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**IN THE COMPETITION**

Case No. 1110/6/8/09

**APPEAL TRIBUNAL**

Victoria House  
Bloomsbury Place  
London WC1A.2EB

Monday, 19<sup>th</sup> October 2009

Before:

THE HON. SIR GERALD BARLING  
(President)

LORD CARLILE OF BERRIEW QC  
SHEILA HEWITT

Sitting as a Tribunal in England and Wales

BETWEEN:

**BAA LIMITED**

Applicant

and

**THE COMPETITION COMMISSION**

Respondent

Supported by

**RYANAIR LIMITED**

Intervener

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**HEARING  
DAY ONE**

## **APPEARANCES**

Mr. Nicholas Green QC and Mr. Mark Hoskins QC (instructed by Herbert Smith LLP and Freshfield Bruckhaus Deringer) appeared on behalf of the Applicant.

Mr. John Swift QC, Mr. Paul Harris, Mr. Ben Rayment and Mr. Ewan West (instructed by the Treasury Solicitor) appeared on behalf of the Respondent.

Mr. Daniel Jowell and Miss Sarah Love (instructed by Nabarro LLP) appeared on behalf of the Intervener, Ryanair Limited.

1 THE PRESIDENT: Good morning. Good morning, Mr. Green. I do not think there are very  
2 many housekeeping issues. We are all interested to know about the timetable, one  
3 possibility which seems to have a certain logic is that BAA would take all or most of today  
4 and then the Commission would have tomorrow – does that sound about right? Then on  
5 Wednesday might split conveniently between Ryanair and reply. Does that sound a sensible  
6 arrangement.

7 MR. GREEN: That sounds to us about right.

8 MR. SWIFT: That sounds about right to us too.

9 MR. JOWELL: And us.

10 THE PRESIDENT: Excellent, that is a very good start. The only other matter is the possibility  
11 because of some of the confidential material that has been put in – no doubt you have had a  
12 word about that – how one is going to deal with that? Presumably there will be points at  
13 which we will be asked to go into camera, or will you be able to do it without that.

14 MR. GREEN: I am hoping to be able to deal with it without asking you to go into camera by  
15 asking you to read to yourselves various passages and transcripts or in documents. If I  
16 make a mistake and start to trespass no doubt I will be punched from behind or from the  
17 side, but I am hoping to be able to avoid that.

18 THE PRESIDENT: Good, excellent. I think that is all we have.

19 MR. GREEN: Sir, members of the Tribunal, good morning. I appear today with Mr. Mark  
20 Hoskins QC, Mr. John Swift QC appears for the Competition Commission with Mr. Paul  
21 Harris, Mr. Ben Rayment and Mr. Ewan West. Mr. Danny Jowell and Miss Sarah Love  
22 appear for Ryanair.

23 Two very different issues arise for your determination on this application. I propose to  
24 commence BAA's case by giving you an extremely brief précis of these two issues. The  
25 first issue concerns what is termed "apparent bias", it focuses upon the fact that the most  
26 experienced member of the Competition Commission, Professor Moizer had a powerful  
27 connection with one of the main parties to the inquiry, Manchester Airport Group, whom I  
28 will refer to throughout as "MAG". That interest was not disclosed throughout the inquiry,  
29 BAA was unaware of it. At a late stage BAA discovered the bare bones of this connection,  
30 they raised the matter with the Competition Commission. The Competition Commission in  
31 a manner that I will describe in detail later, failed to address BAA's very real and very  
32 legitimate concerns. At the 11<sup>th</sup> hour, literally days before the Report was published the  
33 Competition Commission stood down Professor Moizer, they did not tell anyone about this.

1 The net effect of this was that from the outset and thereafter to an increasing degree the  
2 conduct of the inquiry was riven through by an acute and intolerable conflict of interest.  
3 The Competition Commission in their written submissions to you seek to downplay the  
4 facts and they astonishingly seek to cast the blame on BAA. The facts of this case are  
5 stubborn, they cannot be shaken and, as I will explain, the hard facts demonstrate this is not  
6 a trivial or a technical case, but a fundamental failing on the part of the Competition  
7 Commission to operate in a fair and impartial manner which went to the core of the  
8 investigation.

9 The second issue that I will be addressing you on is very different; it is much narrower in  
10 its compass and it concerns the way in which in its report the Competition Commission  
11 addressed the nature of the divestiture remedy. Indeed, it is even narrower than that, in  
12 particular it concerns the amount of time which the Competition Commission gave to BAA  
13 in which to divest the three airports in question.

14 The starting point for that particular analysis is the position in the report itself, this is that it  
15 is accepted that it is relevant when considering the proportionality of any particular remedy  
16 to take account of the cost of that remedy to the person subjected to it. There is no dispute  
17 as to that.

18 Further, that the cost to BAA of being required to sell three airports in the amount of time  
19 stipulated would be substantial but, and notwithstanding the recognition of these points, the  
20 report fails to analyse or address the issue or the questions which should necessarily follow.  
21 You will have seen from the Competition Commission's skeleton argument, in particular  
22 para.30, that it accepts in clear and unequivocal terms that the Competition Commission did  
23 not in fact assess whether the timing of the three divestments would lead to loss of value to  
24 BAA in the manner BAA alleges. The issue therefore is why they failed to conduct this  
25 analysis and what were the reasons for not doing so and whether they were justified.

26 There is a hint in the defence that they did in fact conduct a qualitative analysis. That hint is  
27 inconsistent with the position in para. 30 of the skeleton. They cite in their defence various  
28 numbered paragraphs, and I will come back to those and demonstrate that when you look at  
29 each and every one of those paragraphs they say nothing about the issue.

30 Those are the two issues before you, they are very different, and I am going to start with  
31 apparent bias, and I propose to divide my submissions up this morning in the following  
32 way. First, I am going to address the legal principles, secondly, I will address the key  
33 evidence and assess that evidence in the light of the relevant legal principles on apparent  
34 bias; and thirdly, I am going to address the evidence and law in relation to waiver. That will

1 take you to the end of the question of conflict of interest and apparent bias. So without  
2 more ado I am going to start with the law.

3 We have set this out fully in our skeleton argument at paras. 4 to 23 and you will see there  
4 is no great material difference between the parties on the principles to be applied. I would  
5 ask you to have our skeleton available because I am going to refer quite extensively to that  
6 and in particular to the chronology which we have attached to the skeleton argument.

7 The legal principles relating to bias and Waiver have been laid down in a series of  
8 authorities, primarily from the European Court of Human Rights in Strasbourg, but  
9 extensively analysed in the English context by the House of Lord and the Court of Appeal.  
10 We therefore have an extensive line of cases of the very highest authority which govern this  
11 area.

12 Now, because there is no great disagreement between the parties, what I propose to do is to  
13 summarise the main propositions of law which most directly impact on the facts of the case.  
14 There are eight points that I wish to make in this regard.

15 The first point is that this case concerns apparent bias and not actual bias, and I think it is,  
16 on behalf of my client, proper and right to explain at the outset that there is no allegation  
17 against Professor Moizer of actual bias, and it is important to get that out of the way. This  
18 case concerns apparent bias, which is really quite a different principle of law. As the  
19 Strasbourg Court and the House of Lords and Court of Appeal have emphasised, cases of  
20 actual bias are in fact extremely rare. This is because it is impossible to know what is in a  
21 man's mind, or a woman's mind, and it is for this reason that the vast majority of bias cases  
22 arising out of conflict both before the Strasbourg Court and the domestic courts concern  
23 apparent bias not actual bias. That is point one.

24 Point two is the basis in law of the principle of apparent bias. As I have said, the principle  
25 of apparent bias is different to that underlying actual bias. The principle of apparent bias is  
26 concerned with the confidence the public is entitled to place in decision making bodies. It  
27 is a fundamental principle of public policy. It is a principle which is viewed as being one of  
28 high constitutional importance and that is very plain from the many statements of the House  
29 of Lords and the Strasbourg Court to that effect.

30 The Strasbourg Court has taken to its heart the pithy aphorism first expressed by Lord Chief  
31 Justice Hewart in 1923 that justice must not only be done, it must be seen to be done. Lord  
32 Chief Justice Hewart in 1923 described the principle as emanating from a long line of cases  
33 and he stated that it is not merely of some importance, it is of fundamental importance.

1 Moreover, as to the element of justice being seen to be done, he said it should manifestly  
2 and undoubtedly be seen to be done.

3 That principle has been adopted verbatim into modern jurisprudence under Article 6 of the  
4 Convention and has been applied rigorously by the English Courts. It is a principle of  
5 essentially universal application across the world.

6 Point three concerns the relevant test. The English Courts taking their cue from Strasbourg  
7 case law have led the way in formulating a test of practical utility to be used by the courts  
8 when assessing an allegation of apparent bias. The English Courts have evolved the test of  
9 the fair minded observer. This person is something of a paragon, he is fair and reasonable,  
10 he is not complacent, but he is reasonably well informed. In the early Strasbourg cases the  
11 court used a somewhat more cumbersome formula, they asked themselves whether the  
12 Judge offered guarantees “sufficient to exclude any legitimate doubt” but more recently  
13 they have translated this into the test of the external observer.

14 The essential question for you on the facts of the case is whether there is an appearance of  
15 bias, viewed objectively from the standpoint of the fair-minded observer, and you will ask  
16 in relation to the facts as they unfold what the fair-minded observer would have been  
17 concerned about; what he or she might have thought at the time. The observer is asking him  
18 or herself a particular question, which is whether the decision-maker would be inclined  
19 consciously or subconsciously towards the views of one party or another. I put it to you  
20 quite emphatically that the test is not a high one. The fair-minded observer asks whether  
21 the person alleged to be subject to apparent bias would be inclined consciously or  
22 subconsciously to the position of one party or another. This dual bench-marking against  
23 conscious, as well as conscious disposition is important - it underscores the fact that the  
24 court and, here, the Tribunal is concerned with the objectively observable position and not  
25 with the actual subjective views of Professor Moizer.

26 The fourth point I wish to make concerns the strictness of the approach adopted by the  
27 courts. It is an important point to take on board, which is that the courts apply the principle  
28 in an extremely rigorous and strict manner, reflecting the fundamental importance which the  
29 principle plays in guaranteeing the proper standards that decision-makers must adhere to.  
30 We see, for example, the authorities in our skeleton, para. 5, footnote 3. The particular  
31 point to note is that the strictness with which the principle is applied is a reflection of the  
32 increased sensitivity of the public to the fair administration of justice. I will deal with the  
33 cases briefly later, but cases such as the *Pinochet* case in the House of Lords, *Re*.

1 *Medicaments* in the Court of Appeal, *Smith v. Kvaerner* in the Court of Appeal demonstrate  
2 and reinforce the strictness which with the test is applied.

3 My fifth point concerns the relevant facts that are to be considered in establishing the  
4 conflict of interest. As to these they are, in principle, unlimited - a financial connection  
5 between the decision-maker and the affected person is always causative of conflict and case  
6 law indicates that that is generally irredeemable and results in automatic disqualification. A  
7 decision-maker whose decision affects a friend or a relative, or a client, or, as the House of  
8 Lords put it in the *Pinochet* case, an associated person, or someone within the same  
9 organisation creates a conflict which precludes that person from acting. Case law is quite  
10 replete with examples. We have set out *Smith v. Kvaerner* in our skeleton at paras. 12 and  
11 13. Very, very briefly, in that case the judge had a connection of what was described as of a  
12 professional nature with a company. That company was not a litigant before him. The judge  
13 was a recorder. The company was, however, in the same group of companies where one of  
14 the other subsidiary companies was a litigant in front of him. The judge had no connection  
15 with the facts of the case before him. The Court of Appeal held that was sufficient to create  
16 a professional connection which should have resulted in either the judge giving adequate  
17 disclosure leading to a waiver, or standing down. We have seen in *Pinochet* that a really  
18 vague and indirect political connection was sufficient. Lord Hoffmann was the director and  
19 chairman of a charity. That charity was a subsidiary of Amnesty International. One of the  
20 objects was the suppression of extra judicial murder and execution. There was no  
21 suggestion on the facts of the case that that was something which Lord Hoffmann adhered  
22 to, though it is hard to see why he would not because it is a principle set out in many United  
23 Nations conventions. It is entirely uncontroversial. Yet, that was sufficient to create a  
24 conflict. The entire House of Lords judgment was set aside and the decision taken again.  
25 *Re. Medicaments* - a case really quite closely on point because it concerns what was, in  
26 effect, the predecessor to this Tribunal - the Restrictive Practices Court. In that case Dr.  
27 Rowlatt was sitting as a lay member. The case before the Restrictive Practices Court  
28 concerned re-sale price maintenance for pharmaceutical products and the Director-General  
29 of Fair Trading had brought a case in front of the court. Preparation had taken a very long  
30 period of time. The costs were very substantial. During the hearing, Dr. Rowlatt made an  
31 application to be employed by Frontier Economics. Frontier were advising the Director-  
32 General of Fair Trading. When she realised, as she put it, the connection, she withdrew her  
33 application for employment. That issue was then brought to the attention of Sir Gavin  
34 Lightman, who was the president of the court. He brought it to the attention of the parties.

1 After a hearing he decided there was no apparent bias. The company - the trade association  
2 concerned - appealed to the Court of Appeal who held that there was apparent bias - a  
3 serious apparent bias, and they set aside the entire case, lock, stock and barrel. The  
4 connection was ephemeral, non-financial, and entirely speculative. But, the court said she  
5 might be inclined to favour the expert evidence of Frontier, supporting the Director-General  
6 because she might at some future point want to be employed by them. That was sufficient  
7 to taint the entire process and result in the case having to be repeated.

8 The next point concerns the evidence that is relevant. It is something of a technical point,  
9 but it is an important point. You will need to consider all of the circumstances. These  
10 circumstances are not limited to the facts and matters which a member of the public has  
11 access to, though clearly that is an important set of facts. The relevant evidence is not  
12 limited to that. For your reference, see *Re. Medicaments*, paras. 74 and 83. Paragraph 74  
13 summarises the Strasbourg case law on that point.

14 Point 7 - irrelevant considerations. What is, and what is not, a relevant consideration has  
15 been the subject of fairly extensive judicial analysis. It is clear that certain matters are  
16 irrelevant to the task before you. There are five matters I wish to mention here. The first are  
17 the costs and the time implications of quashing the report. The Court of Appeal had no  
18 truck with that. *Re. Medicaments* at para. 100. They reported that the Director-General of  
19 Fair Trading had quite properly made no submission that the effort and the burden was a  
20 relevant consideration. The importance of the principle exceeds vastly short term financial  
21 and other exigencies.

22 Secondly, another irrelevant consideration: protestations by the person concerned that he or  
23 she was not in fact prejudiced or biased in any way. I can give you the reference: House of  
24 Lords in *Porter v. McGill*. The references are in our skeleton at para. 10, footnote 10. As  
25 Lord Hope put it, "*Ex post facto* protestations are inevitably self-serving". But, in any case,  
26 that must inevitably be the case because the law is predicted in part upon sub-conscious bias  
27 so that a decision-maker might personally subjectively feel that they were not prejudiced;  
28 yet sub-consciously they were.

29 Thirdly - and, indeed, associated with the second point - is whether the decision-maker  
30 acted in good faith. We have set out the relevant cases from both Strasbourg and the House  
31 of Lords in our skeleton. Indeed, I would add to that the *Pinochet* case in which the point  
32 was very clearly made - there was never even a scintilla of a suggestion that Lord Hoffmann  
33 acted in bad faith in any way, shape or form. It is an irrelevant consideration.



1 Fourthly - and one of some significance in this case, given the Competition Commission's  
2 defence - the suggestion by the decision-maker that the decision would have been the same  
3 regardless of the bias. My learned friends will have to confront, at the very least, at least  
4 four House of Lords authorities against them on that which we have set out in our skeleton.  
5 In fact, we have referred to three, but I add to that *Pinochet* and in particular the statement  
6 of Lord Hope.

7 THE PRESIDENT: Which paragraph are these in, Mr. Green?

8 MR. GREEN: These are in the skeleton where the analysis is around the authority of *Dimes*,  
9 which is para. 19. I will take you to the paragraphs in the authorities at a later stage. If my  
10 memory serves me right it is pp.140-141 per Lord Hope in *Pinochet*. The courts have  
11 essentially held that the principle of impartiality is a fundamental, almost sacred principle,  
12 and it has to be applied rigorously to send a salutary message demanding the highest of  
13 standards of lower and inferior courts, and that was the House of Lords in *Dimes*, in 1852,  
14 followed rigorously ever since, and we have cited other authorities in the skeleton, paras.20  
15 and 21.

16 I will also address later why, on the evidence of this case, the assertion that nothing would  
17 have changed is simply not one which can be sustained.

18 The fifth irrelevant consideration is the anti-Musketeers point, and it really related, I think,  
19 to the fourth point but the Competition Commission says that even if there was bias it does  
20 not affect the remainder of the Competition Commission. Again, this is a proposition which  
21 case law does not support – see *Re Medicaments*, para.99, the Court of Appeal. *Re*  
22 *Medicaments* is interesting in that it could be taken to suggest that it is a question of fact.  
23 The House of Lords authorities suggest that it is not. If it is a question of fact there is a  
24 very, very low hurdle to be overcome. In one paragraph the Court of Appeal simply said,  
25 “Did Dr. Rowlatt discuss her views with the other members of the Panel? If so, the  
26 inevitable consequence is that the other two are tainted”. It was as simple as that. They  
27 dealt with tainting literally in four lines.

28 If it is a question of facts the threshold is exceedingly low. Our primary submission on the  
29 basis of case law is that it is not something which you can sever off. I will come back to  
30 that.

31 The eighth point – the eighth point about the law and the facts, I am moving away from the  
32 relevant considerations, and this is the last point before I get stuck into the evidence – is  
33 why on the facts of this case BAA was entitled to expect and demand that the Competition  
34 Commission would ensure with scrupulous and punctilious care that its proceedings were

1 fair and impartial. I address this at this stage because there is a hint in the submissions of  
2 the other parties that in some way the principle of apparent bias should be watered down or  
3 diluted in so far as it affects BAA. So let us consider the facts, and you will be able to  
4 measure these against the evidence as we go through it in the course of the day.

5 First, the Competition Commission accepts that it has a duty to act impartially. In its  
6 witness statements the Competition Commission explains why, as an adjudicatory body  
7 wielding quite stupendous power, it is important that it retains public confidence. As you  
8 know, to this end it has published detailed guidance on conflicts of interest. It operates a  
9 procedure designed to ensure that conflicts are rooted out and addressed, and where they do  
10 arise they are resolved and, I emphasise, prophylactically and definitively. So the starting  
11 point is the Competition Commission's own clear acknowledgement of the principles as it  
12 applies to them.

13 The second point which is relevant to this case is that the Competition Commission does  
14 indeed wield extraordinary power and this case exemplifies the exercise of those powers.  
15 The report in this case entails the imposition on BAA of just about the most draconian and  
16 extreme remedies which the Competition Commission has ever imposed on any company.  
17 We have analysed this in our detail in our notice of application and in a schedule, and the  
18 facts simply speak for themselves. With great power comes great responsibility and part of  
19 that responsibility entails quarantining those affected by bias or conflict and guaranteeing  
20 the highest standards of impartiality and independence.

21 A third fact relevant to the present case is that the investigation from the very outset, from  
22 the moment that the investigations started, from the word go, pitted BAA in one corner of  
23 the ring against virtually everybody else. The other airport authorities were against it or the  
24 airlines were against it. Indeed, I go further, virtually everybody else had a strong and  
25 vested interest in seeing BAA subject to the severest of remedies. They either were airlines  
26 who wanted lower service charges or possibly even the opportunity to buy assets, or they  
27 were opposing airport operators who were interested in buying any assets that BAA were  
28 required to divest. They were like vultures circling around BAA hoping that the  
29 Competition Commission would order extensive divestiture. There were precious few  
30 supporters and, as the documents reveal, the Competition Commission had little time for  
31 them. For example, the Civil Aviation Authority rendered a number of submissions to the  
32 Competition Commission, including on matters where they were sympathetic to BAA. I  
33 will give you the reference to this so that it can be looked at later. On 23<sup>rd</sup> January 2009 the  
34 Competition Commission, having held a hearing with the CAA – the reference to this is

1 respondent's bundle, tab 4, 35, p.2 – at that meeting the chairman, Christopher Clarke, is  
2 recorded as reporting the group's view that the economic regulation group in the CAA,  
3 "gave insufficient weight to the interests of consumers and tended to be driven by economic  
4 dogma". So the net effect was that as this inquiry unfolded it was BAA against the world.  
5 In such circumstances BAA was undoubtedly entitled to the strongest possible procedural  
6 protection that the Competition Commission was able to give.

7 The fourth and final point on how this principle should be applied on the facts of this case  
8 concerns the fact that whilst the Competition Commission exercises very great power, its  
9 decision makers are not judges. Their instincts in spotting conflicts may not be as finely  
10 tuned as that of a judge. Accordingly, there should have been put in place an absolutely  
11 watertight system guaranteeing that no panel member could ever entertain even the hint of a  
12 conflict.

13 We say these facts demonstrate why the principle of independence and impartiality and  
14 apparent bias must apply fully and without mitigation to the Competition Commission.  
15 That is all I wish to say about the law on apparent bias. I want to say a few words about  
16 waiver and then turn to the evidence. I have got four broad points I wish to make about  
17 waiver at this stage. The first point is this: that if apparent bias exists then unless waiver  
18 arises the judge must – and I emphasise the word "must" – recuse himself (skeleton para.18,  
19 footnote 25). The House of Lords made this absolutely clear in *Pinochet*, amongst other  
20 cases. Waiver is therefore a defence, the burden of proof would lie upon the Competition  
21 Commission, nonetheless I am going to address this comprehensively.

22 Point two, for waiver to exist there are, and I use the Court of Appeal's expression, vital  
23 requirements (see Lord Phillips in *Smith v. Kvaerner*, para.29) which must be satisfied, and  
24 these are fourfold. Lord Phillips describes them as threefold, but they can be broken down  
25 into four. First, there must be full and frank disclosure by the conflicted decision maker;  
26 secondly, there must be full awareness of all the material facts by the person affected;  
27 thirdly, and significantly, there must be full awareness of the consequences of the choices  
28 open to the affected person, and let me just explain that a little. What that means is that the  
29 decision maker must explain what options are open to, in this case, BAA.

30 There are two recent authorities on this point, which is *Smith v Kvaerner* and *Jones v DAS*.  
31 What it means is that in a more traditional judicial context the judge must say: "We can stop  
32 this case now. If we stop it now it is going to mean an adjournment of six months, nine  
33 months. It will mean the following procedural steps have to be repeated. It means perhaps  
34 in the Crown Court, there is a judge next door who can start this case this afternoon, I have

1 made inquiries of listing.” You have to explain the options available to the affected person  
2 so that they can make an educated decision as to whether they wish to waive or not.

3 In the present case it remains to be seen whether the Competition Commission submit to  
4 you that they ever made full and frank disclosure and by the time we get to that I am  
5 confident they will not suggest to you that they ever made full and frank disclosure. But,  
6 had they done so, one thing is crystal clear they never explained the options open to BAA.  
7 The fourth vital requirement is the existence of a non-pressurised and fair opportunity for  
8 the affected person to consider the position before making the election. I will return to  
9 these later in the context of the evidence. I should emphasise that the test is not what the  
10 fair minded observer would think about waiver. It is a straight forward question of whether,  
11 on the evidence, the test is met.

12 The third point concerns an argument advanced with various degrees of enthusiasm I think  
13 by the Competition Commission and Ryanair, the concept of constructive knowledge. The  
14 argument seems to be that BAA ought to have known of the material and relevant facts. It  
15 ought to have been able to join the dots. The evidence, stubborn, hard, unshakeable  
16 evidence, completely demolishes that, but it is relevant to address the question as one of law  
17 as well. The doctrine of constructive knowledge is completely unknown to the case law, it  
18 just does not exist. It cannot be said: “If you have been subject to an intolerable bias that  
19 you should have known but you did not and therefore it is all right.”

20 There was a very important purpose served by the requirement that the decision maker gives  
21 full and frank disclosure and the purpose has two basic strands to it. First, it puts the  
22 affected person in the position where he can make an educated decision, and secondly – I  
23 think from the perspective of the proper administration of justice – it importantly enables a  
24 position of conflict to be resolved definitively at an early stage so as to avoid future  
25 collateral or satellite litigation.

26 If you make a disclosure statement and it is there in black and white and it says: “These are  
27 the facts”, that statement is intended to be relied upon, that is its purpose, it is deliberately  
28 intended to be relied upon. If that statement is erroneous or false, or omits material facts,  
29 that does not in any way undermine its essential purpose as a document to be relied upon.  
30 Indeed, as I will show you, the Competition Commission’s letters of disclosure have a line  
31 at the end which says: “We, the Competition Commission, and indeed the Members above,  
32 are quite satisfied that on these facts there is no risk to independence or impartiality.” So  
33 the Competition Commission represent in their disclosure letters that this is a watertight,  
34 copper-bottomed document. If it is suggested that persons affected should then go ferreting

1 around in the undergrowth to check the CVs and the history of those who are their judges,  
2 then that is a false proposition of law, and that is something I will come back to because it  
3 seems to be the last ditch effort of the Competition Commission – “if there is a conflict, yes,  
4 we have not disclosed, nonetheless you knew about it all along.”

