IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1110/6/8/09

Victoria House
Bloomsbury Place
London WC1A.2EB

Thursday, 22nd 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 FOUR

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.

THE PRESIDENT: Good morning.

MR. GREEN: Good morning. Can I start just by handing in a number of documents? First of all, the references from the Competition Commission guidelines. I am not going to say anything about any of these documents. Secondly, again by way of record, documents from the Competition Commission published in the last twenty-four hours in relation to the sale yesterday and undertakings being extracted from the new purchaser. They are there for the record only. I have handed up also a note on the confidential matters arising out of Mr. Jowell's submissions yesterday which you have just got. Those are the points we were making, somewhat opaquely, about Mr. Jowell's submissions. I do not propose to make any further submissions about those this morning.

These documents are purely for record. (Same handed) They are documents produced by the Competition Commission in relation to purchaser undertakings. They are purely and simply for record only. There are two separate documents.

THE PRESIDENT: They look similar, but they are different.

MR. GREEN: They are different. Purely for information they do not add or subtract, but you are now informed as to the public documents disseminated by either party - the press release and the Competition Commission's information.

THE PRESIDENT: Thank you very much.

MR. GREEN: I am anticipating that I will be less than an hour this morning. I will be dealing with five matters raised by the Competition Commission. They are as follows: first, the Competition Commission's case that BAA was 'not concerned about the conflict and 'delayed and waived' by passivity; secondly, the Competition Commission's case on constructive knowledge; thirdly the Competition Commission's attack on the evidence and issues of credibility; fourthly, the Competition Commission's downplaying of the 2002 notice; and, fifthly and finally, the Competition Commission's case on what I will loosely call severance, which is that it really does not matter.

Issue 1 - the Competition Commission's case that BAA was not concerned. The facts really speak for themselves. I am going to remind you pretty briefly of the chronology and make some observations about it as I go through. I do not propose, save with limited exceptions, to take you to any documents because you are now familiar with them. Point 1 - the Commission informed BAA that Professor Moizer had a problem in January of this year. No information was given at that stage as to the nature of the problem.

THE PRESIDENT: Do you have the actual date?

MR. GREEN: I have just said that you know the facts. I ought to know the date myself, but I am just checking the precise date – 22nd January. It is chronology, 110.

The second point is that BAA expected to receive a letter as a follow-up, nothing arrived, so it did its own internet search and it discovered the 2002 notice on 26th January. Mr. Jowell was puzzled by Mr. Herga saying that he was puzzled in his witness statement at para.13. In fact, what Mr. Herga said between 13 and 15 was that he was "obviously concerned". For your note that is paras.13 to 15, bundle 5, tab 82.

Point three, on 6th February BAA wrote a letter asking a series of questions – that is defence bundle, tab 4, p.7. The Competition Commission have submitted that the contents of this letter indicated that BAA was only concerned with the mechanics for the sale of Gatwick, and that, apart from that, BAA thought the position of Professor Moizer was "not a big deal" – reference, transcript day 2, p.42, line 7.

THE PRESIDENT: Sorry, what was not a big deal, you said this shows BAA only concerned with Gatwick and that?

MR. GREEN: Apart from that BAA thought the position of Professor Moizer was "not a big deal" – transcript reference, p.42, line 7, to p.44, line 30. As to this, as you will have seen, the letter was not intended to, and did not set out BAA's concerns. It was a request for information. It set out a list of questions to be answered and, as you will have seen, at no point did the Competition Commission answer those questions.

The extent to which BAA was still in the dark is demonstrated, for example, by the first bullet point, we did not even know whether Professor Moizer still acted as an adviser to the Fund. The Competition Commission refused to give a copy of Professor Moizer's retainer and indeed persistently refused even in pre-action correspondence.

On its own terms, the letter was not confined to Gatwick, as indeed the Tribunal pointed out during the course of argument. The letter expressly refers to BAA's understanding that MAG was a potential bidder for Stansted and/or a Scottish airport. I will come back to it later, but you know that the Competition Commission's letter of 25th February in response to this omitted to explain that to BAA, even though the Competition Commission knew that at the time.

BAA cannot remotely be criticised for seeking information before putting forward what would necessarily be a serious allegation at a very sensitive stage of the inquiry, as Mr. Herga has explained in his statement. Indeed, I think the fair minded observer would be quite certain that it would have been inappropriate for BAA to make an allegation until the Competition Commission had been given an opportunity to answer the questions. I will not

take you to it, but Lord Hope in *Helow*, authorities bundle 2, tab 24, para.2, said of the fair minded observer as follows:

> "The observer who is fair minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument."

