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IN THE COMPETITION APPEALS TRIBUNAL

Case No. 1006/2/1/01

Royal Courts of Justice
Belfast

Thursday, 23rd May, 2002

Before:

SIR CHRISTOPHER BELLAMY QC
(The President)

MR MICHAEL DAVEY
MR DAVID SUMMERS

(Sitting as a Tribunal in Northern Ireland)

B E T W E E N:

BETTERCARE GROUP LIMITED

Applicant

Supported by

**THE REGISTERED HOMES CONFEDERATION
OF NORTHERN IRELAND LIMITED**

BEDFORDSHIRE CARE GROUP

Interveners

and

THE DIRECTOR GENERAL OF FAIR TRADING

Respondent

MR JAMES FLYNN (instructed by Messrs L'Estrange & Brett)
appeared for the Applicant and the Interveners)

MR JON TURNER (instructed by The Director of Legal Services,
Office of Fair Trading)

Transcribed from the shorthand notes of
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PROCEEDINGS

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Thursday, 23rd May, 2002

10.10 am

1
2
3 THE PRESIDENT: Good morning everybody. The issue before the
4 tribunal today is whether or not the Director was right in the
5 contested decision to reject the complaint by Bettercare Ltd v
6 North & West Hospital Trust on the grounds that the activities
7 of an undertaking were not involved. That takes us into the
8 question of the meaning of "undertaking" in the particular
9 circumstances of this case.

10 We are grateful in particular to the Director for having
11 responded promptly to various questions that we have recently
12 asked. I think that material by way of background is helpful.
13 You, Mr Flynn, may not have had a great deal of time to consider
14 it but I hope you are not put in difficulties. If you are you
15 will no doubt tell us.

16 I think at this stage, unless we have any particular
17 questions before we start it is probably best to commence the
18 argument and to see where we get to - unless there are any
19 applications or observations anyone wants to make before we do
20 so?

21 MR FLYNN: Sir, no. We have no applications, it seems my friend
22 does not either.

23 THE PRESIDENT: Yes.

24 MR FLYNN: Indeed, we have obviously just received this.

25 THE PRESIDENT: Well if you want more time, Mr Flynn, you have only
26 to ask.

27 MR FLYNN: We have only one copy, and in so far as it becomes
28 relevant we may need to take further instructions.

29 THE PRESIDENT: Yes. The only other thing I should say is that we
30 would hope to get through in the day---

31 MR FLYNN: Indeed.

32 THE PRESIDENT: ---but if, for some reason, we do not then we do
33 not.

34 MR FLYNN: That is understood, Sir. Once again if I may say in
35 opening Bettercare is grateful to the tribunal for putting
36 itself to the trouble and inconvenience of coming to Belfast for
37 this issue which is of considerable importance to Bettercare.

38 THE PRESIDENT: It is no particular trouble or inconvenience, Mr

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1 Flynn.

2 MR FLYNN: Indeed, Sir, I do not think I will need the hour that
3 the tribunal indicated in its letter. I think probably the most
4 helpful course for the tribunal will be for me to indicate, as
5 it were, how we see the case and what we think should done, and
6 then submit to the tribunal's questions.

7 THE PRESIDENT: I think we would be glad if you would just alert us
8 to the principle passages in the case law - remind us of the
9 principle passages.

10 MR FLYNN: Indeed, Sir, I have noted that from the letter and I
11 fully intend to do that.

12 THE PRESIDENT: Yes, we will probably want to glance at them as we
13 go along.

14 MR FLYNN: Yes, and as we go along was precisely how I intended to
15 deal with it if I may.

16 THE PRESIDENT: Thank you.

17 MR FLYNN: If I may just take one minute to put the case in
18 context?

19 THE PRESIDENT: Yes.

20 MR FLYNN: I do not mean by this the economic and legal context,
21 but simply what has happened really in this case.

22 THE PRESIDENT: Yes.

23 MR FLYNN: From Bettercare's perspective the handling of the
24 complaint really took an unfortunate turn from the start in that
25 when Bettercare wrote to the Office of Fair Trading to complain
26 about the rates that it was being paid by North & West, the
27 OFT's position was "this is a complaint about local authorities,
28 and we have a view on this. We have a position. We have had lots
29 of complaints and we will set out the position to you".

30 THE PRESIDENT: Yes.

31 MR FLYNN: That position was one of principle, as the tribunal said
32 in its Judgment on the admissibility issue [para 62], the
33 principle being that local authorities in this activity are not
34 covered. That understanding was based on the OFT's understanding
35 of the applicable case law. They invited representations on that
36 law, on the legal issue, but the Office did not think that it
37 needed to gain any clearer view of the facts or to go into the
38 substance of the complaint, which is the logical position when

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1 you start from that point.

2 Now obviously the original Bettercare letter and the
3 L'Estrange & Brett letter - particularly the L'Estrange & Brett
4 letter 1 - do contain quite a deal of factual, regulatory,
5 legislative content, and it does offer to provide any
6 clarification that the Office might need. [para. 6.3 to that
7 letter] But the dialogue was essentially confined to the meaning
8 and effect of the EC case law.

9 The case in the application is that Bettercare had the
10 better of the exchange on that law. That is the point of
11 substance to which we will come in a moment. The tenor of the
12 decision if you like was: "I'm sorry we can't help because the
13 entity of which you are complaining is not an undertaking when
14 it is purchasing services" and the shutters come down at that
15 point. That was a definitive statement of position, and I know
16 it has been said on the other side that Bettercare could always
17 come back, but Bettercare had had three attempts at it by then -
18 two attempts by the time the letter that was defined as "the
19 complaint rejection" was given, and the third attempt, namely,
20 the second L'Estrange & Brett letter, was met with a very short
21 reply by the Office of Fair Trading in OFT3, which does not give
22 any further reasons or insight into why Bettercare's arguments
23 on case law have been rejected.

24 The result of all this is that the decision itself, the
25 scope of the application, and therefore the point before the
26 tribunal, which you have already encapsulated, Sir, is an
27 extremely narrow one. We are concerned only with whether or not
28 North & West is an undertaking in the relevant capacity. We are
29 not at all concerned with - we cannot get into, and certainly we
30 are not inviting the tribunal to get into - any issue to do with
31 dominance, abuse, defences such as Schedule 3 exclusions, or
32 whatever. We are concerned solely with the issue: could North &
33 West be an undertaking in the relevant capacity?

34 THE PRESIDENT: You might say, Mr Flynn, that the issue was even
35 narrower than that, namely, whether or not the Director could
36 correctly and legitimately decide that North & West were not an
37 undertaking on the material that he had before him at the time
38 of the decision?

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1 MR FLYNN: Yes, indeed, Sir, and I think we do say that - we do
2 that.

3 THE PRESIDENT: I think your essential case is that although the
4 Director took a point of principle you say it is more
5 complicated than that, and that had he gone into the facts, of
6 which we have now a sketchy background knowledge, he either
7 would have come to the conclusion that it is an undertaking, or
8 at least you cannot exclude the possibility on the facts as
9 investigated that it would turn out to be an undertaking.

10 MR FLYNN: Yes, that is absolutely correct.

11 THE PRESIDENT: Yes.

12 MR FLYNN: In those circumstances one then has to ask oneself what
13 is the tribunal's role?

14 THE PRESIDENT: Yes.

15 MR FLYNN: Which is something that has already been canvassed in
16 very general terms in previous hearings.

17 Bettercare's case - I think it is clear from the
18 application that the first task is to consider the validity of
19 the decision on that basis. If the decision is not right then it
20 must be struck down. We say by way of application that the
21 tribunal should then itself determine whether or not North &
22 West is an undertaking for these purposes. We fully recognise
23 that this is an option for the tribunal. It is not said that
24 that is what the tribunal must do. It is said that that is
25 something that the tribunal can do in the exercise of its powers
26 under the Act.

27 The alternative course is for the tribunal to overturn the
28 decision and remit it for further investigation of the facts by
29 the Director General, and that alternative is also in the
30 application.

31 We have always said that if the tribunal considers that it
32 needs further facts to make that determination then it has the
33 power to investigate. It has the power to call for evidence, and
34 it has the power to rule on the evidence.

35 THE PRESIDENT: I think we said in our interim Judgment that we are
36 a bit reluctant to go into the question of substance any further
37 than we needed to in order to verify whether the original
38 decision was right or not, rather than substituting ourselves

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1 for the Director on a point that he had not yet fully
2 investigated.

3 MR FLYNN: Sir, yes, and I think that is, as you said, your initial
4 view of your role.

5 THE PRESIDENT: Yes.

6 MR FLYNN: We can only say that that is not the only view that you
7 could take.

8 THE PRESIDENT: Yes.

9 MR FLYNN: You are a tribunal with wide powers and an alternative
10 is possible.

11 THE PRESIDENT: So you want us to decide it? That is your first
12 position?

13 MR FLYNN: That is the first position in the application. Should
14 you strike down the decision then you have the power to make a
15 decision which the Director could have made.

16 THE PRESIDENT: Yes.

17 MR FLYNN: And it is our submission that on the basis of the
18 information he had, he could have made the decision that we say
19 would have been a correct one.

20 THE PRESIDENT: Yes.

21 MR FLYNN: But we do submit that in so far as through whatever
22 process the tribunal comes to the view that, to use the phrase
23 in your interim Judgment that the Director was "insufficiently
24 informed", if you as it were close the gap in these proceedings
25 those facts should not, indeed we would say could not" be used
26 to cure the decision, to supplement the decision. If you find
27 further facts which lead you to a particular view then we say it
28 is appropriate in those circumstances to use those to make your
29 own decision on the point but not to, as it were, fill the gaps
30 in the Director's knowledge.

31 THE PRESIDENT: Is that not having your cake and eating it to some
32 extent?

33 MR FLYNN: I think we are both possibly guilty of a measure of
34 that.

35 THE PRESIDENT: Both parties have produced new "angles" - to use a
36 neutral word.

37 MR FLYNN: Yes, new angles have been produced from our side in an
38 attempt to respond to what has been said by Mr Barry, the

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1 Director and not with a view to saying that everything that is
2 in there is a matter of hot dispute which must be decided by the
3 tribunal, that is an issue for you and I do not - I think - push
4 the case to the extremes apprehended by my friend.

5 Sir, we submit that the first and main task is to look at
6 the decision itself which is for these purposes we say contained
7 in OFT1 and OFT2, and I think that is accepted.

8 You have to consider the correspondence as a whole
9 nevertheless to understand what is in that decision. The essence
10 of the decision, and I do not think I am caricaturing it, is
11 that local authorities such as North & West can be undertakings
12 - they are undertakings, it is not disputed - undertakings when
13 supplying care services in competition with the private sector,
14 but not when purchasing such services from the private sector.
15 Purchasing was characterised as a "State-like" function,
16 exercising public interest type of function.

17 The position taken by Bettercare in the correspondence,
18 again in essence - I do not think I am caricaturing it - is that
19 if the State had confined itself to pure provision of services
20 that might be a State-like activity, but once it entered into a
21 private relationship with the private sector, Bettercare, once
22 it traded with the private sector, it lost the protection of
23 State-like functions and entered the market, and it became an
24 undertaking. I think that way of putting the case, summarising
25 the positions, brings out quite an important aspect of the case
26 which I think needs to be kept in mind, which is of course the
27 complaint - the nub of the complaint - is about purchasing and
28 the rates and fees paid for what is purchased by North & West
29 from Bettercare.

30 But the basis on which the complaint was made was that
31 this was a competition problem because of the dual role of
32 North & West in direct provision and purchasing from the private
33 sector. Bettercare says in terms that if you had confined
34 yourself to pure provision we would not have considered that as
35 a market type activity. this dual role of North & West is
36 referred to in all the correspondence right from the beginning -
37 it is referred to in the Bettercare letter. In fourth paragraph
38 it refers to North & West both directly "providing and

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1 procuring". In each of the L'Estrange & Brett letters too:
2 L'Estrange & Brett letter 1 in paragraph 6.2 it says: "North &
3 West is empowered both to supply and to purchase." It also says
4 that North & West has created and manipulated the market in
5 nursing home care services.

6 The second L'Estrange & Brett letter says in paragraph 8:
7 "North & West as a monopsonist is acting independently of the
8 market in which it is operating. Its non-cost relating pricing
9 is creating a significant entry barrier in this market - the
10 provision of residential and nursing home care services".

11 When one comes to the decision, we submit that it clearly
12 recognises the dual role of North & West, but drives a wedge
13 between them. It treats the provision and the purchasing as
14 wholly distinct activities. It may be on analysis that this is
15 perhaps the key issue in the case. Was the Office right to draw
16 that distinction? We say it is artificial to focus on purchasing
17 just because that happened to be the substance of the complaint.
18 It is artificial to focus on the purchasing to the exclusion of
19 the rest of the factual matrix. We should not allow ourselves to
20 get confused by the fact that the terms of purchase are what lay
21 behind the complaint. That is the alleged abuse, but it is not
22 the only fact to be taken into account in determining whether
23 this public entity is acting as an undertaking.

24 Sir, I think at this point I need to deal with two
25 allegations - one from each side, as it were - about change of
26 position. The Director has said in correspondence that he
27 apprehends anyway that we are changing our case. Secondly, we
28 say as to this it appears in the defence that he is abandoning
29 an crucial part of the analysis in the decision. This is set out
30 in the skeletons and it is perhaps helpful if I summarise it.

31 The Director's allegation on a change of case comes about
32 because he states in the defence [para. 14] - he says it is the
33 only point and that is not a fair reading of the application -
34 that only substantive point in the application is that any
35 purchasing of services will be enough to confer the character of
36 an undertaking on that entity. In the reply Bettercare sought to
37 make clear that that was not its case that "any" purchasing, it
38 was purchasing in the relevant economic and legal context.

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1 Our submission is that that is clear on a fair reading of
2 the application, because as I have already sought to explain it
3 is this dual providing, purchasing role which led Bettercare to
4 the view that the Competition Act might apply - might apply I
5 say in the case of the Bettercare letter, and did apply in the
6 case of the letters from its solicitors, L'Estrange & Brett. The
7 opening Bettercare letter of course is framed as an inquiry -
8 quite a humble inquiry indeed. It says at the end: "I do not
9 know if this is a matter under the Competition Act. It is
10 definitely unfair but I would like to find out from you what
11 further information you might need if you think there is a basis
12 for the complaint." But that is the basis on which the complaint
13 was made. I shall come back to that point.

14 THE PRESIDENT: Yes.

15 MR FLYNN: The second point. As I say in our skeleton we note that
16 the Director is shifting his ground in that the decision
17 unambiguously proceeds on the basis that when it supplies care
18 services in competition with the private sector North & West
19 acts as an undertaking. Now, in the defence, and I have set out
20 the relevant passages in my skeleton, he takes a completely
21 different position.

22 It is at paragraphs 12 and 13 of my skeleton, and I quote
23 from paragraphs 11 and 15 of the defence. The relevant
24 quotations from the defence are:

25 "The activity of arranging for the provision of
26 residential and nursing home care for people in need and who act
27 means of their own is a typical activity of the State. It is an
28 aspect of the social welfare system and cannot be carried out by
29 a private undertaking for profit."

30 Then paragraph 15:

31 "Where North & West directly provides residential home
32 care to members of the public in need in its operational area
33 and who lack the means of their own, this is in the nature of
34 social assistance and not an economic activity".

35 Our submission on that is that it is not open to him to
36 take that position in defending the decision. If that is the
37 Director's view then he must withdraw the decision. Furthermore,
38 the defence does not defend the decision in the terms in which

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1 it is written. As I said, the principle argument in the
2 application is that the decision reaches conclusions for which
3 no support is found in the cases to which it refers.

4 The Office shortly sets out some of the tests in the
5 European Court case law to the effect that it is necessary to
6 consider the entirety of the activities being exercised, and
7 that one entity may be, as it were, both an undertaking and not
8 an undertaking. It may have economic functions and it may have
9 what they call public interest type functions.

10 Public interest type functions are defined by reference to
11 the case of *Diego Cali & Figli Srl v Servizi Ecologici Porto di*
12 *Genova Spa* (Case C-343/95) [1997] ECR I-1547 and *SAT*
13 *Fluggesellschaft mbH v Eurocontrol* (Case C-364/92 [1994] ECR I-
14 0043 on page 2 of OFT2 as "Activities not generally provided
15 on a commercial basis in competition with the private sector,
16 and which fulfil an exclusively social function."

17 It goes on to apply that principle, and you are familiar
18 with this, by concluding that "...purchasing of services for the
19 socially disadvantaged, using moneys raised by taxation, is a
20 typical function of the State".

21 Our submission, and it is the case made in the application
22 is that Bettercare was entirely right when it said that those
23 cases were distinguishable, they did not involve purchasing from
24 the private sector, they involved regulatory monopolies, and the
25 ability of those monopolies, those Regulators, to impose
26 compulsory charges for administering that regulation. Those
27 points are developed in the second L'Estrange & Brett letter and
28 rejected without any reasons in OFT3 and that, as I have said,
29 is when the shutters came down.

30 So the decision which the tribunal is looking at is one
31 which posits a distinction between providing and purchasing and
32 analyses them as completely separate activities without, we say,
33 providing any case law in support or other reasoning, it simply
34 reaches a conclusion and now in the defence and skeleton the
35 Director does not seek to defend that conclusion but takes a
36 different position which is that North & West is not an
37 undertaking when it purchases or when it provides.

38 MR DAVEY: I am sorry, Mr Flynn, could you say that again - I did

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1 not hear it.

2 MR FLYNN: I am sorry, Mr Davey. I will summarise that again. The
3 decision with which you are faced is one which is predicated on
4 a distinction between providing and purchasing and says that
5 they are to be treated completely differently - providing is an
6 economic activity, purchasing is not. We say that is not
7 supported by the cases on which they rely, they are
8 distinguishable for the reasons we have given. No other reasoning
9 is given or to be found in the decision.

10 Now we find in the defence that the Director is not
11 defending that decision, or that analysis of the applicable case
12 law. He is now taking a completely different position which is
13 that North & West is not an undertaking, not only when it
14 purchases, but also when it provides. In neither capacity is it
15 an undertaking. It is an aspect of the social welfare system.

16 THE PRESIDENT: Just to be clear on that, Mr Flynn, so that others
17 can correct me if I am wrong. As I have understood it North &
18 West has a number of statutory homes of its own and it also
19 purchases places, as it were, in Bettercare's two homes. You say
20 that in the decision it was indicated that North & West could be
21 an undertaking in so far as it was meeting with the private
22 sector in relation to its own statutory homes, that it was not
23 an undertaking when it was purchasing from Bettercare in
24 relation to the places provided by Bettercare.