5 The evidence is set out in the witness statements of Mr. Hawkins and Mr. Herga is  
6 absolutely unequivocal, they both state in crystal clear terms, the facts they did know and  
7 they did not know, and you cannot deduce from that unchallenged evidence that in fact  
8 there is anything in the Competition Commission’s and Ryanair’s suggestion, but it is bad  
9 in law anyway as I will show you, and it becomes clearer once one actually sees the  
10 documents.

11 If one puts that point in the context of the present case, the Competition Commission can be  
12 assumed to know its own business. It has detailed rules on conflicts. The rules are in the  
13 public domain, they are on its website. It puts disclosure information on its website and it  
14 sends that information out in letters to affected third parties. It says in those letters quite  
15 explicitly that it is satisfied the disclosure is sufficient and no conflict arises, and so is the  
16 individual member. These factors are deliberately intended to create an expectation the  
17 disclosure is reliable and comprehensive and to be relied upon. BAA did rely upon it as  
18 they were both intended to do and entitled to do.

19 As I have said, I am going to address the evidence fully later on, but at this point I wish to  
20 make just a few observations about the evidence. The 2007 notice, which triggered the  
21 issue is woefully inadequate on its face. The key facts which give rise to the conflict in the  
22 present case were never disclosed. Remarkably, those key facts are set out in a notice five  
23 years earlier in 2002, issued during the quinquennial inquiries into BAA and Manchester  
24 Airport. Equally astonishingly, Professor Moizer was selected for the 2007 inquiry because  
25 of his experience in 2002, but nobody apparently thought to remind themselves as to what  
26 happened to him in 2002 and repeat the disclosure exercise. That notice, the 2002 notice,  
27 was on the Competition Commission’s website, but nobody gave it a thought and  
28 importantly it is pretty clear that the Competition Commission did not itself give it a  
29 thought; they cannot blame us for having overlooked it if they themselves failed to overlook  
30 it as they palpably did.

31 The next point is that following the 2007 notice at no point did the Competition  
32 Commission ever address itself to the task of giving disclosure to BAA of what had, even  
33 internally, towards the end of the inquiry become an increasingly problematic issue. It is  
34 clear from the evidence that the Competition Commission at the time did not consider that it

1 was attempting to give disclosure and it never for a moment thought that BAA had waived  
2 anything. It is only in the course of this case that the issue of waiver and defence has  
3 arisen, but you will see that contemporaneously it was not something which crossed the  
4 Competition Commission's radar. Indeed the Competition Commission acted as if no  
5 waiver had been given. It decided on 24<sup>th</sup> February of this year that Professor Moizer  
6 should be stood down definitively. Regrettably what happened after that date is a confusing  
7 muddle within the Competition Commission. They did not stand him down until 3<sup>rd</sup> March  
8 for reasons which I will explain to you later and even then they did not tell anyone. The  
9 important point at this stage is that the Competition Commission never thought that there  
10 was anything which waiver could bite upon, because they accepted he had a conflict and  
11 they had to stand him down.

12 So waiver never arose at the time and it realistically cannot arise now. But by the end of the  
13 elucidation of the facts I am quite confident the Competition Commission will not submit to  
14 you that ever contemplated waiver. We are confident that albeit with the benefit of  
15 hindsight the Competition Commission will acknowledge that in the way that it handled this  
16 matter it fell below the standards it would expect to adhere to.

17 With that, I want to turn to the evidence. What I am proposing to do is to address this  
18 chronologically. The starting point is that in 2007 Professor Moizer stood, even then, in a  
19 position of acute and intolerable conflict. The core facts relating to that conflict were not  
20 disclosed. Indeed, the 2007 disclosure gave a misleading impression. From that date  
21 onwards, month by month, event by event, the situation got increasingly worse. Viewed  
22 entirely objectively, the hard facts are very much worse than those arising in the decided  
23 cases of the House of Lords or the Court of Appeal. You can use those as a benchmark.  
24 You can look at those cases - *Pinochet*, *Medicaments*, *Kvaerner* and others - and you can  
25 identify what the conflict was. You can look at it in terms of its durability, its nature, the  
26 extent to which it could impact upon the decisions being undertaken. You can see quite  
27 clearly that the present facts are far, far to the wrong side of the line laid down in case law.  
28 So, we start with the position in 2007. There are six headings here. I am going to start with  
29 my first heading.

30 The bare facts. These are the bare facts of the association between Professor Moizer and the  
31 Manchester Airport Group. Just so that you have them in mind, let me tell you what the  
32 other headings are: Heading 1 - the bare facts. Heading 2 - the conclusions of the  
33 Competition Commission in 2002 and their relevance to the position in 2007. Heading 3 -  
34 the Office of Fair Trading's report referring BAA to the Competition Commission and its

1 implications. Heading 4 - the 2007 disclosure notice. Heading 5 - the state of BAA's  
2 knowledge at the time. Heading 6 - the conclusions of the fair-minded observer as to 2007.  
3 Those are the six headings.

4 Heading 1 - the bare facts. We have set these out in considerable detail in our skeleton. The  
5 relevant documents are set out largely in full - at least where appropriate - in the  
6 chronology. I am going to summarise the position. Professor Moizer advises ten local  
7 authorities in the Manchester greater area. Those local authorities collectively own a fund  
8 presently worth about £9 million, but at the start of this inquiry less. But, they also are the  
9 shareholders who own Manchester Airport. So, the local authorities wear a number of hats.  
10 They are not only local authorities in the political sense. They are the owners and  
11 controllers, subject to statutory regulation of a very, very large pension fund -- a very  
12 profitable and successful pension fund. They are also, at the same time, 100 percent  
13 shareholders of Manchester Airport. Indeed, Manchester City Council owns 55 MCT and  
14 the rest own a smaller percentage.

15 Now, the local authorities who are his clients - and I use that expression advisedly because  
16 they are his clients -- We have asked for copies of Professor Moizer's contract and been  
17 denied it on a number of occasions, but the position is pretty clear -- His contract is with  
18 the local authorities to advise them on investment matters relating to the investment fund.  
19 His clients have a very close relationship with Manchester Airport. They are not arm's  
20 length investors. MAG's shares are not listed or traded. 100 percent are owned by the  
21 same authorities whom he advises. Those clients provide loan capital to Manchester  
22 Airport - approximately £100 million from Manchester City Council. They provide other  
23 services. All this is set out in the accounts and we have provided references in the skeleton.  
24 Those local authorities - his clients - sit on shareholder committees which have what MAG  
25 itself describes as a pro-active relationship as between the airport and its shareholders. The  
26 local authorities, his clients, are consulted on, and give consent to, investments over certain  
27 limits. These are set out in the Articles of Association. Indeed, it is clear - and was  
28 expressly acknowledged in the press in the summer of 2008 - that the local authorities, his  
29 clients, had consented to the airport contemplating a bid for BAA assets. Those same  
30 clients - *qua* local authority and shareholder - received dividends which they set off against  
31 other local government expenditure. The relationship between those local authorities and  
32 the airport can be described as political with a small 'p'. They spun off ownership into a  
33 separate company in 1986, and they always view the airport as a very important and

1 strategic public asset. Again, we set out the references to the documents of the local  
2 authorities where that is recorded.

3 Professor Moizer has known about these facts. Indeed, these facts were the reasons why he  
4 was quarantined in 2002 during the quinquennial reviews.

5 Now, over and above those links between the authorities and MAG there are also powerful  
6 links between the fund and the airport. As of 2007 the airport had contributed  
7 approximately £280 million worth of pension contributions into the fund. The figure is now,  
8 I think, circa £300 million. At the time this had deficit implications for the employers. So,  
9 there is an ordinary pension relationship between Manchester Airport and the fund.

10 When Professor Moizer advises the fund he sits in a room where there are generally six  
11 representatives of the employees in front of him representing not just of course Manchester  
12 Airport, but all the other admitted employers and employees in the scheme. They are union  
13 representatives representing the employees directly - not the employers.

14 LORD CARLILE: So, you managed employees.

15 MR. GREEN: Employees, yes. There are employer representatives and employee representatives  
16 at meetings of the fund.

17 THE PRESIDENT: Both.

18 MR. GREEN: Both. For example, at meetings of the fund the employee representatives have full  
19 voting rights. It is probably worth at this stage, so that you have it in mind, looking at the  
20 governance rules of the fund at Bundle 3, Tab 25. This is a 2008 statement. I will take you  
21 through this, but I think it is worth just having the structure in mind at the outset - otherwise  
22 I might slightly stray from the narrow point that I was making in order that I deal with it  
23 comprehensively here. Under the heading 'Introduction' it says,

24 "Governance in the public service context is the leadership, direction and control  
25 of public service organisations to ensure that they achieve their agreed aims and  
26 objectives and in so doing serve the public's best interests.

27 Good governance is a crucial element of effective public services. It leads to good  
28 management, good performance and good stewardship for public money as well as  
29 being a legal requirement. Good governance encompasses both what is achieved  
30 and how things are done.

31 The Governance Policy Statement is revised and republished by the administering  
32 authority following any material change in policy.

33 Then under the heading "Delegation", Tameside Metropolitan Borough Council (Tameside  
34 MBC) has delegated to it the authority on behalf of the other local authorities to administer



1 the funds. So Tameside is the lead local authority. In turn Tameside delegates its  
2 responsibilities and function – or rather I should say “functions” because it cannot delegate  
3 its responsibility. It delegates its functions to four bodies, Pension Fund Management  
4 Panel, and that is the Panel that Professor Moizer sits upon, Pension Fund Working Groups  
5 and Director of Pensions. Professor Moizer sits upon the Advisory Panel as an external  
6 adviser, one of three, as it is called, wise men.

7 You have then got a description of the Pension Fund Management Panel, and then you have  
8 got a description of the Pension Fund Advisory Panel.

9 “Terms of Reference”, to work closely with the Pension Fund Management Panel, and then  
10 here it is its reference “and to advise on all matters”:

11 “The detailed terms of reference are reviewed annually by Tameside MBC and the  
12 current detailed delegations are contained in the Tameside MBC Constitution  
13 referred to below under the heading ‘ACCESS TO INFORMATION’.

14 **Structure**

15 Consists of 10 local authority councillors, one nominated by each of the 10 local  
16 authorities within the Greater Manchester Pension Fund and a minimum of 2  
17 employee representatives nominated by the North West T.U.C. Current practice is  
18 to have 6 employee representatives. All the elected members and employee  
19 representatives have voting rights.”

20 What is explained in the witness statements is that in practical terms the Pension Fund  
21 Management Panel and the Pension Fund Advisory Panel sit together as one body. So it is  
22 not as if there are two bodies sitting on separate days. They work collegiately together and  
23 they form what the Fund describes as the “backbone” of its decision making process. The  
24 reason I am drawing this to your attention is because Professor Moizer was at the very heart  
25 of the decision making process of the Fund. That is the way he is described in their own  
26 literature. They even have pictures of him constituting the “backbone”, as they describe it,  
27 of the decision making.

28 On p.5 of this document under the heading “EXTERNAL ADVISERS”:

29 “Three external advisers assist the Pension Fund Advisory Panel in particular  
30 regarding investment related issues.”

31 So that is where Professor Moizer sits in. Then they describe internal and external controls  
32 and various other matters relating to risk management. They then refer under the heading  
33 “COMMUNICATION WITH EMPLOYERS”:

1 “Quarterly meetings are held with GMPF local authority employers and meeting  
2 with non-local authority take place twice yearly, at which administrative matters  
3 are discussed and updates provided on administration and investment matters.

4 Other meetings with employers are held to report on key issues as required.”

5 So demonstrating a link between, for example, Manchester Airport and other employers.

6 Then there is a heading “ACCESS TO INFORMATION”.

7 So those are the internal governance rules of the Fund. We can put this bundle away now.

8 I want to turn the specific nature of Professor Moizer relationship with the local authorities.

9 As I say, we have been declined the opportunity to review his contract, but I do not think it  
10 really matters and we are certainly not asking for it to be disclosed at this stage. The facts

11 really are incontrovertible and derive from the Competition Commission’s witness

12 statements and from the documents the Competition Commission has produced. The facts

13 can be summarised as follows: Professor Moizer is a very long standing adviser to the local  
14 authorities. He was appointed in 1987, so he had been an adviser for 15 years at the point

15 of the 2002 investigation, and 20 years by the time this investigation started. His personal

16 stock is very high. He is described in glowing terms by the local authorities. Mr. Morris,

17 who is the director of pensions at the Fund since 2003, and for your note this is respondents’

18 bundle, tab 10, para.25, says that Professor Moizer is somebody whose views carry weight

19 and authority and he has a particular strength in economics. He is a described as a “wise

20 man”. He is paid an annual fee of, in 2009 terms, £12,600 per annum. You have seen that

21 under the governance rules of the fund the advisers advise on all matters.

22 If we briefly turn back to bundle 3, tab 30, you will see a document entitled “Greater

23 Manchester Pension Fund Report & Accounts 2008”. The Pension Fund has as it registered

24 office Town Hall, Manchester. We set out the reference for that in the skeleton. If you turn

25 to p.6 of this under the heading “Management Structure”, at the top it says:

26 “Tameside MBC became GMPF’s administering authority in 1987, and established  
27 a management structure which is still the backbone of the operation today.”

28 We then see a colour photograph of Councillor Oldham with the Director of Pensions,

29 Mr. Peter Morris, and the Head of Pensions Investments, Mr. Stephen Taylor, individuals

30 who have given evidence and whose names occur in the documents in this case, and below

31 that we have the external advisers, and Professor Moizer is looking thoughtful in the

32 middle. Under the heading “Pension Fund Advisory Panel” it says:

33 “The Pension Fund Advisory Panel works closely with the Management Panel, and  
34 advises them in all areas. Each local authority is represented on the Advisory

1 Panel, and there are six employee representatives nominated by the North West  
2 TUC.

3 External advisors

4 Three external advisors assist the Advisory Panel, in particular regarding  
5 investment related issues. A key element is helping them to question the portfolio  
6 managers on their activities.

7 The advisors are (pictured to left to right) ...”

8 Mr. Bowie, and then we have Professor Moizer in the middle and Mr. Hemingway on the  
9 right.

10 So he is part of the backbone of the operation.

11 What does one deduce from the bare bones? What would the fair minded observer think  
12 about this? We will come back to him because he is going to look at matters in the round,  
13 or she will. His links to the Fund through his clients are very strong. His links to MAG are  
14 strong. He advises clients who own MAG, MAG’s money is under his control and advice.  
15 He has a fee paying, very long standing relationship of trust and confidence. Everybody,  
16 but everybody, emphasises that his value to the local authorities is due to the longevity of  
17 his relationship and the trust and loyalty that exists between them. You will see in  
18 documents later on that the Fund says, “We would not invest without his advice or his  
19 consent, if he disagreed we would not invest”. That is in internal documents between the  
20 Competition Commission and the Fund itself.

21 If one compares Professor Moizer’s position against the persons affected in *Re*  
22 *Medicaments* or *Pinochet* or *Smith v. Kvaerner*, it is a very, very strong relationship of  
23 enormous durability. It is extreme. It is an extreme set of facts.

24 Those are the bare bones and we can say with confidence that that analysis holds because it  
25 is precisely the analysis which the Competition Commission itself adopted in 2002. That is  
26 the next matter that I wish to turn to.

27 THE PRESIDENT: Are we moving on from the bare facts now to the next heading?

28 MR. GREEN: Yes. In 2007 Mr. Christopher Clarke explains to us that the reason they wished to  
29 have Professor Moizer on the BAA Inquiry is because of his experience with the complex  
30 economic and cost related issues arising in 2002. So we start with the proposition that  
31 everybody knew the blindingly obvious fact that he had form.

32 If I can start with the chronology which is attached to our skeleton – I am going to cross-  
33 refer quite extensively to the chronology now, and on a relatively small number of  
34 occasions to the actual documents, because we have set them out for the most part pretty

1 fully in the chronology. Just for your reference, and you have probably already seen it that  
2 Mr. Christopher Clarke's witness statement, para . 13: "We wish to draw on his  
3 experience".

4 The 2002 investigation commenced in February of that year, this is chronology paras. 8 and  
5 9. Some months later in May or June the Competition Commission identified certain issues  
6 which were common to BAA and to the MAG reviews and, as you will have read, the  
7 Competition Commission had two quite separate reviews on its books at the time dealing  
8 with the charges that both of those airports could quite independently levy; that is the  
9 function of the quinquennial reviews.

10 The Competition Commission therefore identified some issues which were common, one of  
11 which was the cost of capital and in consequence they set up certain working groups to  
12 produce common positions on the constituents of the cost of capital model which they  
13 wished to work with. Now, in or about May Professor Moizer raised with the then  
14 chairman of the Competition Commission, Sir Derek Morris, his connection with  
15 Manchester Airport, and he accepted that he had a close relationship with Manchester  
16 Airport because he as a fee paid adviser to the authority that owned Manchester Airport.  
17 One can take this from the witness statement of Mr. Simon Jones from the Competition  
18 Commission, and whilst keeping the chronology open, if you go to respondent's bundle, tab  
19 8 paras. 7 to 9, this is the account of how the conflict of interest arose. Just so you know we  
20 have used the abbreviation "R" for what is in fact the respondent's defence, so if I say "R" I  
21 really mean "D"!

22 THE PRESIDENT: It is in fact our bundle 6, but I am not sure we know that!

23 MR. GREEN: We do not know that!

24 THE PRESIDENT: So for "8" read "6".

25 MR. GREEN: Mr. Jones' witness statement. Mr. Jones is the legal director of the Competition  
26 Commission. He says in para. 1 he has been the legal director of the Commission, having  
27 joined the staff in 2001. Paragraph 6 he says:

28 "6. Professor Moizer was a member of the inquiry group investigating charges at  
29 BAA's airports. During the inquiries, and to ensure necessary consistency,  
30 there as some joint working between the members and staff of the two inquiry  
31 groups.

32 7. Professor Moizer alerted Derek Morris, chairman of the Commission and  
33 chairman of the inquiry into airport charges at BAA airports that he was an  
34 advisor to GMPF, and that GMPF was connected to the councils in the Greater

1 Manchester area who owned Manchester Airport. I was asked to speak to  
2 Professor Moizer.

3 8. On 30 May 2002 I spoke to Professor Moizer. Professor Moizer explained the  
4 reasons why he wished to draw the connection to our attention.

5 Understandably, they revolved around the fact that the inquiry into  
6 Manchester Airport's charges would determine a significant part of that  
7 airport's revenues for the next five years. Professor Moizer explained that as  
8 the adviser to a pension fund he advised the local authorities ..."

9 I pause there just to make the obvious point, the pension fund is not a corporate body, in  
10 advising the fund you are directly advising the authorities.

11 "... who, through a holding company, also owned Manchester Airport. I  
12 concluded that had the question arisen the Commission would not have appointed  
13 Professor Moizer to the Manchester group. For the sake of consistency it seemed  
14 to me that he should not subsequently play a role in the proceedings of the  
15 Manchester group. Subsequently, with some basic precautions in place, joint  
16 sessions of the BAA and Manchester Airport charges inquiry groups took place.  
17 The then Chief Executive of the Commission, Robert Foster, wrote to the parties  
18 to the Manchester Airport charges inquiry on 13 June 2002 setting out the  
19 connection between GMPF and Manchester Airport (the 2002 Disclosure Notice).  
20 That letter was also published on the area of the Commission's website dedicated  
21 to the Manchester Airport charges inquiry."

22 Can I pause there to make a point, which is that at the time the Competition Commission  
23 sent a detailed letter to a long list of companies who were parties to the Manchester inquiry,  
24 they did not send that letter to BAA. They put the same letter on the Competition  
25 Commission website but they did not receive the letter, and we know that because there is a  
26 list attached to the Manchester letter of those persons who are going to receive the letter and  
27 BAA is not on it.

28 "9. The Commission's 2002 Disclosure Notice was also published on the area of  
29 the Commission's website dealing with the BAA airport charges inquiry."

30 THE PRESIDENT: So that is the letter of 13<sup>th</sup> June you are referring to.

31 MR. GREEN: Of 2002, yes, which I will show you later.

32 "The Commission did not conclude that Professor Moizer's connection with  
33 GMPF should prevent him from participating in any of the BAA airport charges  
34 inquiries of 2002 and 2007 or in relation to the BAA Inquiry."

1 That is a little bit of after the event analysis as we will see.

2 The points to be made from this is that Professor Moizer recognises that in advising the  
3 fund he is advising the local authorities and the authorities, of course, own the airport. The  
4 Competition Commission also recognises that this would have disqualified him from being  
5 involved in the MAG investigation – they say that in terms. It follows from that that he  
6 cannot have any involvement with anything which could affect the position of Manchester  
7 Airport. They say that it did not prevent him from remaining a member of the BAA panel,  
8 and that is for two reasons. I think it was a close call but nonetheless it is probably one that  
9 on balance they could make certainly with proper disclosure. It is a close call but it is not  
10 an unreasonable close call because (a) BAA and MAG were not protagonists during those  
11 inquiries; and (b) they were not in the same case, they were discrete inquiries, so the  
12 connection between Professor Moizer affecting MAG through his conduct vis-à-vis BAA  
13 was really quite remote. That is, of course, a major difference between the 2007 inquiry  
14 where MAG was a direct protagonist to BAA in the same case.

15 The Competition Commission’s analysis can be seen from their letter which, for your note,  
16 is the same bundle tab 9 and if we turn to that we see the letter of 13<sup>th</sup> June, 2002. If you  
17 just turn over the page of the letter, you will see the list of persons to whom the letter was  
18 sent. There are three and a bit pages of that. BAA is not on the list. You will see the level  
19 of the detail with which they make disclosure. The letter says as follows,

20 “Professor Peter Moizer is a member of the inquiry into BAA airports. I am writing  
21 to you about a financial interest that Professor Moizer has in one of the parties to  
22 the Manchester inquiry”.

23 Just note the starting words: “Professor Moizer has a financial interest in one of the parties  
24 to the Manchester inquiry”. Why? Because he is paid by the Authority who own  
25 Manchester Airport. That is their analysis: he has a financial interest in a party. That is  
26 their analysis. I will make the point later that our fair-minded observer would look at that  
27 and say, “Quite right. Correct. That is the analysis which should have been applied in  
28 2007”. You would not look any further because that is the Competition Commission’s own  
29 considered view. He has a financial interest in a party. According to case law that results in  
30 automatic disqualification. The Competition Commission then goes on,

31 “Professor Moizer is one of three external advisors to the Greater Manchester  
32 Pension Fund which is a pooled investment vehicle with a value currently of over  
33 £6 billion. His role is to give independent strategic advice on the management of  
34 the fund’s investments. He receives a fee for his advice on an ongoing basis. The

1 fund's administering authority is Tameside MBC. Employees of all local and joint  
2 authorities in the Greater Manchester area, apart from teachers, police officers and  
3 fire fighters, and of many other public bodies, have automatic access to the  
4 scheme. Employees of a wide range of other bodies providing public services can  
5 join the scheme by means of admission agreements made between the body  
6 concerned and Tameside MBC. Consequently, as well as the ten local authorities  
7 in the Greater Manchester area, the scheme employers include five Greater  
8 Manchester joint authorities and over 100 other bodies. The ten local authorities  
9 within the Greater Manchester area are the shareholders of the Manchester Airport  
10 Holding Group”.

11 So, their connection is directly set out. The fee-paying relationship is set out. The size and  
12 scale of the fund is set out. Admission to the fund is set out. They do not actually mention  
13 that MAG is an admitted member, but that is, I think, a much more venial sin because there  
14 is sufficient here to put BAA on notice. They should have done so, but one can perhaps  
15 forgive them that single omission.

16 “An issue has arisen because it is planned that three joint meetings of the members  
17 of the Manchester and BAA inquiry groups will take place to consider primarily,  
18 but perhaps some other, issues common to both inquiries. There are also bi-lateral  
19 working groups between the two inquiries and Professor Moizer has been a  
20 member of one of these groups. There is also a limited exchange of views between  
21 the two groups”.

22 Then the Commission's own analysis,

23 “In order to ensure the independence and impartiality of the Manchester inquiry the  
24 Commission is taking the following steps --“

25 So, they recognised that the conflict of interest requires them to immunise the inquiry from  
26 the risk of bias by taking its independence and its impartiality, and the steps they were  
27 taking are then set out. I emphasise that these are before the problem arise. They are  
28 prophylactic steps.

29 ”Professor Moizer should not participate in any [not some] joint meeting of the  
30 Manchester and BAA groups, nor in any smaller, bilateral group. His interest  
31 should be disclosed to the BAA and Manchester inquiry groups”.

32 I pause there. This was not disclosure in order to create a waiver. This was disclosure  
33 because it is proper to provide disclosure even though they have taken steps to avoid a  
34 conflict. So, the view of the Competition Commission is not that, “We have now got a

1 conflict, because we are going to do everything necessary to eradicate it”, but they are still  
2 going to provide disclosure. Of course, waiver is generally when the adjudicator wishes to  
3 continue to sit notwithstanding the continuance of the conflict. Here the Commission had  
4 avoided the conflict by these steps, yet still gave disclosure. Going back to the text,

5 “Where the views of the BAA Group reflect those of Professor Moizer in whole or  
6 in part and are conveyed to the Manchester Group, the Manchester Group should be  
7 so advised”.

