FLYNN: You see it graphically in those ladders, but there are other factors in the report which
13 go to the same conclusion.

14 THE PRESIDENT: And you have collected up for us all the various cross-references you want us to
15 look at?

16 MR. FLYNN: Yes, and you will see how we have dealt with that without re-opening everything, and
17 it certainly is not a question of going back to stage 1.

18 I did not understand, to be honest, the point that Mr. Swift was making about Kwik
19 Save. The impact of Kwik Save on Somerfield which was the point of one of the paragraphs
20 he read out is not relevant to the impact of the LADs on Somerfield and Kwik Save. He made
21 something of the supply side point. I think all I want to say on that is the Commission had full
22 details of Somerfield's intentions for the Kwik Save fascia and I do not think there is a point to
23 be made on that, but the essential issue is that the impact of Kwik Save on Somerfield or
24 vice-versa is not relevant to the impact of the LADs on Somerfield and Kwik Save.

25 The real point in this second ground, what flows from appendix B and accepted in the
26 report by the Commission, the LADs can be, and are, in certain circumstances at least as
27 effective competitors as others in the set. That is what the report says. What the Commission
28 has tried to do since is put forward various bits of other evidence which detract from that, and
29 we have discussed why we do not think that gets them anywhere. In particular they attempt to
30 use the NOP survey to show that there are differences between the LADs and other
31 competitors. We say they have not struck a valid difference there and that is the point, in
32 particular, of the RBB note which I handed up earlier – that is what that goes to. So we start
33 with the very simple point in relation to what is actually in the report and, as I say, the rest is
34 really rebuttal of what has come from the Defence.

1 THE PRESIDENT: Do we know whether the NOP survey actually covered any of the stores that we
2 are now thinking about, and whether it matters or not? It seems to have covered a couple of
3 them anyway.

4 MR. FLYNN: The NOP survey covered all the SLC locations and many others.

5 THE PRESIDENT: Including these?

6 MR. FLYNN: Yes, I think 50-odd were surveyed, but all of those with which we are concerned, yes.
7 I think, Sir, that is all I was going to say by way of reply, and I will not indulge in a coda
8 either. You know what I would say if I said it.

9 THE PRESIDENT: Good, thank you very much indeed. We will give judgment at a later date.
10 Thank you very much.

11 (The hearing concluded at 4.45 p.m.)