25 What you say is that in the defence the Director has now
26 moved on from that position and is saying that neither when it
27 is purchasing from Bettercare nor when it is running its own
28 statutory homes is North & West an undertaking in the relevant
29 sense.

30 MR FLYNN: Yes.

31 THE PRESIDENT: Is that it?

32 MR FLYNN: That is it, except that I would put it more strongly
33 than indicating - I can go to the terms of the letter if needed.

34 THE PRESIDENT: Do not worry, we will re-read it, it may well have
35 been more explicit.

36 MR FLYNN: I think it is stronger than an indication. It is a view
37 that it has two main activities, one economic and one non-
38 economic - one State-like or public interest type.

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1 THE PRESIDENT: Yes.

2 MR FLYNN: Our submission is having got to that position that that
3 is enough for the decision to be set aside for the tribunal. It
4 is enough for Bettercare to show that the decision has been
5 made, and not withdrawn, is defective and wrong. It is not
6 necessary for Bettercare on that to be right about what the
7 decision should have said. We may never know what the decision
8 should have said, particularly if the tribunal stops its
9 analysis at that point. So it would not matter if it were
10 Bettercare's case that mere purchasing conferred status of
11 undertaking on the purchaser and the tribunal said "That's
12 nonsense". So long as Bettercare can show that the decision
13 itself is defective then it should succeed on its plea for
14 annulment.

15 THE PRESIDENT: That may be strictly true, but if it were the case
16 that there was an error in the decision but the Director had
17 drawn to our attention an alternative analysis in his defence
18 that was plainly correct in law and would be the analysis he
19 would adopt were the decision to be remitted to him, it would be
20 perhaps a bit unnecessary for us to remit the decision to him to
21 take a new decision, the content of which was blindingly
22 obvious. It might in those circumstances be appropriate for us
23 to take our own decision. We might say that the Director was
24 not quite right first time but he has got it right before us,
25 and that is enough. So long as it is sufficiently clear it does
26 not need any further investigation.

27 MR FLYNN: Yes, Sir, but by way of relief, I would say. I do not
28 think you can reach that position---

29 THE PRESIDENT: No, you might have to set aside the first decision,
30 at least partly - he had reached the right conclusion but for
31 the wrong reason, and this is the right reason, in support of
32 the right conclusion - is something the tribunal could say, I
33 would have thought, without sending it back.

34 MR FLYNN: Yes, I do not disagree with that. That is the way I am
35 putting my case. If the decision is wrong then it must be
36 overturned.

37 THE PRESIDENT: Yes.

38 MR FLYNN: That is Bettercare's first plea. Then what do you do

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1 with it? You may say on fuller analysis and based on the
2 arguments of law in the defence, which cannot be seen as
3 defending the decision but providing another rationale for
4 reaching an equivalent conclusion. That, I think, is a separate
5 point that is, as it were, by way of relief.

6 THE PRESIDENT: Yes.

7 MR FLYNN: In any case, as I have already mentioned this morning,
8 it is not Bettercare's case that mere purchasing confers
9 undertaking status on the purchaser. That would plainly lead to
10 absurd results and Bettercare disavows those results and that
11 analysis.

12 As I said, it would make anyone purchasing in a shop
13 potentially an undertaking at one end of the spectrum, and at
14 the other it would mean that any Government procurement - be it
15 for desks or accountancy services - would turn that Government
16 department into an undertaking, and that is not an analysis
17 which we urge upon the tribunal.

18 THE PRESIDENT: Maybe we will come to it later. That is an area I
19 think we would like to explore - the general question of when a
20 public Body is purchasing supplies whether it is books for
21 libraries, or surgical gloves for hospitals or police cars for
22 police services, what is the ambit of this Act, if any, in that
23 regard?

24 MR FLYNN: Sir, it is possibly a big issue but I do not have to go
25 as far - it is not our case - to say that if this is caught by
26 the Act then so must the purchase of a fleet of police cars or
27 desks.

28 THE PRESIDENT: Why do you not have to go that far?

29 MR FLYNN: Because the Home Office buying a desk is not then
30 selling it or leasing it to anyone else. It has been used, say,
31 within the Home Office.

32 MR DAVEY: Is it the dual role that you say North & West has in this
33 case which distinguishes the situation?

34 MR FLYNN: Essentially, sir, it is.

35 MR DAVEY: I am just trying to under the case. You are saying that
36 you are not urging this on the tribunal, that any purchase,
37 whether it be of accountancy services or legal services
38 possibly, would be caught and make the department purchasing it

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1 an undertaking. You are saying that if the department were
2 competing as well in the particular field that would necessarily
3 - or are you saying that?

4 MR FLYNN: Sir, yes.

5 MR DAVEY: To make it easier for you, Mr Flynn, in this particular
6 case, let us confine ourselves to this case, in this case it is
7 the fact that North & West is providing services as well as
8 purchasing them - providing them, you say, in competition with
9 the private sector and you say that is the distinguishing
10 feature?

11 MR FLYNN: Sir, yes. The way I put it in the skeleton is that it
12 is not purchasing for absorption by itself, for consumption by
13 itself, or use by itself. It is purchasing to provide. It is
14 purchasing to provide.

15 THE PRESIDENT: As I see it there are two senses in which there
16 could arguably exist a dual role. The first is in relation to
17 the residents that are in the Bettercare Homes, as I understand
18 it what is happening is that North & West is paying Bettercare
19 for the accommodation and is recovering at least part of the
20 costs of that accommodation from the residents. So it is in a
21 sense re-supplying accommodation to the residents. That is one
22 duality.

23 The other duality is that Bettercare has its homes, and
24 North & West has its other homes. There is a sense in which in
25 operating those other homes again on the same basis where North
26 & West is itself directly supplying the services to the
27 residents, and also in part recovering the cost of those
28 services from the residents, North & West I think according to
29 you - however, correct me if I am wrong - is to some extent at
30 least operating undertaking-like activities that are not in a
31 loose sense at least in competition with the Bettercare homes.

32 MR FLYNN: Yes, both those aspects.

33 THE PRESIDENT: There are those two aspects?

34 MR FLYNN: Yes. Those are the facts. It has separate homes, and it
35 purchases capacity or beds in Bettercare homes. In both cases it
36 is doing so to discharge its statutory duty of providing care.

37 THE PRESIDENT: If we go back to the straight purchasing situation
38 and presumably there are many respects in which this Trust and

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1 other hospital Trusts are purchasers of equipment and supplies
2 of all kinds, medical and otherwise, in relation not just to
3 their homes, but to their hospitals and all their other medical
4 services - let me put this question. I will put it on the table
5 so Mr Turner can think about it as well. When a hospital Trust
6 goes out to tender for the supply of, say, surgical gloves, is
7 it acting as an undertaking and if the tender documents say that
8 the winning tenderer will be the exclusive supplier of surgical
9 gloves to the Trust for 10 years, so there is an agreement of
10 exclusive supply, is in either of those cases the Trust acting
11 as an undertaking?

12 MR FLYNN: I think my initial reaction would be "no", but it is not
13 my case that it needs to be for our argument to ---

14 THE PRESIDENT: You may say you do not have to go so far.

15 MR FLYNN: Yes. I would say the exclusivity of the supply, or the
16 duration or the price in that sort of example, are functions of
17 the contract. Those are elements of the tender, elements of the
18 procurement and simply the terms on which that particular
19 purchase is being made.

20 THE PRESIDENT: Yes, if we take an agreement between a private
21 hospital and a supplier of medical equipment in which the
22 private hospital - BUPA or somebody - agreed to take its
23 supplies exclusively from one supplier for 10 years and that, on
24 ordinary principles of analysis, was to be regarded as an
25 agreement which restricted competition under the Act, does the
26 analysis differ in a case where a hospital on the other end of
27 the contract, is not a private hospital but a public hospital.
28 In other words, what I am seeking to explore is how far this Act
29 is going to reach various restrictive arrangements that could be
30 entered into in relation to purchasing, but are entered into by
31 public authorities rather than private authorities. You may want
32 to think about that and come back later on.

33 MR FLYNN: I may want to do that, Sir, and I may be rash in seeking
34 to answer it straight away, but again it seems to me that it is
35 relevant to know in the case of the public hospital whether it
36 is also offering the goods it purchases on the market. It is one
37 thing to buy surgical gloves for---

38 THE PRESIDENT: Yes, I suppose it might be a public hospital with

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1 private beds which would further complicate the situation.

2 MR FLYNN: Yes, which might well complicate the situation. That
3 might well complicate the situation but I certainly do submit
4 that I do not need to go so far as to establish that every
5 Government procurement makes it an undertaking when it purchases
6 under that contract. If they buy gloves, and also resell them
7 that is a very different situation from simply buying them. We
8 are in a situation here where it is evident, known by everyone
9 for what purpose these purchases were being made. It as
10 certainly not, as it were, for internal consumption by North &
11 West. It was not part of their retirement scheme for retired
12 loyal servants of North & West. It was to discharge the function
13 of providing services to the public.

14 As I have said, the decision on our analysis accepts that
15 supplying services is an economic function, and that is the
16 purpose for which the purchasing was being made.

17 THE PRESIDENT: Yes.

18 MR FLYNN: We say that was obvious to everyone, it was certainly on
19 the facts available to the Director General at the time. He must
20 have known. That is not, as it were, a new element. It might be
21 a new insight, a new way of looking at it but it is not a new
22 argument, or a new point. It is something that comes out of new
23 evidence.

24 THE PRESIDENT: We have probably got quite close to looking at some
25 cases, have we?

26 MR FLYNN: Precisely, I was going to do exactly that. I was going
27 on to say that while the Director may, however shortly, stated
28 the correct tests in the decision by reference to the *Höfner &*
29 *Elser v Macrotron GmbH* (Case C-41/90) [1991] ECR 1-1979 and to
30 *EC Commission v Italy* (Case 118/85) [1987] ECR 2599, he
31 certainly did not come to the right result or at least gave no
32 reasons for coming to that.

33 Sir, what I was proposing to do on the authorities was to
34 take that fairly shortly by reference to the two recent cases of
35 *Ambulanz Glöckner v Landkreis Südwestpfalz* (Case C-475/99)
36 [2002] 4 CMLR 21 and *Cisal di Battistello Venanzio & Co Sas v*
37 *Istituto Nazionale per L'Assicurazione contro Gli Infortuni Sul*
38 *Lavoro (Inail)* (Case C-218/00) [20002] 4 CMLR 24 that the

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1 Director refers to in the defence, as those seem to summarise
2 the point.

3 THE PRESIDENT: *Glöckner* and *Cisal*?

4 MR FLYNN: Yes.

5 THE PRESIDENT: Yes.

6 MR FLYNN: Mr Turner helpfully reminds me they are at 8 and 9 in
7 the second authorities' bundle, the one that has been provided
8 for the hearing.

9 THE PRESIDENT: I have them at 2 and 1A in mine. Right.

10 MR FLYNN: Sir, taking *Glöckner* first of all, and the Judgment
11 starting at paragraph 18, we say fairly summarises the cases
12 with some reference back. If one traces those quotations back
13 one will find them in *Höfner* and---

14 THE PRESIDENT: The Judgment at paragraph 18?

15 MR FLYNN: Yes.

16 THE PRESIDENT: 770 in the CMLR Reports.

17 MR FLYNN: I am afraid I am using a court report.

18 THE PRESIDENT: Yes.

19 MR FLYNN: At paragraph 18 the court addresses the question whether
20 these medical aid organisations are undertakings, which is the
21 relevant issue for us, and secondly it is going to ask the
22 question whether medical aid organisations hold special
23 exclusive rights.

24 THE PRESIDENT: Yes.

25 MR FLYNN: And that is an issue with which we are not concerned
26 today. Starting at paragraph 19, as regards the first of those
27 points, which is what is an undertaking, the court says:

28 "The concept of an undertaking, in the context of
29 competition law, covers any entity engaged in an economic
30 activity, regardless of the legal status of the entity or the
31 way in which it is financed."

32 And they refer to *Pavlov and Others v Stichting Pensioenfonds*
33 *Medische Specialisten* (C-180-184/98) [2001] 4 CMLR 1, and the
34 same quotation is to be found in *Höfner*. "Any activity
35 consisting in offering goods and services on a given market is
36 an economic activity.

37 "In the present case, medical aid organisations provide
38 services, for remuneration from users, on the market for

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1 *emergency transport services and patient transport services.*
2 *Such activities have not always been, and are not necessarily,*
3 *carried on by such organisations or by public authorities.*
4 *According to the document before the Court, in the past Ambulanz*
5 *Glöckner has itself provided those types of service. The*
6 *provision of such services therefore constitutes an economic*
7 *activity for the purposes of the application of the competition*
8 *rules laid down by the Treaty.*

9 *"Public service obligations may, of course, render the*
10 *services provided by a given medical aid organisation less*
11 *competitive than comparable services rendered by other operators*
12 *not bound by such obligations, but that fact cannot prevent the*
13 *activities in question from being regarded as economic*
14 *activities.*

15 *"As regards to the provision of emergency transport*
16 *services and patient transport services, entities such as the*
17 *medical aid organisations must therefore be treated as*
18 *undertakings within the meaning of the competition rules laid*
19 *down by the Treaty."*

20 To similar effect is Advocate General Jacobs.

21 THE PRESIDENT: Just before we go to him, if we jog back to
22 paragraph 19, the last sentence:

23 *"Any activity consisting in offering goods and services on*
24 *a given market is an economic activity".*

25 How do you define the "given market" in this particular
26 case? What is the market in which this economic activity is
27 being done?

28 MR FLYNN: In our case today?

29 THE PRESIDENT: Yes, our case.

30 MR FLYNN: The provision of nursing and residential care services.

31 THE PRESIDENT: To the elderly persons.

32 MR FLYNN: To the elderly persons, is the market that is defined in
33 the correspondence, and is the one that is claimed to be
34 affected. My point on the quotations from this case is that it
35 leads me to make the submissions that it is fairly clear when
36 providing the services North & West is acting as an undertaking.
37 It is providing, I accept that, that is a provision.

38 THE PRESIDENT: Are you saying that North & West is providing

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1 services to the residents in Bettercare's homes because North &
2 West is effectively recovering from those residents the cost?

3 MR FLYNN: Yes.

4 THE PRESIDENT: As well, of course, according to you as providing
5 services to residents in its own statutory homes?

6 MR FLYNN: Yes, two forms of service provision, two ways in which
7 it discharges its duty.

8 THE PRESIDENT: Yes.

9 MR FLYNN: I wanted to take the tribunal to the Advocate General's
10 Opinion because, as usual, that contains more elaborate
11 reasoning that both sides I think sought to draw from the case,
12 so it is important that we should look at it.

13 THE PRESIDENT: Yes.

14 MR FLYNN: The relevant passage of Mr Jacobs's Opinion starts at
15 paragraph 67.

16 THE PRESIDENT: In the bundle that we are looking at that is going
17 to be on page 743 - paragraph 67?

18 MR FLYNN: That is where he starts his analysis, but it is probably
19 sensible if I go back to where he starts this analysis which is
20 65.

21 *"Ambulanz Glöckner maintains that both the medical aid
22 organisations..."*

23 THE PRESIDENT: Yes, we can read it to ourselves, yes, we have that.

24 MR FLYNN: Then at 67 he again summarises case law and how this
25 concept is to be applied.

26 THE PRESIDENT: Yes.

27 MR FLYNN: And I do wish to draw the tribunal's attention to the
28 end of 67:

29 *"The basic test is whether the entity in question is
30 engaged in an activity which consists in offering goods and
31 services on a given market and which could, at least in
32 principle, be carried out by a private actor in order to make
33 profits."*

34 He then goes to look at what happens in non-emergency and
35 emergency transport services and comes to the conclusion which
36 the court endorsed, that since both had been in the past
37 provided by the private sector then it should be regarded as an
38 economic activity.

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1 He says at paragraph 69:

2 *"That conclusion is not affected by the legal status of*
3 *the medical aid organisations, it non-profit-making*
4 *associations, the method of financing their activities, or the*
5 *fact that they have been entrusted with tasks in the public*
6 *interest."*

7 In connection with the last two points he is echoed by the
8 Court. At 71 and following he has some observations about public
9 authorities as undertakings. At 72:

10 *"I consider that a differentiated approach is necessary.*
11 *It is settled case law that public bodies engaging in economic*
12 *activities may be regarded as undertakings. On the other hand,*
13 *activities in the exercise of official authority are sheltered*
14 *from the application of the competition rules."*

15 This is familiar language from the Decision, because the
16 case references which he gives in the footnotes there are to *EC*
17 *Commission v Italy, Höfner v Elser*, and the *Diego Cali* case.

18 *"Furthermore, the notion of "undertaking" is a relative*
19 *concept in the sense that a given entity might be regarded as an*
20 *undertaking for one part of its activities, while the rest fall*
21 *outside the competition rules.*

22 *"Where the public authorities operate the public ambulance*
23 *service themselves (as appears to have been the case in the town*
24 *of Trier) they are engaged in the economic activity "provision*
25 *of ambulance services". In those areas the authorities in*
26 *question must be viewed as undertakings within the meaning of*
27 *the competition rules."*

28 Then he goes on to say:

29 *"Where the authorities assign public ambulance service to*
30 *medical aid organisations, it is more difficult to classify the*
31 *nature of that assignment. It might be argued that the transfer*
32 *of responsibility for a given economic activity from one*
33 *(public) entity to another (private) entity must itself be*
34 *considered as an economic activity. Conversely it might be*
35 *argued that in such a situation an authority acts in its*
36 *capacity as public authority and therefore not as an*
37 *undertaking."*

38 Unfortunately he then says that he does not have to reach

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1 a conclusion on that issue because it was not raised directly by
2 the case.

3 Then there is a third role of the public authorities in
4 this case, which is the grant or refusal of authorisation, and
5 he says that that is classic public authority non-undertaking
6 type activity. It is a typical administrative decision taken in
7 the exercise of prerogatives, conferred by law, which are
8 usually reserved for public authority.

9 "I cannot see how that decision-making activity could be
10 assimilated to the offering of goods or services on given
11 markets."

12 THE PRESIDENT: Yes.

13 MR FLYNN: Sir, what I say about that analysis is that he is
14 dealing with situations on, I suppose, a market by market basis
15 - a town by town basis.