8 So, wherever Professor Moizer’s views might have an even indirect impact on Manchester,  
9 Manchester is told. Finally,

10 “The parties to the BAA and Manchester inquiries, and also third parties who have  
11 participated in the inquiry, should be advised of Professor Moizer’s position and  
12 the steps that will be taken in relation to it”.

13 The point to note: disclosure was made to all affected persons. In the present case, no  
14 disclosure was made even on the Competition Commission’s case taken at its Himalayan  
15 highest to anyone other than BAA.

16 “In accordance with our usual practice a copy of this letter will be placed on our  
17 website. I am copying this letter to those on the attached list”.

18 Of course, that does not include BAA.

19 That was the 2007 disclosure notice. So, the key point showing the connection were  
20 disclosed - in particular, that he advised the local authorities who owned Manchester  
21 Airport and that Manchester Airport - and indeed anybody else within that ownership  
22 structure - had access to the fund. The Competition Commission did not seek to wriggle  
23 out of the predicament by seeking a waiver. They took prophylactic steps. They accepted  
24 that on this basis they would never have appointed him to the MAG inquiry at all and *a*  
25 *fortiori* it followed that they had to take every strenuous step required to sterilise him from  
26 any risk.

27 Analysis of this particular event. The 2002 decision is a direct precedent slap, bang on the  
28 facts. The fair-minded observer would take it as the starting point and possibly the end  
29 point of his, or her, analysis. He would accept that analysis. The facts had not, in 2007,  
30 changed in any material way. In fact, as we will see, they had got worse. The conflict of  
31 interest was not better - it was worse five years later when the 2007 inquiry started. MAG’s  
32 contribution to the fund had increased. Professor Moizer had five years additional  
33 experience, which is relevant in a case where the case turns upon loyalty and trust. And he



1 had been paid an extra £50,000 or £60,000 worth of fees. And, of course, in 2007 MAG  
2 was a direct protagonist to BAA which was not the case in 2002.

3 So, the 2002 decision is directly a precedent of great importance. You will see precious  
4 little analysis of it in the Competition Commission's evidence. The fair-minded observer  
5 would conclude that there was, as a result of the 2002 decision an acute conflict from the  
6 moment the 2007 inquiry started.

7 Then really, matters get worse. I now turn to the third heading, which is the OFT's  
8 reference in March 2007. We deal with this in the chronology at paras. 24 to 27 and in our  
9 skeleton at paras. 45 to 48. The OFT reference to the Competition Commission will have -  
10 and I say 'will have' because it seems to us obvious that it must have done so, but if it did  
11 not, it should have - put the Competition Commission and Professor Moizer on high alert.  
12 This is a very elementary and very simple point that I am making. The OFT's preliminary  
13 assessment which justified the making of the reference was essentially twofold: first, that  
14 there was a case to be made out that joint ownership of airports created an AEC; secondly,  
15 that there as 'a reasonable prospect that appropriate remedies would be available including  
16 divestiture of airports'. So, when Professor Moizer was reading the 2007 OFT reference as  
17 part of his introductory reading he will have been aware that if divestiture was a real issue  
18 (1) MAG would be at the front of the list of suitable potential bidders. MAG already own  
19 not just Manchester, but Humberside, East Midlands and Bournemouth Airports. It is the  
20 largest airport operator in the UK after BAA. It has access through its shareholders to a  
21 pretty decent pot of funds.

22 Of course, Professor Moizer would not conclude that MAG would inevitably be a bidder or  
23 that the fund inevitably would be called upon. We do not suggest that. - that it was a  
24 realistic possibility, which is all that matters. Given what had happened to Professor Moizer  
25 just five years earlier it must have crossed his mind that there was a real issue. Indeed, the  
26 OFT's report refers to MAG as a potential competitor and it is plain and obvious that  
27 anyone who understood anything about the airline and airport sector would know that.

28 THE PRESIDENT: Are you going to give us a reference to that in the OFT -- or is it already in  
29 the skeleton?

30 MR. GREEN: In the skeleton at para. 47. I am happy to give you a reference. What I was  
31 proposing to do was to give you ----

32 THE PRESIDENT: If they are already there do not worry.

33 MR. GREEN: It is all there. If it is not I will certainly make sure you have got all the references.

34 THE PRESIDENT: So the OFT report referred to MAG as a competitor?

1 MR. GREEN: Yes, there is a list of who the competitors were, there is a list of who the operators  
2 were. All one says is that the moment the Competition Commission read the OFT report,  
3 the moment Professor Moizer read it, it was at least foreseeable – one does not have to put it  
4 very highly – it was a possibility, accept not an inevitability, but a possibility that MAG  
5 would be a bidder. It was inevitable that MAG would be a protagonist, because it was  
6 obvious that they would have a vested interest in seeing BAA go down in flames. We will  
7 see that that is exactly the score because they explained it to the Competition Commission  
8 within weeks of the inquiry actually starting.

9 So the fair minded observer says, Professor Moizer cannot have been oblivious to the  
10 implications of the OFT’s reference, and he cannot possibly have forgotten what happened  
11 in 2002. So one comes then to the next heading which is the 2007 Disclosure Notice. For  
12 your note it is skeleton, para.86 and paras.98 to 103, chronology paras.29 and 30. We can  
13 take this from the chronology because it sets out the document. The document, for your  
14 note, just in case you want to see the original, is respondents’ bundle, that is the defence  
15 bundle, tab 4. The document in question, the two documents, the letter and the disclosure  
16 notice and recorded in the chronology. If we start at para.29 of the chronology:

17 “On 17 April 2007, the Competition Commission wrote to BAA with biographical  
18 details of the members appointed to carry out the BAA Market Investigation and  
19 Heathrow/Gatwick Airports Quinquennial Inquiry. The notice stated that  
20 Professor Moizer had given strategic advice to the GMPF on how to structure  
21 investments.”

22 The letter said as follows:

23 *“Professor Peter Moizer PhD FCA currently serves on the Competition*  
24 *Commission’s Reporting Panel. He has been appointed to the Competition*  
25 *Commission’s Reporting and Utilities Panels from 10 September 2005 until 9*  
26 *September 2009. He is Professor of Accounting at Leeds University Business*  
27 *School, where he has been employed for the last 16 years. Prior to joining Leeds,*  
28 *he was a lecturer in accounting at the University of Manchester and before that,*  
29 *Assistant Audit Manager at Price Waterhouse. Peter has advised the DTI on*  
30 *issues related to the audit profession and has given strategic advice to the Greater*  
31 *Manchester Pension Fund on how to structure investments. He has sat on a*  
32 *number of committees of the Institute of Chartered Accountants in England and*  
33 *Wales. He is a co-founder of the European Auditing Research Network.”*

1 The only fact which was even half relevant was that he gives strategic advice to the Fund.  
2 There is no reference to ownership of the Fund and no reference to the connections with the  
3 airport, no reference to the fact that the airport has admitted status to the Fund.

4 Then the next entry:

5 “On 18<sup>th</sup> April, the Competition Commission wrote to BAA with details of  
6 interests of members and staff of the Competition Commission who would work  
7 on the BAA Market Investigation and Heathrow/Gatwick Quinquennial Inquiry.  
8 The letter disclosed that Professor Moizer was one of three strategic advisers to the  
9 fund.”

10 This is the letter and it is worth taking it paragraph by paragraph:

11 *“I am writing regarding the interests of members and staff of the Competition*  
12 *Commission (CC), who will work on these inquiries.”*

13 Then this is what we get about Professor Moizer:

14 *“Peter Moizer is one of the three strategic advisers to the Greater Manchester*  
15 *Pension Fund, dealing with long term funding issues, such as the balance between*  
16 *the equity and bonds.”*

17 Pausing there, that is an inaccurate description of his role. His role was to advise on all  
18 investment matters, and as we will see as the facts unfold, he did advise on a range of really  
19 quite important matters and indeed matters directly relevant to this case. It was not just  
20 long term funding issues. His remit was much more intrusive. It was part of the backbone  
21 of the Fund. Then it says:

22 *“External fund managers control the investments of the Pension Fund.*  
23 *Professor Moizer has no involvement in the share selection decisions of the*  
24 *Pension Fund and is unaware of the shares in which it invests.”*

25 Again, that is incorrect. In his witness statement he accepts he did have, he puts it, “on a  
26 limited basis”, limited involvement in certain specific investment projects.

27 *“It is possible, however, that the Pension Fund may include investments the value*  
28 *of which could be affected by the outcome of the inquiry.”*

29 That is one of those boilerplate statements that shares can go up and they can go down.  
30 Manchester Airport’s shares are not affected by the Fund because they are not listed, they  
31 are not traded, so they have got nothing to do with going up or down as a result of the  
32 outcome. That is misleading in that it suggests that the only way in which somebody could  
33 be affected by the outcome of the inquiry was because the funds over which it invests may  
34 go up or go down. It is one of those boilerplate statements which is pretty much

1 meaningless. When read in context it downplays the underlying reality. You simply have  
2 to compare this with the 2002 statement and you will see what is there and what is not there.  
3 We have analysed that very fully in the skeleton at paras.98 onwards. You will see why this  
4 suffers from the very serious and unforgivable situation of multiple omission.

5 The letter goes on to describe then Laura Carstensen's position, and she, as we know, is an  
6 eminent member of the Commission, was formerly a partner at Slaughter and May. They  
7 refer there to capital in the firm being repaid and she said that she had never advised British  
8 Airways or Consignia.

9 I would like you then to compare Peter Moizer's reference with John Collings' reference,  
10 because if you were reading this as someone affected by the inquiry you would assume that  
11 John Collings was a normative statement of what was to be expected in a disclosure notice.

12 It is worth reading John Collings in full:

13 *“John Collings’ wife is a senior employee of an international executive recruitment*  
14 *firm which serves clients across a wide range of industries. Within the last two*  
15 *years one of the firm’s offices outside the UK has carried out an assignment for a*  
16 *member of the consortium that recently purchased BAA. Over the same period, the*  
17 *firm has also worked for a few other companies acv in the UK air transport sector,*  
18 *specifically members of the consortia owning civil airports and providers of air*  
19 *services. In aggregate the firm’s work for these companies has not amounted for a*  
20 *significant proportion of its total fee income. Her own area of specialisation is*  
21 *outside the air transport sector and none of her personal workload has been*  
22 *undertaken for companies that operate civil airports or use them to provide air*  
23 *services.”*

24 He, therefore, disclosed the interests of his wife who had nothing at all to do with any of the  
25 issues, simply because some of the companies, or the company that she worked for, had  
26 advised companies that were peripherally involved and had a *de minimis* amount of  
27 remuneration.

28 If that is the level of disclosure which people see in a disclosure letter you assume that the  
29 same standard has been applied to Professor Moizer. It is a benchmark, it is cautious, it is  
30 detailed. It is said against us that we should have added the dots, we should have deduced  
31 from this or from collective corporate memory of 2002 that Professor Moizer's involvement  
32 was far greater. It is nonsense. Look at the last paragraph. This is gold-plating the  
33 disclosure statement:

1                   *“The members mentioned above and the CC do not believe that these matters will*  
2                   *prejudice the ability of the Group to discharge its functions in an independent and*  
3                   *impartial manner.”*

4                   That is a statement of intent. It is a statement to be relied upon by the world at large. It is a  
5                   statement not just by the Competition Commission but by the member itself – in other  
6                   words, this is correct, it is comprehensive, you can rely upon it. Nothing will affect the  
7                   independence and impartiality of the Commission.

8                   Then the final paragraph:

9                   *“In accordance with our normal practice the substance of this letter will be placed*  
10                  *on the Competition Commission’s website.”*

11                  So that was the 2007 Notice. The intended reader of this notice would be entirely  
12                  comfortable, it would not raise any alarm bells; any concerns they had would have been  
13                  quelled or calmed, the observer would conclude there was nothing which warranted concern  
14                  or further inquiry, the notice was intended to be taken at face value and it would suppress  
15                  even the most inquisitive and suspicious of minds. The Competition Commission’s own  
16                  words were intended to be balm, and as Messrs. Hawkins and Herga have explicitly  
17                  confirmed, this is exactly what happened.

18                  Let me turn to the fifth heading which is “BAA’s Knowledge at the time”. The hard and  
19                  stubborn facts are as follows, and they come from three statements that I would like to refer  
20                  you to. Mr. Herga’s statement, and if I give you the references and then we will go to them,  
21                  bundle 5, tab 82. Then we have Mr. Hawkins first, bundle 5, tab 83, and we then have Mr.  
22                  Hawkins second statement bundle 6, tab 35, I would like, because I think it is important to  
23                  get these facts on the table straight away, to take you to them. I would like to do it in this  
24                  order if I can, Mr. Hawkins first, bundle 5, tab 83. Paragraph 6: “Initial disclosure”. Mr.  
25                  Hawkins, we will see, from para. 2 has been employed since 1995, held a range of  
26                  managerial positions. He is acting director of economics and regulation, he has been in that  
27                  post since 2009. He was head of Structural Review from March 2007. He was responsible  
28                  for BAA’s day to day conduct of the inquiry. He says at para. 6:

29                  “6. On 17<sup>th</sup> April 2007, I was among a group of recipients copied into an email  
30                  from the Competition Commission’s Inquiry Coordinator, Julie Hawes, which  
31                  identified the members of the panel for the market investigation and the  
32                  Heathrow and Gatwick quinquennial reviews. The email included an  
33                  attachment containing biographical details for the panel members, including  
34                  Professor Moizer. This included a statement that Professor Moizer was an

1 advisor to the ... Fund. The CC provided further biographical details in its  
2 letter of 18 April 2007.

3 7. As far as I am aware, no one within BAA thought the CC's 2007 disclosure in  
4 relation to Professor Mozier was a cause for concern at this time. I did not  
5 identify a link between the GMPF and Manchester Airport Group."

6 Just for the sake of completeness, I am going to go to para. 10 and onwards, unless it is  
7 convenient for you to read that to yourself. I am happy to read it so it is on the transcript.

8 THE PRESIDENT: We are very happy for us to read it if you want us to – para. 10, how far  
9 down?

10 MR. GREEN: It is really to the end of the statement, it just deals with the other disclosure  
11 matters, so you have his evidence in full.

12 THE PRESIDENT: We will read it, if you want to sit down, that is fine. (After a pause) We  
13 have read those paragraphs, thanks.

14 MR. GREEN: There are only four points which one draws from that statement, first that Mr.  
15 Hawkins did not know of the link between the fund and the airport. Secondly, he relied on  
16 the 07 notice and it did not give him cause for concern. Thirdly, they first discovered about  
17 the 2002 notice after a somewhat genomic call in early January 2009 after which they did  
18 their own research on the internet and discovered the 2002 notice. Fourthly, they remained  
19 in the dark until after the report itself was published in March 2009 when Mr. Hawkins  
20 telephoned the Competition Commission to find out why Professor Moizer had been stood  
21 down, they did not know.

22 I will show you in due course the telephone note of that conversation. Just so that you have  
23 the position of Mr. Herga in mind, if you turn back to tab 82, the relevant paragraphs are 6  
24 to 8. Mr. Herga is currently a legal consultant employed by BAA. He was General Counsel  
25 between 2007 and 2009. He held a similar position with BAA plc between 1996 and 2007.  
26 He was involved in the 2007 inquiry. He says in para. 6,

27 "I recall receiving details of the Competition Commission panel which had been  
28 provided by the Competition Commission inquiry co-ordinator in relation to the  
29 market investigation and the Heathrow and Gatwick quinquennial review  
30 reference in or around April 2007. These were circulated within BAA by Kyran  
31 Hanks, Director of Economics and Regulation from November 2004 when he  
32 joined BAA until 30<sup>th</sup> April, 2009, who was responsible for BAA's conduct of the  
33 quinquennial reviews and the market investigation. Kyran Hanks identified no  
34 conflicts in relation to the members of the Competition Commission panel,

1 including Professor Moizer. I do not recall any concerns about conflicts being  
2 raised in relation to Professor Moizer by anybody else at that time. I certainly was  
3 not aware of any concerns.

4 (7) My only recollection of any conflicts issue being raised in the context of the  
5 Competition Commission inquiries was when BAA raised concerns with the  
6 Competition Commission concerning a member of the Competition Commission  
7 staff on the Heathrow and Gatwick quinquennial review, Mr. John Earwaker,  
8 between June and September 2007. A bundle comprising copies of that  
9 correspondence ... is attached”.

10 Just to make the point, when they sniffed a conflict they chased like mad. It was not as if  
11 they were quiescent. When they sniffed one, or one was made aware to them, they were not  
12 passive. You can compare their position vis-à-vis Mr. Earwaker with that of Professor  
13 Moizer.

14 “(8) Although I have now seen the Competition Commission’s 2002 disclosure  
15 notice concerning Professor Moizer, which related to the BAA London Airports  
16 and Manchester Airport quinquennial reviews I do not recall having seen that  
17 disclosure prior to 26<sup>th</sup> January, 2009. Although I was Legal Director of BAA in  
18 2002 I was not closely involved in the London Airports 2002 quinquennial  
19 review”.

20 Finally, for the sake of completeness, because various allegations were made in the  
21 Competition Commission’s pleadings, Mr. Hawkins has addressed outstanding matters in  
22 his second statement, which is Bundle 6, Tab 35. Paragraphs 6 to 14.

23 “The 2002 disclosure notice was published nearly five years before the start of the  
24 market investigation and as far as I am aware none of the BAA staff working on  
25 the market investigation, including myself were aware of the 2002 disclosure  
26 notice until 26<sup>th</sup> January 2009 when we discovered it on the Competition  
27 Commission website following the call from David Peel”.

28 Can I pause there and just ask you to make a reference next to para. 6, “See para. 2” because  
29 that explains who Mr. Hawkins spoke to within BAA in order to be in a position to set out  
30 these facts in the witness statement. So, he made inquiries - and, of course, it is hearsay  
31 technically, but it is not inaccurate for that reason - of a range of people to find out the  
32 position across the board within BAA. Then he goes on to say,

33 “Although the 2002 disclosure notice is available on the Competition Commission website,  
34 and some of the information contained in it is available separately from public sources,

1 there would be no reason to undertake those investigations prior to our discovery of the  
2 disclosure notice in late January 2009.

3 (7) As I explained in my first witness statement the initial disclosure by the Competition  
4 Commission in the market investigation concerning Professor Moizer was circulated with  
5 BAA in April 2007. None of the recipients raised with me or Kyran Hanks the existence of  
6 the 2002 disclosure notice. I believe they would have done so had they been aware of it so  
7 that Kyran Hanks and I could consider the implications for the market investigation.

8 (8) I wish to make clear to the Tribunal the matters I was and was not aware of  
9 concerning Professor Moizer prior to 26<sup>th</sup> January, 2009. I was aware from the  
10 disclosure made by the Competition Commission to BAA at the start of the market  
11 investigation that Professor Moizer was an advisor to the GMPF. I took the  
12 Competition Commission's letter of 18<sup>th</sup> April, 2007 at face value and believed in  
13 particular that Professor Moizer had no involvement in, and no knowledge of, the  
14 share investments of the GMPF. I was aware that Manchester Airport was owned  
15 by a group of local authorities in the Manchester area. I was not aware of the  
16 GMPF's membership and governance arrangements. I was not aware that  
17 Manchester Airport employees were members of the GMPF. I was not aware that  
18 in 2002 the Competition Commission itself considered that the links between  
19 Professor Moizer and MAG were sufficient to preclude his participation, even  
20 through joint meetings in the work of the Manchester quinquennial inquiry group.  
21 Nothing in the Competition Commission's letter of 18<sup>th</sup> April, 2007 put me on  
22 notice about the facts and matters which have since come to our attention. As a  
23 result there was no reason to consider these matters at the time to conduct further  
24 investigations".

25 Just for the sake of completeness, I am going to go through paras. 9 to 14.

26 "(9) The Competition Commission alleges that BAA was aware from December  
27 2008 that MAG was considering a bid for Gatwick. As I understand it, the  
28 Competition Commission argues that the failure by BAA to raise concerns about  
29 Professor Moizer either at this juncture or later when the participation of the fund  
30 became apparent is evidence of the absence of apparent buyers.

31 (10) I have addressed this matter in my first statement. BAA created a dedicated  
32 team, including external advisors to manage the Gatwick sale process. Contact  
33 with bidders, including the solicitation and receipt of bids was the responsibility  
34 of, and managed by, BAA's Gatwick transaction team, in particular its external



1 financial advisors, RBS and HSBC. The transaction team did not include  
2 members of the market investigation team and its members were not aware of the  
3 connection between Professor Moizer and the GMPF or MAG. They were not in  
4 a position to identify a concern arising from the interest of MAG or the GMPF in  
5 bidding for Gatwick.

6 (11) With very limited exceptions, the activities of the Gatwick transaction team  
7 were kept separate from the market investigation team. For reasons of  
8 commercial confidentiality, information about the sale process (including the  
9 identity of bidders) was not disseminated generally in BAA. The exceptions to  
10 this were instances where, for a reason related to the market investigation, limited  
11 information concerning Gatwick was provided to the market investigation team -  
12 for example, to respond to information requests to the Competition Commission.  
13 Generally once the shadow monitoring trustee was appointed in late November  
14 2008 the transaction team provided information directly to the trustee rather than  
15 using the market investigation team as a conduit for information to the  
16 Competition Commission.

17 (12) The limited interaction between the Gatwick transaction and the market  
18 investigation teams occurred through either Kyran Hanks or myself. This was  
19 necessary as the market investigation team was dealing with some issues which  
20 were relevant to the Gatwick sale process, such as agreeing the appointment of a  
21 shadow monitoring trustee or making submissions to the Competition  
22 Commission as to purchaser suitability criteria. Information about the sale process  
23 was only provided to the market investigation team on a strictly need to know  
24 basis.

25 (13) In the circumstances, I can confirm I was aware, following the publication in  
26 January 2008 of the Competition Commission's October 2007 hearing with MAG  
27 that MAG could be a potential bidder. This did not cause me any concern because  
28 I was not aware of the links between MAG, Professor Moizer and the fund.

29 (14) I can confirm that I was not aware until *after* bids were submitted that GMPF  
30 was a possible bidder. On 19<sup>th</sup> January, 2009 the first indicative bids for the  
31 Gatwick sale were received by BAA's transaction team however. I was not  
32 provided with that information at the time as the market investigation team had no  
33 specific interest in the identity of the bidders. I am informed by Kyran Hanks that  
34 he and Robert Herga each received a pack of information containing bidder details

1 from the Gatwick transaction team approximately one week after the bids were  
2 submitted. I first became aware of a conflict issue concerning Professor Moizer as  
3 a result of the call by David Peel to Louise Pengelly on Thursday, 22<sup>nd</sup> January,  
4 2009, but the nature of Professor Moizer's conflict was not clear from that call. I  
5 anticipated that the Competition Commission would write to us explaining the  
6 situation, but when there was no further communication we began our own  
7 inquiries on the following Monday, 26<sup>th</sup> January, which led to the disclosure of the  
8 2002 disclosure notice at around the same time that the GMPF was bidder for  
9 Gatwick. I was therefore not aware of the involvement of the fund in a bid for  
10 Gatwick until 26<sup>th</sup> January, 2009. I have made inquiries of each member of the  
11 market investigation team and they have each told me that they were not aware  
12 until on or about 26<sup>th</sup> January, 2009 of the interest of the fund in Gatwick".

13 So, there we have it. If it is suggested that there is constructive knowledge - which is really  
14 what this point goes to - and really nothing else - that BAA knew, or should have known, or  
15 could have joined the dots, it is nonsense. The facts are stubborn. They are set out fully,  
16 comprehensively, and unequivocally, and they are reasonable. The 2007 notice was  
17 intended to be relied upon. Frankly, it is absurd to suggest that when the Competition  
18 Commission itself, having addressed its mind to the issue, gives you a copper-bottomed  
19 guarantee that all is well, that you should then spend acres of time ferreting around for  
20 additional information. You take it on trust. That is the purpose of that wretched letter. It  
21 is to ensure that those to whom it is addressed can rely upon it and they did.

22 The conclusions of the fair minded observer of all these facts and matters as of 2007: the  
23 fair minded observer, he or she stands back, he looks at these facts and asks, "Might  
24 Professor Moizer consciously or sub-consciously be inclined, even indirectly, even without  
25 knowing about it, towards the position of MAG?" As of 2007, Professor Moizer was  
26 already in a position of acute conflict because of his links via his clients to MAG.