Point four concerns the Competition Commission's meeting of 11th February, 2009. This contains an acknowledgement that the Competition Commission did not, at that point in time, know about the fund's true intentions or Professor Moizer's position in the fund. You will recollect that it was decided that Simon Jones would speak to BAA.

Point five. The next day, 12th February, was the informal meeting between BAA and the Competition Commission. The Competition Commission did not at this point have all the facts at its fingertips. Mr. Jones wrongly described Professor Moizer's role. He described him in terms of a high level adviser on macro-economics. But you have already picked up that just a few days' later he was expressly told by the fund, and recorded amongst other things that Professor Moizer was one of the wise men; they would normally comment on matters such as the investment in Gatwick as a matter of course; that the fund would not make an investment that was not approved by each of the three wise men; that Professor Moizer was very influential in forming the consensus at meetings; that he was effectively at officer level; he was a main player; he was significant because of his longevity and a relationship of trust and respect had developed and matured. So, at the meeting on 12th February a mis-description of his role was given. At that same meeting the Competition Commission wrongly limited the fund's involvement to Gatwick. They also failed to explain that the quarantine was highly circumscribed and limited only to the details of the Gatwick bid. But, as we now know, Professor Moizer was able to, and did, sit in relation to all other matters and, in particular, including those relating to Gatwick on the basis that Gatwick might not be solved by the time the report was published, and therefore the report might have to deal with Gatwick, as indeed was the case. At that meeting they did not mention Professor Moizer involvement with Fleet of Foot. I think one can reasonably infer from the evidence that Mr. Jones did not know about it because it is not at all clear that Professor Moizer ever disclosed that to the Competition Commission.

Point six. Over the course of the next six days, leading up to 18th February the Competition Commission elicited information from the fund and they discovered in broad terms three things: first of all, that Professor Moizer was very close indeed to the fund; secondly, that the fund was interested in non-Gatwick assets; thirdly and importantly, that the fund's

investment decisions were affected by its very close relationship with MAG - they were not arm's length investment decisions.

Having obtained this information the Competition Commission did not either call or write to BAA in order to correct the mis-information communicated on 12th February.

Point seven. Over the course of 23rd and 24th February the Competition Commission decided to stand Professor Moizer down. They must have taken this decision in the light of the information given to them by the fund. Mr. Clarke decided that Professor Moizer should be stood down with effect from 3rd March because he was such a valuable player and they wanted him to advise on the submission they were making to the Department of Transport in relation to regulatory reform. It appears that in fact he did not advise as requested or invited, but that does not alter the fact that he was viewed as so important that he should stay on nonetheless notwithstanding the recognition of a conflict.

Point eight. The next day, 25th February was the reply to the BAA's request for information of 6th February. Again, you have seen it. We have reserved a great deal of criticism for this letter. It does not answer the questions which were posed. It does not inform BAA of the fund's interest in non-Gatwick assets. It does not inform BAA that twenty-four hours earlier the Competition Commission had taken the decision to stand Professor Moizer down. Misleadingly, it suggests he has been quarantined from everything, and the clear inference is that he is still sitting. We know he was not quarantined from everything. There was no clear explanation of what he was, and was not, quarantined from.

Point 9. The next day, 26th February, the Competition Commission informed Professor Moizer he is to stand down. They do not tell BAA. They do not communicate this decision to the rest of the world or to any other interested party.

Point ten. On 3rd March 2009 Professor Moizer formally stands down. Again, the Competition Commission does not tell BAA, nor anybody else.

Point eleven. 19th March. Report published. Almost total silence as to the position. See the asterisk and the footnote.

Point twelve. 20th March, 2009 - the next day - Mr. Hawkins phones Simon Jones. The note of the tele-conference is Bundle 4, Tab 76. He is asked whether Professor Moizer had been identified as having any form of conflict in either an historical sense or a future sense. The response is that the Competition Commission is satisfied that no conflict in either sense. Then they say they stand him down simply because there is a connection between Professor Moizer and the fund. Thoroughly misleading. It does not identify any of the matters which the Competition Commission knew about - not least the fund's interest in non-Gatwick

assets. It is apparent, and I think you will deduce from the evidence, that by this time the Competition Commission had concluded there was a conflict, and it was for that reason they stood him down.