16 THE PRESIDENT: Yes.

17 MR FLYNN: Saying where they are providing they are undertakings,
18 where they get someone else to provide it in that case they
19 might not be undertakings, but they might be and I do not have
20 to decide. Where they simply authorise they are not
21 undertakings, and that last category I do not think concerns us.

22 THE PRESIDENT: No.

23 MR FLYNN: The distinction that I would draw is that here it is not
24 appropriate to draw that distinction between in one town they
25 provide, in another they choose not to. This is a mixed case, or
26 a dual case. They are providers, so while it would, perhaps,
27 have been helpful, at least agreeable for us if we had had a
28 clearer steer from Mr Jacobs on that, it is a distinguishable
29 case.

30 He goes on to look at a situation which might also be
31 considered relevant, in paragraph 77 where he says that *Ambulanz*
32 *Glöckner* tried to argue that the public authorities were
33 potential competitors in the market for ambulance services. He
34 says that that is not right, and basically Article 81 does not
35 apply to potential undertakings. So the fact that they might
36 have reserve powers does not turn them into undertakings. It is
37 really a question of they might become an undertaking if they
38 exercise the power but not if they simply have it but do not use

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1 it. You have to see what activities they are carrying out.
2 Again, in my view, that is a distinction from the present case
3 where the power, on our analysis, to act in the market is
4 exercised.

5 THE PRESIDENT: If we just jog back to paragraph 67 of the Advocate
6 General, to the last sentence where he again refers to the
7 activity of offering goods and services on a given market, and
8 then goes on:

9 *"...and which could, at least in principle, be carried out*
10 *by a private actor in order to make profits."*

11 I think one of the points the Director now makes is that
12 in this particular case the residents concerned cannot actually
13 afford to pay their own accommodation because they do not have
14 the means, and that no private actor could actually make profits
15 out of the activities that North & West is performing - it is
16 basically performing a function of last resort for social
17 reasons. I think we would be interested to know your response to
18 that particular line of argument.

19 MR FLYNN: Sir, I think our response is that that draws a
20 distinction in the market which is not to be found in the case
21 law. The case law is look at the activity - provision of
22 ambulance services, pollution certificates in harbours, air
23 traffic control, and ask yourself whether that, in principle,
24 can be carried on by someone who is in it for the money.

25 THE PRESIDENT: You are saying one of the questions might become how
26 we actually define the activity for the purposes of applying
27 principles set out by the Advocate General. In other words, I
28 think you are saying that the activity here is the supply of
29 residential care services and inputting the supply of
30 residential care services - there are residential care services
31 up and down Northern Ireland as there throughout the United
32 Kingdom, and I suspect the Director is saying that the sale of
33 the activity here is the supply of residential care services to
34 those who cannot afford it, which no private actor could
35 actually supply it because by definition the customers cannot
36 afford it.

37 MR FLYNN: It may depend on what "cannot afford" means.

38 THE PRESIDENT: Yes.

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1 MR FLYNN: Obviously there are plenty of private actors providing
2 things which you and I cannot afford never mind those classified
3 in this sort of case as "socially disadvantaged". It is not
4 contested that the residents in these homes make a contribution,
5 yet at any rate, for the care they receive, and the principle in
6 the Statute as set out in Mr Barry's witness statement, is the
7 principle is payment in full. The Body provides the care and
8 seeks to recoup what it can. I think that must be different from
9 the situation - this is not the workhouse, this is not people
10 who have nothing and nowhere else to go. These are people with
11 resources. They may be extremely modest resources, but
12 nevertheless a payment is made. I do not think it can be said as
13 simply as no one in principle can carry out this activity for
14 profit.

15 THE PRESIDENT: Yes, but it may take us more deeply into the facts
16 that we would wish to go, I do not know. But I am simply raising
17 points as we go along so that we can help the argument so the
18 Director can understand the various points.

19 If you go back to paragraph 12 of your skeleton argument,
20 Mr Flynn, where you are quoting the defence, you quote the
21 Director's position set out in the defence, which refers to the
22 activities - back to the activity again.

23 MR FLYNN: Yes.

24 THE PRESIDENT: "Arranging the provision of residential and nursing
25 home care...", and I think that is where you stop as you define
26 the activity, but the Director goes on: "...for people in need
27 and who lack means of their own".

28 MR FLYNN: Yes.

29 THE PRESIDENT: Now, it may be, and I just make this comment in
30 passing, Mr Turner, so you can deal with it if you wish, that
31 there are two ideas there: 1) people in need; and 2) people who
32 lack means, that is to say one could imagine an elderly person
33 who had no immediate family or other carer but who had
34 resources, who is therefore in need of being in a home of some
35 kind for whom residential and nursing home care could be
36 provided, as I understand it either by a Trust in Northern
37 Ireland, or by a private home. But they have resources----

38 MR FLYNN: Or I suppose there is also the category of voluntary

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1 homes - something falling somewhere between the two.

2 THE PRESIDENT: Voluntary homes. Then you have a second category of
3 people who are both in need, because they have no one to look
4 after them, and have no means - or insufficient means - to do
5 what? I suppose to afford the charges of a private home, I
6 suppose that is the idea, and for those people it is true there
7 may be charitable homes they could go to - I suppose that is the
8 voluntary home.

9 MR FLYNN: As I understand it, Sir---

10 THE PRESIDENT: There may be charitable homes, but I think North &
11 West's argument is that, at least to some extent - or perhaps
12 mainly - they are actually catering for people for whom the
13 private sector is not accessible. We are doing that as a public
14 authority, performing a social need in the interests of
15 solidarity in the State and so forth, and that activity is not
16 an economic activity.

17 MR FLYNN: Sir, yes, but I think at that stage one gets into what
18 in the EC case law is the Article 86(1) and (2) point.

19 THE PRESIDENT: Services of general economic interest.

20 MR FLYNN: As the court has said, the public service obligations
21 imposed on people may make them much less competitive. They may
22 need all sorts of protections from the competition rules, that
23 is not the point we are on, as it were. We are on the point
24 where there are an undertaking. I do not think it can be said
25 that this activity cannot be provided for profit.

26 THE PRESIDENT: Yes, well no doubt we will come back to that.

27 MR DAVEY: Mr Flynn, are you saying that we are dealing with a
28 narrow point, that is to say whether or not North & West is an
29 undertaking for the purpose of this hearing, and all this
30 business about solidarity, and people in need and so on, is a
31 point which should be dealt with once we have got past the
32 undertaking stage, that that would come to be considered. If
33 they are saying this is a market of last resort, are you saying
34 that that should be considered at the dominance and abuse stage,
35 the substantive stage of the whole thing---

36 MR FLYNN: Sir, yes.

37 MR DAVEY: ---and not in relation to this rather narrower issue. You
38 are saying the only test is whether or not they are carrying on

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1 an economic activity.
2 MR FLYNN: Which in principle could be carried on for profit.
3 MR DAVEY: Which in principle could be carried on for profit, and
4 all this talk about solidarity is for another day? Is that what
5 you are saying?
6 MR FLYNN: Sir, it is.
7 MR DAVEY: You are not saying it is totally irrelevant?
8 MR FLYNN: Not at all.
9 MR DAVEY: It is for another day.
10 MR FLYNN: It is for another day. It is territory which, as I said
11 at the outset simply was not explored in these proceedings
12 because it was taken as a point of principle.
13 THE PRESIDENT: The solidarity point, just to pursue Mr Davey's
14 question for a moment, it is important to try to make an effort
15 to identify in which legal pigeonhole each of these belongs.
16 Does what could be loosely described as the solidarity point
17 belong to the analysis of whether this Body is an undertaking,
18 or does it belong to the question of whether the Body is, for
19 example, abusing the dominant position? Is it a question of
20 abuse, or is it a question of definition of the undertaking?
21 MR FLYNN: Sir, I think if you look at the Social Security
22 affiliation cases the answer must be that solidarity goes to
23 undertaking, it goes to whether it is public interest type
24 functions.
25 THE PRESIDENT: Right.
26 MR FLYNN: The use of the solidarity point in those cases is, I
27 think, look at what they are doing, the way the scheme is set up
28 - no insurance company could operate on that basis, either
29 because it would not make a profit or because nobody would
30 contribute to it.
31 THE PRESIDENT: Yes.
32 MR FLYNN: I think those monopoly cases, because such schemes have
33 to have an element of compulsion in them because otherwise
34 people will not join. Such schemes are, I think, different from
35 the case here where a supply of care services to people of a
36 kind which can clearly be provided for profit, for gain, by
37 commercial undertakings - the proof of the pudding is all around
38 that is so.

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1 The distinction comes, I think, as you said the way the
2 Director puts it is to say "I carve out at the bottom some
3 people who cannot afford that system at all". So that is where
4 it becomes perhaps artificial when it is not something which is
5 either compulsory or provided for free, but which is provided
6 against a contribution from the resident, and the Trust is at
7 the market - it may only be at one end of the market. It may be
8 to address gaps, or to perform public service obligations or
9 statutory duties but that has not stopped the Court of Justice
10 characterising Bodies as undertakings in the past.
11 THE PRESIDENT: Do you say there is no particular reason in
12 principle why you should exclude the possibility that a hospital
13 Trust running a statutory home could do that on a commercial
14 basis of some kind, on the basis of such recoveries as it is
15 able to make from its residents by the benefits it takes for
16 those residents that have pensions or other resources, by
17 charging them fees.
18 MR FLYNN: Sir, yes, and who knows---
19 THE PRESIDENT: Correct me if I am wrong, but I think the idea in
20 some of the documents that we have seen is that the Trust should
21 really try to recover as much as possible from the residents?
22 MR FLYNN: Well that is the basic principle.
23 THE PRESIDENT: And that may enable it to wash its face, and there
24 is no reason why that should not be regarded as an economic
25 activity within the meaning of the case law.
26 MR FLYNN: Yes, this may also be going further into the facts than
27 you want, and it may be a generalisation.
28 THE PRESIDENT: There is no reason in principle to exclude it at
29 this stage?
30 MR FLYNN: No, there is certainly no analysis which drives one to
31 that conclusion. As a generalisation why were the Trusts set up
32 in the first place?
33 THE PRESIDENT: Yes.
34 MR FLYNN: They were set up to be contracting Bodies to have a more
35 direct relationship with provision we would say to get further
36 into the market and to move out of a National Health monolith.
37 THE PRESIDENT: To move further back into a more commercial
38 environment you say?

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1 MR FLYNN: Yes, it is a mixed economy environment.

2 THE PRESIDENT: Very well. Is it *Cisal* we want to go to?

3 MR FLYNN: I think we may have covered some of the *Cisal* points. I
4 have made the points on the compulsory affiliation schemes that
5 I think I wanted to do at this stage, and Advocate General
6 Jacobs again goes through the list of factors which do not
7 count, as it were, in his balance sheet of determining whether
8 or not a particular entity is an undertaking.

9 He said he found *Cisal* a particularly difficult case, a
10 borderline case, one where the Italian Competition Authority had
11 taken a different view as is recorded. I suppose one could say
12 that there are some fairly strange animals that have been held
13 to be undertakings for the purposes of the competition rules.

14 THE PRESIDENT: Yes.

15 MR FLYNN: The agency in *Höfner* is perhaps one of them. A strange
16 animal to be held to be an undertaking but an undertaking
17 nevertheless.

18 I am coming to the end, I am conscious this has been---

19 THE PRESIDENT: Well I have been interrupting you----

20 MR FLYNN: ---this has been lengthy, I only had seven pages of
21 notes and I am on the last one, that will be short.

22 THE PRESIDENT: Yes.

23 MR FLYNN: The essence of the case is why, if provision is in the
24 market as we say the OFT have accepted it, why in this case
25 should purchasing be different? Why did the Office treat it
26 differently? It does not give any answers, and we say that
27 purchasing is for provision and there is not an answer actually,
28 it is part of the activity.

29 Sir, I do not know if I need to go further into matters at
30 this point. The area that has been opened up in the defence and
31 which is not an agreed matter as between us, is the ability of
32 North & West and similar Trusts to set, negotiate, the rates
33 that it pays when purchasing from the private sector providers.

34 I shall not go into that in detail, but it is clear now
35 from the second statement of Mr Barry that in some areas they
36 depart from what we say is guidance, and has always been
37 presented to us as guidance for one particular category he
38 mentions - learning disability. I should say that the people in

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1 that category are elderly people in Bettercare homes if I can
2 put it that way, using "elderly" in a non-technical sense,
3 meaning at the upper end of the age range, rather than the
4 catch-all category that it seems to be used in describing the
5 sort of residents one finds in the home. I think it is right to
6 say that all the residents in the Bettercare homes are at the
7 upper end of the age range. Some of them may not have reached
8 retirement age but they are, nevertheless, going down rather
9 than going up if I can put it that way. "Learning disability"
10 for these purposes is a category of older person. These are
11 people in Bettercare homes. We say they have discretion in that
12 area, and we say they have discretion in other areas too. They
13 may not agree very often or at all to increase the rates.

14 THE PRESIDENT: Again, we have a factual issue here that is not
15 completely resolved at the moment, but it is probably useful at
16 some point, Mr Flynn, to glance at some of the documents that
17 the Director at our request only very recently produced,
18 including some letters from EHSSB to North & West, which say
19 things like: "The attached prices should be applied to
20 independent sector homes from 1st April, 2001." That is the sort
21 of language that you associate with a direction.

22 Suppose for argument's sake, the EHSSB has the power to
23 direct North & West as to the prices it can offer to the
24 independent sector homes, on that assumption what effect does
25 that have on the argument as to whether or not North & West is
26 an undertaking? Does it mean it is not an undertaking? Does it
27 mean that it is not an abuse? Does it mean that it is subject to
28 some compulsion that takes it outside the Act for another
29 reason, or what?

30 MR FLYNN: As I think I said in the skeleton, we do not think it
31 is enough to take it away from the category of "undertaking".
32 It may well be a defence. We think it goes to abuse essentially,
33 because it goes to one of the issues that we are not able to
34 deal with.

35 THE PRESIDENT: Would you go so far as to submit that EHSSB [Eastern
36 Health & Social Services Board] itself could be an undertaking
37 when setting the prices at which North & West contracts with
38 independent providers? Do you want to think about that?

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1 MR FLYNN: I do not want to make a submission on that, Sir.
2 Certainly it is not part of our case. Again, as with any public
3 entity it would be necessary to look at the activities it was
4 carrying out. Our position, as you know, is whatever power of
5 direction it may have what it gives is guidance from which
6 Trusts do, on occasion, all be it rare, depart. They may well
7 have constrained budgets but that is not a relevant factor for
8 defining what an undertaking is either - anyone could have a
9 constrained budget, they may not often agree to individual
10 rates, b ut nothing that we have seen so far says that they
11 cannot.
12 Sir, perhaps that is enough for the moment.

13 THE PRESIDENT: Thank you.

14 MR FLYNN: On the material that has been put before you this
15 morning, perhaps I should see what Mr Turner wishes to make of
16 that and the reply.

17 THE PRESIDENT: Yes, you will have time, I think. Thank you.

18 MR TURNER: May it please the tribunal. I should wish to address
19 the tribunal and to organise my argument under three main topics
20 for convenience.
21 The first, particularly in the light of Mr Flynn's
22 approach, is to return to the administrative procedure before
23 the Director General and to look at the facts and submissions
24 that were presented to him, and thereby to understand the nature
25 and basis of the Director General's decision.
26 The second topic would be in the nature of brief comments
27 on the administrative and regulatory framework which has been to
28 some extent clarified during the appeal procedure, and in that
29 context, if it should please the tribunal, I would propose to
30 deal with questions that have been raised by the tribunal
31 recently, and to take in the autonomy issue.
32 Finally, I shall deal with an analysis of Bettercare's
33 case, as that has appeared in the skeleton argument and in oral
34 argument, and also touch on procedural aspects, institutional
35 aspects of this case relating in particular to the development
36 in Bettercare's case, as we see it the consequences that flow
37 from that, and the relief that has been sought by Bettercare
38 from the tribunal.

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1 I begin then with the administrative procedure before the
2 Director General, and would recall that as we pointed out in the
3 skeleton at paragraph 8.1 of the Notice of Application,
4 Bettercare specifically says that it relies for the substance of
5 the application to this tribunal on the correspondence. That was
6 at paragraph 2 of the skeleton. I would invite the tribunal to
7 turn up that correspondence so that I can draw to your attention
8 particular paragraphs which are deserving of emphasis.

9 THE PRESIDENT: The original correspondence.

10 MR TURNER: Of the original correspondence.

11 THE PRESIDENT: Annex 1 to the original application?

12 MR TURNER: It is annex 1 to the original application.

13 THE PRESIDENT: File number 1, it starts with the original
14 application and annex 1 to that.

15 MR TURNER: Perhaps I should preface the survey of that material
16 with an important remark which is that in the tribunal's
17 consideration of the way that the Director General approached
18 this, in our submission it is not appropriate to treat this in
19 the same way as if it were an infringement decision in which
20 penalties, for example, have been imposed upon the party at all.
21 One cannot expect the same level of detail or consideration as
22 would arise in those different circumstances. This must be
23 viewed for what it was, namely, a response to a complaint and to
24 the facts and matters that have been presented by a complainant.

25 THE PRESIDENT: Yes.

26 MR TURNER: With that remark I would ask the tribunal just to have
27 before them the first letter from Bettercare. The tribunal will,
28 of course, be very familiar with these letters by now. Just to
29 draw to the tribunal's attention a number of points that were
30 made in that letter.

31 In the fourth paragraph down---

32 THE PRESIDENT: This is 23rd November letter?

33 MR TURNER: This is 23rd November letter from Mr Caldwell, the
34 managing director.

35 "My inquiry is not in connection with the Trust's
36 statutory duty to provide care. It is rather in connection with
37 how this role is discharged when purchasing care from my
38 company."

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1 THE PRESIDENT: Yes.

2 MR TURNER: So that immediately one sees that he had set up a
3 disjunction between provision and purchasing. He then goes on to
4 describe the essential factual matrix, and in particular says at
5 the bottom of that page:

6 "The location of the centres is an area of severe social
7 depravation and where approximately 99 per cent. of all care
8 provided is to means tested, publicly funded individuals
9 assessed as requiring these services."

10 One has immediately set up also the specific circumstances
11 of this case which involve people who do not have the financial
12 means of their own to arrange for their care.

13 Turning the page and this relates to what becomes later
14 the autonomy issue, four paragraphs up from the end - the
15 paragraph beginning "I have sought meetings regularly to discuss
16 this issue..." continues:

17 "...the Trust Chief Executive refuses to meet with me, and
18 when I have met with those who he has designated they have
19 stated that they are not in a position to negotiate or vary the
20 contract on either price or service."