27 The position in 2007 was substantially more serious than the position in 2002 because now  
28 the parties were locking horns head to head and they were in the same case. The potential  
29 impact of that conflict on BAA could be devastating. What was potentially on the cards  
30 was the most draconian remedy ever imposed by the Competition Commission. That 07  
31 notice did not include the key facts which the Competition Commission identified and  
32 recognised as so crucially important in 02. We have no adequate explanation for that  
33 omission in any of the Competition Commission's documentation. BAA were quite  
34 properly, as intended, lulled into a false sense of security. That was the inevitable effect of

1 the 07 notice. There is no reason why BAA should have been suspicious. They did exactly  
2 what they were intended to do, which was to put the entire issue aside and concentrate on  
3 defending themselves against the possible dismemberment of the corporate body.  
4 That is the position in 2007. I am now moving to the next part of my submissions, which is  
5 how things developed from the starting point, because you will see that month by month,  
6 event by event, the crisis deepened. What I am going to do is give you a series of dates, and  
7 I will give you the chronology and skeleton references, I will tell you what happened on  
8 each date and I will tell you why it makes the matter worse. The first date is 25<sup>th</sup> October  
9 2007, because this was the date upon which Manchester Airport explained its position to the  
10 Competition Commission. They did so at an oral hearing on that date. If the Competition  
11 Commission had not been aware, for whatever reason, that MAG was direct conflict with  
12 BAA before that date there can be no doubt that as of this date the position was, so far as  
13 MAG was concerned, cards face up on the table. This is the skeleton, paras.49-51, and the  
14 chronology, para.41. We have set out the relevant quotation from the relevant document  
15 and we have given the references to the documents for your later perusal. At this oral  
16 hearing MAG emphasised its relationship with the local authorities, who were  
17 Professor Moizer's clients. Just in case it could be said to be reasonable for the  
18 Competition Commission and Professor Moizer not to have twigged earlier, MAG now  
19 made it clear the relationship which should have set the alarm bells ringing at full volume.  
20 MAG emphasised its "strategic relationship with the authorities". I am jumping ahead, but  
21 one of the points which does arise from the evidence is that the Fund's investment decisions  
22 vis-à-vis Manchester are not normal arm's length decisions. It has always been affected by  
23 the fact that they have common ownership of the airport on the one hand and the Fund on  
24 the other. They explicitly confess that to the Competition Commission when they are  
25 quizzed about it – "but for our connection with MAG we would not have invested", is the  
26 sort of position. Professor Moizer must have known that. He knows the nature of the  
27 investments which the Fund is engaged in on behalf of the local authority.  
28 At this meeting the Manchester Airport's credentials as an acquisitive company were set out  
29 and they explained that they did purchase airports and they had an appetite to purchase  
30 airports. They had already purchased Humberside, East Midlands and Bournemouth, and  
31 they made it clear that they were interested in BAA airports "at the right price".  
32 Just thinking about it for a moment, Professor Moizer is advising the Competition  
33 Commission on one side of the table about a series of conditions which would impact upon

1 the price of a divestiture; and on the other side of the table his client's company,  
2 Manchester Airport, is saying, "I would like to buy some airports at the right price".  
3 MAG's views on the merits of the case were they said, "There are probably some big wins  
4 from separate ownership of the South-Eastern airports". So MAG was again putting its  
5 cards on the table, "We would quite like to see separate ownership for airports in the South-  
6 East".

7 Professor Moizer did not attend this oral hearing, but he has stated in his statement that he  
8 was aware of them. He has also confirmed that he was aware more generally at the time of  
9 the Manchester Airport's appetite for a bid for a BAA airport.

10 So it is accepted by Professor Moizer that he knew that MAG was in the market to buy  
11 airports.

12 The fair minded observer looks at this and say, "MAG was candid about its close links to  
13 Professor Moizer's clients", the observer would take particular note that MAG was  
14 interested in any airport – and I ask you to note that one down, not just Gatwick, because  
15 the Competition Commission's defence later on becomes, "Oh, well, there was only a bid  
16 for Gatwick going forward", and we forget the fact very conveniently that MAG was  
17 interested in all airports, all assets potentially. So they expressed in "any BAA airport, not  
18 just Gatwick". The observer would conclude that Professor Moizer's links to MAG in  
19 relation to the position now being contemplated was really intolerable; and moreover, and  
20 again I think the observer would now think this was already obvious, the observer would  
21 concluded that if MAG was going to bid for a South-East airport it would be likely to need  
22 external capital. We were looking at, even just taking the figures that were in the press,  
23 sums to the tune of the £2 to £3 billion. It is at least possible that MAG would need  
24 external finance. If it needed external finance, its shareholders were at least likely to have a  
25 look at their own funds. That must have been highly probable at the time, if not inevitable.  
26 The observer would know now how close the links were, and I think inevitably he would be  
27 deeply puzzled by the fact that the Competition Commission had given no disclosure of the  
28 links.

29 So MAG had come off the fence, if it was ever on it. Both it, its shareholders and their  
30 funds now stood on the opposite side of the battlefield to BAA and Professor Moizer was  
31 quite clearly judge in his own cause. The Competition Commission did nothing, they did  
32 not think it necessary to make any disclosure.

33 The next date, because it now gets worse, 22<sup>nd</sup> April 2008. On this date the Competition  
34 Commission set out its emerging thinking document. For your reference, skeleton, para.52,

1 chronology, para.54. The relevance of this is that it shows the issues that Professor Moizer  
2 and his colleagues were addressing their minds to at the time. It is clear that the  
3 Competition Commission were contemplating the existence of an AEC in common  
4 ownership and the possibility of structural remedies, i.e. divestiture. So we therefore know  
5 that Professor Moizer was addressing himself to divestiture, and that is a view that is  
6 distinctly favourable to Manchester Airport and its shareholders.

7 We have set out the summary of the Competition Commission's emerging thinking at para.  
8 54(b) and I do not propose to take you to that.

9 THE PRESIDENT: That is the chronology?

10 MR. GREEN: Of the chronology, yes. In the run up to the publication of that document, we  
11 know that the Competition Commission had before it documents highlighting the  
12 adversarial position of MAG and BAA. If you look at our skeleton para. 52 on pp.18 and  
13 19 we set out a series of facts which really just provide some colour to the nature or flavour  
14 of the conflict. We say in para. 52 of the skeleton, p.18 that on 22<sup>nd</sup> April the Competition  
15 Commission published its Emerging Thinking in which the Competition Commission found  
16 evidence of an AEC arising out of common ownership of airports and highlighted the  
17 possibility of structural remedies. It reported MAG's submissions to the Competition  
18 Commission on the benefits of separate ownership. In the months preceding in the months  
19 preceding publication, the fact that MAG and BAA's interest were opposed manifested  
20 itself in a variety of ways including (a) BAA submitted evidence and papers contradicting  
21 claims by MAG that it did not object to other airports' planning applications; (b) BAA  
22 submitted papers to the Competition Commission in relation to MAG's second runway  
23 explaining that local authority support had been an important factor in MAG securing  
24 planning permission for a second runway at Manchester Airport. (c) At a hearing between  
25 the Competition Commission and BAA on 12<sup>th</sup> March Professor Moizer posed a series of  
26 questions to BAA in which the implicit assumption was that MAG's performance was  
27 superior in material respects to that of BAA. It is profoundly unfortunate, to say the least.  
28 (d) On 17<sup>th</sup> March 2008 the Manchester Evening News reported MAG's interest in  
29 acquiring Stansted or Gatwick. The report stated that MAG was lining up a bid, further that  
30 MAG was willing to seek external capital to assist in the making of bids. In the article, the  
31 chief executive of MAG is reported as saying that "the Group is interested in acquiring  
32 assets that will add value for our shareholders". That is his clients. The report observes that  
33 MAG would be interested in London, Gatwick, Stansted or the Scottish Airports. The

1 article also highlighted that MAG was owned by the 10 local authorities of Greater  
2 Manchester.

3 Following the publication of the Emerging Thinking the Competition Commission held a  
4 hearing with BAA during which BAA *inter alia* reiterated its position that the Competition  
5 Commission had no basis for drawing adverse comparisons with MAG.

6 This demonstrates no more than some of the issues that were bubbling along in large  
7 measure outside the view of the external fair minded observer, but there was a real conflict  
8 between BAA at the time, these are merely illustrations of that. It was a battle on all fronts,  
9 they had different views of life and different objectives.

10 It is very hard to understand how Professor Moizer can sit at an oral hearing and question  
11 BAA on why in material respects it performs worse than MAG. Did he not remember the  
12 position in 2002, it must surely have crossed his mind that he had a conflict. Remember,  
13 Mr. Christopher Clarke, the chairman of this particular inquiry selected Professor Moizer  
14 because of his 2002 experience. How can it not have crossed his mind that in 2002  
15 Professor Moizer should be precluded from any involvement with MAG but yet here he was  
16 at an oral hearing quizzing BAA on why they were inferior to MAG. Frankly, the fair  
17 minded observer at this stage is flabbergasted.

18 Now, we move to 17<sup>th</sup> March 2008. I just want to concentrate on what was in the Press at  
19 the time. We have identified a large number of articles in the Press during 2008 which  
20 make it clear that the level of hostility between MAG and BAA is pretty acute. MAG were  
21 not all shy about expressing their views, both privately and in public. If you look at the  
22 chronology para. 51, p.13. We have the Manchester Evening News on 17<sup>th</sup> March 2008.  
23 This is not untypical of what else was in the Press.

24 *“MANCHESTER Airport bosses have London rival Gatwick firmly in their sights*  
25 *today as the break-up of BAA looms nearer.*

26 *A powerful committee of MP’s has called for BAA’s monopoly of the capital’s*  
27 *major gateways – it also owns Heathrow and Stansted – to be ended.*

28 *Now Manchester Airports Group, the country’s second largest airports operator*  
29 *behind BAA, is lining up a bid if the Spanish- owned company is dismantled.*

30 *It already owns East Midlands, Bournemouth and Humberside Airports but would*  
31 *dearly love to add a London gateway to its portfolio.*

32 *Gatwick or Stansted would cost billions but MAG chiefs are willing to forge a*  
33 *partnership with private equity or other outfits ...”*

34 - what could be plainer? Its owners have a £6 to £7 billion pot.

1                   “... forge a partnership with private equity or other outfits, such as American  
2 investors or Australian infrastructure and banking giant Macquarie, to achieve  
3 their goal.

4                   Geoff Muirhead, chief executive of Manchester Airports Group, said today:

5                   ‘We have a strong track record when it comes to running airports – we  
6 have a lot of skilled people who have a developed very good relationships  
7 with airlines and other partners.

8                   ‘The Group is interested in acquiring assets that will add value for our  
9 shareholders’.”

10 - for Professor Moizer’s clients.

11                   “MAG’s hopes have gained impetus after the House of Commons Transport  
12 Committee said competition was being stifled by BAA’s dominance. The MP’s  
13 said increased competition could have huge benefits for both airlines and  
14 passengers.

15                   BAA, which is owned by Ferrovial, could decide to press ahead with a break-up of  
16 its own accord before being ordered to do so by competition regulators, which  
17 would prevent a ‘fire sale’ of its assets.”

18 - bear that in mind that any divestiture of, let us say, three airports in a compressed period of  
19 time would be unprecedented and a fire sale is the appropriate term which the Press used.

20                   “*That could mean an announcement by the end of the year.*

21                   ‘It’s a question of when, rather than if, this happens, and MAG has to be  
22 ready to act very quickly when the opportunity arises’ said a group  
23 source’.”

24 I would like you to keep that one in mind because within a very short period of time  
25 internally the Fund were contemplating the setting up of investment vehicles for the  
26 acquisition of distressed assets in the recession, within months, and Professor Moizer was  
27 asked to advise on these. He tells you, as you will have seen from statements, he was not  
28 aware that it was going to be used for the purpose of buying BAA assets, but we will see  
29 shortly that the MAG was indeed getting ready to act rapidly.

30                   “*The group does not have the resources to buy Stansted or Gatwick in its own  
31 right, and linking up with another party looks the most sensible option.*

32                   *However that does not apply in Scotland, where Edinburgh or Glasgow are seen as  
33 the most likely to come on to the market.*

1                    *MAAG, which is owned by the 10 local authorities of Greater Manchester, would*  
2                    *be keen to bid alone for one of these and, with its current low levels of debt, sees*  
3                    *no problem raising the finance.”*

4                    That was not untypical of what was in the Press at the time, and a fair minded observer  
5                    simply looks at this and says: “Well, the Competition Commission is conducting an  
6                    investigation, they have Press services, they monitor the Press, they are interested in what  
7                    reaction they have; there is nothing novel in what is being said here”. How could the  
8                    Competition Commission, how could Professor Moizer not realise the nature of the  
9                    conflict?

10                  LORD CARLILE: Mr. Green, can you just help me with para. 52 of the chronology?

11                  MR. GREEN: Yes.

12                  LORD CARLILE: The figure of £263.1 million, I do not quite understand what the £263.1  
13                  million represents?

14                  MR. GREEN: That is the total amount of money which Manchester Airport has by way of  
15                  contributions into the fund.

16                  LORD CARLILE: That is the contributions, thank you.

17                  MR. GREEN: Yes, that is contributions, yes.

18                  LORD CARLILE: So it is not a valuation of assets.

19                  MR. GREEN: It must be valuation, to some extent, in accordance with FSR17. But, it is the  
20                  value which comes out of their accounts. So, it is their audited valuation. So, obviously, it  
21                  can go up and down depending on the nature of the market.

22                  THE PRESIDENT: Which are all contributions from employers and ----

23                  MR. GREEN: Yes. It is pension contribution from Manchester Airport as an employer on behalf  
24                  of ----

25                  LORD CARLILE: It is not a valuation of the airport or any part of the airport.

26                  MR. GREEN: No.

27                  LORD CARLILE: Thank you. That was the point.

28                  MR. GREEN: The next date of relevance is 20<sup>th</sup> June, 2008. This is a meeting of the fund. This  
29                  is just, therefore, two or three months after the statement in the Manchester Evening News.  
30                  On 20<sup>th</sup> June the fund held a meeting to consider rapid response investments. It is worth  
31                  just looking at this document in the respondents’ defence document which we have called  
32                  R, Tab 11, p.19. This is part of the documents disclosed by the Competition Commission.  
33                  The date of this is June. It is at a point in time at which MAG has announced to the market



1 that it wants to be ready to buy assets. This is not MAG. This is, of course, the fund. You  
2 will see at the top here in manuscript it says, "GMPF Advisory Panel. 20<sup>th</sup> June, 2008".

3 "The Director of Pensions submitted a report which reviewed the benchmark asset  
4 allocations for the main fund and fund managers and considered changes to the  
5 investment restrictions.

6 He stated that the panel's decision on investment strategy was crucial in  
7 determining the investment success of the fund in relative and absolute terms and  
8 helps to deliver low stable employer contribution rates. The fund had a good  
9 starting position, having returned to a fully funded position at the 2007 valuation.  
10 It also had a track record of good returns and low volatility. The panel strived to  
11 maintain this combination and provided UBS and Capital International with the  
12 scope to take tactical positions".

13 If you turn over two pages, to p.21, Item 8, under the heading 'Further Reports' says,

14 "The management panel consider the 'fleet of foot' ideas further by receiving  
15 future reports on the two themes of (a) the use of pre-agreed asset allocation  
16 'triggers'; and (b) the creation of a 'special opportunities' portfolio"

17 That is the only information we have been given about those two documents, but they are  
18 plainly documents in existence. They are proposals or reports which are going to be  
19 considered. We do know that they were considered on 21<sup>st</sup> November. I will take you to  
20 that. The relevance of this is as follows: On 21<sup>st</sup> November Professor Moizer advice was  
21 sought on these investment vehicles under the heading 'Fleet of Foot'. The name speaks for  
22 itself. It was, in particular, decided at that point to set up the so-called special opportunities  
23 portfolio. Professor Moizer's advice is recorded and given on that SOP - the special  
24 opportunities portfolio - and in the fullness of time, that portfolio, that SOP became the  
25 vehicle for the joint indicative bid which the fund launched with Manchester Airport. So,  
26 this is the genesis of the fund making vehicles available for asset purchases. I emphasise  
27 that Professor Moizer says he was not aware that that was its purpose at the time.

28 THE PRESIDENT: Did you say you were going to take us to that November ----

29 MR. GREEN: If I can do it chronologically -- I will certainly do that, yes.

30 THE PRESIDENT: Certainly, yes.

31 MR. GREEN: What does the fair-minded observer think about this? I think it is blindingly  
32 obvious what he thinks about this. The conflict is still acute, and is getting worse. The fund  
33 is now gearing itself up to launch a direct bid with Manchester Airport for BAA assets. As  
34 all of that is going on, Professor Moizer is advising the Competition Commission on the

1 very conditions which govern the sale of those assets. It is also informative to look at press  
2 commentary at the same time.

3 So, we move forward a month or two. The next chronological heading is Summer 2008.

4 We have attached as Schedule C to the notice of application quotes from the press. I am not  
5 going to take you to them. I just want to give you a couple of illustrations of what the press  
6 was analysing at the time and therefore what was in the public domain.

7 Bundle 3, Tab 40. The Financial Times. An article by Kevin Done and Anousha Sakoui. It  
8 is dated 18<sup>th</sup> August, 2008. It reads as follows:

9 “Rival airport groups and infrastructure funds are preparing bid approaches for UK  
10 airports owned by BAA, as the UK airport operator today completes a complex  
11 £13 billion (\$24.2billion) refinancing package.

12 The acquisition interest is being triggered by a preliminary report to be published  
13 this week by the Competition Commission into the structure of BAA, the UK  
14 airports operator. It is expected to recommend the break-up of its monopoly  
15 ownership of the main London and Scottish airports.

16 Manchester Airport Group, the largest UK-owned airports group, which is  
17 controlled by the ten local authorities of Greater Manchester, said it had gained the  
18 backing of its shareholders to investigate bidding for BAA assets. A bid for  
19 Gatwick, the second-largest UK airport, would only be mounted as part of a  
20 consortium, but a bid for Glasgow would be made alone”.

21 Pausing there, the shareholders, his clients, have now given consent to the possibility of  
22 MAG making a bid. It also contemplated here that they would need external finance.  
23 Again, I do not say it is inevitable that the authorities would look to their own fund, but it is  
24 at least a possibility which must have been self-evident to Professor Moizer or the  
25 Competition Commission. I ought to emphasise, because I keep on saying that it should  
26 have been, or would have been, self-evident, that you do not have to decide that. This is an  
27 objective test. It is what the fair-minded observer would have thought. As I said at the  
28 outset, there is no suggestion in this case that Professor Moizer had a conflict of interest,  
29 and there is always a risk that one sort of slips into using language that ‘he did’ or ‘he did  
30 not’. You are concerned with what the views of the fair-minded observer are, and what that  
31 paradigm person would make of a statement that the shareholders have given consent to  
32 Manchester for a bid, and that they would be seeking external funding in a bid for Gatwick.  
33 Then we have,

1 “Global Infrastructure Partners, a joint venture between Credit Suisse and General  
2 Electric’s GE Infrastructure fund, said it as also interested in bidding for BAA  
3 assets, in particular Gatwick or Stansted.

4 Other potential bidders could include Hochtief, the German construction and  
5 infrastructure group, which has already bought Budapest Airport from BAA and  
6 Australia’s Macquarie group, which controls Brussels and Copenhagen airports.

7 Sir Nigel Rudd, BAA chairman, said in an interview with the BBC that there had  
8 been ‘huge expressions of interest’ from potential buyers of both Gatwick and  
9 Stansted, though neither was for sale.

10 The developments will have serious consequences for Ferrovial, BAA’s embattled  
11 Spanish owner, which led a purchase of the airports operator for more than £10  
12 billion in 2006”.

13 If one turns to the Telegraph on 21<sup>st</sup> August, 2008 in Bundle 4 ----

14 THE PRESIDENT: Tab 44, is it?

15 MR. GREEN: Tab 44, Roland Gribben, The Daily Telegraph, 21<sup>st</sup> August 2008, heading “BAA  
16 defies call to dismantle its airport monopoly”:

17 “BAA launched a rearguard action yesterday to head off the sale of three of its  
18 seven airports after scathing criticism from the Competition Commission about the  
19 group’s failure to improve air travel in the 20 years since the business was  
20 privatised.

21 The Commission effectively put the ‘for sale’ sign over two of the three London  
22 airports, Gatwick and Stansted, and told BAA either Glasgow or Edinburgh would  
23 be added to the list to encourage competition and accelerate delayed investment  
24 and improvements for travellers.

25 Former merchant banker Christopher Clarke, chairman of he panel handing the  
26 inquiry into BAA’s airport monopoly, believes sales could be completed quickly  
27 once the Commission produces its final report in April. He said selling three  
28 airports was ‘not complicated’.

29 But BAA made it clear it was not preparing to clear the decks for a break-up of the  
30 business. Colin Matthews, BAA chief executive, hit back, saying that in many  
31 areas the Commission’s analysis was flawed and ‘its remedies would be  
32 disproportionate and counter-productive’. He claimed that the Commission risked  
33 delaying urgently needed new runways and better customer service.

1 The CBI, the employers' organisation, also challenged some of the findings. John  
2 Cridland, deputy director-general, said ownership of airports was secondary to the  
3 'overriding priority for aviation markets to increase airport capacity'.

4 There is no shortage of potential buyers lining up to bid for the two South-East  
5 airports. The Commission has not ruled out making Heathrow one of the sale  
6 candidates but believes the sale of the world's busiest international terminal would  
7 risk delays to badly needed improvements.

8 Analysts have pencilled in a pounds 3bn to pounds 4bn price tag for Gatwick while  
9 uncertainties about planned increases in capacity have complicated the valuation of  
10 Stansted, where Ryanair is calling for drastic cuts in a pounds 4bn investment  
11 programme. The prospect of changes in airport regulation could affect bids,  
12 analysts added.

13 A mixture of banks, private equity and infrastructure specialists are already in the  
14 frame. Goldman Sachs and Citigroup are forecast to head the banking interest;  
15 KKR and Blackstone the private equity players, GIP the infrastructure investors;  
16 and Hochtief, the German construction group, the industrial bidders.

17 Macquarie, the Australian group with Bristol Airport in its portfolio, is cooling on  
18 further airport expansion but Manchester Airport Group has already approached  
19 Sir Nigel Rudd, BAA chairman, about buying Gatwick. Fraport, the Frankfurt  
20 airport operator, and Singapore's Changi Airports International are also said to be  
21 ready to knock at his door.

22 Raising a possible pounds 5bn to pounds 6.5bn from the sale of the London  
23 airports and possibly pounds 500m from either Edinburgh or Glasgow would  
24 provide a shot in the arm for Ferrovial, the Spanish construction group that bought  
25 BAA for pounds 10bn three years ago, and mean that Heathrow is even more  
26 valuable.

27 The Commission acknowledges that the problems of runway capacity at the South-  
28 East airports will limit competition benefits in the short term, but believes new  
29 owners would be more acv than BAA in exploiting opportunities."

30 As an aside, can you please just note the sorts of values which are being talked about for the  
31 airports as a whole, £5 to £6 billion for the London airports, half a billion for Edinburgh or  
32 Glasgow, because you will recall in relation to the second ground, proportionality, that the  
33 Competition Commission says it is all far too complicated to get even a handle on the  
34 quantum of the value of the assets. One of the points we will make then, and I am just

1 flagging it now, is that you could do “back of fag packet” calculations to work out the  
2 significance of the loss which might be sustained by BAA in relation to forced sale. I will  
3 come back to that later, I just ask you to note the scale of the values being talked about in  
4 the press.

5 Then finally tab 46, David Litterick in the Daily Telegraph on 26<sup>th</sup> August 2008,  
6 “Manchester forms Gatwick bid group”. I think we will just have time for the fair minded  
7 observer to cast his eye over the press before one o’clock:

8 “The owners of Manchester Airport have formed a bid team and have begun  
9 talking to infrastructure funds and sovereign wealth investors about a potential  
10 approach for Glasgow and Gatwick airports.

11 However, MAG said there was ‘no way’ it would pay some of the valuations for  
12 the airports mentioned since the Competition Commission issued its damning  
13 report of BAA and called for its break-up last week.

14 MAG’s external affairs director, Jonathan Bailey, said he was leading a team as it  
15 evaluated the airports likely to come up for sale.

16 He added that he was far more interested in Gatwick and Glasgow than Stansted as  
17 the operations of the former two were more similar to those at Manchester.

18 He said the limitation at Gatwick, where a new runway cannot be built until at  
19 2019 due to legal agreements, was by no means a problem, ‘We have just opened a  
20 new runway at Manchester and that took us almost 10 years’.

21 Mr. Bailey said he believed the group had the capacity to buy and invest at  
22 Glasgow on its own, but that doing the same at Gatwick would require a partner.

23 ‘We would need another investor like an infrastructure group or sovereign fund.

24 We have made contacts with a few but have not yet held formal talks’, he said.

25 Companies such as Hochtief and Fraport of Germany have also expressed their  
26 interest in any of the airports BAA may be forced to sell, with AIG, General  
27 Electric and Credit Suisse also named as potential suitors.

28 But Mr. Bailey said that the valuations mentioned of pounds 1bn for Glasgow and  
29 pounds 3bn for Gatwick were far too high. ‘I have seen valuations – and not ones  
30 done by us – of pounds 380m for Glasgow. I think we would be somewhere in the  
31 middle.

32 ‘Gatwick would only get that kind of valuation if it were unregulated and not  
33 subject to price controls. With regulation, even pounds 2bn may be over-egging  
34 it.’

1 MAG, Britain's fourth largest airport with around 21m passengers a year, is 55pc  
2 owned by Manchester City Council."