Two documents which I do not think you have seen – could you take bundle 4, tab 77, the document of 31st March 2009, a letter from Herbert Smith to the Competition Commission. It is not a confidential document, but I am not proposing to read it. Its gist is self-evident. It asks a series of questions seeking to elicit the nature of the conflict of interest or the position adopted by the Competition Commission and its reasons. So a detailed request for information. Attached to the letter was BAA's request for information of 6th February, plus information which had now been obtained from the Competition Commission's website about Professor Moizer.

In the light of a detailed request for information, the Competition Commission's response is at tab 78, and it is dated 8th April. It is short, dismissive, uncooperative and generally unhelpful. They make a number of points. First of all, in the third paragraph, the Competition Commission says they were:

> "... satisfied that no actual impropriety or conflict of interest had arisen. Among the matters we took into account in reaching this conclusion were representations made to us by BAA. In particular, on 6 February 2009 Robert Herga of BAA had identified a specific point arising from Professor Moizer's relationship with the Greater Manchester Pension Fund. However, Mr. Herga accepted our assurance that his concern was unfounded and indicated that BAA had no further concern."

You have seen the evidence. That is flatly rejected. Mr. Herga addresses that in his statement.

> "We subsequently wrote to BAA on 25th February 2009 to confirm that we had investigated BAA's concern both with Professor Moizer and with the Pension Fund and were satisfied that it was without foundation."

That also is a concealment of the true position of its knowledge vis-à-vis the Fund, in particular in the light of the discussions on 18th February. At no point have they recognised the closeness of Professor Moizer's relationship with the Fund or that the Fund itself quite firmly refused to rule out the possibility of bids for non-Gatwick assets.

In the next paragraph they state that they were concerned only about appearances and reputation and for that reason they stood Professor Moizer down. That is not, we would invite you to conclude, an accurate description of their thought process at the time.

In the next paragraph they refer to the telephone conversation with Mr. Hawkins, which you have just seen, and they say:

> "This was explained to Mr. Hawkins on 20 March 2009 without any expression of dissatisfaction by him."

I think that barely deserves comment.

Then what I think is perhaps the most important failing, which is reflected by this letter:

> "In the light of our discussions with Mr. Herga on 6 February 2009, and of our conversation with Mr. Hawkins of 20 March 2009, we do not see any reason why we should now answer the numerous questions set out in your letter of 31 March 2009. Many of those questions are in any event either difficult to relate to the concerns BAA has expressed about Professor Moizer or very intrusive."

So a point blank refusal to answer questions, and, in fact, a conclusion that we were being intrusive – in other words, impertinent – in even asking the questions.

THE PRESIDENT: That date of 6th February, do they mean the 12th?

MR. GREEN: I think that is probably right. That would make since, since they are talking about discussions rather than the letter itself.

In the next paragraph they say:

> "The Greater Manchester Pension Fund has been disclosed by the Competition Commission on numerous occasions, including of course at the start of the BAA market inquiry."

Then they say the following:

> "However, in case it is of reassurance to BAA, we have investigated whether any change was made on 13 February 2009 or 25 March 2009 to the disclosure notices for the Manchester and BAA quinquennial inquiries of 2002, or for the present BAA market inquiry, relating to Professor Moizer."

The reason they are saying this is because they have been asked whether the website had, in fact, been updated, as had been suggested it would be earlier in February.

> "Having investigated our records and our archives we do not believe that any such change was made. The changes identified by your search of our website are likely to be changes made to the relevant navigation menu to reflect updates to our website. When those updates are made each modified page will be uploaded to the server and it is likely that it is this process that is reflected in the results of your search."

Translated into less technical language, the website was never updated to take account of information the Competition Commission itself discovered during January, February or March.

It is in that context that the Competition Commission says that BAA acted unreasonably, passively, and without any real concern for what was going on. The reality is that BAA acted reasonably and did not jump to conclusions. It requested information. The Competition Commission, in a variety of different ways, declined to answer or answered inaccurately, or in a manner which led to a misleading impression being given.

There is, therefore, absolutely nothing in the Competition Commission's suggestion that BAA was not concerned, delayed or waived through passivity.

The second issue concerns the Competition Commission's case on constructive knowledge. In the course of its submissions the Competition Commission took three different positions which I will isolate and dissect. The first, for your note, transcript, day two, pages 64 and 65, in response to a question from Lord Carlile on whether affected persons should not be entitled to take the Competition Commission's disclosure notices at face value, the Competition Commission's response was that:

> "It may be taken into account by the company but experience suggests that it is far from complete."