21 Later that becomes an allegation of stiff necked behaviour
22 on the part of the Trust. I would draw to the tribunal's
23 attention the way in which it is put here, which in my
24 submission is likely to have been entirely accurate as things
25 stand, that they have said that they are not in a position to
26 negotiate or vary the contract on either price or service, and
27 that the reason for that is that it is not within their gift.

28 The response from the Director General on 29th November, I
29 would ask the tribunal to turn up next.

30 THE PRESIDENT: Yes.

31 MR TURNER: Looking at the first full paragraph on the first page,
32 the Office says that it would be helpful if they were to set out
33 the facts about local authorities' general role in the care
34 sector as they understand them.

35 "As you are aware local authorities are obliged, usually
36 by statute, to purchase certain services, for example
37 residential care, etc. and collectively social care for the
38 disadvantaged in society. The purchase of social care is

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1 regarded as necessary because the market fails to satisfy the
2 housing needs of the entire population."

3 I confess the use of the word "housing" is perhaps
4 infelicitous in this context. But the essential point that was
5 sought to be made by the Director General, by the Office at this
6 stage is that this is not a market, this is a situation in which
7 there is a gap in the market, an instance of market failure as a
8 general proposition.

9 THE PRESIDENT: In fact, general knowledge suggests that in that
10 particular sentence one is actually lumping in together a number
11 of different activities that are not necessarily related one
12 from the other. The kind of bed and breakfast accommodation
13 that London Boroughs have to purchase for immigrant families is
14 not necessarily the same as running residential homes in
15 Northern Ireland. We may have to look at different factual
16 situations.

17 MR TURNER: That is accepted. At this stage the Office was seeking
18 to make a general a general point in response to the way in
19 which the initial letter of complaint had been framed.

20 THE PRESIDENT: Yes.

21 MR TURNER: That where one is providing to the disadvantaged in
22 society the market has failed to satisfy a need, and the State
23 is stepping into the breach. That was intended as helpful
24 guidance in response to the initial letter of complaint, and it
25 really captures the essence of a very important point that has
26 remained at the forefront of this case all the way until today.

27 Turning the page, the Office of Fair Trading quote from
28 *Höfner & Elser* and make the point clearly a local authority can
29 act as an undertaking when it is engaging in an economic
30 activity but - and rightly in my submission - draw a distinction
31 between such a case and the exercise of the public interest type
32 functions.

33 The Office then goes on to say:

34 "On the basis of the facts set out above, we take the view
35 that local authorities are not undertakings for the purpose of
36 the prohibitions to the extent that they are purchasing social
37 care for the disadvantaged in society using moneys raised by
38 taxation. We consider that the activities of a local authority

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1 acting as the purchaser of social care of last resort in an area
2 of zero or less than full economic value, are not the activities
3 of an undertaking engaging in economic activity. In this context
4 the role of Government is to correct market failure, and so
5 inevitably local authority spending will affect markets and
6 raise competition issues of a general policy nature. However,
7 such spending does not raise legal issues under the Act, so the
8 Director has no power to intervene."

9 Pausing there, the approach of the Office of Fair Trading
10 is specifically to refer to here an area of zero or less than
11 full economic value, and is responsive to the situation that has
12 been raised by Mr Caldwell.

13 The Office points out that again this is a correction of
14 market failure in such a situation, and that admittedly such
15 spending may affect private undertakings in markets, but that is
16 not a matter for the Competition Act.

17 THE PRESIDENT: Just pausing there, Mr Turner, there are a number of
18 factual assumptions in that passage you have just read to us,
19 namely that local authorities are using moneys raised by
20 taxation to purchase social care, that they are acting a
21 purchaser of last resort in an area of zero or less than full
22 economic value.

23 MR TURNER: The second of those - in an area of zero or less than
24 full economic value - is responsive to the point that has been
25 made in the original letter---

26 THE PRESIDENT: Yes.

27 MR TURNER: ---describing this as an area of severe social
28 deprivation.

29 THE PRESIDENT: You could imagine - it may be as you rightly say
30 this is in response to the original letter that referred to
31 "...means tested, publicly funded individuals assessed as
32 requiring these services". The assumption is that the Trust in
33 the operation of its homes, or in the operation of the homes it
34 is purchasing from Bettercare is not able to recover the cost of
35 the residential provision from the residents, i.e. they do not
36 have in their state benefits or private pensions or other
37 resources, enough to cover the cost of their accommodation. That
38 is the assumption, is it not?

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1 MR TURNER: And indeed, it is inherent in the problem given that
2 the complaint is that the State is not paying enough to
3 supplement, to make it worthwhile for Bettercare to continue
4 profitably in business.

5 THE PRESIDENT: And you say if the Trust was able to recover from
6 the residents what it was paying Bettercare then it would be
7 able to pay Bettercare a bit more, as it were.

8 MR TURNER: That may be so.

9 THE PRESIDENT: If there was a balance, i.e. you are saying it is
10 implicit in the situation that what the Trust is able to recover
11 from the residents is less than what it is paying Bettercare?

12 MR TURNER: Precisely, Sir, and I will come later in the argument
13 to that point because it became an issue in Mr Flynn's address,
14 but we say that is actually a critical distinction, that where
15 one is, as it were, outlay without payback, one is in the area
16 of filling in a gap in the market rather than operating in a
17 market.

18 THE PRESIDENT: Just a minute, I am just writing this down. [Pause]
19 Yes?

20 MR TURNER: That is not something that a private undertaking could
21 conceivably carry on for profit, and it is typical activity of
22 the State.

23 Sir, to conclude in this letter, which was a response to
24 the initial approach, the Office of Fair Trading directed
25 Bettercare to a number of other avenues that may be more
26 suitable for it to pursue its complaint, including central
27 Government departments, and politicians.

28 However, they then conclude the letter by saying that they
29 should be:

30 "...happy to receive detailed legal representations on our
31 preliminary view should you think that we have adopted the wrong
32 approach or misunderstood the situation".

33 In my submission, as will become clear in a moment, it is
34 far too narrow to say that the Office of Fair Trading had at
35 this stage ruled out any interest in the further factual
36 situation in the area at all. One needs to bear in mind the
37 context in which this letter was written. Reading it fairly the
38 Office of Fair Trading is saying "That is our initial response

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1 to what you have said, please make detailed representations".

2 THE PRESIDENT: Yes.

3 MR TURNER: Bettercare then proceeds to do so in the detailed
4 letter from their solicitors, L'Estrange & Brett, of 21st June.
5 If the tribunal would now refer to that.

6 THE PRESIDENT: Yes.

7 MR TURNER: In section 2 of that letter the solicitors set out in
8 impressive detail the essential constitutional functions and
9 powers of North & West and perhaps, although it has not featured
10 strongly in oral argument today, I should draw the tribunal's
11 attention to paragraph 2.5---

12 THE PRESIDENT: Yes.

13 MR TURNER: ---which is then picked up and relied upon in the
14 notice of application. This refers to a number of powers of the
15 trust which are subsequently taken as indicating that it carries
16 on an economic activity in the circumstances of this case.

17 Picking this up in particular four lines up from the
18 bottom of the page, it reads:

19 "Also an HSS Trust is granted under Schedule 3 [1991
20 Order] the powers specified in Article 3(2) of the 1998 Order
21 for the purposes of making additional income available in order
22 to better perform its functions. These include the power to
23 acquire, produce, manufacture and supply goods, to acquire land
24 by agreement, and manage and deal with land, to supply
25 accommodation to any person, to supply services to any person
26 and to provide new services and to do anything which appears to
27 the Department to be calculated to facilitate or to be conducive
28 or incidental to the exercise of any power conferred on the
29 Trust".

30 I should say this has only been recently pointed out to me
31 as a result of the helpful researches of Miss Charlton of the
32 Office. The tribunal ought to be aware that our case on this is
33 really as follows:

34 First, that it is irrelevant in any event on the facts
35 because the Trust, in the activity which is in issue in these
36 proceedings is not doing any of these things, and one needs to
37 focus on the specific activity. However, there are two further
38 points of law which arise when one looks at the legislation

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1 carefully, as I confess I should have done some time ago. The
2 first is that these provisions do not apply to personal social
3 services anyway, and the second legal point is that in any event
4 in order to do any of these things it appears that a direction
5 by the Minister is required. Should the tribunal wish I can take
6 you quickly to the relevant passages.

7 THE PRESIDENT: Well I think it probably better if you simply write
8 down on a piece of paper the relevant statutory provision, agree
9 it with Mr Flynn and give it to us on a piece of paper.

10 MR TURNER: Yes. Moving on then, at paragraph 2.8, the conclusion
11 is drawn:

12 "To summarise, the above statutory powers granted to
13 North & West it is evident that this statutory body was
14 established to be an economic entity in that it was empowered to
15 engage in economic activities, enter into contracts, raise
16 finances by trading, albeit efficiently, and in a manner which
17 certainly contained a public interest element to it, but
18 trading, and carrying on an economic activity nevertheless."

19 So that is the first way in which the case has been put
20 and which travels through into the notice of application, that
21 as a result of the powers one is dealing with an animal which is
22 an economic entity and I have made shortly my submissions on
23 that.

24 Paragraph 3.1 the point is made in the second sentence,
25 which then became clear only in the appeal procedure as to what
26 was precisely going on, but formally North & West supplied these
27 services itself, namely nursing home services, but has gradually
28 stopped the provision of these services and has decided to
29 purchase these services from the private sector.

30 So one had there, had one not appreciated at the outset
31 that there were two sorts of care being provided, possibly a
32 reference to the fact that North & West was probably no longer a
33 provider of care, although it did not, in the event, form any
34 part of the Director General's decision to make a finding on
35 that basis.

36 At 3.3 is the entirety of the end of the submissions. "It
37 is our contention that for the reasons outlined above, arising
38 from the constitution, function and powers of North & West, and

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1 having regard to the following principles, North & West is an
2 undertaking." So that is the way that the case is put there.

3 From that I can then move straight to what has become, as
4 a result of the tribunal's decision at the admissibility stage,
5 the Director's decision in the case, the letter of 25th July,
6 2001, and it is important for the tribunal to look at that to
7 see the nature of the decision that was made.

8 THE PRESIDENT: Yes.

9 MR TURNER: First, the Director recites that they have considered
10 the matters that have been raised, and then responds. At the
11 end of the page in the last full paragraph, the Office notes:

12 "As you note in your letter North & West appears to have
13 two principal activities, as a purchaser of social care services
14 for persons in need, using moneys raised by taxation, and as a
15 supplier of social care services in competition with the
16 voluntary and private sector."

17 So that what the Office is doing there is essentially
18 agreeing with Bettercare that there are two activities in play
19 but forming the view which is still adhered to that those
20 activities can properly be distinguished and treated separately,
21 and that the right one to focus on for the purpose of the
22 decision is the activity of purchasing from the private sector.

23 THE PRESIDENT: Does it follow from the way the case has been
24 developed that in your submission neither of these activities is
25 in fact an economic activity?

26 MR TURNER: Yes, it does.

27 THE PRESIDENT: Because they are both filling a social gap that
28 could not be filled by anybody else?

29 MR TURNER: Yes, it does, Sir.

30 THE PRESIDENT: On the facts of this case, as far as we know them?

31 MR TURNER: And that is a very important qualification, with
32 respect - on the facts of this case so far as we know them,
33 because if one focuses on precisely how the Office did deal with
34 provision in this letter, looking at the second page, and the
35 first full paragraph, what they actually said was:

36 "Looking at local authorities including healthcare Trusts
37 such as North & West our current view is that they can act as
38 an undertaking when they are engaging in economic activities

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1 such as supplying residential accommodation in competition with
2 private sector care homes, but they would not appear to be when
3 they are exercising their public interest type functions.." and
4 then it continues.

5 Now, this is important because what the Office is saying
6 is that they can act as an undertaking when they are engaging in
7 activities of provision such as supplying accommodation in
8 competition with private sector care homes. That is not a matter
9 which was the focus or basis of the actual decision, but was a
10 statement of, as it were, principle.

11 In the case, for example, of private residents who did
12 meet the full cost of their care, it may be in such an area and
13 in certain circumstances, that one likes saying that the Trust
14 was carrying on an economic activity, providing services to
15 people in need in competition with private bodies who were doing
16 the same thing. To pick up the President's example of a
17 circumstance where there may be a prosperous area, different
18 from this, where there are lots of people well able to afford
19 their own care but who are in need in the sense that they
20 require, in social terms, the services that can be provided.

21 It may be that on providing care for these people they are
22 well able to and do fund the full cost of that care, and that
23 private undertakings offer such services at the same time as a
24 public healthcare Trust also provides such services. In such a
25 case, which we do not face today, there may be an argument for
26 saying that the Trust is acting as an undertaking in the
27 provision of care in those circumstances. The decisive feature
28 of this case is that there is a gap in the market and not a
29 market, that this is an area of acute social deprivation, where
30 money is being paid by the State for the benefit of people who
31 do not have the means to arrange this care for themselves.

32 THE PRESIDENT: So does that drive us to the conclusion that this
33 case is very much revolving around its own facts as far as we
34 know them and we are not deciding whether a hospital Trust that
35 runs residential homes is or is not an undertaking in the
36 abstract - yes, let us stop there, a hospital Trust that runs
37 its own homes is or is not an undertaking in the abstract?

38 You say the relevant question is whether the activity,

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1 which you say is the purchase in this case, is essentially
2 being done for social reasons because nobody but the State can
3 do it.

4 MR TURNER: Yes.

5 THE PRESIDENT: Well, so therefore the facts may depend on where the
6 Trust is what the make-up of the residents is, all sorts of
7 things?

8 MR TURNER: Yes. The feature of this case has been defined in the
9 original letter and in the detailed letter that followed, that
10 this was an area of acute social depravation where pretty well
11 everybody is being publicly funded, and if the tribunal has
12 regard to the terms of this decision letter in the penultimate
13 full paragraph it reads:

14 "The abuse your client is alleging, namely, non-cost
15 related low prices offered by North & West for residential and
16 nursing home care services, relates to North & West's activities
17 as a purchaser of social care. The purchasing of such services
18 for the disadvantaged in society, using moneys raised by
19 taxation, would seem to be typically those of the State, and
20 will not appear to be of an economic or commercial nature."

21 The essence of the Office's decision, which is an
22 expression of the principle of solidarity, is that the general
23 public is funding care services for those who do not have the
24 means to afford them themselves. Thence the apt reference by
25 Advocate General Fennelly in *Sodemare SA and Others v Regione*
26 *Lombardia* (C-70/95) [1997] ECR I-3395, which is quoted in the
27 defence, to how the principle of solidarity applies in this sort
28 of setting. It is not a market, it is filling a gap in the
29 market.

30 THE PRESIDENT: So what exactly is the criterion that we are
31 searching for here? If there is a resident in another home run
32 by North & West who happens to have a perfectly respectable
33 pension that will actually cover the cost that North & West want
34 to recover from that resident, I am assuming it is possible,
35 indeed hoped, that North & West will recover the cost of caring
36 for that resident?

37 MR TURNER: As Mr Flynn points out, that is the statutory
38 intention.

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1 THE PRESIDENT: That is the statutory intention, so in that case are
2 they acting as an undertaking vis à vis that resident?
3 MR TURNER: Yes.
4 THE PRESIDENT: They are? And where do we draw the line? Is it a
5 break even line, or a cost-plus line?
6 MR TURNER: One applies the test which has emerged from the
7 jurisprudence. Is it an activity that could be carried on for
8 profit by a private undertaking and for that it may not be
9 sensible to look at particular person if everybody else in the
10 home---
11 THE PRESIDENT: You would have to see how many residents you have,
12 and whether those that can pay enable you to make up the
13 shortfall on those that can not.
14 MR TURNER: It will be fact sensitive.
15 THE PRESIDENT: You have quite a mixed picture in other words?
16 MR TURNER: Yes, but the acid test is, once you have defined the
17 activity concerned, could this be carried on for profit? If it
18 could not, if what one has is outlay without an investment in
19 the hope of making a return, if one could not be made, then it
20 is likely to be an expression of the principle of solidarity,
21 which is in play in this case.
22 THE PRESIDENT: When we say "carried on for profit", it is quite
23 interesting for us just by way of general background to leaf
24 through this very helpful booklet you have provided to us. It is
25 in our new bundle. I think in fact if it were possible we would
26 be quite pleased to have originals of it rather than photocopies
27 - not necessarily now.
28 MR TURNER: They are out of print. We will provide you with this
29 original---
30 THE PRESIDENT: Well I do not want to deprive you of your last
31 original, but if there was a spare one somewhere. One notices
32 there are quite a range of homes of various sorts. There is a
33 category, for example, which would appear to be charitable
34 homes, or voluntary homes. Now, are they undertakings in your
35 analysis? They are not actually operating for profit in the
36 normal way, but they are presumably hoping to meet - I do not
37 know quite how they are doing it - whether they are meeting it
38 out of their charitable resources or voluntary donations or

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1 what. Whether it is profitable or not is not normally a test of
2 whether there is an undertaking.

3 MR TURNER: Sir, I am informed those aim to cover their costs. I
4 have a not that they act in a similar way to private homes, and
5 Bettercare, of course, aims to make a profit, that is what it is
6 there for. But the critical point is how are they aiming to make
7 a profit? They are not aiming to make a profit from the supply
8 of these services to the people whom they accommodate. The
9 profit comes from the State funds. That is how Bettercare hopes
10 to make a profit, and that is the only way in this area in which
11 any independent sector provider would hope to make a profit. It
12 is a fallacy to say that there is a market for the provision of
13 services to the residents. They cannot pay. The market is
14 created here by the very action which is complained about.

15 THE PRESIDENT: Well, there is provision of services to the Trust.

16 MR TURNER: Quite.

17 THE PRESIDENT: It is a dual---

18 MR TURNER: And then one proceeds to the issue of the purchase by
19 the Trust as to whether that is itself an economic activity. In
20 relation to that I would like to take up Mr Flynn's point about
21 the distinction between purchasing for absorption and purchasing
22 for provision. But certainly here the key point is that no one
23 could make a profit from supplying these services to the
24 receiving public.

25 MR SUMMERS: Mr Turner, perhaps you can just help me to understand
26 something. As I understand it, North & West Trust has the
27 option to place a client in one of its own homes, or in a
28 Bettercare home. What helps it to make the decision as to where
29 that client is placed?

30 MR TURNER: I think, sir, as to that, because you will have seen
31 there is a dispute in the witness statements about what actually
32 goes on, it is probably best to look at the directory itself,
33 because it sets out how that choice is made. On page 11, section
34 5: "What should I consider when choosing a home?" There is a
35 strong encouragement of choice on the part of the client.