3 Just putting that in context, what does the fair minded observer think about this? MAG is  
4 now squarely in the fray. MAG is coming and saying, "We disagree with public valuations,  
5 we are fighting to squeeze the value of the BA assets down to their lowest level, so they will  
6 adopt any position which forces the value of the assets down". That is what the fair minded  
7 observer is deducing from this. It is obvious.

8 At the same time Professor Moizer is taking decisions in the Competition Commission  
9 which exactly addressed that very issue, purchaser suitability, number of airports to be sold,  
10 sequencing of airports to be sold, conditions for purchasers, what level of debt, etc, they can  
11 or cannot have. These are the sorts of detailed discussions going on at this time and earlier  
12 and later which would impact either to the benefit of MAG or to the detriment of MAG, and  
13 equally and in an opposite way to the benefit or detriment of BAA. The Competition  
14 Commission does not think there is a conflict, no conflict, nothing to disclose, and do not  
15 know why.

16 The fair minded observer came to the conclusion there was a conflict a year earlier and his  
17 concerns have become more accentuated over the 12 months plus from 2007 onwards. The  
18 Competition Commission sees nothing to worry about at this point. They do not see  
19 anything to worry about for at least another six months. By then things have got to an  
20 extraordinary pitch.

21 I do not know if that is an appropriate moment?

22 THE PRESIDENT: Yes. Two o'clock.

23 (Adjourned for a short time)

24  
25 THE PRESIDENT: Yes, Mr. Green.

26 MR. GREEN: We had arrived on 20<sup>th</sup> August 2008, which I can deal with quite briefly. The  
27 relevant references to this are skeleton paras. 58 to 60, chronology para. 64. This is the date  
28 of the Competition Commission's provisional findings and notice of possible remedies. It is  
29 relevant because it demonstrates the way the Competition Commission was thinking about  
30 issues at the time, and therefore the way Professor Moizer was thinking about issues. The  
31 Competition Commission's provisional view was that BAA should be forced to divest two  
32 out of the three London airports and either Edinburgh or Glasgow, and it was consulting on  
33 these options. It set out certain purchaser suitability criteria, and I will not take you to it,  
34 but Manchester Airport's response (bundle 4, tab 50, p.6) was submitted on 17<sup>th</sup> September

1 2008 and, amongst other things, MAG submitted, as suggested, purchase criteria factors  
2 which would make it easy for it to qualify but more difficult for others. There is nothing  
3 surprising in that, it is simply a continuation of the theme which had already existed.  
4 The next relevant date is 17<sup>th</sup> September 2008, and on this date BAA announced the sale of  
5 Gatwick. For your note, chronology paras. 70 to 78 and skeleton paras. 61 and 62. BAA  
6 therefore announced the sale on 17<sup>th</sup> and the Competition Commission sought information  
7 about this on 24<sup>th</sup> September. The Competition Commission and BAA: (a) held a series of  
8 meetings on the following dates: 1<sup>st</sup> October, 8<sup>th</sup> October and 27<sup>th</sup> October, and detailed  
9 documentation was exchanged. The communications descended into considerable detail by  
10 way of illustration only they concerned such matters as the appointment of a shadow  
11 monitoring trustee, somebody who would oversee the sale to see that it accorded with the  
12 Competition Commission's perception of the public interest. It dealt with matters such as  
13 purchaser suitability criteria for Gatwick. It dealt with the rationale for BAA seeking to sell  
14 Gatwick in the teeth of what was a howling financial gale, and it concerned the Competition  
15 Commission's expectations about the competitive and financial viability of purchasers.  
16 One illustration of the sorts of matters which were being discussed, and which therefore  
17 tells you what sorts of key issues were in the Competition Commission's mind at the time,  
18 is to be found at bundle 6, 19 and 20. This refers to a confidential document.

19 THE PRESIDENT: Is that our bundle 6 or your bundle 6?

20 MR. GREEN: It is our bundle 6, which I think is your bundle 10. I am going to start at tab 19, a  
21 letter from BAA to the Commission dated 27<sup>th</sup> October 2008. There is a confidential block,  
22 if you would just read that, which explains the background.

23 THE PRESIDENT: (After a pause) Yes.

24 MR. GREEN: If you turn over you will see that at the top BAA recognise that in order for the  
25 Commission's objective to be achieved it was important to ensure a number of matters, and  
26 you will see they are numbered (i), (ii) and (iii) and below (iii) there is a sentence which,  
27 although it is not confidential I am going to ask you to read to yourself because if I read it  
28 now I think it will possibly enable people to understand some confidential material that I am  
29 going to ask you to read in a moment. So the sentence starting: "BAA's objective ..." and  
30 particularly the first line, and you will see the point that is being made there.

31 THE PRESIDENT: Yes. (After a pause) Yes.

32 MR. GREEN: If you turn to tab 20, this is the note of a meeting on Monday, 27<sup>th</sup> October and  
33 under the heading "Terms of Sale" there is some confidential material, and at the second  
34 sentence you will see the word starting "They"?

1 THE PRESIDENT: Yes.

2 MR. GREEN: The word “They” is the Competition Commission itself. This is a meeting  
3 between the staff of the Competition Commission and BAA and the staff are relaying  
4 certain views expressed by the Competition Commission Panel Members. If you would  
5 read that confidential material, and in particular the second and third lines which set out  
6 what BAA’s objective was. You will see the point made in the second and third line is the  
7 same point that is in the non-confidential bit, the previous page.

8 What does this illustrate? What would the fair minded observer make of this? It is one  
9 illustration amongst many of what was going through the Competition Commission’s  
10 thought processes at the time. It is pretty obvious that on the one hand Professor Moizer has  
11 an issue to grapple with, which concerns an extraordinarily delicate issue so far as the  
12 Competition Commission is concerned and, on the other hand, as an adviser to the local  
13 authorities in relation to the Fund you can see that he has entirely the opposite objective.  
14 You can see what the investors would wish, you can see what BAA’s objective would be,  
15 you can see that they are in direct collision and you can see where Professor Moizer stands,  
16 what is conflict might be in relation to that issue.

17 One could say with complete confidence the conflict is red hot and that would be inevitably  
18 the view of the fair minded observer.

19 Putting that away, we jump to 25<sup>th</sup> September 2008. In the context of the Gatwick bid  
20 MAG was quite concerned to ensure that BAA was subject to some pretty tight discipline,  
21 because MAG wanted to make sure that Gatwick did not escape its grasp, as it were, and  
22 they went into the Press in order to make this point – our bundle 4, tab 60. 25<sup>th</sup> September  
23 2008, Dan Milmo, Transport correspondent for The Guardian – a fairly detailed article – on  
24 the second page of the bundle:

25 “Manchester Airport group, one of the early favourites to acquire Gatwick, is  
26 understood to have asked the Commission to appoint a ‘divestiture trustee’ who  
27 would oversee the disposal of assets, including Gatwick, to ensure a fair sale.  
28 MAG is concerned that BAA will sell the airport to a sovereign wealth fund or  
29 private equity firm rather than a rival in an attempt to protect its remaining  
30 businesses from competition. The Commission, which is due to make its final  
31 decision on BAA March next year, asked par ties last month whether a disposal  
32 trustee should be appointed.”



1 It is nothing more than a further illustration – on the one side of the table Professor Moizer  
2 is advising on precisely these issues; and on the other side of the table Manchester Airport is  
3 asking for a very particular remedy in order to constrain BAA.

4 Then we come to the fund meeting on 21<sup>st</sup> November 2008, and in bundle 4 you will find  
5 the comprehensive record of this meeting at tab 63. If the conflict was not red hot until this  
6 point, it certainly became scalding on 21<sup>st</sup> November.

7 On this date, 21<sup>st</sup> November, Professor Moizer attended a meeting of the fund; you can see  
8 who attended from the first page of tab 63 – it was the representatives of the local  
9 authorities, Mr. Baldwin for Wigan, Mr. Hobhouse for Rochdale, Mr. Pantall for Stockport,  
10 Mr. Pennington for Salford, Mr. Mitchell for Trafford, and there were two employee  
11 representatives from AMICUS UNITE and from UNISON, various apologies were  
12 tendered. There were no declarations of interest (Item 48). There is a reference to a  
13 specific investment under Item 50. I am not going to read that out because I think in  
14 Professor Moizer’s statement he refers to this as confidential material. It is not marked here,  
15 but I will be cautious. If one turns over two pages to Item 59, there is a funding update.  
16 Mr. Bowie, actuary to the fund, gave a presentation which gave details of how the current  
17 economic turmoil implicated on the fund valuation and reported how asset valuations were  
18 impacting on funding levels. He reported the following positive news: the designated fund  
19 was protected from movement in the equity markets; GMPF has cash; buying opportunities  
20 existed for the long-term investor; inflation was tumbling; bond yields were rising. If you  
21 look down to the bottom of that section, in ‘Summary’,

22 “In summary, it was reported that the economic situation was serious and that GMPF’s  
23 caution was justified. There were opportunities and risks, which would need careful  
24 management. Employer contribution rates were set until March 2011 and the actuary would  
25 continue to strive for the right mix of prudence, stability and affordability in setting future  
26 rates, taking account of the high creditworthiness of local authorities and associated  
27 employers”.

28 60. Market Turmoil - Implications for GMPF.

29 The Director of Pensions gave a presentation which updated members with regard to the  
30 current market situation, implications for the fund and a review of the investment strategy”.  
31 Then, on the next page you will see that there is an analysis of that. Three-quarters of the  
32 way down, there is a sentence which says,

1 “The relative attractiveness of assets which were considered to offer good long-term value,  
2 and those expected to deliver low long-term returns, were detailed and discussed, in the  
3 light of recent valuation shifts”.

4 So, at this meeting, which of course Professor Moizer attended, there was a detailed  
5 discussion not only of the macro situation but the general position in the economy and the  
6 position in relation to a whole range of different investments.

7 Then one gets a lengthy section on the next page, entitled ‘Fleet of Foot Proposals’. As you  
8 know, these were the proposals that were used as the vehicle for the consortium being  
9 launched by Manchester Airport on an indicative basis in January of the following year.  
10 “The Director of Pensions submitted a report and delivered a presentation which set out  
11 proposals for streamlining decision-making in connection with implementing certain  
12 changes to investment strategy in order to be in a position to react to market events in a  
13 timely manner”.

14 Please note that. That is exactly what MAG said in the press three or four months earlier -  
15 the need to respond to market events in a timely manner. We have seen, of course, that in  
16 June of the same year the fund mooted the possibility of these fleet of foot proposals. It  
17 goes on,

18 “The potential uses of pre-agreed asset allocation triggers and the proposed trigger process  
19 along with the rationale for and features of a special opportunities portfolio were detailed in  
20 the report and presentation”.

21 Now, we have not seen the report or the presentation. But, you can deduce from this that  
22 they pre-existed 21<sup>st</sup> November and that all of those who attended this meeting will have  
23 had sight of them so that they could express educated views about them. So important  
24 documents will have been in existence between June and November, and one can assume  
25 that Professor Moizer had access to them.

26 “The long-standing arrangements for strategic and tactical asset allocation would remain the  
27 cornerstone of the fund’s ongoing approach in this area. The trigger proposals detailed in  
28 the report would enhance the fund’s decision-making process in turbulent times and the  
29 proposals for a special opportunities portfolio offered the scope for increased  
30 diversification.

31 The Director also outlined proposals for a ‘special opportunities’ portfolio, the key features  
32 of which included

33 \* the portfolio will be developed over time, building on ideas recommended for  
34 consideration by the advisors and/or internal team”.

1 So, Professor Moizer is one of those advisors - though I perhaps should add - and I am  
2 speculating - it is theoretically possibly it was the external fund managers.

3 “\* Investments are expected to be capable of generating returns in excess of inflation plus 5  
4 percent and give diversification benefits.

5 \* Investments will normally be undertaken by way of an externally managed pool  
6 vehicle.

7 \* Having received advisor support, any new types of investment will be  
8 considered by the local initiatives and venture capital working group with a view  
9 to seeking panel approval of investments of that type.

10 \* An annual performance report will be considered by the management panel  
11 with ongoing monitoring by the Local Initiatives and Venture Capital Working  
12 Group”.

13 I think it is plain here that the advisory panel is an advisory panel which Professor Moizer  
14 does sit on and advise. Then,

15 “Recommended .. that the panel approve the inception/creation of (i) pre-agreed asset  
16 allocation triggers as envisaged in sub-sections 4.5 and 4.7 of the report with initial triggers  
17 for considering the purchase of further equity at FTSE 3800 and for the sale of equity at  
18 FTSE 5000, such triggers to be reviewed in June 2009;

19 (ii) [and this is important] a ‘special opportunities portfolio’ with an allocation of 5 percent  
20 of main fund assets currently around £400 million in line with the key features of the  
21 portfolios detailed in sub-section 5.4 of the report”.

22 Then Professor Moizer gives his comments on this.

23 “Advisor comments. Mr. Moizer gave a detailed analysis of the current global economic  
24 situation. He agreed with the proposals [note - plural - so, that must be both the allocation  
25 triggers and the SOP] and commented on the unprecedented volatility in the market at  
26 present and the need for a long-term view and approach. He added that the current situation  
27 could not be compared to any other recession and commented on the unbelievable level of  
28 personal and corporate borrowing. He reiterated that a long-term strategy was needed.

29 Mr. Hemingway concurred with Mr. Moizer’s comments and the  
30 recommendations above.

31 Mr. Bowie made reference to risk and the importance of understanding what the  
32 risks to the fund were. He also encouraged the Director of Pensions to ensure that  
33 the fund was adequately resourced both internally and externally, given the  
34 additional requirements of the ‘fleet of foot’ proposals”.

1 We do not know what Professor Moizer's detailed analysis of the market situation was. We  
2 simply know he made one.

3 You have then got the reports of the managers at para. 63, and you have the heading  
4 'Capital International'. We do not need to go into that, but you will note at the bottom,  
5 about two-thirds of the way down, "The advisors were then asked to comment --" and,  
6 Mr. Moizer is reported as having agreed and added that it was now time to get good stocks  
7 at good prices with outperformance to follow".

8 Under the heading 'UBS Global Asset Management' on the next page again the advisors  
9 were asked to comment, just about half-way down.

10 "Mr. Moizer sought clarification of how well UBS were resourced in terms of research  
11 coverage. Mr. Powers, in his response, assured members that UBS were well resourced in  
12 this area".

13 So, as of 21<sup>st</sup> November, Professor Moizer advised and approved of the adoption of a so-  
14 called special opportunities portfolio. The portfolio was to have an allocation of 5 percent  
15 of main fund assets. That would give them access to in the region of £400 million.

16 Professor Moizer is reported also as having said that this was a good time to buy stocks at  
17 good prices. The context of this entire debate was that there were, because of the recession  
18 assets available which would be at distressed values. That is why the opportunity existed  
19 and that is why they needed to be 'fleet of foot'.

20 You will have seen from the statement that Professor Moizer says he was not aware at this  
21 point in time that the fund was going to use this SOP to engage in a bid for BAA assets.  
22 He does not say what he suspected, or what might have been on the cards. He simply  
23 explains what his actual state of mind was. For your record - and I think perhaps it is worth  
24 going to precisely what Professor Moizer says so that I do not inaccurately or unfairly  
25 describe his evidence - we go to defence bundle R, Tab 3. I am going to take you from  
26 para.58 onwards, which is p.15 of the witness statement. I emphasise that there is no  
27 necessity for the Tribunal to make findings of fact about discrepancies between this and  
28 other evidence, you simply have to ask yourself what the fair minded observer would make  
29 of everything, consistent and inconsistent material all taken as one. Paragraph 58:

30 "I learned from GMPF that Project Golf is the bid for Gatwick Airport whilst  
31 preparing for the Pension Fund Advisory Panel meeting on 6<sup>th</sup> March 2009. I have  
32 had no connection with Project Golf. Project Golf was discussed on 6<sup>th</sup> March  
33 2009, I excused myself from the relevant part of the meeting.

1 Fleet of Foot is a proposal that Peter Morris should, as Director of Pensions, have  
2 discretion to respond quickly to market developments to make opportunistic  
3 investments in marketable securities.”

4 I take from that an acceptance and acknowledgement that it is an opportunistic fund. I think  
5 it is not an entirely accurate description of the way it is described in the minutes, but be that  
6 as it may. He then says:

7 “It has nothing to do with Project Golf ...”

8 We know that at the beginning of the following year this was the vehicle which was used  
9 whereby the Fund would participate with the airport and Borealis, a third party investor, in  
10 Project Golf. He says:

11 “... or otherwise with investments in airports. Indeed, that would be completely  
12 contrary to the reason for its creation.”

13 I think if you look objectively speaking at the description of the Fund that statement simply  
14 does not stack up. Purchasing or participating in the purchase of an airport, not necessarily  
15 a sole investor, of course, is entirely consistent with a long term investment of an  
16 opportunistic nature for distressed assets.

17 “60 The Special Opportunities Portfolio was created as a vehicle to acquire  
18 unitised investments outside the normal range of GMPF’s investments ...”

19 Fine, no quarrel with that –

20 “The proposal was presented by Mr. Peter Morris at the November quarterly  
21 meeting.”

22 We have seen it was introduced in June because that is recorded in the Fund’s minutes.

23 “It was proposed that an opportunity should be created to allow GMPF to make  
24 unitised acquisitions and so to take advantage of abnormal conditions. In  
25 November 2008 there was no mention of any other opportunity that might be  
26 pursued through the SOP. I do not know ...”

27 and I find it odd that he uses the present tense there –

28 “... whether the SOP is to be used as the vehicle for Project Golf.”

29 I am going to draw your attention in a moment to a set of facts which you may find render  
30 that statement somewhat surprising, but again I emphasise that there is no particular need  
31 for the Tribunal to resolve inconsistencies of evidence.

32 “61 As to other groups or meetings mentioned in the notice I was not present at  
33 the meeting of Local Initiatives and Venture Capital Working Group on 30<sup>th</sup>

1 January. Nor did I attend the meeting of the Urgent Matters Panel on 18<sup>th</sup>  
2 February. I have never attended a meeting of either group.

3 62 In conclusion, I wish to emphasise that at no time have I had any  
4 involvement in relation to any actual or possible bid by GMPF for any airport. The  
5 first I knew of GMPF's possible participation in a bid for Gatwick was on 9  
6 January."

7 Again, you may want to mark that because that, I am afraid, does not stack up.

8 "Once the Commission knew on 20 January 2009 that an indicative bid for  
9 Gatwick had actually been made by a consortium involving GMPF steps were  
10 immediately taken to preserve the independence and impartiality, and the  
11 appearance of independence and impartiality of the BAA inquiry. As a chartered  
12 accountant and Professor of accounting, I have expertise in and have published on  
13 the subject of auditor's independence. Accordingly, I understand the importance  
14 of considering the public perception of independence. I have at all times  
15 endeavoured to discharge my functions as a Member of the BAA Inquiry Group in  
16 accordance with high standards of independence and impartiality expected of my  
17 profession as well as those expected by the Commission."

18 Could you please go to, in the same bundle, Mr. Morris's statement, paras.18 to 22, tab 10.  
19 Mr. Morris is the Director of Pensions at the Fund, and you will see that from the  
20 introduction to his statement. Paragraph 18, under the heading "Project Golf", he says:

21 "Project Golf is the name given to the bid by the Manchester Airport Group  
22 consortium for the acquisition from BAA of Gatwick Airport.

23 GMPF was approached as a possible participant in Project Golf in late November  
24 2008 by MAG."

25 We have just looked at a meeting of 21<sup>st</sup> November, and here the Fund is speaking to the  
26 Airport at the end of November.

27 "MAG and Borealis had been working on this proposal for some time ..."

28 So the Airport had been working on the proposal for some time prior to 21<sup>st</sup> November, one  
29 surmises –

30 "... and another partner(s) was desirable for the project. I understand that one of  
31 the local authorities had suggested that GMPF might be considered."

32 So the shareholders, as I have suggested all along, quite naturally said, "Well, maybe the  
33 Fund would become relevant.

1                   “A meeting was held between representatives of MAG, myself and Steven Taylor  
2                   from GMPF and the consortium’s advisers to Project Golf on 26 November ...”  
3                   that is five days after the meeting

4                   “... at which a presentation on the investment opportunity was given.”

5                   If there was a meeting on the 26<sup>th</sup> one surmises, and it is only surmise, that there will have  
6                   been pre-discussions, emails, letters, telephone calls, which almost certainly take the  
7                   genesis of these discussions to at or about the date of the 21<sup>st</sup> – it is almost impossible for it  
8                   not to have been the case – a day or so either side of the 21<sup>st</sup>.

9                   It is possible that Professor Moizer did not know. The fair minded observer might think it  
10                  odd, but it is possible that he did not know. It is possible that at the meeting the Director of  
11                  Pensions did not explain what the purpose of the SOP was. To be fair, it is not recorded  
12                  that he explained the purpose of the meeting in the minutes, and we have not seen the  
13                  background report, so it is possible. I do not think it is necessary for you to decide either  
14                  way.

15                  “21       GMPF wished to consider the matter further but needed some initial advice.  
16                  As is explained in the First Witness Scheme of Steven Taylor, which I have seen in  
17                  draft, our initial proposal was that we should take advice from the Fund’s external  
18                  advisers on the principle of such an investment.”

19                  So at the same time as they were contemplating going to the Fund, they were seeking advice  
20                  from one of the Fund’s external advisers. As I will show you in a moment, that was  
21                  Professor Moizer.

22                  Just standing back, on 21<sup>st</sup> November, he was advising the authorities to use a fund to buy  
23                  distressed bargain assets. At the same date, Manchester Airport was in communication with  
24                  the Fund – I say “the same date”, on or about that date – to obtain investment support. On  
25                  or about that date, Professor Moizer was advising on exactly those issues which could and  
26                  would lead to this forced sale becoming a painful reality for BAA and a boon, or a  
27                  wonderful opportunity, for MAG.

28                  The Competition Commission does not think this is a conflict. They did not disclose this.  
29                  Apparently Professor Moizer did not disclose this to the Competition Commission.

30                  I am afraid it gets materially worse from now on in. The next date is 2<sup>nd</sup> December, just a  
31                  few days later. The references to this are skeleton paras.69 and 70, and chronology para.90.  
32                  On 2<sup>nd</sup> December, just days afterwards, as we have just seen from Mr. Morris’s statement,  
33                  the Fund sought the advice of Professor Moizer on this investment. Again, I do not want to  
34                  put words into their mouths, and it is best, I think, to take this from the statement from

1 Mr. Taylor himself. This is at tab 12 of the same bundle. He addresses at some length this  
2 phone call to Professor Moizer from para.9 onwards. Let me just explain to you what the  
3 relevance of this is so that you have it in mind. There is a difference of evidence between  
4 the Fund and Professor Moizer. The Fund makes it clear that they explained to  
5 Professor Moizer that they wished to obtain his advice about the Fund's participation in a  
6 bid for airport, Gatwick. Professor Moizer says it was not clear that that is what they were  
7 talking about. What happened was that the conversation was opened up, Professor Moizer  
8 said, "I do not think we can talk about this", the conversation abruptly terminated. What I  
9 am going to ask you to conclude is that Professor Moizer either knew or he inferred that the  
10 Fund was participating in bid for Gatwick. There are two alternatives, he either knew or he  
11 inferred. Again, I do not think it is necessary for you to decide which of those is true,  
12 because you can take the lower of those submissions from Professor Moizer's own  
13 evidence. He inferred that the Fund was involved in a bid for Gatwick. It does not matter  
14 to me whether he actually knew or it was actually constructive knowledge.

15 Paragraph 9 of Mr. Taylor – Mr. Taylor is the head of pension investment at the fund and  
16 he explains that at the outset. He has been the head since 1994. "Phone call to Professor  
17 Moizer", para. 9:

18 "9. As Peter Morris explains in his First Witness Statement, following our initial  
19 meeting with the Manchester Airport Group to discuss the possible  
20 involvement of the GMPF with Project Golf on 26 November, we jointly  
21 considered to whom we might turn for some initial advice as to whether the  
22 GMPF should progress this investment opportunity.

23 10. In such circumstances, it was entirely natural that our first thought would be to  
24 talk to one or more of our three Advisors. In that regard, we considered  
25 Professor Moizer could be the best placed to assist us.

26 11. I had a general awareness that Professor Moizer had some particular  
27 knowledge of airports, not least because I remembered that a number of years  
28 ago I had understood that he had been unable to be involved in an 'inquiry'  
29 involving Manchester Airport."

30 12. I was also generally aware that Professor Moizer may have had some current  
31 involvement in airports via his role with the Commission, though I did not  
32 know precisely what form that took or the extent of his involvement. I had  
33 only a hazy understanding of his work for the Commission, though I  
34 appreciated that he must have had a senior role. I did not fully appreciate the



1 nature of the Commission's market investigation into BAA and did not know  
2 the degree or nature of Professor Moizer's involvement with it.