What I am going to do is just identify the three points and then come back to them. I will give you the quote again:

> "It may be taken into account by the company but experience suggests that it is far from complete."

The second point that they make, coming out of the transcript, day two, pages 65 and 66 in response to the President's questions on the relevance of information on the internet, came the Competition Commission's response that, BAA has actual knowledge or constructive knowledge, and they seem to waver between the two, because it could find out information on the net, and this is what a diligent person exercising due diligence would have done.

Thirdly, and there is no need for me to give you a transcript reference, corporate knowledge. If someone at some point in time within BAA knew of the 2002 notice then the company, as a whole, is impressed with that knowledge for all time.

Those are three points of principle that arise out of the various submissions on constructive knowledge, and I am going to deal with each one. The starting point is simply to remind you what the case law says. I am not going to go into the cases. I will give you references and they can be looked at at leisure, but it is, we submit, incontrovertible that the concept of

waiver requires that the person who is said to have waived, and this is a quotation, "has acted freely and in full knowledge of the facts". That is *Pinochet*, per Lord Browne-Wilkinson at 137; and *Smith v. Kvaerner*, para.26.

It is, secondly, incontrovertible that any waiver must be "clear and unequivocal", and also that it must be made with full knowledge of all the facts relevant to the decision whether to waive or not, *Locabail*, para.15. Waiver must be actual. It cannot be constructive. There is no case on constructive knowledge. One other point of law - though in our submission it does not arise on the facts - on constructive knowledge it is submitted that knowledge can arise (a) in the absence of disclosure; (b) if the affected person knows of all the relevant facts and then does nothing. The important point is that it is submitted that waiver can arise (a) in the absence of disclosure. On this, you were shown *Locabail* at para. 40 (Authorities 1, Tab 9) as a support for the proposition. However, you will, I am sure in due course, wish to read para.26 and onwards of *Locabail*. Paragraph 26 says as follows - and I am quoting from the judgment -

> "If [and that is the important word] appropriate disclosure having been made by the judge, a party raises no objection to the judge hearing or continuing to hear a case, the party cannot thereafter complain of the matter disclosed as giving rise to a real danger of bias".

It makes it clear from that quotation that waiver can only arise where a party is put to his election after appropriate disclosure has been made and then there being no objection taken. it is not authority for the proposition that waiver by silence might arise. Paragraph 26 also says,

> "If, of course the judge does make further inquiry and learn additional facts not known to him, then he must make disclosure of those facts also".

Paragraph 26 therefore makes it a condition that waiver should have been -- that the condition of waiver -- that there should have been preceding appropriate disclosure because of the word 'if'. Now, we have not identified a single case in the United Kingdom, in the Strasbourg jurisprudence, or elsewhere where waiver has been said to arise when the decision-maker fails to give adequate notice, and where it is nonetheless found that the affected person knew of the facts. So the suggestion goes considerably beyond existing case law. The case law that you are looking at is case law which follows *Re. Medicaments* in the United Kingdom because that is the point in time at which UK law was brought into consistency with Strasbourg case law. It is a small point. It does not arise on the facts, but I simply wanted to note it.

THE PRESIDENT: Mr. Jowell showed us some older cases ---

MR. GREEN: A couple of George VI cases and one from either Outer Mongolia or Deepest Peru - I think it was forty years old.

THE PRESIDENT: I think one was actually in Victoria, Australia.

MR. GREEN: There we are. It was Australia. Whether that counts -- Well exactly.

THE PRESIDENT: Are you going to say anything about those?

MR. GREEN: They do not deserve comment. The law that you are concerned with is post *Medicaments* case law in compliance with Article 6 of the Convention. The first time that English law was brought into compliance was in *Medicaments*. That was endorsed by the House of Lords and that deals with the concept of bias and the circumstances with which it can be waived. *Locabail* is a case which is consistent with Convention case law and it says, in unequivocal terms "If there is appropriate waiver --"

THE PRESIDENT: What about cases where you know the facts but you keep it in reserve?

MR. GREEN: If you are told the facts -----

THE PRESIDENT: There is no disclosure -- No, you are not told. You just know them, or you may have looked them up. There is no disclosure.