36 THE PRESIDENT: "Look at more than one home, with more than one
37 price".

38 MR TURNER: Yes.

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1 THE PRESIDENT: Different homes offering different prices looks very
2 like economic activity even if they are not able to do it on a
3 profitable basis.

4 MR TURNER: It is competition in one sense only. It is competition
5 in the sense which was intended when the structure was set up to
6 offer a maximum range of choice of different options to the
7 receiving clients. However, in terms of the homes concerned
8 competing for the business of these residents in terms of price,
9 or these consumers being to that extent price sensitive, that is
10 not the scheme and that is not the intention of this
11 legislation.

12 So far as the reference to price is concerned, it must
13 also be borne in mind that this is the Board's directory, it
14 relates to the entire area. The particular area with which we
15 are concerned in North and West Belfast is in the defining
16 letter from Mr Caldwell "an area of severe social depravation".

17 Therefore, the clients do not choose on the basis of
18 price.

19 THE PRESIDENT: What I am finding a little hard to analyse at the
20 moment is that we have in this document a series of
21 advertisements for all kinds of homes, some of them private,
22 some of them voluntary, some of them statutory, as the
23 advertisement for North & West, which is on page 28, is there,
24 not far from any other advertisements with homes of various
25 kinds, which suggests in a general sense that North & West is,
26 as it were, offering its homes to people in a mixed market of
27 private and voluntary and public, as indeed are other Trusts
28 such as Ulster Community Trust, and so forth.

29 Where this argument is taking us is to say well you have
30 almost to look at it on a Trust by Trust basis to see whether it
31 is an undertaking or not and able to make a profit. For all we
32 know there are homes in the Ulster community area, which seems
33 to cover Bangor and that sort of area, where they may well be
34 able to subsidise a few people who cannot afford to pay but
35 still in some sense or other operate on a profitable basis
36 because there are others who can pay. We just do not know.

37 MR TURNER: Yes, Sir. I think we accept all of that. The directory
38 relates to the Board's entire are.

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1 THE PRESIDENT: Yes.

2 MR TURNER: It is certain that the homes which are mentioned in the
3 directory are options offering a range of choice to people, and
4 also it is not clear from the witness statements, and I hope it
5 will not be controversial, the Trust has the option of placing
6 someone in the North & West Belfast area who desires to go
7 outside in a home outside the Trust's area. So the boundaries
8 are distinctly porous.

9 THE PRESIDENT: Still within the Board's area rather than the
10 Trust's area?

11 MR TURNER: Anywhere in Northern Ireland I am told.

12 MR SUMMERS: There again you used the word "direct", whereas
13 previously we have been talking about the concept of client
14 choice. I am trying to understand the mix of direction and
15 client choice in this whole process.

16 MR TURNER: Yes, I have been informed, and indeed it is in Mr
17 Barry's witness statement but I would need to find the precise
18 paragraph, that the client is offered maximum choice. There is a
19 session with a care worker to decide whether the particular
20 service is required. The client is given this booklet, and given
21 such assistance as they want, but the intention, and it is there
22 in policy guidance as well, is that they should be able to make
23 the fullest possible choice as to which home they go into. That
24 is, of course in dispute. Miss Montgomery says that is not the
25 way it happens at all, but that is our evidence.

26 The essential point for our case is, as it was raised in
27 the correspondence, and the basis on which the Office made its
28 decision, that one is dealing with people in an area of severe
29 social depravation who do not, in almost all cases, have the
30 means to choose on the basis of price, and do not do so, they
31 are funded by the State.

32 The decision letter, if I may call it that, refers to
33 three cases, namely *Höfner & Elser*, *Diego Cali* and *Eurocontrol*.
34 I will return to those in a few moments to draw attention to
35 certain features of them.

36 THE PRESIDENT: Wait a minute, Mr Turner, it is not disputed that
37 Bettercare is an undertaking, is it? Bettercare is plainly an
38 undertaking?

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1 MR TURNER: Bettercare is an undertaking but in so far as it is
2 providing services to the public, the people who are
3 accommodated, it is not making a profit out of them and could
4 not hope to do so. It is an undertaking in so far as it is
5 carrying on business hoping to make a profit from the money it
6 gets from the Trust.

7 THE PRESIDENT: Just to explore your analogy a little, Bettercare
8 could not operate (according to Bettercare) without a subsidy
9 from the State - it could not have these homes in this
10 particular area of Belfast without a State subsidy.

11 MR TURNER: No it could not.

12 THE PRESIDENT: But it is sitting there operating them and making a
13 profit out of it. That does not deprive Bettercare of the
14 character of an undertaking?

15 MR TURNER: No, one does need to focus on the precise activity in
16 question. Here what is being said, you asked Mr Flynn to define
17 the situation, is what is the market here? What is the
18 provision? What is the market in which competition is taking
19 place? If one defines it as competition for the payments by the
20 Trust then one can immediately appreciate that what the Trust is
21 doing in purchasing these services from Bettercare is not the
22 expression of a true economic activity, it is simply the
23 indirect provision of social care to the people who are
24 accommodated in the private homes.

25 THE PRESIDENT: I am getting in a bit of a muddle, I think. In what
26 respect is Bettercare not an undertaking according to you? Are
27 there some respects in which it is not an undertaking, or is it
28 an undertaking for all purposes of the Act?

29 MR TURNER: If it were to be alleged that Bettercare is an
30 undertaking, if the State were left entirely out of account and
31 one was focusing on Bettercare's provision of services to
32 residents who cannot afford to pay, then in that sense
33 Bettercare is not acting as an undertaking.

34 THE PRESIDENT: But Bettercare is providing services to residents
35 who cannot afford to pay?

36 MR TURNER: It is doing so, yes, as a matter of fact it is doing so.

37 THE PRESIDENT: The fact that it is getting the money from the State
38 is neither here nor there. It is still carrying on an economic

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1 activity.

2 MR TURNER: What is important though in defining the market is to
3 see who is the purchaser and who is the provider of the service,
4 and here it is the State which is the purchaser of the service
5 and not the people who are accommodated.

6 It is clear that Bettercare is an undertaking in doing
7 what it does, that is because it hopes to make a profit from the
8 money it gets from the State. But what is being asked, and the
9 issue for the tribunal is, is the State an undertaking in either
10 - and let us focus on the two activities that have been raised -
11 the State's provision in its statutory homes, of services to the
12 public in the area; or in the State's purchasing from Bettercare
13 of accommodation for those people.

14 THE PRESIDENT: Just a minute. Let us do those one by one.

15 MR TURNER: Yes. So far as the first is concerned, this is the
16 statutory homes in which people who cannot afford to pay the
17 full cost themselves are accommodated.

18 THE PRESIDENT: That is already an assumption as I understand it, it
19 is not necessarily the case that everybody in a North & West
20 home cannot afford to make a respectable contribution - or
21 somewhere in Northern Ireland, it covers the whole of Northern
22 Ireland.

23 MR TURNER: That is right as a matter of theory. What one is
24 dealing with is the basis for this decision which is that one
25 has an area of severe social deprivation.

26 THE PRESIDENT: In the decision we do not know anything about the
27 other statutory homes. We know about the Bettercare homes, but
28 we do not know about the other eight homes that North & West are
29 providing.

30 MR TURNER: We do not know about those. What we do know is from the
31 paragraph at the foot of the first letter of 23rd November, that
32 "...approximately 99 per cent. of all care provided is to means
33 tested, publicly funded individuals assessed as requiring those
34 services."

35 When the tribunal is considering what was the essential
36 factual matrix on which the Office wrote its letter of 25th
37 July, there it is.

38 THE PRESIDENT: He is talking about the two centres concerned, he is

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1 not talking about the other eight North & West homes. It may be
2 the other eight North & West homes are in exactly the same
3 position, I do not know. We are not talking about that in this
4 letter.

5 MR TURNER: No, that is fair comment. However, the decision which
6 that letter formed the jumping off point for relates to the
7 purchasing of services, the second scenario that I am about to
8 come to.

9 The purchasing of services by the State from Bettercare
10 homes.

11 THE PRESIDENT: I think what you are doing is you are assimilating
12 this situation to a situation some of us at least have come
13 across in other contexts, that of providing accommodation for
14 the homeless. A local authority has people who are simply on the
15 streets, they have nowhere to go. They have a statutory duty to
16 sweep them up and put them somewhere, and one of the ways that
17 they do that is to buy bed and breakfast accommodation and put
18 them in there.

19 MR TURNER: Yes.

20 THE PRESIDENT: You are saying well basically that is a last resort
21 social activity and would not be caught by the Competition Act.
22 What is going on here is analytically rather similar.

23 MR TURNER: Analytically that is so because what the decision is
24 concerned with is the second of the situations that we have just
25 been discussing, namely, the purchasing of services on behalf of
26 such people from Bettercare. There can be little doubt that
27 that is what the letter of 23rd November is referring to, and in
28 those cases which perhaps can analytically be assimilated to the
29 provision of accommodation for homeless people in the broader
30 sense, is not the activity of an undertaking.

31 Returning to the first of those scenarios, the provision
32 by North & West in its own statutory homes. It is true that I
33 cannot say, on the basis of this material here, definitively
34 that those homes are not capable of being run for profit on the
35 basis that perhaps people from other parts of Northern Ireland
36 who are able to pay the full cost wish to come into the homes
37 operated by the Trust in North and West Belfast. I am therefore
38 making an assumption that to the extent that that is not true,

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1 to the extent that it is the same group of people who are
2 exercising a choice as between Bettercare's homes and the
3 statutory homes, then what the statutory homes are also doing is
4 providing services to people who do not have, generally
5 speaking, the means to pay, and that those statutory homes are
6 not therefore capable of being run for profit.

7 THE PRESIDENT: I think we may have a bit of a conflict with some of
8 the case law here, because there is another line of case law
9 which I do not think we are actually looking at at the moment
10 which, if my memory is correct, clearly says that whether a Body
11 is profit making or not is not conclusive of the undertaking
12 issue. Profitability is not really relevant to the idea of an
13 undertaking.

14 MR TURNER: I believe that is common ground. The acid test is
15 whether it is possible to make a profit carrying on the activity
16 in question. We accept immediately that whether a particular
17 Body is doing so in the present case is not decisive either
18 way. But what is important is whether it could be done, and we
19 relied, in answering that question in the negative here, on the
20 fact that once one appreciates what the activity concerned is,
21 purchasing services for people assessed as requiring funding,
22 that is not something which could be done for profit, and falls
23 within activities of the State. So it may be that as I move
24 forward that point can be further developed, or should we dwell
25 on it---

26 THE PRESIDENT: Let us go on, let us go on.

27 MR TURNER: On that note it is perhaps eyebrow raising to turn to
28 the following letter, the letter of L'Estrange & Brett of 31st
29 August, which was their response to the decision and I would
30 draw the tribunal's attention emphatically to the way in which
31 Bettercare now puts the case, and the very matter that we have
32 been discussing. At the foot of the first page, paragraph 2, and
33 turning over the page:

34 "We submit that your above statement does not adequately
35 appreciate the activities of North & West when considered in
36 relation to established case law."

37 When a local authority is supplying residential
38 accommodation for residents/patients, it is engaged in non-

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1 economic activity and in discharging its statutory duty it is
2 providing functions which are typically those for the State. It
3 is not engaged in economic activity and is not in competition
4 with the private sector. In our view residents/patients
5 benefitting from statutory healthcare services could not be
6 classified as, or compared to consumers.

7 I would ask the tribunal to bear in mind, again because
8 this forms part of the application before you, hat that is the
9 way in which the case has been put by Bettercare on that precise
10 point. They disavow expressly that the provision of services
11 directly by North & West is an economic activity or in
12 competition with the private sector. Continuing the disjunction,
13 they then continue in the following paragraph:

14 "However, local authorities discharging their statutory
15 duty by purchasing said healthcare services from the private
16 sector are engaged in economic activity." Accordingly they
17 clearly divorce the two functions and rely upon the mere fact of
18 purchasing healthcare as being itself an economic activity.

19 The two other parts of this letter that are perhaps
20 important for the tribunal to appreciate at the moment are
21 paragraphs 4 and 9, which both make the same important point.

22 In paragraph 4, after reciting the point that it is
23 necessary to consider the precise nature of the activities being
24 exercised by an entity, and travelling down to the last
25 sentence, L'Estrange & Brett say:

26 "We would contend that state entities, in this case North
27 & West, are also carrying on economic activities by purchasing
28 services in the market, particularly where it is monopsonist in
29 that market, and uses that position of dominance to create and
30 determine economic conditions within that market."

31 It is the recognition of what is happening is the creation
32 of an economic activity which would not otherwise exist, apart
33 from the very funding which is complained of, which is
34 recognised in paragraph 4. Paragraph 9, at the end of the
35 letter, after the first sentence, they say:

36 "North & West is under a statutory duty to provide social
37 healthcare services. To save on the cost of providing these
38 services it has decided to outsource these services by

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1 purchasing them from the private sector. North & West only act
2 as a purchaser of last resort due to the market situation it has
3 created."

4 The recognition there again is that there is no market in
5 the sense of people who, apart from the State provision, would
6 be willing to pay, able to pay for these services. The factual
7 situation which is posited by these letters is precisely that it
8 is the very funding from North & West that creates the market by
9 virtue of which---

10 THE PRESIDENT: That may be right, but I do not think it is
11 necessarily an insuperable object. Supposing we had a case in
12 which, just for argument's sake let us say a hospital trust had
13 no homes at all of its own and decided it was going to perform
14 its statutory duty by placing everybody in private homes of one
15 sort or another?

16 MR TURNER: Yes.

17 THE PRESIDENT: And supposing it is said "I will put half my
18 patients in with one company, and half with another company", so
19 I have two people who are supplying me with these services and I
20 will pay one of those companies double the other because that is
21 how I want to do it. The one who is being paid less claimed that
22 he was being discriminated against. Why should that sort of
23 situation not be within the competition law - control of
24 monopoly buying power?

25 MR TURNER: Well it is my submission that such a situation would be
26 covered by the public procurement rules, assuming that the
27 threshold requirements, turnover requirements were satisfied.

28 The purchasing of such services by the public Body in
29 those circumstances, again on the assumption that this is for
30 people who do not have the means to pay for themselves, is not
31 the activity of an undertaking.

32 THE PRESIDENT: So that would not be covered by competition law?

33 MR TURNER: No.

34 THE PRESIDENT: Would it be covered by anything?

35 MR TURNER: It would be covered, as I say, by the public
36 procurement rules, assuming that the threshold turnover
37 requirements were satisfied.

38 THE PRESIDENT: What public procurement rules are we talking about?

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1 Perhaps we could go into this a little bit at some point?
2 MR TURNER: I am afraid I have not come prepared to deal with the
3 public procurement regime, but if it is important we can ---
4 THE PRESIDENT: Well it is of some interest to know what controls
5 there are on monopsonist public purchasers, if any.
6 MR TURNER: Yes. That is so and I do want to come to the
7 circumstances----
8 THE PRESIDENT: I am sorry, Mr Turner, I am taking you out of your
9 stride.
10 MR TURNER: Not at all, because it is essential to meet these
11 points where they arise. But what I would like to deal with is
12 the point, the kite that Mr Flynn has flown, about the
13 circumstances in which purchasing is economic activity that
14 could be caught, and the circumstances where it is not, because
15 there is a large measure of common ground between us. It is
16 only, I think, in the description of the facts that we differ,
17 but we probably agree entirely on the test.
18 THE PRESIDENT: Right, good. I am glad you agree on something!
19 MR TURNER: Yes. The 23rd September letter from the Office I would
20 ask you briefly to look at now. This is in line with the
21 submission that it was all dealt with as a matter of principle.
22 The second paragraph:
23 "We have read and noted your further comments about the
24 Office's views on undertakings, relevant case law, and the
25 activities of North & West. We have also noted that you have not
26 provided any new evidence on this matter".
27 THE PRESIDENT: Yes.
28 MR TURNER: Then lastly, and to similar effect, the letter of 2nd
29 November, which is perhaps more explicit. In the second full
30 paragraph, that is the big one beginning "Pursuant to section
31 25..."
32 THE PRESIDENT: Yes.
33 MR TURNER: The last sentence reads: "Contrary to your assertions
34 at paragraph 3 of your letter this view is based upon the
35 evidence provided by your clients as to the activities of North
36 & West in particular as set out in the respective letters".
37 THE PRESIDENT: Yes.
38 MR TURNER: From that it is appropriate to turn to the soundness of

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1 the proposition, so the relevance of the authorities that were
2 relied on by the Director General. If I may I would turn up two
3 of the classic cases, namely, *Diego Cali* and *Eurocontrol*, only
4 shortly to draw the tribunal's attention to certain relevant
5 passages. Does the tribunal have *Diego Carli* anywhere convenient
6 at hand?

7 MR FLYNN: It is number 3 in annex 2 to the application.

8 THE PRESIDENT: Yes, thank you very much. Yes, I think we are all
9 there.

10 MR TURNER: The first paragraph:

11 *"Article 86 of the Treaty must be interpreted as not being*
12 *applicable to anti-pollution surveillance with which a body*
13 *governed by private law has been entrusted by the public*
14 *authorities in an oil port in the member state even when port*
15 *users must pay dues to finance that activity."*

16 I would ask the tribunal to look at paragraph 16 which, in
17 our view, is as good a statement as any of the essential test.

18 *"The distinction between, on the one hand, the exercise of*
19 *official authority, and then on the other hand economic*
20 *activities of an industrial or commercial nature by offering*
21 *goods or services on the market."*

22 That is the principal distinction on which we place heavy
23 reliance. It is choosing between those two things in the present
24 case that the tribunal is asked to do, which the Director was
25 asked to do.

26 THE PRESIDENT: I am not quite sure that is right, Mr Turner,
27 because the exercise of official authority is one concept like
28 granting licences and making sure people do not pollute the port
29 and that sort of thing. The performance of social functions is
30 not exactly the exercise of official authority, it is the
31 carrying out of social function in pursuit of some solidarity
32 principle.

33 MR TURNER: Yes.

34 THE PRESIDENT: In other words, there is a nuance there which
35 probably comes out more clearly in the subsequent cases.