- 3 13. Certainly, if I had known that Professor Moizer would definitely have had a  
4 conflict of interest in talking to me or to anybody else t the GMPF about a  
5 possible investment by the GMPF in Project Golf, I would not have contacted  
6 him in that regard.
- 7 14. As I mention above I was aware that Professor Moizer may have had a current  
8 involvement in airports via his role with the Commission, and that such an  
9 involvement would be likely to raise a conflict for Professor Moizer which I  
10 needed to confirm or otherwise. At the same time, in the event that he was not  
11 conflicted, his knowledge on this subject made him the perfect person to  
12 provide initial high level advice in relation to the potential involvement of the  
13 GMPF in a possible bid. Moreover, as I did not know the details of Professor  
14 Moizer's involvement with the inquiry, I was not at all clear what the precise  
15 impact and scope of the conflict might be in the event that such a conflict did  
16 indeed exist. I therefore decided that the correct approach in talking to him  
17 would be to start at a high level of generality, to invite him to tell me to stop if  
18 at any point he felt uncomfortable in talking to me, and then progressively to  
19 narrow down the conversation until it reached any granular detail regarding  
20 the topic upon which the GMPF required advice, namely a potential  
21 investment in the MAG bid for Gatwick Airport.
- 22 15. I discussed such a possible approach with Peter Morris before making the  
23 telephone call and agreed it was an appropriate way to proceed.
- 24 16. I believe that the actual telephone call with Professor Moizer took place  
25 around lunch time on 2 December 2008. I have, however, only been able to  
26 establish that date by means of circumstantial evidence. I believe that it must  
27 have taken place within a short window following a meeting with MAG on 26  
28 November 2008. This is my belief because an email from Peter Morris to the  
29 Chief Executive of Tameside MBC (Janet Callender) dated 3 December 2008  
30 makes a definitive statement that 'Peter Moizer is conflicted out'.
- 31 17. I do not telephone Professor Moizer very frequently, and on requesting an  
32 interrogation of the records of my office telephone calls between the dates in  
33 question, only one call to any of his three numbers is recorded being of  
34 duration 1 minute and 5 seconds at 12.29 on 2 December 2008.

1 18. My recollection of the relevant conversation is cant, but there was no reason  
2 for it to stick in my memory and I have no memory that it went otherwise than  
3 as planned. I believe that I opened the conversation as I had planned and  
4 agreed with Peter Morris, by first of all outlining to Professor Moizer my  
5 proposed approach of starting at a 'high level' and narrowing down gradually  
6 to detail and making it clear that if Professor Moizer wished the conversation  
7 to stop at any point he should tell me so."

8 - then this is important:

9 "... I believe I proceeded to use words to the effect that the GMPF was  
10 looking at the possibility of considering a potentially large single investment  
11 opportunity; that this opportunity related to an airport."

12 If that is what was in fact relayed in the course of this conversation, Professor Moizer must  
13 have known immediately that the fund was looking at an investment in an airport and that  
14 was the pre-arranged line of discussion, it was planned quite deliberately in advance that  
15 you would start with that. So that is the opening statement of fact.

16 "19. My recollection is that before I could continue any further with the  
17 background to my query, Professor Moizer indicated that he did not wish  
18 conversation on the topic to continue and it stopped. I believe that  
19 discussion of the matter lasted only a short time.

20 20. I believe that I subsequently advised Peter Morris of the nature and content  
21 of the telephone call, and confirmed to him that Professor Moizer considered  
22 himself conflicted out and therefore unable to give any advice on the  
23 matter."

24 Then he goes on to explain that he spoke to one of the other three advisers. So the fund's  
25 position is that they did explain to Professor Moizer that the fund was looking at the  
26 possibility of a potentially large single investment opportunity related to an airport; that was  
27 the fund's perception. If that is right Professor Moizer knew on 2<sup>nd</sup> December that the fund  
28 was interested in a bid for Gatwick – 2 and 2 undoubtedly make 4.

29 Professor Moizer puts it in slightly different terms and it is only right that I should draw to  
30 your attention the way in which he expresses it – tab 3, para. 35. I think it will be evident  
31 what the difference between the two pieces of evidence is. At para. 35 Professor Moizer,  
32 having explained the fact that he does not make formal disclosures to the fund, he then says:

33 " 35. At lunchtime on 2 December 2008 I was called at my office at Leeds  
34 University. The call was from Steven Taylor of GMPF. This was in itself a

1 rare occurrence. He began the call by saying: *'You can stop this*  
2 *conversation at any point ...'* I replied: *'If this is anything to do with*  
3 *airports or Gatwick, the conversation can stop now'*. In saying this I reacted  
4 instinctively. The only reason why Mr. Taylor would begin a conversation  
5 in this way would be if it might cause me prejudice. The only source of  
6 prejudice would be my work at the Commission which, at that time, was  
7 concerned only with BAA's airports. Mr. Taylor replied: *'Fine, I*  
8 *understand'*. Our discussion on the subject lasted less than one minute. I do  
9 not have a note or record of the conversation, but I recall it clearly.

10 36. Afterwards, I did not give the call much thought. If any issue would have  
11 been raised about airports I did not want to know about it. I made that very  
12 clear to Steve Taylor by pre-empting that subject at once.

13 37. Looking back now, I can say that, had I thought about it at the time, I would  
14 in any event have had no reason to think that GMPF would itself be  
15 considering participating in a bid for Gatwick. During my long association  
16 with GMPF it has never, to my knowledge, been involved in a similar  
17 investment. GMPF has invested in shares, bonds, property and funds."

18 Of course, that does not get him anywhere, because they have just created a fund which was  
19 for abnormal investments, that was the whole purpose of the fleet of foot vehicle.

20 If you turn to tab 4, which is exhibit PPM1 to the witness statement, and if you turn to the  
21 sixth page of that, you will see there is an email from Professor Moizer dated 9<sup>th</sup> February  
22 2009, at 4.25 in the afternoon, and is to David Peel of the Competition Commission. It says  
23 "Daniel Goodwin" at the top. At this point one has to say quite extraordinarily late the  
24 Competition Commission is investigating Professor Moizer and they have asked him to  
25 comment on various matters and he comments on the telephone conversation.

26 "Dear David,

27 Thank you for the copy of the letter from BAA. My response would be as  
28 follows:

29 1. Professor Moizer provides strategic investment advice to the GMPF and  
30 continues to do so. The Fund uses external and internal fund managers and he  
31 gives advice to the trustees on the fund managers' performance. He does not  
32 comment on the choice of individual investments.

33 2. Professor Moizer made clear to the GMPF that should they have any interest in  
34 being part of a bid for Gatwick that he could not offer advice in relation to that bid

1 and should receive no communication in relation to that bid. Hence, he was not  
2 aware of the bid until it became known in the financial press.”

3 - just look at the way he expresses himself in item 2, he is describing what he did. He  
4 made clear to the fund that should they have any interest in being part of the bid for  
5 Gatwick he could not offer advice. I regret to say that is inconsistent with his statement.  
6 He is there implicitly acknowledging that he made that statement clear to the fund. To be  
7 fair to him it may be that this is the way he expressed it two months after the event, but his  
8 witness statement was a number of months after that. All you should conclude from this is  
9 that he had either actual or constructive knowledge. He either deduced it from the  
10 conversation with the fund because it was obvious -- They were ‘phoning him about the  
11 possible involvement of the fund with Gatwick and he just worked that out, or he actually  
12 knew. It does not really matter. At the very least he had inferred or constructive  
13 knowledge.

14 If that is the case - and, again, one can only say a number of times that two and two make  
15 four - he did not disclose his problem on 2<sup>nd</sup> December. The Competition Commission  
16 appear to have been blissfully unaware of it. The fair-minded observer is really shaking his  
17 head in disbelief at this stage. After all, Professor Moizer has been asked by Manchester  
18 Airport Group’s owners to advise on their bid, and yet at the same time he is coming to the  
19 crux of the inquiry with his colleagues on those self-same issues. He is sitting on both sides  
20 of the table.

21 Now we turn to 2009. This is the first time that the Competition Commission begins to  
22 recognise the problem that it faces. What you will find as we pass through the first three  
23 months of 2009 is that the Competition Commission a very blinkered view of the problem  
24 that it faced. It never once confronted the issue or addressed it in a sensible fashion. The  
25 first date is 9<sup>th</sup> January, 2009. The Competition Commission says that it learnt of the  
26 conflict when the shadow monitoring trustee that was regulating the Gatwick bid produced  
27 a document identifying the fund as a bidder. So, that was 9<sup>th</sup> January. That is the first point  
28 at which they recognised there was any difficulty, even though the fact that Manchester  
29 Airport was interested in bidding and that had been known from the outset Mr. Clarke, in  
30 his witness statement (para. 27) says that the Competition Commission left the position  
31 under review. He did not apparently think there was any conflict. He does not explain why  
32 it was simply kept under review, but the Competition Commission did not, as they should  
33 have done, felt the collective hairs on the back of their neck rising.

34 THE PRESIDENT: What period was Mr. Clarke referring to?

1 MR. GREEN: This period from 9<sup>th</sup> January until the end of January.

2 THE PRESIDENT: He is referring to that when he says they left it under review?

3 MR. GREEN: Yes. They did not take immediate steps. If you like, I can take you to his  
4 statement.

5 THE PRESIDENT: Perhaps we had better look at para. 27.

6 MR. GREEN: Tab 5 of the defence bundle, Bundle R, under the heading ‘Steps taken in the BAA  
7 inquiry in relation to Professor Moizer’s connection with the fund’. It says ‘Confidential’  
8 by the side of para. 26. I am just going to ask you to read both of those paragraphs. It may  
9 just be the numbers. No. It is just the numbers.

10 “26. Where the possibility of a conflict arises we have to consider what steps to take. In this  
11 case the potential conflict of Professor Moizer arose from his role as a strategic advisor to  
12 the GMPF --“

13 We just compare and contrast 2002. A point I should have made at the outset was that in  
14 the disclosure letter of 13<sup>th</sup> June, 2002 it is plain because there are hidden copies to go to  
15 ‘Moizer folder’. They had a folder in the Competition Commission entitled ‘The Moizer  
16 folder’. They obviously did not get it out. It is stated on that little disclosure letter in 2002.  
17 “This role had of course also been disclosed by letter to BAA and also on our website at the  
18 start of the inquiry in April 2007. On 11 December 2008 the Commission received the  
19 SMP’s first monthly report dated 10 December, 2008) which showed that Manchester  
20 Airport was one of X parties shortlisted by BAA as a potential purchaser along with  
21 Borealis. At this stage there was no mention of GMPF. Manchester Airport Group had  
22 signed a non-disclosure agreement and had received an information memorandum.

23 27. On 16 December, 2008 the SMP produced a first weekly potential purchaser  
24 update report. This indicated that BAA had shortlisted X parties as potential  
25 purchasers; that Manchester Airport had formed a consortium with Borealis.  
26 GMPF was identified as reviewing the NDA. Should it become involved it would  
27 be to contribute equity funding for the Manchester Airport bid. Similar  
28 information appeared in the subsequent potential purchaser update reports of the  
29 SMP on 22 December 2008 and 6 January”.

30 Then they go on to explain at the bottom of that paragraph, “But on 12 January GMPF was  
31 identified for the first time as having received an IM. This was the first occasion on which  
32 the possibility of an indicative bid by the Manchester Consortium with involvement by the  
33 GMPF became more than a matter of speculation. After 12 January the staff team

1 monitored the situation and considered what action to take should the Manchester  
2 Consortium make an indicative bid”.

3 So, the mere fact that it was contemplating it was an irrelevance. They were only interested  
4 in whether it actually did.

5 THE PRESIDENT: That is your reference to keeping it under review.

6 MR. GREEN: Yes. That is the first stage. That is the date upon which they learnt of the fund’s  
7 indicative bid, or something which was more than mere speculation.

8 The next date is 19<sup>th</sup> January, 2009. That is the MAG indicative bid itself. This was a non-  
9 binding indicative offer. We have seen that this was the first point in time that the  
10 Competition Commission took any steps in relation to Professor Moizer. This is clear from  
11 Defence, para. 227.

12 The Competition Commission decided at this point to adopt the very limited steps of  
13 excluding Professor Moizer from anything to do with the bid.

14 I emphasise ‘with the bid’. They did not exclude him from anything else, including  
15 anything else which concerned Gatwick. He was simply excluded from that small part of  
16 the inquiry which concerned the bid. This was a very limited quarantine. They did not  
17 apply the principle which they had applied in 2002.

18 Indeed, even then, I have to say, they cocked up because they still allowed Professor Moizer  
19 to see the minutes of Competition Commission meetings which impacted upon the bid of  
20 23<sup>rd</sup> January and 29<sup>th</sup> January. They confess in relation to that. So, the quarantine steps  
21 taken were very limited and ineffective.

22 Now one comes to 22<sup>nd</sup> January, 2009. The Competition Commission telephoned BAA. If  
23 we go to our chronology, this is para. 110(c). This simply records a date. It is a relatively  
24 minor event, but one with some significance.

25 David Peel, from the Competition Commission, ‘phoned Louise Pengelly and told her that  
26 Professor Moizer was an advisor to the fund and he was likely to be stood down. No  
27 reasons were given.

28 That is all that was stated. It was a short telephone call.

29 The next relevant date is 26<sup>th</sup> January. BAA was hoping for and expecting a detailed  
30 communication from the Competition Commission to explain. Nothing arrived. So, on 26<sup>th</sup>  
31 January they searched the Competition Commission’s website and they discovered the 2002  
32 notice. I have already taken you to the evidence which makes it clear that this was the first  
33 occasion that this particular team came to learn about the 02 notice. You will remember the  
34 witness evidence, and I do not propose to go over it again.

1 The next relevant date is 27<sup>th</sup> January 2009, chronology para.113, the Competition  
2 Commission called BAA to inform it that it was minded to add details of  
3 Professor Moizer’s position on the website. They never did.

4 On the same day they wrote to a Mr. Dooley, and I need to explain to you a little bit about  
5 Mr. Dooley. Many, many years ago he worked for BAA, but he left nearly 20 years ago,  
6 and the details of his position are set out in our reply. He is a man, I think he is retired, but  
7 he is interested in airports and airport regulation. He held senior position in the airport  
8 industry. He made a submission to the Competition Commission and the Competition  
9 Commission responded to it. I would like to just take you through three references in our  
10 chronology which will enable you to see his position in the round. First of all, chronology  
11 104(a). The Competition Commission published on its website a report from Michael  
12 Dooley dated 6<sup>th</sup> January 2009 which stated that:

13 *“What is also of interest is that three members of the Inquiry Group, Laura*  
14 *Carstensen, is a non-executive board member of the Parliamentary Counsel*  
15 *(Cabinet Office), Prof J Haskel, is a consultant to the DfEE and HM Treasury and*  
16 *Prof P Moizer, is a Strategic Adviser to the Greater Manchester Pension Fund.*  
17 *Two have political connections and a third has links to a possible purchaser or one*  
18 *or more of the BAA airports that it is proposed should be sold. It is very difficult*  
19 *to interpret this as an independent body!’”*

20 Then one turns to chronology 113(b), this was the Competition Commission’s response to  
21 the Mr. Dooley, and the text of the letter is set out:

22 *“The CC conducts a full assessment of the interests of any members appointed to*  
23 *decide on the references it receives. The CC will not appoint a member where it*  
24 *feels that there is even the appearance of partiality and the CC discloses any*  
25 *relevant interests to ensure that the decision making process is transparent.*  
26 *Should the existence of a conflict become apparent during an inquiry the CC will*  
27 *consider whether the member should withdraw from the inquiry all together or*  
28 *from any aspects of the decision making process that may be affected. The conduct*  
29 *of the members is controlled by the CC’s Rules, the Members’ Code of Practice*  
30 *and the Guidance on Disclose of Interests. All of these documents are available on*  
31 *our website. Please be assured the CC takes it’s [sic] the impartiality of its*  
32 *decision making very seriously. We note your views about the Group however it*  
33 *remains that we do not believe that these matters will prejudice the ability of the*  
34 *Group to discharge its functions in an independent and impartial manner’.”*

1 By this time they had discovered the Fund's bid and they were taking steps to quarantine  
2 him. So that was inaccurate. They were here saying there was no problem whatsoever.  
3 They did not explain even the limited steps they had taken to quarantine him. Indeed, just  
4 to make that good, if you look back over the other side the chronology, para.110(b), the 22<sup>nd</sup>  
5 January was the date upon which steps were taken to quarantine Professor Moizer from just  
6 the limited Gatwick sale. So the response on 27<sup>th</sup> January was simply inaccurate.  
7 Then one has Mr. Dooley once again writing to the Competition Commission on  
8 29<sup>th</sup> January, this is chronology 115:

9 "… Mr. Dooley wrote to the CC in relation to the CC's response to his letter and  
10 response to the Provisional Decision on Remedies and comments regarding the  
11 extent to which the CC Market Investigation panel members, as a result of their  
12 interests, could be viewed as impartial."

13 So he did not let go.

14 So as of 27<sup>th</sup> January, which is the date that we are looking at, the Competition Commission  
15 phoned up Louise Pengelly and said there is a problem, they are going to need to update the  
16 website. They had already, on the 22<sup>nd</sup>, phoned up and said they were likely to stand him  
17 down, and on that same day they wrote to Mr. Dooley and said there ain't no problem.  
18 On 6<sup>th</sup> February BAA writes a letter to the Competition Commission. If you go back to the  
19 defendant's bundle, tab 4, p.7, and chronology para.120. Indeed, I think you can take it  
20 pretty much from the chronology because it is all set out there. It was sent to John Banfield,  
21 the Inquiry Director:

22 "BAA wrote to the CC regarding Professor Moizer's apparent conflict of interest."

23 The letter, you will see, starts:

24 *"Dear John*

25 *We understand you are considering writing to us concerning the position of*  
26 *Professor Moizer as a strategic adviser to the Greater Manchester Pension Fund*  
27 *(GMPF) and the implications of this role for his position as a member of the panel*  
28 *in this inquiry.*

29 *As we understand it, Professor Moizer acts as an adviser to the GMPF (the*  
30 *members of which include employees of local authorities in the Greater*  
31 *Manchester area). His role is to advise the GMPF on investment. On 19<sup>th</sup>*  
32 *January 2009 BAA received first round bids in relation to the sale of Gatwick.*  
33 *One of the consortia bidding, comprising Borealis and the Manchester Airport*  
34 *Group (MAG) which is owned by local authorities in the Manchester area) has*



1 indicated that GMPF will invest in that consortium. We understand that MAG is  
2 also a potential bidder for Stansted and/or a Scottish airport should the  
3 Commission require divestment.  
4 BAA does not want to prejudge the situation and therefore we would be grateful if  
5 you could address the following matters.  
6 \* Whether Professor Moizer continues to act as an adviser to the GMPF, and if so,  
7 to set out what are the terms of his retainer. If he no longer advises GMPF when  
8 did he cease to do so;  
9 \* Whether Professor Moizer has been aware of GMPF's interest in investing in the  
10 MAG bid, and if so when he became aware;  
11 \* Whether Professor Moizer has advised GMPF in relation to this investment;  
12 \* Identify the panel and staff meetings in which Professor Moizer participated  
13 since becoming aware of GMPF's interest in the MAG bid; and  
14 \* What steps Professor Moizer and the Commission propose to take in the  
15 circumstances.  
16 We would appreciate your urgent attention to this matter.  
17 Yours sincerely  
18 Robert Herga.'”

19 You will appreciate that as of this point, no disclosure has been given to BAA of any of the  
20 facts and matters of which you are now aware, which is why BAA is having to write, even  
21 though, whatever view you ultimately take of Professor Moizer on 2<sup>nd</sup> December, he knew  
22 there was something up and even now the Competition Commission knew there was  
23 something up almost three weeks earlier. Why should BAA have to write?

24 On that same day, 6<sup>th</sup> February 2009, the Competition Commission calls BAA, there is a  
25 telephone conversation. A note of that conversation is to be found at bundle 4, tab 72. This  
26 is from the diary from Louise Pengelly who is from BAA. It concerns a telephone  
27 conversation from David Peel, and you will see the handwritten notes at the bottom. There  
28 are three bullet points:

- 29 “\* 2<sup>nd</sup> Round bids – group who have made it to 2<sup>nd</sup> Round.  
30 \* RH letter is timely reminder they need to write to us (re Moizer)  
31 \* Could tinker with statement on website and be explicit about bid (if that  
32 knowledge is public).  
33 \* Moizer has excluded himself at both ends, MAG on bid and at CC.”

1 So the suggestion is being made that Professor Moizer was completely in quarantine, well  
2 that is not the position the Competition Commission took. If it is ever suggested, and I do  
3 not know if it will be that this constitutes disclosure that would be a hopeless proposition.  
4 So what does one deduce from this? The Competition Commission now thinks there is a  
5 timely reminder, we had better write to BAA, but I am afraid they did not write to BAA for  
6 quite a long period of time. We now enter a period of events which I think shows this  
7 episode at its very lowest.

8 On 11<sup>th</sup> February, which is the next date, there is an internal meeting of the Competition  
9 Commission, and there is a note of this on p.54, respondent's bundle, tab 4. The  
10 Competition Commission now address themselves quite specifically to Professor Moizer's  
11 predicament. Professor Moizer attended this meeting, it started at 10 am on Wednesday,  
12 11<sup>th</sup> February, in hearing room 4 at the Competition Commission. You will see under  
13 "Other business" item 10, and the context is on the previous page, 53, it tells you where it  
14 was and this is minute number 106. Item 10:

15 "The group discussed BAA's concerns about Peter Moizer's conflict of interest  
16 with regard to the sale of Gatwick and agreed that Simon Jones should speak to  
17 Robert Herga (General Counsel at BAA) to find out more about the nature of  
18 BAA's worries. It was also agreed that he would contact the Greater Manchester  
19 Pension Fund to find out whether there was anything they could say at present  
20 about their interest in the possible purchase of any other BAA airport."

21 Then the last sentence I do not think is relevant, something that Laura Carstensen raised in  
22 relation to her position.

23 Two points come out of that, that Simon Jones should speak to Robert Herga, not as an  
24 exercise in disclosure, but to find out more about BAA's concerns. BAA's concerns were  
25 based upon snippets of information that it had discovered, but – and this is quite important  
26 for the sequence of events which follows. Simon Jones did in fact speak to Robert Herga on  
27 the next day, but as of the next day they had not conducted their inquiries into the fund and  
28 they did not therefore have answers to two important matters: (i) what was the fund's  
29 intentions vis-à-vis other assets; and (ii) what was the true nature of Professor Moizer's role  
30 in the fund? Those were two discrete matters they investigated a few days later.

31 THE PRESIDENT: BAA investigated?

32 MR. GREEN: No, the Competition Commission. The Competition Commission held a meeting  
33 with Robert Herga the following day but five or six days later they got 'round to speaking to  
34 the fund, and the point of that is that when they spoke to Robert Herga they did not have full

1 information and you will see from what happened that they actually gave misleading  
2 information to him. It would even have been better if they had just delayed a week, or had  
3 their meeting or discussion with the fund the following day, but they did not have at their  
4 disposal adequate information when they spoke to Robert Herga the following day. But  
5 they are not saying: “We are going to give disclosure here”, they are saying: “Try and find  
6 out what his concerns are, it is a fact finding message.”

7 THE PRESIDENT: You mentioned two things, the first things was other bids by the fund?

8 MR. GREEN: Yes.

9 THE PRESIDENT: And the second thing was?

10 MR. GREEN: Professor Moizer’s true involvement with the fund, they were unclear, and I will  
11 show you the notes of the telephone conversation, because they demonstrate some really  
12 quite important facts which the Competition Commission plainly did not know about at the  
13 time.

14 So we come to the following day, 12<sup>th</sup> February, and there was a hearing between BAA and  
15 the Competition Commission, for your note: chronology 125, skeleton 92 through to 94.  
16 The facts surrounding the meeting were as follows: it was not convened to deal with the  
17 Professor Moizer problem, it was convened to discuss the impact of divestiture of Stansted  
18 on the planning application for the second runway and, as I will explain, that is quite  
19 important. It was not convened to deal with the Moizer problem, it was convened for a  
20 collateral purpose. The meeting was to deal with the impact of divestiture of Stansted on  
21 the planning application for the new runway.

22 Prior to the commencement of that meeting Robert Herga was handed a two-line note which  
23 simply said: stay behind. Robert Herga sets out his view of what happened in his statement,  
24 which is at bundle 5. You may conclude there are some discrepancies in the versions of  
25 events, and you might well conclude that you do not need to resolve these disputes; such  
26 differences as exist do not advance matters either way. Nonetheless Robert Herga says he  
27 was handed this two line note, and he says in para. 18:

28 “18. On 12<sup>th</sup> February 2009, I attended a meeting with CC staff along with Tim  
29 Hawkins (Head of Structural Review for BAA) and Alastair McDermid  
30 (Director of the Stansted Project) of BAA. The purpose of the meeting was  
31 to discuss the impact of any requirement to divest Stansted on the planning  
32 application for a second runway at Stansted. Before the meeting started,  
33 John Banfield (or possibly David Peel, the Inquiry Manager) passed a two  
34 line note to me asking me to stay behind after the meeting to speak with

1 Simon Jones, who was not present at the Stansted meeting. I do not recall  
2 that there was any mention of the purpose of the meeting. There had  
3 certainly been no prior notice to me or BAA of any such meeting or its  
4 purpose. I took it from the note that, as it was addressed to me personally,  
5 Simon Jones did not want anybody else present. Once the meeting  
6 concerning Stansted was over and everyone had left the room, Simon Jones  
7 joined me.”