MR. GREEN: No. I understand. It is an interesting point and it has plainly got merits going both ways. Put it another way -- There is lack of merit on the part of the party concerned because they are saving a point, as it were. That is not good for the administration of justice. But, there is also a failure on the part of the decision-maker to make proper disclosure. That also is bad for the administration of justice. One goes back to the statement of the House of Lords in *Dimes* in 1852 - that the purpose of this rule is a salutary one, to ensure that even if it could not in a million years be suggested that the decision would be any different, or that the decision-maker was affected by bias -- If there is a failure it is salutary because it tells other inferior courts and tribunals that they must comply with the law in the future. So, there are two competing interests there - one a broader interest in ensuring that the decision-makers stay up to the mark; then, secondly, the individual (if you want to put it in such terms) misconduct in sitting on a point. All I can say is that there is no case which addresses that squarely. *Locabail* seems to suggest there is a pre-condition of disclosure before the 'sitting on your hands' argument can come into force.

THE PRESIDENT: I am not sure, you see. I know you dismiss them, but I think one of those old cases is not dissimilar from that.

MR. GREEN: I heard what Mr. Jowell said - that if one is going to take literally one-line comments without analysis, without background jurisprudence as indicating anything -- I

mean, one can read them. They are as Mr. Jowell suggested they are. But, they really do not take one anywhere. Cases which are one hundred years old or, in Australia, forty years old, which do not take account of the Article 6 considerations do not cite -- *Dimes* does not take account of the policy considerations in the judgments from *Re. Medicaments* onwards. They do not take account of the Strasbourg case law. They really are not cases to which any sensible weight can be attached. I see what they say.

THE PRESIDENT: There was **Chitty** as well, was there not?

LORD CARLILE: But even if you are right on the law, if the situation was that the complainant knew all the material facts, given that we are in judicial review territory, that would go to remedy, would it not -- or, it could go to remedy? The court might refuse a remedy because all the relevant knowledge was in the hands of the complainant.

MR. GREEN: It is possible. At that point a discretion arises. But, the same policy clash arises between the importance of salutary decision-maker behaviour as against passive and unacceptable conduct on the part of the litigant. There would be a balance to be struck at that stage.

I mention that point not because it arises on the facts but because it seemed to us that the submission, as made, simply over-stretches itself in the light of the modern jurisprudence. Those are the points of principle. I am now going to take each of the Competition Commission's three considerations. The first point is the submission made that experience suggests that it is far from complete. That is referring to the Competition Commission's disclosure notices. That is the Competition Commission's three positions on constructive knowledge, the first point taken. I have dealt very briefly with the legal position where we say that actual knowledge is required, coming back to the Competition Commission's position addressed to you on Day 2, pp.64 and 65.

Let us start with this: everybody knows that you cannot rely on a Competition Commission disclosure notice because it is incomplete. I must say this: this took everybody on this side of the court by surprise. It is a pretty startling proposition. I ask this question rhetorically: is the Competition Commission now submitting that its disclosure notices generally should be treated as incomplete and that the assurances given by the Competition Commission in disclosure letters are not to be trusted? I have to say that on our side we did expect that submission to be withdrawn, but it has not been. It is our view that you should treat that submission as one made in the heat of battle. We simply cannot believe that the Competition Commission, with mature reflection, would wish to say in a court of law that carefully thought-out public disclosure notices are to be treated as unreliable because they

are habitually incomplete. Consider the implications of that. City solicitors and industry would instruct inquiry agents into panel members. Their professional and personal lives would be investigated - personal lives because those are also relevant to the position of conflict. Solicitors will bombard the Competition Commission with requests for information. What about the staff of the Competition Commission? They are highly influential in the formulation of the decision. There are large numbers of them. Their personal lives, their professional affiliations will be investigated. Is this what the Competition Commission really wants? Then there arises the implications for other statements of the Competition Commission - for example, statements in provisional documents that the Competition Commission has not yet formed a view. Are those to be treated, as Mr. Jowell would have it, as boilerplate statements that nobody could take at face value. Should the City and industry take such statements at face value and trust the Competition Commission or not? What about other regulatory bodies? Is it conceivable that the FSA would make a statement in a similar vein - that its notices are not to be relied upon?

For these reasons, and notwithstanding the Competition Commission's position, we invite you to treat that as not a position that the Competition Commission would, on mature reflection, wish to advance before you. Instructing me today are Freshfields and Herbert Smith, and I have asked both of them as to whether their current practice is to conduct personal enquiries about members of the Competition Commission or its panel, and at the moment they trust the Competition Commission, and I think that is indicative of the position in the City and industry generally. It would, frankly, be a very, very serious backward step if that were not to remain the case. There cannot possibly be anything in the suggestion that the world at large should treat Competition Commission disclosure notices as inaccurate or incomplete and everybody knows it.