36 MR TURNER: That is a fair correction. The exercise of official
37 authority is a somewhat elastic term.

38 THE PRESIDENT: Yes.

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1 MR TURNER: Some of that elasticity is picked up in the subsequent
2 paragraphs of this very judgment, and I would ask the tribunal
3 just to look at paragraph 22, where the court took into account
4 that it was:

5 *"...a task in the public interest which forms part of the*
6 *essential functions of the State."*

7 I believe it is possible to axe the last words, as regards
8 "protection of the environment" which was specific to that case.
9 But certainly "task in the public interest which forms part of
10 the essential functions of the State" is important and has been
11 echoed in the subsequent case law.

12 Then again in 23:

13 *"Such surveillance is connected by its nature, its aim and*
14 *the rules to which it is subject with the exercise of powers*
15 *relating..."*

16 - in this case to the protection of the environment,

17 *"...which are typically those of a public authority. It is*
18 *not of an economic nature justifying the application of the*
19 *Treaty of Laws on Competition".*

20 THE PRESIDENT: Yes.

21 MR TURNER: So actually this case is a very important part of the
22 jurisprudence because it gave general guidance, laid down
23 general principles, which have then been developed as to when
24 you do have the exercise of official authority.

25 That is all that I wanted from that case. The next one is
26 *Eurocontrol* which is immediately following in the bundle at tab
27 4 to the annex 2 of the notes of application.

28 THE PRESIDENT: Yes, we are there.

29 MR TURNER: There are only one or two points that are important
30 here. Paragraph 6, these are the functions of Eurocontrol in
31 supplying air navigation services.

32 *"In order to justify its refusal to pay the charges SAT*
33 *pleads that Eurocontrol has infringed Articles 86 and 90 of the*
34 *Treaty. It claims that the procedures followed by Eurocontrol*
35 *in fixing charges at different rates for equivalent services of*
36 *an amount varying in particular from State to State and from*
37 *year to year, constitutes abuse of a dominant position."*

38 I would like to pause there because of course the court

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1 found that Eurocontrol was not an undertaking when carrying out
2 the relevant activity but it is important, and perhaps relevant
3 to the issue that the President has raised, that what the
4 complaint related to, fixing charges at different rates for
5 equivalent services, was something that could have affected
6 competition on the downstream market.

7 THE PRESIDENT: Eurocontrol is a bit coloured by the particular
8 nature of this particular body, is it not?

9 MR TURNER: I understand that to be so.

10 A. (Dr Weeds): That is probably a very important aspect of this
11 case that it is an internationally established joint exercise of
12 sovereignty effectively.

13 MR TURNER: That is so, Sir. On the other hand, the court in its
14 reasoning discarded that as a basis for concluding that this was
15 not an undertaking, or would fall outside of the competition
16 rules on that account. That was expressly dismissed and one sees
17 under the jurisdiction of the court, at paragraph 8:
18 *"Eurocontrol claims that as an international organisation*
19 *it is outside the jurisdiction of the court".*

20 THE PRESIDENT: Well that is a slightly different point.

21 MR TURNER: Yes, but the court dealt with the undertaking issue
22 according to principles that are relevant in this case. It may
23 be sensible therefore just to look at those from paragraph 15
24 onwards. I would, however, emphasise the point that this case
25 does indicate that even where there is a potential competition
26 problem in the broadest sense, because differential charges are
27 being paid to people in a market, that was not enough.

28 THE PRESIDENT: Yes.

29 MR TURNER: The substance of *Eurocontrol* begins at paragraph 15.

30 THE PRESIDENT: Yes. Do you want us to read it quickly to ourselves?

31 MR TURNER: It may be sensible if the tribunal quickly reads from
32 15 - well 15 are the claims, it may be a sensible use of time
33 for the tribunal just to read 15 down to 29, if that would be
34 convenient, because then one can see the entire picture.

35 THE PRESIDENT: I think it would be easier, Mr Turner, if you
36 assumed that we have read it. We will read it over the
37 adjournment. You tell us what point you want us to conclude from
38 it.

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1 MR TURNER: Right. Paragraph 19 the approach of the court is to
2 say that it is necessary to establish the nature of the
3 activities.
4 THE PRESIDENT: Yes.
5 MR TURNER: It then proceeds to do so
6 THE PRESIDENT: Establish the nature of the activities, yes - got
7 that.
8 MR TURNER: Paragraph 22 records what Eurocontrol's tasks are.
9 THE PRESIDENT: Define the tasks, yes.
10 MR TURNER: Paragraph 23 relates to its competence to establish
11 and collect route charges, but notes half way down that rate is
12 not fixed by Eurocontrol but by each of the contracting States
13 for the use of its air space.
14 THE PRESIDENT: Yes. That would be an essential reason why
15 Eurocontrol was charging different rates, because each of the
16 member States were themselves charging different rates?
17 MR TURNER: Yes, that is so. Paragraph 24, just towards the end of
18 that:
19 *"For the purposes of such control [its own navigation*
20 *control] Eurocontrol is vested with rights and powers of*
21 *coersion which derogate from ordinary law and which affect the*
22 *uses of air space. In exercising those particular powers it*
23 *must ensure compliance with international agreements" - national*
24 *rules, etc".*
25 THE PRESIDENT: Yes.
26 MR TURNER: 25 the point that it has to provide services even
27 where someone has not paid the route charges.
28 26 finally that its activities are financed by the
29 contributions of the contracting State. Then 27 is the
30 conclusion:
31 *"It thus carries out on behalf of the contracting States*
32 *tasks in the public interest aimed at contributing to the*
33 *maintenance and improvement of their navigation safety."*
34 28 records that cannot divorce the collection of route
35 charges from the organisation's other activities because they
36 are merely the consideration payable by users for the obligator
37 and exclusive use of air navigation facilities and services.
38 Finally 29:

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1 *"That Eurocontrol acts in that capacity on behalf of the*
2 *contracting States without really having any influence over the*
3 *amount of the route it charges."*

4 In 30 there is the summary:

5 *"Taken as a whole Eurocontrol's activities, by their*
6 *nature, their aim, the rules to which they are subject, are the*
7 *concerned with the exercise of powers relating to the controlled*
8 *supervision of airspace, which are typically those of a public*
9 *authority, and not of an economic nature justifying the*
10 *application of the Treaty rules on competition."*

11 The points which we draw from that are as follow: First,
12 in its decision the Office was right to rely on Eurocontrol
13 because the activity which the Office of Fair Trading had
14 described in its letters, on the basis of the evidence presented
15 to it was similarly a task in the public interest and typically
16 the activity of the State.

17 Secondly, the point that I have mentioned that here there
18 was a real possibility of distortion of competition as a result
19 of what was going on, what was complained about but that in
20 itself was not said to be enough.

21 Thirdly, the point from paragraph 24 that it is important
22 to look at the rules to which the activity was subject.
23 Eurocontrol had to comply with particular rules in everything
24 that it did. Similarly here, the Trust carries on its activities
25 closely governed by statutory criteria.

26 Lastly, the autonomy point which has only really arisen on
27 the appeal, that the rates were not fixed by Eurocontrol and the
28 court found that it did not really have any influence over them.

29 I do not propose to elaborate further on the Director
30 General's essential analysis of these activities. I would
31 remind the tribunal of the relevant passages in our skeleton in
32 paragraphs 27 to 32, and paragraphs 21 to 27 of the defence, in
33 particular going through the questions: what is the nature of
34 this activity? What is its aim? What are the rules to which it
35 is subject?

36 I am about to turn to what is my brief, second topic: The
37 regulatory and administrative context, but I note the hour, Sir.

38 THE PRESIDENT: You are suggesting that that would be a convenient

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1 moment?

2 MR TURNER: It may be a convenient moment.

3 THE PRESIDENT: I am sure it is. Shall we say, 2 o'clock.

4 MR TURNER: Indeed.

5 THE PRESIDENT: I am obliged, thank you very much.

6 (Adjourned for a short time)

7 THE PRESIDENT: Yes, Mr Turner?

8 MR TURNER: May it please the tribunal, before the short
9 adjournment I had covered the first major of the three topics
10 that I propose to address. In the course of doing so I have
11 trespassed on the subject matter of the other two to a
12 considerable extent so I can take them far more smartly.

13 In essence, to recap, I have reviewed the basis of the
14 Office's decision and the nature of Bettercare's case which is
15 on the appeal, and have shown, in my submission, that the same
16 essential reasoning is now relied upon as in the decision letter
17 of 25th October last year. The point is that on the facts
18 presented to the Office the activity concerned is to purchase by
19 the State of services for the disadvantaged members of society,
20 that is not commercial or industrial activity. That is an
21 activity typically that of the State.

22 Mr Flynn has complained about a lack of reasoning in the
23 process. In my submission that is unfair. The degree of
24 reasoning was entirely appropriate---

25 THE PRESIDENT: Do not worry about the reasoning point, Mr Turner.

26 MR TURNER: Finally, although I intend to develop this a little bit
27 further in dealing with Mr Flynn's skeleton, Sir, you raised the
28 issue of Bettercare as being an undertaking and if Bettercare is
29 an undertaking and provided these services, how is it that North
30 & West providing these services as well is or might not be an
31 undertaking? My answer in short is that Bettercare gets its
32 opportunity for profit from payments from the State. North &
33 West, the Trust itself, is the State. It gets no opportunity for
34 profit from itself but only from those for whom the services
35 are provided. Certainly, in this application there has been no
36 suggestion of any competition for residents able to fund the
37 full cost of their care, and I have shown the tribunal at
38 paragraph 2 of the letter of 31st August, that Bettercare indeed

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1 avow in the strongest possible terms that there is no
2 competition between North & West as a provider, and itself.

3 The second topic that I propose to touch upon is the
4 regulatory and administrative context. In that regard, it may be
5 helpful to know whether the tribunal will want assistance in
6 developing any of the points that were raised in answer to the
7 questions because I know the tribunal had an opportunity to read
8 through those. I wanted in particular to address the tribunal
9 briefly on the answer to question 2 which relates to the
10 autonomy issue.

11 The legal basis for this question was set out at
12 paragraphs 35 to 38 of the defence, and I touched on it in the
13 reference to *Eurocontrol*.

14 THE PRESIDENT: Yes.

15 MR TURNER: It is that where a body itself does not have a
16 discretion in relation to the activity complained of, but is
17 subject to supervision or control, that that body itself is not
18 acting as an undertaking when exercising that activity. The two
19 authorities that I referred to were *Eurocontrol* and the *Cisal*
20 case, paragraph 37, where it was pointed out in the quotation
21 set out at the top of page 16 of the defence that the amount of
22 contributions upon which the INAIL deliberates must be approved
23 by ministerial decree - the competent Minister having the power
24 to reject the scales proposed, and to invite the INAIL to submit
25 to him a new proposal taking account of certain information.

26 So here we say it is clear that the Board has and
27 exercises the power of direction over the Trust, and the case
28 referred to in Mr Barry's second witness statement, learning
29 disability, also requires the involvement and agreement of the
30 Board as was made clear in that short witness statement.
31 Certainly for the activities with which we are presently
32 concerned the court will have seen from the attachment to the
33 answers to those questions the terms in which the Board has
34 directed the Trust to purchase on the basis of particular rates.
35 Those prices, looking at the letter of 19th June, were endorsed
36 as policy by the Board at its public board meeting on Tuesday,
37 12th June, 2001. "The attached prices for 2001/2002 should be
38 applied to independent sector homes..." and so on.

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1 THE PRESIDENT: Yes, we have read that.

2 MR TURNER: Just to supplement that, what the tribunal may not have
3 seen is that in this care homes' directory, of which the
4 tribunal has a copy, at paragraph 4.3 on pages 10 to 11, there
5 is another very strong indication that this is a Board matter,
6 this is the Board's directory, and under the heading "Finance"
7 at the bottom of page 10 you will see that there are rates which
8 change annually on 1st April, and the rates shown here were
9 those applying from July, 2001, and they are then set out.

10 THE PRESIDENT: Yes.

11 MR TURNER: And those are the Board rates which are applied by this
12 Trust within the Board's jurisdiction, as by the other Trusts
13 within the Board's jurisdiction, as by the other Trusts within
14 the Board's jurisdiction.

15 So far as the power of direction is concerned, I shall not
16 take the tribunal through the legislation which is referred to
17 in the answer to question 2, but essentially we rely upon the
18 fact that the Trust exercises the function of arranging for the
19 provision of care on behalf of the Board. In other words, it
20 acts as the agent of the Board. So if the Board wishes a certain
21 course to be followed the Trust does not have power to depart
22 from that.

23 There is, I believe, one document that is needed to follow
24 through the chain of delegation which is not currently with the
25 tribunal in the legislation bundle and that will be provided. It
26 is a 1973 Direction given by the Department by which it
27 delegates its functions, including the relevant ones, to the
28 Board, and for completeness we will provide that to the
29 Tribunal. I beg your pardon, I am told that it is actually
30 attached to the answers, and you will find it ----

31 THE PRESIDENT: Behind the red tab?

32 MR TURNER: In mine it is green! At any rate it is behind the care
33 homes' directory.

34 The Director's case is that this is in the nature of the
35 exercise of official authority, as that term has been understood
36 in the European case law. In my submission this feature can be
37 more clearly appreciated when one appreciates the context in
38 which this activity takes place. In particular, I would ask the

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1 tribunal to turn up Mr Barry's first witness statement at
2 paragraphs 34 to 36. This simply makes the point that it is a
3 budget. Money is allocated by Central Government. Then the money
4 that has been allocated to the Department of Health needs to be
5 broken down into particular programmes, and is done so, and this
6 forms part of one of those programmes.

7 I would invite the tribunal, also briefly, to look at
8 exhibit BB5 in case you have not previously seen that, which is
9 the press release by the Department after the departmental
10 allocations in which the Minister refers to the total resources
11 available at her Department and half way down says specifically
12 "I am providing" and then lists how the pie is to be sliced up.

13 As part of that at the very bottom of the page, she says:

14 "In recognition of the steep rise in costs in the
15 residential and nursing home sector I will be providing a
16 further £3.6 million on top of the normal annual increase in
17 fees we pay for places in these homes. So that overall fees will
18 increase next year by approximately 5½%."

19 That supports the indication that one is concerned here
20 not with an economic activity, at any rate exercised by the
21 Trust, but by a political allocation of funds raised by taxation
22 for social purposes.

23 Beyond that, in Mr Caldwell's evidence, he has referred to
24 a market survey at exhibit CC3 which the tribunal ought to have
25 attached to his first witness statement.

26 THE PRESIDENT: That is attached to the reply - is that right?

27 MR TURNER: There are three short parts of that I would ask the
28 tribunal to look at which, in my submission, show that what one
29 is dealing with here is not a market in the true sense, but an
30 industry which has been created on the back of State provision.

31 If one looks at page 25, the first page, in the exhibit,
32 and the first full paragraph, there is a reference to the
33 availability of places in particular settings. Paragraph 2.1 is
34 entitled "Care in Residential Settings". At the end of the first
35 paragraph, which is concerned with discussing capacity, the last
36 sentence really says:

37 "This contrasts [the drop in capacity] with the previous
38 decade during which time the ready availability of open ended

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1 income support funding fuelled a steady growth in capacity over
2 and above that necessary to keep pace with the age of the
3 population. The figures are set out below."

4 So that what one sees from this is that the growth of
5 homes such as Bettercare's was in part stimulated by the open
6 ended availability of State funding beyond the needs of the
7 actual population.

8 On page 27----

9 THE PRESIDENT: All of which might go to a question of abuse but is
10 it really helpful on the question of undertakings?

11 MR TURNER: If this were an undertaking it would certainly be
12 relevant to the question of abuse. In my submission it is also
13 relevant to the question of an undertaking in that it shows that
14 what one is concerned with is a State provision rather than an
15 economic activity at root. I hear your indication and I will----

16 THE PRESIDENT: If you just look at something like the table on page
17 27, table 2.3, which is headed "Nursing, Residential and Long
18 Stay Hospital Care of Elderly Chronically Ill and Visibly
19 Disabled People, Market Value By Sector", it then gives values
20 for the private sector, the voluntary sector, and the public
21 sector, and then a total value, all of which is just the sort of
22 table that you would normally see if somebody was analysing a
23 market and putting a value on the services being supplied in the
24 market - all of which suggests an economic activity.

25 MR TURNER: Those terms - "competition", "market", and so on are
26 certainly appropriate to an ordinary market context, but the
27 distinguishing feature of this market, this area, is that it
28 results from the availability of State funding, and only from
29 that - at least so far as this case is concerned, and that is
30 the only point that I desire to draw from it. Perhaps I can
31 leave that point there.

32 THE PRESIDENT: Not to hammer the point, but the whole survey talks
33 about the care industry, market size and trends, and seems to
34 include public supply within one sector in the overall growth
35 market.

36 MR TURNER: But what one is concerned with in our case is---

37 THE PRESIDENT: It depends where you start?

38 MR TURNER: It depends from where one starts, and one has to bear

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1 in mind and that is why I return to it, the circumstances in
2 which the Office made its decision and the facts presented to it
3 that form the basis for it.

4 THE PRESIDENT: That is where they were sort of propelled to their
5 starting point by the way the complaint was put to them.

6 MR TURNER: From the Office's perspective one has a pool of
7 disadvantaged people in an area of acute social depravation, and
8 the issue which it decided was whether purchasing on behalf of
9 such people is an economic activity. That is a question that it
10 answered, and it was at all times open to Bettercare, if it
11 wished to raise a wider case to do so. In my submission it did
12 not, and has not done so before this tribunal, and on that note
13 I turn to the third topic, which is addressing Mr Flynn's points
14 in the skeleton.

15 THE PRESIDENT: Am I right in saying, and you will correct me
16 because I have not looked at it for a while, the case made by
17 one of the interveners, the Bedfordshire Care Group, does not
18 quite have this social depravation feature in it to the same
19 extent, does it?

20 MR TURNER: I am afraid I have not looked at that for a
21 sufficiently long time to give you a crisp answer, it would not
22 be fair.

23 THE PRESIDENT: It does not matter, we have the point. Yes, topic
24 number 3.

25 MR TURNER: Turning to Mr Flynn's case, if the tribunal has a copy
26 of the Competition Act, 1998?

27 THE PRESIDENT: Yes.

28 MR TURNER: It may be convenient to turn up Schedule 8, paragraph
29 3.

30 THE PRESIDENT: Yes.

31 MR TURNER: The tribunal will be extremely familiar with these
32 provisions but paragraph 3(1) states:
33 *"The tribunal must determine the appeal on the merits by
34 reference to the grounds of appeal set out in the notice of
35 appeal."*
36 Paragraph 3(2) sets out what the tribunal may do.