8 I should say the Competition Commission says they did not intend him to be, as it were,  
9 isolated, but that was his perception and that is what happened.

10 “19. I believe the first issue raised by Simon Jones was whether BAA would be  
11 willing to give interim undertakings following the CC’s final report. He  
12 made reference to interim undertakings that would ensure that BAA would  
13 not sell Gatwick without the CC’s consent and only in accordance with the  
14 terms of its final report. I understood that Simon Jones’ position was that if  
15 BAA was unwilling to give interim undertakings the CC would need to  
16 consider making interim orders. I made it clear that there was no problem  
17 with interim undertakings.

18 20. Having discussed the undertakings, the conversation then turned to Professor  
19 Moizer. Simon Jones commenced the discussion by stating that the CC  
20 assumed BAA’s main concern was that Professor Moizer might have  
21 advised the fund in relation to the Gatwick bid. I recall that I said something  
22 to the effect that this was BAA’s main concern. However, I am sure that I  
23 did not say that this was BAA’s only or sole concern. At this juncture,  
24 Simon Jones explained that Professor Moizer had assured the CC that: -

25 a. He had first learned about the GMPF’s involvement in the bid for  
26 Gatwick when he read about it in the press;

27 b. he had informed the fund that he could not advise them in any  
28 way in relation to any such bid from the start. I cannot now recall  
29 whether this was a reference to bids for Gatwick or to bids for any  
30 airport. I also cannot now say whether the reference to the start was  
31 intended to be a reference to the start of the market investigation or  
32 the start of the Gatwick sale process;

33 (c) he had no involvement in the deliberation of the fund in relation  
34 to a bid for Gatwick.

1 21. Simon Jones also went on to explain that Professor Moizer's role in relation to  
2 the fund was a limited one, providing high level macro-economic advice".

3 Now, that was one of the material errors in the description as you will have seen already  
4 from his terms of reference and from his actual involvement for example, on 21<sup>st</sup> - but also  
5 he should have waited a few days until he spoke to the fund because they gave an entirely  
6 different version of Professor Moizer's role which we will come to in a moment.

7 "The clear impression that I had was that it would not have been part of Professor  
8 Moizer's role in the normal course, putting to one side the assurances referred to  
9 above, to have provided advice on GMPPF's Gatwick bid, or, indeed, to have  
10 advised on the appropriateness of specific investments in airports or in relation to  
11 the airport sector generally. I assumed from the above explanation that Professor  
12 Moizer had not been involved in advising the fund in relation to any other possible  
13 airport acquisition aside from Gatwick. Simon Jones also informed me that it had  
14 been agree that Professor Moizer would take no part in the Competition  
15 Commission's deliberations relating to the Gatwick sale process.

16 22. It was clear to me from this explanation that the Competition Commission  
17 was concerned to avoid a situation where Professor Moizer might have to step  
18 down from the market investigation. Simon Jones did not suggest there were any  
19 options open to BAA or the Competition Commission if BAA had continued  
20 concerns about Professor Moizer's involvement or that Professor Moizer might  
21 have to stand down.

22 22. I recall that Simon Jones then asked me if there was anything else I would like  
23 to discuss. I think he asked this question because he had anticipated and stated  
24 BAA's concerns in specific and narrow terms. In response to the question I re-  
25 stated BAA's concerns in terms of Professor Moizer's general connection to the  
26 fund and the Gatwick bid. However, as noted above I did not say this represented  
27 BAA's only or sole concern. At this point Simon Jones sought to reassure me that  
28 Professor Moizer had not had any involvement in the fund's bid for Gatwick.  
29 Contrary to the assertions made in the Competition Commission's letter of 21<sup>st</sup>  
30 April, 2009 I do not recall saying that in these circumstances BAA would find it  
31 difficult to object to Professor Moizer's position. It is possible that Simon Jones  
32 asked me whether his explanation and assurances dealt with my main concerns. I  
33 may have said in response and as an immediate reaction that the assurances given  
34 appeared to cover BAA's main or primary concern. However, this was not a

1 considered response. As I have explained, the meeting was unexpected. It is  
2 possible that Simon Jones may have inferred from this that BAA had no further  
3 concerns. I am certain that at no point during the meeting did I commit myself  
4 either by limiting BAA's concerns to whether Professor Moizer had actually been  
5 involved in advising the fund in relation to Gatwick or conceding that there was  
6 no issue. There was no need for me to do so at this meeting.

7 24. Simon Jones concluded the conversation by saying that if I had any further  
8 thoughts in relation to Professor Moizer I should let him know. I do not recall him  
9 saying that I should get back to him that day. He said he would be writing to me  
10 to follow up on the conversation, confirm what had been discussed and respond to  
11 BAA's letter of 6<sup>th</sup> February, 2009.

12 25. I did not go back to Simon Jones as I wanted to see what the Competition  
13 Commission's position was in writing. During this period BAA was heavily  
14 involved in a number of other matters which were occupying my time - in  
15 particular, the Gatwick sales process, a judicial review brought by Easyjet against  
16 the CAA in which BAA was a party, and the government review of economic  
17 regulation of airports. BAA received a letter from the Competition Commission  
18 on 25<sup>th</sup> February referring to the meeting on 12<sup>th</sup> February and responding to my  
19 letter of 6<sup>th</sup>. A copy of that is attached.

20 26. I did not respond to this letter for a number of reasons. At that time, the  
21 explanation and assurances given by Simon Jones appeared to address BAA's  
22 main concerns, namely that Professor Moizer had been involved in any way with  
23 the GMPF decision to join the consortium bidding for Gatwick. Of course, at that  
24 time I had no idea that the Competition Commission would later consider it  
25 necessary for Professor Moizer to stand down from the inquiry or that this was an  
26 option that the Competition Commission might consider. In those circumstances I  
27 took the view that persisting with the points raised in our letter of 6<sup>th</sup> February  
28 would be unlikely to produce any further assurances. Although BAA had by now  
29 become aware of the 2002 disclosure notice, this was not something which Simon  
30 Jones had raised with me; was not at the forefront of my mind. It was also unclear  
31 what BAA could gain from raising objections in relation to Professor Moizer.  
32 Simon Jones had not explained what possible steps might be open to the  
33 Competition Commission if BAA objected. He simply reported to me what steps  
34 the Competition Commission had taken. It was unclear to me what BAA could do

1 if we were not satisfied with any further response that might have been elicited  
2 from the Competition Commission. In those circumstances I was concerned that  
3 if I pushed the matter further this might annoy the Competition Commission at a  
4 particularly sensitive time of the inquiry, especially because Simon Jones had  
5 given me the impression that the Competition Commission was very concerned to  
6 ensure that Professor Moizer did not stand down. I thought there was nothing to  
7 be gained from further correspondence and there was a risk it could be detrimental  
8 to BAA, for example in the ongoing purchaser suitability discussions”.

9 I am just going to pause for a moment to explain what the fair-minded observer might have  
10 thought about this, and then I am going to show you what the Competition Commission did  
11 a couple of days later.

12 The fair-minded observer is going to take the view that to set BAA up in this way with a  
13 two-line note which had the effect of isolating one person, and from which they then,  
14 following through the day before the meeting of the Competition Commission, elicited his  
15 concerns was a woefully inadequate way to go about things. This was not a disclosure  
16 exercise. It was not putting the facts in front of BAA. In fact, they got the facts wrong.  
17 Professor Moizer is not just a provider of high level macro-economic advice. They did not  
18 disclose his involvement with the SOP. They did not refer to the 2002 notice, or discuss it.  
19 It was done in a context in which BAA felt pressured.

20 “I was concerned that if I pushed the matter further this might annoy the Competition  
21 Commission at a particularly sensitive state of the inquiry”.

22 BAA’s view was that the Competition Commission had decided not to stand him down, and  
23 they were explaining the reasons. Now, the Competition Commission cannot, in a million  
24 years, suggest this was a disclosure exercise.

25 That brings me to what happened a couple of days later. 16<sup>th</sup> February, 2009. We can pick  
26 that up in the chronology at para. 127. This entire meeting was predicated upon one fact -  
27 that Moizer was conflicted purely and simply because the fund was interested in Gatwick  
28 and Gatwick alone and they had immunised him from the Gatwick bid. What we discover  
29 is that within just days the fund was refusing to rule out that it was limited in its interest to  
30 Gatwick. The Competition Commission learnt that, recorded it in its internal  
31 documentation, and they then knew that the fund was interested not just in Gatwick, but in  
32 any other asset that became available.

33 Chronology, para. 127 - a couple of days later on 16<sup>th</sup> February, 2009.

1 “Simon Jones telephoned Steven Taylor, Head of Pension Investments at he GMPF  
2 enquiring whether there had been any involvement by Professor Moizer in the GMPF’s  
3 Gatwick bid (Peter Morris, Director of Pensions at the GMPF, also attended the call on  
4 speakerphone. Mr. Taylor assured Mr. Jones that there had been no such connection. Mr.  
5 Jones also enquired whether the GMPF’s involvement in the Gatwick bid was a one off or  
6 was likely to happen again in connection with other UK airport sales (specifically Stansted).  
7 Steven Taylor indicated that they would need to consider the query before responding to  
8 Simon Jones”.

9 So, on 16<sup>th</sup> the fund refuses to rule out interest in other bids. If, in the chronology you turn  
10 over, you will see a record of two different notes of a telephone conversation which  
11 occurred on 18<sup>th</sup>. They are under the heading on p.41. At 129b,

12 “At 3.45 p.m. on the afternoon of 18<sup>th</sup> February, 2009, Simon Jones telephoned  
13 Steven Taylor of the GMPF regarding Professor Moizer and his position”.

14 This was pursuant to the meeting on 11<sup>th</sup> with the Competition Commission. This was  
15 some six days after the meeting with Robert Herga - the two-line missive.

16 “Mr. Taylor outlined the scope of Professor Moizer’s role as an advisor to the GMPF as he  
17 saw it and explained that the three advisors had a long-term trust-based relationship with the  
18 GMPF and that their role was very much that of ‘influential’ ‘wise men’ providing overall  
19 comment at a ‘high level’. C. Separately, Steven Taylor and Simon Jones each took a note -  
20 -

21 Then we have the note of Steven Taylor. This is from the fund.

22 “Spoke to Simon yesterday (16/2.09) - PM participated in the call on my speaker phone.

23 *As per SJ: enquiry relates purely to internal Commission governance*  
24 *arrangements and will be treated as a strictly private and confidential.*

25 *SJ query in essence:*

26 ‘Is the GMPF involvement in the Gatwick bid a ‘one off’ or likely to happen again  
27 re. other UK airport sales?’

28 *SJT response (cleared with PM before delivery):*

29 *Absent our ‘connections’ with MAG it is highly unlikely we’d be involved in any*  
30 *direct bid/investment such as for Gatwick (usual route is via infrastructure*  
31 *funds)”.*

32 Pausing there, the first thing that is emphasised is that the relationship with MAG is a very  
33 unusual one, and it is that which drives investment decisions because they say absent the  
34 connection with MAG, the Fund would not be involved in anything.



1                   *“If Gatwick bid successful, highly unlikely we’d do any further airports as direct*  
2                   *bid/investment.*

3                   *If Gatwick bid unsuccessful we feel it unlikely we’d be involved in any further*  
4                   *direct airport bids – much smaller size MAG may not ‘need’ our involvement [&]*  
5                   *less chance of presence of major financial co-investor (e.g. Borealis) would make*  
6                   *it less attractive to GMPF*

7                   *But can’t guarantee we won’t be involved in further bids (particularly in light of*  
8                   *MAG connections).*”

9                   And underlined is the word “won’t”. That was highly material. They refused to rule out  
10                  any bid other than Gatwick and they have now confirmed this to the Competition  
11                  Commission and put it on the basis that they have this unusual connection with MAG.

12                 The rest of the note goes on as follows:

13                   *“Note*

14                   *Whole issue, including my proposed script above, discussed with Russell Page.*  
15                   *Russell content with our (PM/SJT) suggested approach and has no contrary*  
16                   *advice.*

17                   *SJT received call from SJ and relayed above ‘response’ on basis that being used*  
18                   *purely for purposes of considering internal CC governance arrangements and that*  
19                   *‘response’ would be treated as strictly confidential.*

20                   *SJ thanked SJT for the ‘response’ and said it helpful.*

21                   *SJ went on to enquire as to the nature of the Professor Moizer/GMPF/PM/SJT*  
22                   *relationship.*

23                   *SJT described the nature of the interaction and discussed this with SJ, responding*  
24                   *to SJ’s follow-up questions.*

25                   *Broadly, SJT advised that the ‘role’ of Adviser to GMPF was to be a ‘wise man’*  
26                   *on a long term trust-based, retained basis. Detailed technical advice was not*  
27                   *sought, but overall comment at a high level was. The 3 Advisers were influential*  
28                   *as soon as counter-point to other input from officers, member, trade unionists,*  
29                   *fund managers, etc. SJT thought it unlikely that the Fund would not take very*  
30                   *seriously the comments of an Adviser who strongly gainsayed any proposal*  
31                   *considered.*

32                   *Finally, subject would prefer it if I did not reveal to Peter Moizer the nature of the*  
33                   *conversation at this stage.”*

1 Then we have Simon Jones' note of the same conversation, which is really rather telling.  
2 He is from the Competition Commission:

3 *"1 I spoke to Stephen Taylor of GMPF at 3.45 [...] on the afternoon of*  
4 *18 February 2009. I spoke to Mr. Taylor for two reasons. First, because I wanted*  
5 *to ascertain GMPF's interests in acquiring airports other than Gatwick should*  
6 *they become available. Secondly because I wanted to explore with GMPF the*  
7 *nature of its relationship with Peter Moizer [...].*

8 *2 Mr. Taylor is Chief Investment Officer at GMPF. I had spoken to*  
9 *Mr. Taylor and Peter Morris, Chief Executive of GMPF, on Monday to ask them*  
10 *about any interest that they might have in airports other than Gatwick. Mr. Taylor*  
11 *was therefore able to give me a considered view on the point. He told me*  
12 *a that absent GMPF's connection with MAG it is highly unlikely that GMPF*  
13 *would considered taking a direct stake in an infrastructure asset. Its preference is*  
14 *to invest in pooled funds;*

15 *b however GMPF is interested in infrastructure investments;*

16 *c that should the bid for Gatwick succeed it is highly unlikely that GMPF will*  
17 *bid for another airport;*

18 *d that should the bid for Gatwick, a bid for a further airport is possible.*  
19 *Much might turn on MAG's funding requirements. This might in turn be affected*  
20 *by MAG's relationship with other members of its present consortium such as*  
21 *Borealis;*

22 *e that this information was provided in strict confidence to be used only in*  
23 *relation to our concerns about conflicts."*

24 So pretty much consistent, you cannot rule out a bid, a bid is possible, depends on  
25 circumstances, and really all because of its relationship with MAG.

26 *"3 I then asked Mr. Taylor if he could help me to understand Peter Moizer's*  
27 *role at the GMPF. Mr. Taylor offered the following observations which I relay in*  
28 *the order in which they were made to me*

29 *a Peter is an adviser to the fund whose involvement goes back at least 15*  
30 *years;*

31 *b Peter is on very good terms with Mr. Taylor and Mr. Morris;*

32 *c Peter attends quarterly 'trustee meetings' as a matter of course. He is one*  
33 *of three advisers who Mr. Taylor termed the 'three wise men'. The three wise men*  
34 *sit at a table of their own at trustee meetings and comment on matters arising.*

1                   *They would normally comment on matters which as the investment in Gatwick as a*  
2                   *matter of course ...”*

3                   The grammar has gone slightly wrong there.

4                   THE PRESIDENT: Yes, “such as”.

5                   MR. GREEN: “Such as”, I think is the answer, that is how I read it. If that so, they would  
6                   normally comment on matters such as the investment in Gatwick as a matter of course.  
7                   Hardly high level economic advice. That is consistent with the terms of reference of the  
8                   Fund and its advisers. We know the Fund did try to seek his advice. That is the proof of  
9                   the pudding. Not much of it got “ate”, but they certainly attempted to get his advice on that  
10                  matter.

11                  *“d        trustee meetings normally last no longer than a morning, and are followed*  
12                  *by lunch, which is attend by Peter and the other ‘wise men’.*

13                  *e        contact with Peter between trustee meetings is ad hoc. There may be no*  
14                  *contact or there may be numerous contacts. Ad hoc contact will not normally lead*  
15                  *to Peter attending GMPF in person.*

16                  *f        the fund will not make an investment that is not approved by each of the*  
17                  *three wise men;”*

18                  This is the Competition Commission’s record. One presumes it has got a smidgeon of  
19                  accuracy about it. It was not invented by Mr. Jones – “will not make an investment that is  
20                  not approved by each of the three wise men”.

21                  *“g        there are about 40 attendees at trustee meetings, but a vote is never taken.*  
22                  *Proceedings are consensual and Peter is very influential in forming that*  
23                  *consensus;*

24                  *h        Peter’s role is effectively at ‘officer level’ in GMPF. He is one of the ‘main*  
25                  *players’. Mr. Taylor stressed that part of the significance of the relationship*  
26                  *between GMPF and Peter is the longevity of Peter’s connection with the fund. A*  
27                  *relationship of trust and respect had developed and matured.”*

28                  Signed off “Simon Jones, Competition Commission,. 18<sup>th</sup> February 2009.

29                  If Mr. Jones had known that information when he went to see him following the hearing on  
30                  the 12<sup>th</sup> he could not possibly have said what he said to him. He would have had to have  
31                  said, “We understand that Professor Moizer has an extremely close relationship with the  
32                  Fund and they will not take an investment decision without having consulted him or taken  
33                  his advice. Moreover, we have to say that the Fund is involved in potentially any asset  
34                  other than Gatwick if it becomes available and they do not succeed in relation to Gatwick”.

1 Frankly, I do not think it matters at this stage what the fair minded observer thinks. I think  
2 his views are pretty obvious.

3 If you thought that was bad, I am afraid what happens next is even more disappointing. We  
4 can take this from the chronology, para.131. On 23<sup>rd</sup> February David Saunders of the  
5 Competition Commission concluded that Professor Moizer should stand down immediately.  
6 That is para.132 and 131.

7 132, Peter Freeman on 24<sup>th</sup> February decided he should stand down immediately. The same  
8 day, 24<sup>th</sup> February, Clare Potter decided he should stand down immediately. The same day,  
9 24<sup>th</sup>, Christopher Clarke decided he should stand down, but he should be held on to for a  
10 week, should not stand down until 3<sup>rd</sup> March. Why? Because they wanted him to continue  
11 to make submissions on a document they were going to submit to the Department of  
12 Transport about regulatory reform.

13 On the 24<sup>th</sup> though the decision was taken to stand him down, definitively, for all time, in  
14 all respects. This is what the next day they wrote to BAA, and this is why I said at the  
15 outset that Competition Commission will not submit to you that this letter constitutes  
16 waiver or disclosure or anything remotely related to it.

17 On the 25<sup>th</sup>, the next day, after they had decided to stand him down, they wrote a letter  
18 which can only be described as inaccurate and misleading. The full text of it is set out in  
19 chronology at 133, and it says as follows:

20 *“We had a word about this a short while ago and I said I would write. Robert*  
21 *Herga’s letter of 6 February on the same subject, to which this can serve as a*  
22 *reply ...”*

23 So this was the reply to BAA’s concerns –

24 *“... also refers. Simon Jones has subsequently spoken to Robert Herga to clarify*  
25 *BAA’s concerns. A copy of this goes to him and to Kyran Hanks.*  
26 *As we understand it, the Manchester Airport Group (MAG/Borealis/Greater*  
27 *Manchester Pension Fund consortium is a bidder for Gatwick Airport and has*  
28 *been included in the shortlist for the second round of the sale process. Professor*  
29 *Peter Moizer is an adviser to the GMPF which is a party to the MAG bid I have*  
30 *referred to.*

31 *Robert Herga focused BAA’s concern on whether Professor Moizer has*  
32 *had any connection with the proposed acquisition of Gatwick by the fund and, in*  
33 *particular, whether he has advised the fund on the acquisition of Gatwick.*  
34 *Professor Moizer has assured us that he took steps to exclude himself from*

1                    *involvement with any fund bid for Gatwick before he became aware that the fund*  
2                    *was considering a bid.”*

3                    - that is the first time we learn of that particular fact , that he had actually done it before he  
4                    was even aware there was a bid.

5                    *“He became aware of the fund’s interest via the Press and he has certainly not*  
6                    *advised the fund on anything to do with its bid. For the sake of completeness we*  
7                    *have spoken to the fund which has confirmed that Professor Moizer has had no*  
8                    *connection with its bid for Gatwick.”*

9                    I think that is a pretty thin explanation if it is intended to reflect the telephone conversation  
10                    which was had, and you will see there they do not reflect that conversation in that the fund  
11                    had told them that they were interested in assets other than Gatwick. Then we get this,  
12                    which is probably near to the low point of this entire episode:

13                    *“Steps have been taken in the Competition Commission to exclude Professor*  
14                    *Moizer from involvement in any Commission discussion of the specific*  
15                    *arrangements for the sale of Gatwick Airport, and from receipt of any documents*  
16                    *dealing with the sale with the Commission’s information requirements from*  
17                    *bidders in round two and with any of the actual or prospective bidders for the*  
18                    *airport. These arrangements came into effect in late January, on or around 23<sup>rd</sup>*  
19                    *before the start of the second round. Prior to this date and prior to the start of the*  
20                    *second round, the Commission’s involvement has been limited to receiving update*  
21                    *on progress from the shadow monitoring trustee and to considering its*  
22                    *information requirements for the round 2 bidders. As you may know, the*  
23                    *Commission has not been involved actively in this first round.”*

24                    Well why is that so disgraceful? It is because the day before they had stood him down  
25                    definitively and taken that decision, and for whatever reason they failed to inform BAA that  
26                    they had decided to stand him down from 3<sup>rd</sup> March. Indeed, the impression given by this is  
27                    that he is keeping going, but in a quarantined manner. Now, this is 24 hours after the  
28                    decision was taken to stand him down from the 3<sup>rd</sup>. This is intended to be the letter, written  
29                    to BAA, putting BAA on notice, explaining the situation.

30                    What did they do on the next day, 26<sup>th</sup> February (chronology 134) they phoned Professor  
31                    Moizer at Leeds University and stood him down – the chronology provides the reference –  
32                    in the light of the possibility of further issues relating to appearances arising in connection  
33                    with remedies going forward and the Competition Commission’s reputation more generally.  
34                    So they decided to stand him down on 24<sup>th</sup>, on 26<sup>th</sup> they tell him so, but in between those

1 two, sandwiched, they convey the impression to BAA that he is going to continue to sit just  
2 in a quarantined manner because they continue to convey the impression that the fund is  
3 only interested in Gatwick.

4 On 3<sup>rd</sup> March 2009 Professor Moizer was formally stood down. The Competition  
5 Commission did not tell anyone of this. 16 days later the report is issued. For your  
6 reference skeleton 81 and 82, chronology 142 to 144. The report is completely silent as to  
7 Professor Moizer's position, apart from an asterisk on p.(iii) and I think you ought to see it,  
8 it is bundle 2, it is the report itself.

9 The report starts on the outside page with its title and its date. If you turn over, the  
10 members of the Competition Commission who conducted the inquiry, six names are  
11 mentioned including Professor Moizer, and there is a footnote. It says: "Professor Moizer  
12 stood down from the Group on 3 March 2009." That is it. Not quite it, the final  
13 denouement really here, is that Mr. Hawkins phoned the Competition Commission to find  
14 out what this was all about, and there is a note of the conversation which is to be found at  
15 tab 83, bundle 5, and it is the very last page of tab 83, and a file note thereon of 20<sup>th</sup> March.  
16 So Hawkins to Jones.

17 "Subject: Moizer.

18 I asked why Peter Moizer had stood down from the inquiry group on 3<sup>rd</sup> March. SJ  
19 responded that the reason he stood down was it was in connection with MAG's  
20 bid for Gatwick and PM's role as an adviser to the GMPF.

21 SJ referred to the conversation he had with Robert Herga concerning the Professor  
22 Moizer issue.

23 I asked whether PM had stood down because the CC had identified a historic  
24 conflict, or because the CC anticipated a conflict arising.

25 SJ responded that the CC was satisfied there was no conflict in either sense.

26 However, it was clear that there was/is a connection between Moizer and the  
27 GMPF, and for this reason the CC decided that he should stand down.

28 I asked whether this meant PM had not been part of the inquiry group that had  
29 signed off the final report.

30 SJ responded that PM had not been part of the inquiry group that signed off the  
31 final report.

32 [SJ sounded hesitant and nervous throughout]"

33 - and so he might.

1 It is a pretty rum state of affairs when BAA actually has to ring up after the report to find  
2 out what on earth was going on. Even then, the Competition Commission says: “There is no  
3 conflict, we did it because we are worried about something or other.”