What about "searching the net, it is all on the net"? That is an equally ridiculous statement. The net is not 100 per cent accurate, nor is it 100 per complete. We did discover, after considerable investigation, the Fund's November 21st minutes. We did not know that "fleet of foot" was first mooted by the Fund in June, because that was not on the net. We have been given a version of disclosure leading to constructive knowledge based upon the concept of "click-click" knowledge. In fact, looking at the document that you were shown, a document submitted by BAA to the Competition Commission which in a footnote referred to a document which, if you clicked a number of times, could have taken you to a reference to MAG. It took four clicks to get to it. So we have a doctrine of "click-click, click-click"

constructive knowledge. Again, it is frankly absurd, and the implications of the Competition Commission saying that the net must now be searched is pretty much the same as the Competition Commission saying that its own statements are not to be treated as reliable.

Thirdly, we have corporate knowledge. "Corporate knowledge" is a concept which is inconsistent with the case law which requires actual knowledge by those affected, and the persons who were affected, those who were conducting BAA's inquiry, it is a very bad point. The BAA witnesses in this case have set out their state of knowledge very candidly. It is a reasonable assumption to make that somebody within BAA will have picked up the 2002 Moizer notice, but you will recollect that BAA did not get a letter. It was simply put on the CC website. It was sent to the members of the Manchester inquiry, which did not include BAA, and it was not a matter of concern to BAA because it did not concern its inquiry, it concerned the MAG inquiry. That is not to say that it would not have been picked up, we do not know. Assume that a company had knowledge ten years before or 15 years before, why would it be relevant to conflict ten or 15 years later? The person who received it might have left, the company might have moved its headquarters, its computer systems might have transmogrified to new systems, its archive might be almost inaccessible, and so on and so forth.

The conclusion to this is the concept of constructive knowledge is not known to law, and the way in which it is put by the Competition Commission is an unacceptable one.

Issue three concerns the Competition Commission's attack on the evidence and credibility. Because knowledge was predictably going to be an issue in this case, BAA decided, quite deliberately, to put forward Mr. Herga and Mr. Hawkins as witnesses; and further, Mr. Hawkins was asked to address points arising in the Competition Commission's defence. These are clear and candid statements as to what was and what was not known. In particular, in his second statement, Mr. Hawkins, in order to ensure that the position could be accurately advanced to the Tribunal, contacted and interviewed other members of his team, and he sets out the individuals who he spoke to in para.2 of his statement. You therefore have the knowledge of those affected before you.

I want to now tell you what BAA did know and what they did not know. First of all, the BAA team did not know of the June 2002 notice until January 2009.

THE PRESIDENT: Can you take this fairly steadily, Mr. Green, unless you have got a note with it on.

MR. GREEN: I am sorry, I do not.

THE PRESIDENT: Did not know of the 2002 notice until?

MR. GREEN: Until January 2009.

THE PRESIDENT: Any references are obviously helpful.

MR. GREEN: The easiest thing is to give you the chronology reference.

THE PRESIDENT: This is all in the chronology, is it?

MR. GREEN: It is all in the chronology, yes. I note that, notwithstanding Ryanair's submissions, no one from Ryanair has come forward and said that they were aware of the 2002 notice. Indeed, we have had no statements from Ryanair explaining what their state of knowledge is. Silence is golden in their case. There is no challenge to the fact that the notice in 2002 went to the MAG inquiry participants but not BAA. There is no challenge to the fact that it went on the CC website. There is no suggestion it was necessarily an issue for BAA. That is unchallenged evidence and I will explain later why it is entirely credible.

The second fact that BAA was not aware of is as follows: BAA did not know of the links between MAG and the Fund. The 02 notice spoke of the Fund being open to local authority employees. It did not say that MAG employees had access.

THE PRESIDENT: It spoke of the Fund being open to?

MR. GREEN: The employees of the local authorities and local authority bodies.

THE PRESIDENT: It did not mention MAG employees?

MR. GREEN: It did not mention specifically MAG. At all events, this information was not known to BAA. That is a simple statement of BAA's knowledge.