37 THE PRESIDENT: Yes.

38 MR TURNER: Now, Mr Flynn, in his skeleton points out that one of

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1 the bases of relief that he urges upon the tribunal is an order
2 - I am sorry this is in paragraph 2 of his skeleton, the top of
3 page 2, a declaration that its activities, those of the Trust,
4 ought to be investigated under s.18 of the Act.

5 In our submission, on any view it would not be appropriate
6 for this tribunal to order an investigation into the activities.
7 That is not covered by any of the matters in paragraph 3(2) and
8 it would in policy terms as well be an upsetting of the
9 institutional balance between the Director and this tribunal
10 because it would mean a setting of priorities for the Office as
11 to what should take priority in its public work which is not
12 appropriate, nor mandated by the Act.

13 Mr Flynn goes on in footnote 1 and also in paragraph 29 of
14 his skeleton to complain (as he did orally) that the Director in
15 some sense fell into error in failing to carry out an inquiry
16 into this matter. In my submission that is wrong. The Director
17 is entitled, and was entitled in this case, to rely on the
18 complainant to put before him the facts and matters of
19 importance in a case and to show the Director why it has merit.
20 It is only once that threshold has been passed that a question
21 arises as to pursuing an investigation----

22 THE PRESIDENT: Yes.

23 MR TURNER: And here Bettercare had a full opportunity to present
24 the relevant facts and matters to the Director General. I refer
25 briefly to paragraph 96 of the Tribunal's Judgment at the
26 admissibility stage, which is helpfully set out in paragraph 25
27 of Mr Flynn's skeleton, where the tribunal recorded that the
28 task on complainant's appeals would usually be to decide
29 "whether on the materials put before him by the complainant the
30 Director was correct". We rely on that.

31 Mr Flynn's substantive case does not emerge until
32 paragraph 15 of the skeleton and comprises two elements. First,
33 that the provision of services by North & West is closely
34 related to the purchasing by North & West. Secondly, that in
35 this case the services purchased are in fact purchased for
36 provision and not for absorption.

37 THE PRESIDENT: Yes.

38 MR TURNER: Taking the first point, the first answer is that this

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1 is directly at odds with the way in which the application itself
2 is structured, which is itself to divorce the purchasing and
3 provision activities, and at paragraph 2 of the August letter to
4 disavow that provision is an economic activity or carried out in
5 competition with Bettercare. What is relied upon to pursue Mr
6 Flynn's oral case is that the mix is crucial, the duality of
7 both providing and purchasing from Bettercare. One sees that, in
8 skeleton at any rate, touched upon at paragraphs 17 and 33.

9 However, even where that a point open upon the application
10 it is difficult to discern the logical basis for it or indeed
11 any authority to support it. Why, if direct provision on its own
12 is not an economic activity, does it become so when there is
13 parallel purchasing behaviour?

14 THE PRESIDENT: Well, the Director came close to acknowledging that
15 a direct provision on its own would be an economic activity, in
16 the course of the correspondence and then he somewhat back-
17 pedalled from that position. So have we not got to allow a
18 little bit of latitude to both sides to think their case through
19 as we go along.

20 MR TURNER: Well, Sir, so far as the Director's case is concerned I
21 recall that the Director said that the direct provision could
22 be, and that was not an essential part of his decision. It was,
23 as it were, an obiter dictum, because the Director defined the
24 correct activity for the purpose of the decision as the
25 purchaser, following Bettercare on that analysis.

26 At all events, the point remains undeveloped, and there is
27 no sensible basis upon critical analysis, or any authority to
28 support it.

29 I turn to the second limb which is that this is a case of
30 purchasing for provision and not for absorption. It is in that
31 context that, Sir, your examples of the private and public
32 hospital may arise - the purchasing of surgical gloves and so
33 forth.

34 The Director would agree with the analysis that purchasing
35 for absorption is not in the nature of an economic activity. As
36 a general proposition the competition rules in the Act are
37 concerned with controlling economic supply in the interests of
38 the consumer, the purchaser, and it inverts that position.

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1 THE PRESIDENT: Can we just look at that for a minute, Mr Turner? If
2 we take a hospital purchasing drugs, for example, and if we take
3 a case with which we are all more or less familiar because it is
4 now published, the Napp case, if you have a situation in Napp
5 where it was not the pharmaceutical company going around
6 offering very low prices in order to keep a competitor out, but
7 it was the hospital authorities insisting on having very low
8 prices, i.e. screwing Napp down to very low prices with the
9 effect that it was extremely difficult for Link or any other
10 competitor to get into the market. I am having some difficulty
11 seeing why that action, that sort of monopsonistic abuse by a
12 purchaser, having competitive effects, should not be within the
13 Act?

14 MR TURNER: The answer to that is, again following Tetrapak and the
15 decision that it is no excuse to say that the purchaser asked
16 for a particular abusive practice to be carried out, is that the
17 focus is still on the practice of supply, it is that which is
18 the target of the competition rules prohibition.

19 THE PRESIDENT: If the situation is, let us assume for argument's
20 sake that the document is perfectly clear, the company had all
21 along resisted it and it has been the purchaser who has been
22 forcing the price down, why should the fine fall on the company
23 and not on the purchaser?

24 MR TURNER: In the case where a dominant company, whether or not
25 prompted to do so by a purchaser, charges below cost and that
26 creates exclusionary effects for other suppliers in the market,
27 the focus is still on an abuse of dominant position by the
28 dominant undertaking, rather than by the customer.

29 THE PRESIDENT: Why should it be exclusively on the supplier if the
30 customer is also using his dominance as a purchaser with the
31 result that an anti-competitive situation arises?

32 MR TURNER: Sir, that is the way, in our submission, that the rules
33 work, that is the scheme of the Competition Act.

34 THE PRESIDENT: It is Tetrapak you assign for that is it? The
35 problem with monopsonistic purchasing is a very, very big
36 problem in the competitive field in general. The proposition
37 that it is all outside the Act if it has been done by some Body
38 that is in some sense carrying on some State related duties, it

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1 is a very big fish for the tribunal to swallow.

2 MR TURNER: I understand that. I would like to make the distinction
3 between purchasing for absorption and purchasing for provision,
4 Mr Flynn's argument, and it seems that we are making common
5 cause on this point. There is a difference between a situation
6 where one is purchasing for one's own needs, and a situation in
7 which one is purchasing an input for a downstream market
8 activity, or purchasing for resale. In those latter kinds of
9 cases, one is firmly within the territory of the Act, and one
10 authority for that, which shows that to be true is the German
11 film purchase case that is in Mr Flynn's authorities.

12 THE PRESIDENT: So in the hospital case I have just given it is
13 inside the Act if the drugs are re-supplied and charged for to a
14 private patient, as they normally would be, but not if it is to
15 a National Health patient?

16 MR TURNER: Sir, that is the analysis that we propose. It is
17 pointed out to me that we may be making large assumptions about
18 the way in which these activities are structured, that we do not
19 currently have the information to do. I would certainly urge the
20 tribunal, in deciding this case, to decide it as closely as
21 possible on the narrower basis in which it has emerged before
22 you, and not to be troubled by larger issues of principle, to
23 the extent that that can be avoided. That is always undesirable
24 in legal contexts. But here, as you rightly point out, where
25 there are very significant consequences that should be avoided.

26 So, on that note I turn to the reason why Mr Flynn says
27 that this is not a case for purchasing for absorption but
28 purchasing for provision, and one sees that set out at paragraph
29 19 of his skeleton. Mr Flynn says that this activity, arranging
30 for the provision of the services to residents might better be
31 called "subcontracting" or "agency purchasing" rather than
32 procurement as such.

33 However, that does not advance the case in my submission
34 one jot further, because that amounts only to purchasing for
35 somebody else. That is not purchasing as an input or for resale
36 in a further market activity at all. Purchasing for somebody
37 else is no more an economic activity where you do not act as an
38 agent, or at any rate charge an agency fee or anything of that

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1 kind. That is purchasing for yourself, and that is the situation
2 that arises in this case when the Trust purchases services on
3 behalf of disadvantaged clients from Bettercare.

4 THE PRESIDENT: The Trust is not purchasing as an agent, putting it
5 in strict analysis, the Trust simply has a contract with
6 Bettercare and has another contract with its residents, and it
7 pays one and collects from the other?

8 MR TURNER: Yes, in strict legal terms, I am picking up on the
9 language in paragraph 19. The strict legal analysis may not
10 matter, but the economic analysis does matter, and the economic
11 analysis shows that what is being bought is not something which
12 is then traded on to the resident with any element of profit in
13 it at all. That is not the statutory scheme. It is arranging for
14 the provision of services for disadvantaged people and that is
15 no more purchasing for provision than arranging for your own
16 services to be provided.

17 THE PRESIDENT: Is the absence of profit the thing you identify as
18 the crucial element, or what?

19 MR TURNER: The absence of the possibility of profit in what is
20 done by the Trust. In arranging for residents to enter
21 Bettercare's home the Trust does not carry out an activity under
22 the statutory scheme, or in fact which could be carried out for
23 profit, and I bear in mind again in that context the pool of
24 people for whom this service is provided are severely
25 disadvantaged people.

26 THE PRESIDENT: I entirely see the point you are making, and I am
27 not saying whether it is right or wrong. But applying it on a
28 case by case basis around the country to all kinds of hospital
29 Trusts in rich parts of the country and poor parts of the
30 country, and all the rest of it, it could be a rather "soggy"
31 test, because it depends on whether, in the particular
32 circumstances you could do it profitably or not. You might do
33 it profitably, Trusts are exhorted to do it properly if they
34 can.

35 MR TURNER: They are exhorted to cover their costs. I acknowledge
36 that that may be right. The situation may therefore be dependent
37 upon the facts in particular cases. In this case there was a
38 very definite set of facts.

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1 THE PRESIDENT: Really one of your principle points on the facts of
2 this particular case is the absence of possibility of any profit
3 out of it for North & West?

4 MR TURNER: Yes. Sir, I would like to return to one of the
5 authorities that Mr Flynn asked you to look at, and that is
6 *Ambulanz Glöckner*, just to draw your attention to one or two
7 parts of the relevant paragraphs that you may not have seen. It
8 is the Advocate General's opinion again, in my bundle at any
9 rate it is tab 8, paragraph 66 where the Advocate General sets
10 out the facts which he then proceeds to analyse. The last bullet
11 point refers to the fact in this case that:

12 *"- under the principle of full cost coverage the user*
13 *charges must be calculated so as to guarantee that they cover*
14 *all the costs of the public ambulance service which are not*
15 *financed from other sources of funding."*

16 THE PRESIDENT: Yes.

17 MR TURNER: Turning the page, paragraph 67 has recited that the
18 test could at least in principle be carried out by private actor
19 to make a profit.

20 THE PRESIDENT: Yes.

21 MR TURNER: Paragraph 68 said:

22 *"In the present case, it is clear from the facts of the*
23 *main proceedings that non-emergency patient transport has in the*
24 *past been carried out in Germany by private undertakings with a*
25 *view to making profits."*

26 That is the distinguishing feature from the present case
27 because in relation to the activity that this tribunal is
28 concerned with, what North & West is doing when it purchases
29 from Bettercare no private person could do that with a view to
30 making profits.

31 THE PRESIDENT: Because of the kind of people with whom North &
32 West is concerned?

33 MR TURNER: Yes, because in this area it is concerned with
34 arranging for the care in Bettercare's homes, as Mr Caldwell
35 says.

36 THE PRESIDENT: You could, in principle, imagine a private sector
37 service that said to elderly persons: "I will place you in a
38 home and you will pay me so much", and this person scouts around

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1 and finds a home, and the home pays that person and the elderly
2 person pays the scout, as it were.

3 MR TURNER: Yes, they could charge a fee for that sort of thing.

4 THE PRESIDENT: Yes, charge a fee for that sort of thing, but that
5 is not this case.

6 MR TURNER: Yes. It is a difficult situation but that is not this
7 case, and on the large issue that you raised, Sir, it may be as
8 well to throw into the counterbalance on the other side, while
9 appreciating the difficult cases of concern that you have
10 mentioned. The typical circumstance of a State Body such as a
11 school or a hospital, which provides services for free to the
12 public - taking a circumstance close to home, for example, a
13 hospital where you choose to have your baby born. On the one
14 hand the National Health Service will provide such services for
15 free, so far as the consumer is concerned, while private
16 hospitals might do the same thing and charge a fee, and they
17 can in the very real sense perhaps be regarded in competition
18 with each other for the business of people deciding where they
19 are going to have their baby born.

20 However, could it really be said that on that account the
21 National Health Service in what it does is acting as an
22 undertaking? The answer is "no", and therefore it would not, for
23 example, be open to a charge of predatory pricing on account of
24 the fact that it is charging nothing.

25 In my submission the reason for that is that the activity
26 is carried out on the basis of the principle of solidarity. It
27 is not organised according to ordinary market principles, and it
28 does not work in that way. It is *par excellence* the use of
29 moneys raised by taxation for a particular social function and
30 on that account it would fall in that capacity outside the
31 competition rules.

32 THE PRESIDENT: The National Health Service does not normally
33 recover, does it, from its patients?

34 MR TURNER: A contribution.

35 THE PRESIDENT: A contribution.

36 MR TURNER: However, we say that the fact a contribution is
37 recovered but not full cost, and cannot be recovered given the
38 clientele, places this in the same category.

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1 MR SUMMERS: Mr Turner, is it your evidence that the full
2 contribution can never be recovered because the Trust is never
3 able to organise its finances so as to cover the entire cost of
4 looking after people in its care?

5 MR TURNER: No, that is not my evidence. There may be cases where a
6 particular people who are placed by the Trust are able to fund
7 the full cost of their care, but they say they want to go into a
8 Bettercare home and they go through this procedure, I cannot
9 exclude that possibility.

10 What I do say is that the fact situation that was
11 presented to the Office, and on which it made its decision was
12 that save in an insignificant number of cases, one is dealing
13 with a pool of people for whom a service has to be provided that
14 they cannot pay the full cost of. That is what Mr Caldwell said,
15 and the common theme of the letters running up to the decision
16 letter was that was the basis on which the OFT decided the case.

17 THE PRESIDENT: While we are on this point if we just glance at this
18 very useful directory that you have given to us. On page 13 we
19 have "Some common questions answered". One of the questions here
20 at 6.3: "I had savings of £5000 and the proceeds of sale of my
21 house, £35,000. I can therefore pay for my care in a residential
22 home." Then it goes on to ask "What happens if my money runs out
23 and I am unable to pay for my care?"

24 Is it your case that if you have in a North & West home
25 someone with £5000 and the proceeds of the sale of his house,
26 £35,000 and he can pay for his care, and therefore North & West
27 recovers from him the cost of his care, that North & West is in
28 that case acting as an undertaking, but when the money runs out,
29 and he is unable to pay for his care, and North & West carries
30 on supporting him as a result of statutory duty, it is no longer
31 an undertaking. Is that really what it comes down to?

32 MR TURNER: There needs to be a distinction and it may not be
33 necessary to draw the boundaries for the purpose of this case. I
34 am instructed that people who can afford to pay the full cost in
35 fact do not come to the Trust - are told not to come to the
36 Trust.

37 THE PRESIDENT: They are sent off to some private sector?

38 MR TURNER: They make private arrangements.

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1 THE PRESIDENT: They make private arrangements. I am quite
2 interested in that - we cannot really get into the facts but
3 just at least anecdotally - when you leaf through this little
4 booklet you see various private and voluntary and other homes,
5 as it were, all pitching for business - "The Down Lisburn Trust"
6 for example, and the "Ulster Community Hospitals' Trust" and so
7 forth. One would have thought that a number of statutory Trusts
8 had a certain amount of interest in attracting people who could
9 contribute towards the cost of their care as a means of
10 defraying the overall burden on the Trust of supporting those
11 that could not contribute.

12 MR TURNER: There are two points to make in relation to that. The
13 first is that the private undertakings concerned, listed in this
14 directory, will receive their remuneration on the basis of which
15 they hope to make a profit from the State typically. Bettercare
16 is in that position and that is the subject matter of this case.

17 Secondly, while it is true to say that the Trust in
18 managing its homes has a duty to try to maximise income, and
19 minimise losses, it also has a duty under guidance, to maximise
20 choice. The aim of the regime is about choice. One cannot equate
21 the way that the statutory homes are run with the behaviour of a
22 private undertaking which aims to gain advantage for itself at
23 the disadvantage of competitors, which is the hallmark of
24 ordinary economic activity.

25 One of the features of this case is that the Trust which
26 both provides and purchases residential care aims to establish a
27 complementary hole in which there is, I believe the term is a
28 "mixed economy".

29 Were the Trust for any peculiar reason to seek to channel
30 people into its own homes rather than into private homes, or
31 particular class of such people, in those circumstances there
32 would be a real question as to the compatibility of what it was
33 doing with public law.

34 I am afraid I am not able to develop that point further
35 because I have not brought with me, nor is it evidence before
36 you---

37 THE PRESIDENT: What you are saying is the basic thrust of the
38 statutory homes and the activities of the Trusts is to look

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1 after people who cannot afford private homes---

2 MR TURNER: Yes.

3 THE PRESIDENT: ---and for one reason or another voluntary homes are
4 not available to them.

5 MR TURNER: Yes.

6 THE PRESIDENT: It is essentially a last resort service and most
7 people who had financial resources would be looking elsewhere in
8 normal circumstances.

9 MR TURNER: Yes. Sir, I hope the tribunal will appreciate one of
10 the difficulties that has arisen. In an effort to be helpful we
11 have put this directory before you at a late stage.

12 THE PRESIDENT: Yes, we must not go into the facts.

13 MR TURNER: It is difficult to go much further into the facts.

14 THE PRESIDENT: We can only do it in a sketchy way.

15 MR TURNER: And that is in part why I do insist that the matter
16 should be looked at in the narrow way in which it was presented
17 and dealt with.

18 THE PRESIDENT: Yes, absolutely.

19 MR DAVEY: At the risk of looking further into it, if North & West
20 buys a place from Bettercare and it pays a particular price for
21 that, is the maximum it can recover from the person who actually
22 occupies that place the actual cost, or are there any
23 circumstances in which they can actually recover more than the
24 cost? I am talking now in a situation where they purchase, so if
25 it costs them, what is it, £230, they can recover £230 but they
26 could not recover £250 is what I am asking?