4 So what does the observer make of all this? I think it is frankly blindingly obvious, and I  
5 am not going to spend a great deal of time standing in the shoes of the fair minded observer.  
6 He concludes there was a conflict in 2002, the Competition Commission rightly so analysed  
7 it. He concludes that the same applied in 2007, indeed, it was a more acute position in 2007  
8 than 2002. He observes all of the events that occurred over the succeeding two years and  
9 concludes that matters just got worse day by day. He notes that there was no disclosure of  
10 any of the events which occurred. He notes that there was no reason why the Competition  
11 Commission should not have thought about the 2002 situation, after all, Professor Moizer  
12 was there in 2002, Simon Jones was there in 2002, Mr. Banfield was there in 2002 and  
13 Christopher Clarke tells us that he appointed Professor Moizer because of 2002. They have  
14 a file somewhere called “The Moizer folder”. They did not think about it, they cannot  
15 possibly accuse BAA of failing to join the dots. Every event that occurred after 2007 is  
16 unfortunate, Professor Moizer’s connection became increasingly close to the actual bid that  
17 Manchester made month by month as the bid was formulated, as it was referred to in the  
18 press as the shareholders were consulted, as the shareholders thought about using their own  
19 pot of money, as he began to advise whether, with knowledge or not, of the use of the fund  
20 as he became cognisant of the fact that the fund was bidding. All of these things were  
21 predictable from the outset. They describe a set of facts which are infinitely worse than any  
22 case which has come before the courts on apparent bias and conflict of interest.

23 As to waiver, which seems to be part of the defence, I am going to simply summarise our  
24 submissions on waiver because you have got a very good idea now of the facts. You will  
25 have noticed that at no point in time did the Competition Commission ever consider that it  
26 was addressing waiver. That was never part of its internal thought process. If so, how can  
27 waiver arise? It is not something which can be invented after the event to simply describe  
28 away or account for the facts which have occurred. You have got to address it at the time.  
29 Waiver arises when a judge acknowledges he has got a problem; he sets his cards out on the  
30 table; he gives those affected an opportunity to think about them, go away and make a  
31 genuine election, and where that party comes back and says, “I’m happy with the situation,  
32 let us continue --“ It is a matter dealt with at the outset before the decision-making process  
33 continues, and it is something which has to be done with a degree of formality. If the

1 decision-maker did not even think about waiver, how can it then be said six months later,  
2 “Oh, well, you waived”.

3 THE PRESIDENT: I am interested in the legal principles of this. Supposing you have a situation  
4 where all relevant facts are in fact known - a hypothetical situation where in fact the  
5 affected party does know everything that might be relevant, but either does not give any  
6 thought to it or sits tight; there is no disclosure, but as it happens they know. How does  
7 that fit in with the legal principles? Could it count that as an implied waiver? Is there any  
8 concept of implied waiver?

9 MR. GREEN: The first thing, and it may be that it is outside the scope of the question, is that the  
10 facts of this case have been set out fully. BA did not know. So, no question of  
11 constructive notice or hypothetical notice or deemed notice can apply. The facts have been  
12 set out and the witnesses have quite specifically addressed that point because it was  
13 predictable that it was the last line of defence which was going to come up. “Oh, you must  
14 have known! You are a bunch of scoundrels! You are just trying to get off the hook! You  
15 really knew, and you have been hanging on to this argument”. Why on earth would Mr.  
16 Hawkins ‘phone Simon Jones to say, “What on earth are you doing? What is going on?”  
17 Why would Simon Jones say, “Oh, there’s no conflict”? Why did they not tell us about the  
18 2002 notice? We did not get it until January 2009 when we had to dig it out ourselves. So,  
19 Point 1 is: they did not know. It is an entirely hypothetical question.  
20 Dealing with it as a hypothetical question, if you, in some corporate sense, have the  
21 knowledge lurking within your building, but the inquiry team did not know, then that cannot  
22 possibly give rise to a waiver. It has got to be the people who are affected on behalf of the  
23 company, having full cognisance of the facts and thereby being in a position to elect to  
24 waive. So, there is no such thing as corporate waiver. Who knows? Somewhere lurking in  
25 BAA - and I am not saying this is the case - there may be a document which says, “Gosh! It  
26 is interesting what happened in 2002!” It might be in some archive or another. He might  
27 say, “Therefore, in 2002 they were impressed with the knowledge, obviously, of the events,  
28 but in 2007 they had forgotten” as had the Competition Commission apparently.  
29 So, corporate constructive knowledge cannot possibly be relevant. You have got to identify  
30 the people who are acting on behalf of the company for that issue, in that piece of litigation.  
31 Who is it who is directing will and mind behind the conduct of the inquiry? You have got  
32 the people. You have got Herga. You have got Hawkins. They have told you what the  
33 score is.



1 Let us take it one step further. Let us assume that Hawkins and Herga sat in a huddle and  
2 said, "Let us hang on to this. This is a beaut of a point. The Competition Commission have  
3 made dog's dinner of this. Let us hang on to it and spring a trap in six month's time". I  
4 think in those circumstances we are at the borderline of what the court might say was actual  
5 knowledge because they were impressed with actual knowledge. They have taken a decision  
6 of a deliberate nature to hold on to the fact rather than use it. In those circumstances I  
7 think it is at least arguable that a court would say, "Yes, that is waiver of a --" Call it  
8 'constructive' -- I think it is more likely to be 'actual waiver'. But, it has got to be a very,  
9 very high level of cognisance. They know the facts. They know they could exploit them, but  
10 they hang on to them. That is perhaps near the borderline of what might be actual  
11 knowledge. The only thing that is missing then is the disclosure exercise.

12 The reason I say that is at the borderline is because all the cases effectively say that there  
13 has got to be a disclosure exercise first. There is a very high degree of formality required.  
14 We have cited *Jones v. DAS* in which the Court of Appeal have laid down guidelines for the  
15 addressing of disclosure issues. They have explained how it must be begun with formality  
16 and, moreover, you have got to explain the options that are available to the affected person.  
17 You have got to say not only, "Is it a problem?", but, "Frankly, we can disband this panel",  
18 or, "We will stand Professor Moizer down. It means we won't start the inquiry for another  
19 three weeks, but we will get someone else in". You have got to explain the options, which  
20 they never did. So I do not accept, as a matter of law, that even that degree of constructive  
21 knowledge would be sufficient, because the courts are very particular about the formality  
22 with which the process must be gone through.

23 *Smith v. Kvaerner*, which we have cited in our skeleton, is a very good example. The judge  
24 bent over backwards to do what he thought was right and proper, and yet the Court of  
25 Appeal said there was no waiver for two reasons: (1) the judge did not fully explain the  
26 options; and (2) the court felt there was a degree of pressure on the individual who was the  
27 litigant. Even though he had counsel advising him, they thought there were some  
28 unfortunate circumstances, and therefore they said that a vital requirement is the ability of  
29 the affected person to perform an unpressured election process.

30 Now, there is no case, so far as I am aware, which deals squarely with someone who has got  
31 actual knowledge and they hang on to it. There is nothing, in a very extreme form, which  
32 would arise. We are not within a million miles of that in this case.

33 So, let me summarise the facts about waiver briefly. There are four conditions. First, there  
34 must be full and frank disclosure by the adjudicator. Well, I am not going to repeat what I

1 said about the 2007 notice. You will simply have to form a view as to whether it was  
2 adequate. We submit it plainly was not. But let us think about what happened in 2009. On  
3 22<sup>nd</sup> January the Competition Commission took steps to quarantine Professor Moizer from  
4 decision-making in relation to the Gatwick sale (Chronology 110). On the same day they  
5 phoned BAA to tell them that Professor Moizer was likely to be stood down, but they did  
6 not do this. On 27<sup>th</sup> January they write to Mr. Dooley and they fail to accept either that  
7 they have a conflict, or to recognise the existence of a problem, or to explain that they have  
8 even quarantined him in a limited way. They put that on the website. That was inaccurate  
9 disclosure to the world at large. On 23<sup>rd</sup> and 24<sup>th</sup> February they decided to stand him down  
10 definitively. On 25<sup>th</sup> they write to BAA and they fail to point that out. I have taken you  
11 through that letter. That is not disclosure. After 3<sup>rd</sup> March the Competition Commission  
12 say nothing in their report and we actually have to phone up to get the information about  
13 what happened. We get a gnostic statement which concludes there is no waiver. So, there  
14 never was disclosure of any relevant information.

15 Point 2. Waiver has to be to all parties. You saw that in 2002 they provided the disclosure  
16 notice to everybody in the Manchester inquiry by a letter. They put everything on to the  
17 website.

18 THE PRESIDENT: Disclosure.

19 MR. GREEN: The disclosure letter, yes. Disclosure has to be to all parties, yes. The 2007 letter  
20 was put on the website - granted. But, the 2009 episodes were simply inadequate  
21 communications of a bilateral nature between ourselves and the Competition Commission.  
22 Then there was the disclosure to Mr. Dooley. There was never disclosure to the world at  
23 large, which has to occur. Vital requirement two is that the party waiving must be aware of  
24 all relevant facts. We have been through this. BAA was not aware of the 02 notice until  
25 January 09. They were not aware of the links between the Fund and Manchester Airport.  
26 They were not aware of Professor Moizer's role in the Fund vis-à-vis investment and the  
27 fleet of foot programme. They were not aware of the attempts by the Fund to seek his  
28 advice. They were not aware of the Fund's interests in all airports. They were not aware of  
29 the pension arrangements existing between Manchester Airport and the Fund, and they were  
30 not aware of the detailed links which the local authorities made in their capacity as  
31 shareholder and providers of loan capital to Manchester Airport. So the Competition  
32 Commission's case fails on that ground.

33 Aware of consequences, the third vital requirement: the Competition Commission never set  
34 these out, so that is a non-starter.

1 Then vital requirement four, and unpressurised fair opportunity: we have set out our  
2 criticisms in pretty trenchant terms of the meeting of 12<sup>th</sup> February, which was cloak and  
3 dagger. That is how it appeared, and you have the evidence of the unsurprising discomfort  
4 that Mr. Herga felt at being isolated, feeling pressurised into giving a decision, feeling that  
5 this was a highly sensitive time and the Competition Commission was really telling him, not  
6 asking him anything.

7 Then you have got the inaccurate statements made at that meeting about the role of  
8 Professor Moizer as a macro economic adviser.

9 Finally, you have got the Competition Commission, who just do not think they ever gave a  
10 waiver. They never thought they were engaged in a waiver of disclosure exercise. They  
11 stood him down. How can you have a waiver for someone who you stand down. Waiver  
12 arises when you keep them standing up, not when they stand down.

13 There is another argument, which is raised by the Competition Commission, which is,  
14 “None of this really matters because we would have come to the same decision anyway”.  
15 We have dealt with in our skeleton, paras.19 to 21. The case law obliterates that argument  
16 out of the water, four House of Lords authorities on the point, something of an obstacle. On  
17 the facts though it is completely hopeless.

18 Let me just show you what the Court of Appeal thought about that in *Re Medicaments*,  
19 authorities tab 11.

20 Just to give you an indication of timing, I probably need about another 20 minutes to deal  
21 with bias. I will probably be not much more than an hour or an hour and a quarter on  
22 proportionality. It is probably best left until tomorrow. In fact, Mr. Swift and I did think  
23 this morning that I would probably trespass into tomorrow, but not by much. It is a much  
24 shorter and much more clearly confined issue than this. Shall I simply get to an end on  
25 bias?

26 THE PRESIDENT: Yes.

27 MR. GREEN: *Re Medicaments*, one can go straight to the point, and I think, in a sense, by way  
28 of conclusion, I am just going to draw one or two threads together from the case law.

29 THE PRESIDENT: You very kindly provided some agreed bundles earlier.

30 MR. GREEN: Yes, this should in the first authorities bundle. Let me just explain what the facts  
31 were in *Re Medicaments*. This is the case which is perhaps of greatest interest to the  
32 Tribunal since it is predecessor body. Dr. Rowlatt was an economist and she sat on the  
33 Restrictive Practices Court, and the court had before it a case brought by the Director  
34 General of Fair Trading under the good old Restrictive Trade Practices Act 1976 concerning

1 resale price maintenance for pharmaceuticals. These were very long running, expensive  
2 cases extending over a number of years accommodating a lengthy trial. During the case Dr.  
3 Rowlatt applied for a job as an economic consultant with Frontier Economics. Frontier  
4 Economics were advising the Director General of Fair Trading. She withdrew her  
5 application. She realised it was perhaps unwise. She informed the presiding judge,  
6 Mr. Justice Lightman. The matter was disclosed to the parties. The Pharmaceutical  
7 Association, who was effectively the respondent to the proceedings, applied for the court to  
8 recuse itself. The court conducted an analysis on an objective basis and decided that Dr.  
9 Rowlatt was not biased and they would not recuse themselves. The Court of Appeal  
10 disagreed. The Court of Appeal, a strong court, Lord Phillips, Lord Justice Robert Walker  
11 and Lord Justice Brooke, gave their judgment in 2000. This was the first case in which the  
12 English courts explicitly harmonised its case law with the Strasbourg case law and  
13 identified the test of the fair minded observer, which the House of Lords has subsequently  
14 endorsed and which has been used throughout.

15 I would like to pick up the facts of this and the analysis at para.92, p.728 of the judgment  
16 internal numbering. The Court of Appeal says here:

17 “The court below, of which Dr. Rowlatt was a member, found itself in the  
18 unenviable position of having to address this challenge to Dr. Rowlatt’s credibility.  
19 It did so on an objective basis, concluding that it was more credible that she did not  
20 Frontier’s position in mind when she applied for a post with them, rather than that  
21 she had it in mind and, having made her application to them, then felt impelled to  
22 bring the matter to the attention of the judge.

23 We do not think that it was appropriate that the court below should have set out to  
24 answer the question of whether or not Dr. Rowlatt’s statement was truthful. The  
25 court should have considered what impression her conduct, including her  
26 explanation for it, would have had on a fair minded observer.

27 We do not consider that the reasoning of the court would have left the fair minded  
28 observer confident that Dr. Rowlatt had forgotten Frontier’s role as experts in the  
29 case when she applied for a post with them. It is, indeed, hard to credit that, had  
30 she had this fact in mind, she would have made the application, only to appreciate  
31 no sooner had she done so that it was inappropriate. But it is equally hard to  
32 credit, for the reasons given by Ms. Bendall, that Dr. Rowlatt could have lost sight  
33 of the fact that Frontier were providing critical expert evidence in the case. Thus  
34 any concerns that Dr. Rowlatt’s initial application would have raised in the mind of

1 the observer would have been augmented rather than allayed by the fact that she  
2 proffered an explanation which it was not easy to accept.

3 What concerns would the remarkable facts that we have set out above raise  
4 in the mind of a fair minded observer? The Restrictive Practices Court is, in this  
5 case, going to have to resolve a fundamental conflict of economic analysis  
6 between rival economic consultants. Ms. Bendall stated that her clients  
7 considered that Dr. Rowlatt had, by making her application for employment to one  
8 of those consultants, indicated a partiality to them which could not be undone. We  
9 consider that the fair-minded observer would be concerned that if Dr. Rowlatt  
10 esteemed Frontier sufficiently to wish to be employed by them, she might ...”

11 - and please note these words because I think they are perhaps the essence of the court’s  
12 tests:

13 “... she might consciously or unconsciously be inclined to consider them a more  
14 reliable source of expert opinion than their rivals.”

15 The words to note there are “might”, because we are dealing with possibility not absolute,  
16 and “conscious or unconscious inclination”, it is a low threshold.

17 96. Mr. Sumption advanced a more basic contention that an objective bystander  
18 would conclude that Dr. Rowlatt might still harbour hopes that, sooner or later,  
19 she might find employment with Frontier and this might induce in her, whether  
20 consciously or unconsciously, a reluctance to reject as unsound evidence advanced  
21 by Frontier’s experts.

22 97. We agree with Mr. Sumption that the fair minded observer would not be  
23 convinced that all prospects of Dr. Rowlatt working for Frontier at some time in  
24 the future had been destroyed, nor that she might not still hope, in due course, to  
25 work for Frontier. He would not be reassured by the fact that initially, albeit on  
26 the advice of the judge, she wrote to Frontier asking that her application should  
27 not be pursued until ‘after the conclusion of the trial’ and that she later offered an  
28 undertaking to join Frontier ‘for two years after the final order in these  
29 proceedings or indeed for any lengthier period which either party may request’.  
30 The observer’s concerns at the possibility that Dr. Rowlatt’s wish to work for  
31 Frontier demonstrated partiality would be augmented by a concern that she might  
32 still have hopes of doing so.

33 98. It is for these reasons that we concluded that a fair-minded observer would  
34 apprehend there was a real danger that Dr. Rowlatt would be unable to make an

1 objective and impartial appraisal of the expert evidence placed before the court by  
2 Frontier and that, on objection being taken, she should have recused herself.

3 99. Having reached this decision, we then had to consider the position of the other  
4 two members of the court. The trial had reached an advanced stage at this time  
5 that it was interrupted by the appellants' application. Dr. Rowlatt must have  
6 discussed the economic issues with the other members of the court. We concluded  
7 that it was inevitable that the decision that Dr. Rowlatt should be disqualified  
8 carried with it the consequence that the other two members of the court should  
9 stand down.

10 100. We reached our decision with great regret. Its consequence is that an  
11 immense amount of industry will have gone for nothing, and very substantial costs  
12 will be thrown away. But Mr. Philipson, for the Director General, made it plain  
13 he did not advance the arguments that these considerations ought to influence our  
14 decision.”

15 Paragraph 99 therefore is the paragraph in which the tainting of A taints the position of B,C,  
16 etc. and we say, with great respect to the Court of Appeal, that is not entirely consistent with  
17 the case law. But assume that it is, you will see that the threshold for, as it were, horizontal  
18 tainting is set at a very, very low level. The court simply asked themselves two questions:  
19 had Dr. Rowlatt discussed the matter with the others? Did the issue arise at a relatively  
20 advanced stage? That was it, that led to the inevitable consequence that Mr. Justice  
21 Lightman and his other colleague had also to stand down and, as we know, the case was in  
22 fact conducted again about a year and a half later, there was a lengthy trial and the  
23 Restricted Practices Court, under a different judge, this time Mr. Justice Buckley, came to  
24 essentially the same result as it had on the previous occasion.

25 The same in *Pinochet* really. One can pick Pinochet up at tab 8 in the same bundle. Lord  
26 Hoffmann was a director and chairman of a charity which was owned by Amnesty  
27 International – I am sure the facts are familiar. The objects of the charity included the  
28 suppression of extra judicial torture and execution – hardly a surprising or controversial  
29 object. There was no evidence led that Lord Hoffmann adhered personally to this object but  
30 again it would be surprising if any of their Lordships were adverse to that object.

31 The House of Lords heard the case with Lord Hoffmann sitting. We all know that Amnesty  
32 International objected. On the second occasion the House of Lords had to decide whether  
33 the first House of Lords was properly constituted as a result of Lord Hoffmann's position,  
34 and they set aside the entire judgment and the case was heard again.

1 Lord Hoffmann was held to have a “close connection” and I will just pick up a couple of  
2 paragraphs: Lord Browne-Wilkinson, p. 135:

3 “Can it make any difference that, instead of being a direct member of A.I. Lord  
4 Hoffmann is a director of A.I.C.L., that is of a company which is wholly  
5 controlled by A.I. and is carrying on much of its work? Surely not. The substance  
6 of the matter is that A.I.L and A.I.C.L are all various parts of an entity or  
7 movement working in different fields towards the same goals. If the absolute  
8 impartiality of the judiciary is to be maintained, there must be a rule which  
9 automatically disqualifies a judge who is involved, whether personally or as a  
10 director of a company, in promoting the same causes in the same organisation as is  
11 a party to the suit. There is no room for fine distinctions. If Lord Hewart C.J’s  
12 famous dictum is to be observed: it is ‘of fundamental importance that justice  
13 should not only be done, but should manifestly and undoubtedly be seen to be  
14 done’.”

15 So that was Lord Browne-Wilkinson. Lord Goff at p.139:

16 “Let me next take the position of Lord Hoffmann in the present case. He was not  
17 a member of the governing body of A.I., which is or is to be treated, as a party to  
18 the present proceedings; he was chairperson of an associated body, A.I.C.L.,  
19 which is not a party. However, on the evidence it is plain there was a close  
20 relationship between A.I.L. and A.I.C.L.”

21 So close relationship to someone who is a party is enough. Lord Hope at the bottom of the  
22 next page, p.140 at H:

23 “As my noble and learned friend, Lord Goff of Chieveley, said in *R v Gough* the  
24 nature of the interest is such that public confidence in the administration of justice  
25 requires that the judge must withdraw from the case or, if he fails to disclose his  
26 interest and sits in judgment upon it, the decision cannot stand. It is no answer for  
27 the judge to say that he is in fact impartial and that he will abide by his judicial  
28 oath. The purpose of the disqualification is to preserve the administration of  
29 justice from any suspicion of partiality. The disqualification does not follow  
30 automatically in the strict sense of that word, because the parties to the suit may  
31 waive the objection. But no further investigation is necessary and, if the interest is  
32 not disclosed, the consequence is inevitable. In practice the application of this  
33 rule is so well understood and so consistently observed that no case has arisen in  
34 the course of this century where a decision of any of the courts exercising a civil

1 jurisdiction in any part of the United Kingdom have had to be set aside on the  
2 ground that there was a breach of it.”

3 The position of the House of Lords, and they do elsewhere cite the *Dimes* case, and the  
4 other House of Lords cases, *El Hassan* and so on that we have cited, are all to the effect  
5 that the consequence is inevitable and automatic, so I put it two ways. If you come to the  
6 conclusion there is apparent bias and there was no disclosure, the inevitable consequence I  
7 law is that the entire panel is tainted. The House of Lords considered that to be the case  
8 because of one member in *Pinochet*.

9 The alternative, the lesser, is the Court of Appeal’s approach in *In Re Medicaments*, which  
10 says that there are some pretty low level facts, did they converse about the case? What  
11 stage did it arise? If so it is inevitable. Those are really the two alternatives.

12 So far as our case is concerned we do not think it matters very much, but we say as a matter  
13 of law the position is as set out in the House of Lords’ authorities. If you adopt the lesser  
14 approach we submit you are bound to come to the same conclusion.

15 If it is then suggested that it is a complicated question of fact, and frankly it was also  
16 blindingly obvious that no one could ever have come to a different decision, then we will  
17 deal with that in reply, but there are innumerable complex questions which were taxing the  
18 Competition Commission in the last four or five months it was by no means a foregone  
19 conclusion; one only has to look at the documents over the last four or five months to see  
20 that they have not finalised their views on a vast array of decisions. I have no doubt at all  
21 that they had formed some strong provisional views on some issues but, for example, on  
22 which airports, whether there were going to be options in relation to airports to be divested,  
23 concurrent or consecutive, bidder’s suitability, precisely what was to form part of the AEC  
24 were all up for grabs until the last moment. There were lots and lots of issues which were  
25 outstanding. I will wait and see what my learned friend says about that, but the evidence is  
26 pretty stark on that. But we say that it really is not something which you should be getting  
27 into. You do not have evidence from any of the other members of the Competition  
28 Commission who say: “Well, I didn’t care about Professor Moizer.” He was an influential  
29 man. He was the most influential man and he was brought on to the inquiry because he had  
30 2002 experience. Mr. Clarke confirms he was an important member of the team. There  
31 really cannot be any doubt about that and I do not propose to spend much time on it. I will  
32 deal with anything arising in reply.

33 The conclusions, I think, are now self-evident. The inquiry was riven through with conflict  
34 from start to finish. There was no disclosure. The consequences are inevitable.



1 Unless I can assist further today ----

2 THE PRESIDENT: Are you finishing on bias now, or are you reserving a word tomorrow?

3 MR. GREEN: No. I am pretty much finished on bias, I think, at this stage. There are one or two  
4 things I might have mentioned, but they would be largely repetitive at this point.

5 THE PRESIDENT: There is an issue about timing of the challenge, is there not? I think that is  
6 linked to the bias point.

7 MR. GREEN: Yes. I think that really is one for Mr. Swift to make. If he is saying that -- Mr.  
8 Hawkins phones after the decision comes out and says, "What are the reasons for standing  
9 Professor Moizer down?" and they say, "We are out of time" -- I mean, I think it is really  
10 for Mr. Swift. If he wants to say that we were tardy and slow in bringing this application  
11 for judicial review and we were not within the confines of the Competition Act, then I think  
12 it is really for the Competition Commission to even remotely to attempt to set out what their  
13 case is on that in the light of the facts - because we find it baffling. Within two months of  
14 the decision coming out we brought that application for judicial review.

15 THE PRESIDENT: You are probably right. It is probably more a matter raised, as it were, by  
16 way of defence.

17 MR. GREEN: Yes. We have dealt with it in the skeleton. We can deal with it in reply in  
18 specifically addressing the points that are made.

19 THE PRESIDENT: Mr. Green, Mr. Swift, Mr. Jowell, we are minded just to start at ten  
20 tomorrow, unless that is going to cause tremendous problems with any of you. It just means  
21 it gives us a bit extra time. Is that convenient? I will take it as a 'Yes'.

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23 (Adjourned until Tuesday, 20<sup>th</sup> October, 2009 at 10.00 a.m.)

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