Thirdly, it did not know of the internal management arrangements within the Fund or Professor Moizer's level of involvement within the Fund. That is clearly set out. Indeed, it is clear the Competition Commission did not either, even though they had Professor Moizer in their building, hence what must have been the surprising nature of the conversation on 18th February when the discussion occurred with members of the Fund and they were given information about Professor Moizer's closeness of connection, we would not invest without his say so, he is very, very important, etc, etc.

Fourthly, BAA did not know that the owners of MAG were the owners of the Fund. We have got Mr. Jowell's rather colourful "phone a friend" test. Actually, it is quite a useful test. What would somebody have thought about the meaning of the words "Greater Manchester Pension Fund". Those terms are about as informative as "Norwich Union", "Scottish Widows", "Bradford & Bingley". It tells you there is some connection with Manchester and it has got something to do with a pension fund. You could not necessarily draw the connection that only widows were members of Scottish Widows from looking at

the title. You would not necessarily draw the connection that Manchester airport in common ownership automatically had access to the fund. It does not follow from the title. It is a silly point.

At all events, they did not know. That is the hard fact. They did not know that the owners of MAG were the owners of the fund. When I say 'owners' I am using that term in a non-technical sense. They were the owners of the fund in the sense that they exercised a statutory control which is not quite equivalent to trusteeship, but it is a useful analogy and they had a fiduciary duty which was operated in parallel with their statutory duties.

Fifthly, BAA never knew of Professor Moizer's involvement with Fleet of Foot from June 2008 onwards. Apparently, neither did the Competition Commission. There is no evidence that they were ever told by Professor Moizer of his involvement in that.

BAA never knew that Professor Moizer knew whether actually, or by inference, on 2nd December that the fund was interested in a bid and that he recognised he then had a position of conflict. We never knew that and it appears that the Competition Commission never knew that until this litigation. At the very least it is not something the Competition Commission has explained to you that they were aware of.

The seventh matter. BAA never knew that the fund was interested in non-Gatwick assets. BAA knew from the press that MAG was interested in non-Gatwick assets, but at the time had no reason to connect that interest with the fund.

The eighth matter. BAA never knew that the fund's investment decisions were influenced by the closeness of its connection with MAG - a fact the fund confirmed to the Commission in its tele-conference on 18th February. In other words, there was never an arm's length relationship between the fund and MAG.

Those were facts BAA did not know.

BAA did know - and these have been set out in the skeleton and in the witness statements - two essential facts: that Professor Moizer advised the fund; they knew that the local authorities owned MAG.

THE PRESIDENT: Which local authorities?

MR. GREEN: I am not certain if they had specific knowledge. They know that it was in public ownership owned by authorities in the North. Whether it is the ten local authorities -- I probably should not be specific as to whether east or west. But, they knew there were authorities.

MR. JOWELL: I hesitate to interrupt, but I just draw Mr. Green's attention to the footnote to the document that the Competition Commission handed up, which lists each of the local authorities - the precise local authorities - that owned Greater Manchester airport.

MR. GREEN: It does not tell you anything about what BAA was addressing its mind to at the time. It does not really matter whether they knew there were seven, eight, nine, or ten, or who they were. Assume, for the sake of argument, that they knew the exact identity. It does not really matter two hoots. The short point is this: you may know who Peter is; you may know who Jane is; but you do not know they are connected until you know they have the same father, who is John. Unless that link is spelled out, you do not know they are brother and sister. You have got two bodies. You may know a bit about each of them. Unless you know the connection between the two, you do not smell anything. You are not on notice that there is a connection. It is that connection which creates the conflict.

THE PRESIDENT: The connection being the fact that the same local authorities who owned, for want of a better word -- had control of -- were responsible for the fund were also the owners of Manchester airport.

MR. GREEN: There are lots of ways in which you can put it. His clients, who he was advising in the fund owned MAG. One of them - Manchester City Council - owned 55 percent of it. When he was sitting in the fund, he was advising those self-same owners. That is the way he himself analysed it in 2002. It is the same way he explained it to Mr. Jones. It is the way Mr. Jones analysed it. Also the fact that he was advising on the contributions which MAG made to the fund and on the use of those pension contributions. I will come back to the connections and draw them out one by one in their simplest form in a little while.

Dealing at this stage with questions of credibility, and what they did and did not know, let us just stand back from it. The Competition Commission are trying to raise an argument that in some way we have constructive knowledge or even actual knowledge. I am simply saying to you that you have before you very explicit evidence as to what was known and what was not known. You can measure it yourself. When you add one and three-quarters and one and a half together, they do not make four. Pretty easy maths.