27 MR TURNER: Yes, that is an important and a relevant question
28 because it relates to the possibility of being able to turn a
29 profit on what is done. Mr Barry, at paragraph 12 of his witness
30 statement----

31 MR DAVEY: I thought I had seen something about it somewhere.

32 MR TURNER: It is appropriate for the tribunal perhaps just to look
33 at that.

34 THE PRESIDENT: Yes.

35 MR TURNER: It is on page 4 of his witness statement at paragraph
36 12.

37 THE PRESIDENT: Yes.

38 MR TURNER: I shall not read the whole thing out, but the tribunal

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1 will see that at paragraph 3, after the Department has made its
2 payments, it shall recover from each person, for whom
3 accommodation is provided under the arrangements, the amount of
4 the refund which he is liable to make in accordance with the
5 following provisions". The "following provisions" then state
6 that the person concerned is "essentially either making a refund
7 equivalent to the amount of the payment..."

8 THE PRESIDENT: Yes.

9 MR TURNER: Or, which on the facts is the case---

10 THE PRESIDENT: Or some means tested payment?

11 MR TURNER: A lower means tested payment, but nothing higher.

12 MR DAVEY: That is the effect of subparagraphs 4 and 5. 4 says "the
13 refund of any payment" and if he is unable to refund at that
14 rate then---

15 MR TURNER: Then it is a lower rate as assessed in accordance with
16 the regulations referred to in paragraph 6.

17 THE PRESIDENT: Just to be clear how this is working in this case
18 what is your evidence? I am looking at Article 36(4) of the 1972
19 Order. The payments made in respect of him [the resident] is
20 the payment made to Bettercare by North & West, the details of
21 which we have.

22 MR TURNER: Yes.

23 THE PRESIDENT: And what Mr Barry is saying in paragraph 14 is that
24 nobody in the two Bettercare homes in fact makes a contribution
25 equal to the payment made to Bettercare for his accommodation.
26 Is that what the evidence is supposed to say, does say?

27 MR TURNER: Yes, in each case.

28 THE PRESIDENT: In each case.

29 MR TURNER: "The individual's assessed contribution does not cover
30 the costs of the residential or nursing accommodation".

31 THE PRESIDENT: "The cost" there is the payment made to Bettercare?

32 MR TURNER: Yes.

33 THE PRESIDENT: Yes, I see.

34 MR TURNER: On that note I shall draw things to a close so far as
35 my submissions are concerned.

36 In conclusion we say that the Director General's decision
37 was right on the evidence that was presented to the Office, and
38 that in the light of the material which has subsequently emerged

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1 it still remains the correct decision. Bettercare's complaint in
2 this case is that it is not having made available to it by the
3 State the funds that it considers immediate for it to continue
4 to provide a service. That sort of complaint is not the province
5 of the 1998 which is concerned to regulate business, and the
6 activities of persons with ordinary market incentives, acting in
7 a market, and not political activity.

8 North & West is not acting as an undertaking. On the
9 basis of the Notice of Application the appeal falls to be
10 dismissed.

11 THE PRESIDENT: Thank you, Mr Turner. Can I just ask you do you
12 happen to have the legislation bundle in with the defence?

13 MR TURNER: Yes.

14 THE PRESIDENT: In the 1991 Order which, in my bundle, is at tab 3
15 "Northern Ireland Health and Personal Social Services Northern
16 Ireland Order 1991. Under Article 8, which is on page 7, there
17 are a lot of provisions dealing with what are called "Health and
18 Social Services Contracts", otherwise known as "HSS contracts".
19 They are basically contracts, or arrangements between various
20 public bodies within the Health Service.

21 MR TURNER: Yes.

22 THE PRESIDENT: And I somewhat suspect, but I have not researched
23 it, that this is perhaps something to do with the internal
24 market that was at one stage being created within the Health
25 Service. Anyway, it involves relationships and contracts between
26 Health Boards and fund holding practices, Trusts, and various
27 things of that kind.

28 When you get to paragraph 5 of the Order, which is over
29 the page, there is a provision which says:

30 *"If, in the course of negotiations leading to an*
31 *arrangement which will be an HSS contract, it appears to the*
32 *parties that the terms proposed by the other party are unfair by*
33 *reason that that party seeks to take advantage of its position*
34 *as the only, or the only practical provider of the goods and*
35 *services concerned, or by reason of any other unequal bargaining*
36 *position as between the prospective parties, or for any other*
37 *reason arising out of the relative bargaining position of the*
38 *second party any of the terms proposed to be arranged cannot be*

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1 *agreed on then it can be referred to the Department for*
2 *determination."*

3 So there is a sort of arbitration provision of some kind
4 in dealing with unfair terms. Unless I have misunderstood it, I
5 do not think this sort of provision applies to our case, because
6 we have not got an HSS contract within the meaning of the
7 Article, my question is whether there is any other similar
8 provision that would deal with a contract where, as here, the
9 Trust is not actually buying from another public body but is
10 buying from the private sector. It is a bit odd that there is
11 machinery if it is another public Body, but no apparent
12 machinery if it is private sector, if you see what I mean?

13 MR TURNER: Yes.

14 THE PRESIDENT: Which I suppose is part of the larger question,
15 namely, what are the alternative remedies here if you are right
16 - if there are any?

17 MR TURNER: Sir, I have had an initial conversation on that matter
18 with the representatives sitting behind me, and they indicate
19 that there are ways in which unfair purchasing behaviour of the
20 kind that you outlined before the short adjournment could be
21 dealt with, but I feel that the appropriate way to deal with
22 this is for us to take full advice - the people behind me are
23 not lawyers - and produce a short note for you, on those on
24 those options.

25 THE PRESIDENT: I think that will be convenient, and Mr Flynn will
26 have an opportunity to comment. If anything arises we can meet
27 again, but I am sure it will not be necessary.

28 MR TURNER: I am obliged, Sir.

29 THE PRESIDENT: Good, thank you, Mr Turner. Yes, Mr Flynn, I think
30 it probably falls to you to reply. I think we are probably
31 running out of questions you will probably be glad to hear!

32 MR FLYNN: Sir, I am not going to take the tribunal's time up by
33 repeating---

34 THE PRESIDENT: Well we have had a very full argument, so just make
35 any points you feel you ought to pick up finally.

36 MR FLYNN: Yes. There is a risk that this will be disorganised, but
37 I will try to take it in order.

38 THE PRESIDENT: Do you want five minutes to organise yourself?

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1 MR FLYNN: I think it is probably best if I just go through it,
2 Sir.

3 THE PRESIDENT: Fine.

4 MR FLYNN: Mr Turner's case, as I understand it now, is that North
5 & West can be an undertaking if it provides services to a self-
6 funded resident, that could be the activity of an undertaking
7 and it is not in dispute, that is something which North & West
8 does, it is an activity which it is engaged in.

9 His case is that we have to focus right in on the two
10 Bettercare homes in the Shankhill Road area of Belfast - Tennent
11 Street and Glencairn - and look solely at whether it is acting
12 as an undertaking when it purchases those services from
13 Bettercare. For reasons which I have gone into to some extent
14 earlier this morning I suggest there is no warrant in the
15 European Court case law for looking at it on a locality or even
16 a resident by resident basis. This is not even looking at it in
17 the area of North & West operation. In my submission this is
18 looking excessively narrowly at a part of North & West's
19 activities, in a part of this area. There are other parts of its
20 own area which are quite different socio-economically and it
21 accepts funded residents in those homes.

22 It is also in our evidence that self-funded residents in
23 statutory homes may end up paying more than they would in
24 private homes, that is in the second witness statement of Miss
25 Montgomery at paragraph 5.

26 Mr Turner says that the key is, is there any possibility
27 of North & West making a profit on this activity? You have
28 pointed out, Sir, before the luncheon adjournment that there was
29 something in the case law about non-profit making status, and I
30 think I had passed over it too quickly. There are references to
31 it in Advocate General Jacobs' opinion in *Glöckner*, it is simply
32 not the test. It is simply not the test that the non-profit-
33 making status or otherwise of the entity who is being looked at
34 to see whether or not it is an undertaking, the fact that it is
35 non-profit-making is simply not part of the test. I can take you
36 to that if necessary.

37 THE PRESIDENT: No, I think we remember the passage.

38 MR FLYNN: I believe it is paragraph 67 and he recites authorities

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1 in footnote 34.

2 THE PRESIDENT: I think it was not so much the question of whether
3 it actually is profitable or not, but the question of whether
4 the activity in question could be capable of being carried on at
5 a profit.

6 MR DAVEY: It says "could at least in principle be carried out by
7 private actor in order to make a profit".

8 THE PRESIDENT: That depends what the activity is, and you say it is
9 the activity of providing residential care or purchasing
10 residential care, and he says it is the activity of securing
11 accommodation for those who cannot afford it, which nobody could
12 ever do at a profit because by definition we cannot afford it.

13 MR FLYNN: Yes.

14 THE PRESIDENT: Well it depends which view we take.

15 MR FLYNN: From that point of view it depends on your starting
16 point, but it is not relevant that it is non-profit making
17 activity, or a non-profit making Body.

18 THE PRESIDENT: A charitable Trust for example could perfectly well
19 be an undertaking.

20 MR FLYNN: Could perfectly well be an undertaking. That cannot be
21 the test. As I said, North & West like other Trusts, take in
22 fully paying people who may end up paying more than that would
23 in the private sector, and that is, I dare say on a case by case
24 basis, profitable.

25 THE PRESIDENT: Yes.

26 MR FLYNN: The same as Bettercare. Bettercare is overall
27 profitable. It has homes all over the United Kingdom located in
28 different areas. I think it is acceptable, though there was
29 perhaps some discussion about it, but Bettercare quite clearly
30 is an undertaking operating in these circumstances, although it
31 must sometimes wonder whether it is not on a hiding to nothing.

32 So you might say more generally as to the potential profit
33 making activities of the private sector Body, with whom the
34 public entity Body is being compared, that the very involvement
35 of the public sector in the provision market affects the ability
36 of private sectors to make profits by below cost provision and
37 indeed taking out of the market some people who could pay, as it
38 were, the market rate, by those two factors. The public sector

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1 is affecting the costs of the private sector in depressing their
2 profitability.

3 In those circumstances I do not think it is right to say -
4 this was a feature in the correspondence - that this is a
5 provision by way of last resort. It is not as if there is
6 nowhere else to go. Bettercare is there. The private sector is
7 there to offer that accommodation. Provision by way of last
8 resort would surely be direct provision.

9 So I think the correspondence has to be looked at as a
10 whole. That is important. Throughout Mr Turner's argument he was
11 alighting on particular passages and I think that is perhaps
12 unduly selective. I think it was plain, taking the
13 correspondence as a whole, that Bettercare would have accepted a
14 pure provision role, without any purchasing involvement by the
15 State, as not the activity of an undertaking. That has been
16 emphasised. The analogy there might be with Mr Turner's health
17 and schools. National Health Services are provided free at the
18 point of delivery, so is State school - no payment.

19 Bettercare said that might be State functions, but that
20 was not the case. It is not the case in this area - that is a
21 counter-factual, if you like. I do not think Bettercare has been
22 inconsistent on that. It said once the State gets in the market
23 and trades with us the position is different and, in any event,
24 the decision itself - you characterised it, Sir, as coming close
25 to acknowledging - I would say that it went further than coming
26 close to acknowledging. It did not say "it might be, it might
27 not". It said "We can accept it may be. We agree with you that
28 they seem to have two roles, supplying services and
29 undertaking". I think it was much stronger than that, and in
30 those circumstances it was incumbent on you to draw the
31 distinction and provide a rational basis - I heard what you said
32 about reason but there still has to be a rational basis - for
33 isolating the purchasing activity from the overall context of
34 purchasing and provision.

35 THE PRESIDENT: Yes.

36 MR FLYNN: And that simply has not been done. I think on the
37 European Court cases we are closer here to a *Glöckner* situation
38 where the activity that is being carried out is one that can be

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1 carried out by, in theory, the private sector at a profit rather
2 than one which is a purely State-type function. I do not think
3 that is a new case. We have been consistent on that and
4 maintained the request in the application but in the order that
5 I specified in opening this morning.

6 The first question is: can the decision stand? If the
7 decision cannot stand then you must take a view on whether you
8 remit or make the decision for the Director. I do not think it
9 can be right to say that now we have had a fuller look at the
10 facts we think the Director was right. He set off on his policy
11 line. Bettercare could have written a fourth letter of course,
12 but that was not a realistic option. As you pointed out, Sir,
13 the Bedfordshire Care Group, in a rather different situation,
14 got entirely the same letter and the same reasons were set out.

15 It is not a case where the Office of Fair Trading has had
16 a fair look at the actual situation on the ground, assessed the
17 activities of the entity under the microscope as it were, and
18 come to a reasonable conclusion. The case got off on the wrong
19 foot, as I said first thing this morning.

20 Sir, if I may, I am just going to check whether there was
21 anything else burning that I needed to say.

22 THE PRESIDENT: I have one question for you and one question for Mr
23 Turner - other members of the tribunal may have other questions.
24 The question for you, Mr Flynn, is could you either say now or
25 let us know within say, seven days, having seen the further
26 material and had this hearing today, whether you are able to
27 accept that North & West is either (a) de facto, or (b) de jure
28 subject to direction by EHSSB in relation to the prices that
29 should be applied for independent sector homes? It appears to be
30 on the general purport of the evidence we have now got, if that
31 is still in dispute then I think we would like to know. If it is
32 something that can be agreed, that is also relevant.

33 MR FLYNN: I think it would probably be sensible if I take full
34 instructions on that.

35 THE PRESIDENT: You can take instructions and let us know whether it
36 is agreed or not in the light of the further material.

37 MR FLYNN: If it had been said to Mr Caldwell "you know our hands
38 are tied, you know we cannot do anything about it" then we would

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1 not be here. So I must take instructions.

2 THE PRESIDENT: Well obviously we are interested in getting the
3 legal question right, the procedural consequences of the case -
4 costs and all the rest of it - are quite secondary and separate
5 to that.

6 MR FLYNN: The only other point that I was going to mention, Sir,
7 having looked through my note, I think Mr Turner is also making
8 an argument about whether you can be an industry created on the
9 back of State funding. That again cannot be the test, you can
10 still be an undertaking if you are in receipt of State aids. The
11 market created, that was referred to in the survey attached to
12 Mr Caldwell's statement, to which your attention was drawn and
13 going through the tables in it, referred to an industry which
14 has grown on income support. I would just underline that my
15 understanding is that income support is funding provided to
16 individuals. The whole idea of increasing income support was so
17 that they could pay for their care. That was the basis on which
18 the industry grew.

19 Sir, we shall revert with an appropriate reaction to the
20 further material. Thank you very much.

21 THE PRESIDENT: I suppose my last question for you, Mr Turner, is
22 just coming back to this problem of the services which could, at
23 least in principle, be provided by a private sector operator at
24 a profit?

25 MR TURNER: Yes.

26 THE PRESIDENT: Almost everybody with whom we are concerned here
27 will at least have a State pension if they have nothing else,
28 presumably an old age pension and possibly some other pension.
29 It is actually an assumption, is it not, that no private
30 operator, even a private individual providing a room in a
31 private house, could care for an elderly person at a cost that
32 was less than the State pension. It could be done, could it not?

33 MR TURNER: I am sorry, Sir.

34 THE PRESIDENT: Sorry, it was a slightly complicated question. If
35 the legal test is could this activity be carried out, at least
36 in principle, by a private sector operator for a profit, one has
37 to be convinced that no private sector operator could care for
38 an elderly person at a cost that was lower than the State

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1 pension. There would always be the State Pension to pay for
2 care. I do not know whether that is an assumption one can make
3 or not. It is not people who have no money at all, they have
4 always got something.

5 MR TURNER: May I make two answers to that - one of fact and one of
6 principle?

7 THE PRESIDENT: Yes.

8 MR TURNER: The first, as a matter of fact that is certainly a
9 point in theory. Nothing in the case suggests that that could be
10 the case. All of the legislation, all of the Charging for
11 Residential Accommodation Guide, which is exhibited---

12 THE PRESIDENT: Yes.

13 MR TURNER: ---all of that suggests that the provision of care is
14 at a cost which can be contributed to by these State benefits
15 but not that that could cover the full cost.

16 THE PRESIDENT: Yes, thank you.

17 MR TURNER: The point of principle which I would add, and which
18 should not be lost sight of, is contained in the latter section
19 of our skeleton argument, which relates not just to where the
20 entity concerned is situated - for example, the National Health
21 Service provides medical services for free alongside private
22 hospitals which do the same thing for money.

23 THE PRESIDENT: Sometimes the National Health Service does it for
24 money too.

25 MR TURNER: And sometimes the National Health Service does it for
26 money too. But also the principles on which it is organised,
27 because as a matter of underlying rationale what one is
28 concerned about is whether there are the incentives there for
29 the entity concerned to behave in a way which might generate
30 effects incompatible with the competition rules.

31 If those incentives are not there because, as a result of
32 the rules to which it is subject - a thicket of statutory
33 criteria guiding what you do and the way in which you do it for
34 example - if those incentives are not there then you are not an
35 undertaking, and that may be seen from the cases referred to in
36 the latter part of my skeleton argument, in particular
37 paragraphs 36 to 39 where the court is considering whether or not
38 certain activities are at least potentially performed by private

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1 entities engaged in the supply of goods or services, and at
2 paragraph 36 of my skeleton I quote Advocate General Jacobs
3 saying:

4 *"The application of Articles 85 and 86 is justified by the*
5 *fact that those public Bodies are operating on the same or*
6 *similar markets and according to similar principles as normal*
7 *undertakings."*

8 THE PRESIDENT: Yes.

9 MR TURNER: And that is a very important point, and the following
10 quotation, which is taken from the same case, Advocate General
11 Jacobs said that the way the pension scheme operates is an
12 important fact, and he noted that in that case the pension
13 scheme was one operating according to the redistribution method.
14 It was not something that a private person would do.

15 THE PRESIDENT: No.

16 MR TURNER: Similarly here it should not be lost sight of that the
17 Trust, North & West, is providing these services in accordance
18 with a statutory duty, and very close statutory criteria about
19 what it does and how it recovers the money.

20 THE PRESIDENT: Yes.

21 MR TURNER: And it does not have the incentives of an ordinary
22 market participant and that is why to regard it as an economic
23 actor is, in my submission, additionally inappropriate.

24 THE PRESIDENT: Yes, thank you. Very well, I do not think we have
25 any other questions. I would like to express our thanks to
26 everyone who has helped us with this case and in particular to
27 the representatives of North & West who I imagine are here
28 today. Thank you very much for all the background information
29 you have supplied.

30 Thank you to Bettercare as well, and to the teams on both
31 sides for all the help we have had. Thank you very much indeed.

32 (The hearing concluded at 3.30 pm)

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