Now, the Competition Commission must have asked themselves whether they wished to cross-examine Mr. Herga or Mr. Hawkins since this evidence goes to waiver - not bias. They did not. It was for them to decide whether they wished to challenge the evidence. Those individuals have given 100 percent honest evidence and it is highly credible. Let me give you some factors just demonstrating why it is highly credible.

First of all, Mr. Herga explained in his statement that he was not closely involved with the 2002 inquiry. I should clarify for the record that he is no longer a consultant to BAA. He was once he left for a period of time.

THE PRESIDENT: Which inquiry?

MR. GREEN: The 2002 inquiry. This is in relation to whether it could be said he ought to have known about the 2002 facts. Secondly, the notice was not sent by way of letter to BAA.

THE PRESIDENT: Do you have any references to these? If we happen to have them noted -- If you have not, do not worry.

MR. GREEN: If you want, we can take the transcript afterwards and make sure that we just put cross-references to documents into the transcript. It is sometimes quite a useful thing to do if that would help.

LORD CARLILE: It probably would.

MR. GREEN: Yes. We will do that as an exercise afterwards. (After a pause): The second point: the notice was not sent to BAA.

The third point: there is no reason that that particular notice would have created waves at the time since it concerned the MAG inquiry - not the BAA inquiry.

Fourthly - and really rather importantly - this Competition Commission did not itself remember the existence of what they must have had in their possession - a Moizer folder. We know that there was one because it is referred to on the face of the disclosure letter - the blind copy to the Moizer folder. Nor did they refer to the Moizer folder or the Moizer issue in their 2007 notice. It is a bit rum for them to complain about us not remembering it if they themselves did not.

The fifth point. The 2007 letter gave what BAA believed were the normal guarantees about independence and impartiality. You will have to form a view about that - whether that is something which they were entitled to rely upon. But, they did. You have that from the witness statement evidence. There was no reason for them to be on notice.

The next point is that during the period 2007 to 2009 Competition Commission never disclosed any further information.

The seventh point is that Professor Moizer did not himself re-raise the issue with the Competition Commission - at least we have not been told that he did. We raised the issue of 2002 with the Competition Commission in 2009. You may conclude that when you analyse all the evidence in the course of preparing the judgment that it is very unsatisfactory that we have not had a proper explanation of why the Competition Commission failed to recall the 2002 notice in 2007. We really do not know what happened. We do not know

whether it was cock-up or conspiracy. Unlikely to be conspiracy. More likely to be cock-up. But, you have not had any form of adequate explanation of what happened at that point in time. It is not suggested that Professor Moizer himself re-referred those queries to the Competition Commission. We know -- I say 'we know ' -- The evidence does not suggest that after the Fleet of Foot meetings in June or in November, or after the 2nd December tele-conference where his advice was sought, he then went back to the Competition Commission and said, oops! I have got a conflict, even though he apparently concluded he had a conflict on 2nd December. We know from his statement that he went on holiday.

So, no disclosure from the Competition Commission up until 2009. In January 2009 the Competition Commission learned of the connection and thereafter failed to act, and failed at any point in time to put the information it subsequently learnt into the public domain or communicated accurately to BAA. You have seen that it was in a state of denial after the report was published - hence the letter from the Competition Commission to Herbert Smith in Bundle 4. It even refused to answer the questions which were posed on the basis that they were intrusive and irrelevant.

It is, in conclusion, in relation to the evidence a profoundly unfair suggestion to make that the evidence of Messrs. Herga and Hawkins lack credibility.

MR. JOWELL: Is that the end of your submissions on knowledge, because I would, if I may, make a request of the Tribunal, which is to ask Mr. Green to please clarify whether, knowing of the existence of an entity called the Greater Manchester Pension Fund, none of the members of the BAA team or its legal advisors -- none of them understood that the Greater Manchester Pension Fund was a pension fund related to the local authorities in Greater Manchester, and if they did not realise that -- if that is said to be the effect of Mr. Herga and Mr. Hawkins' evidence, what they thought the GMPF was?

MR. GREEN: I do not respond -- I am not going to respond to that. If he wanted to cross-examine, he could have applied to do so. It is nonsense.

MR. JOWELL: I had not understood that that was the effect of Mr. Herga and Mr. Hawkins' evidence. If that is said to be the effect of their evidence, then I think that that evidence should actually have been put in, not just by Mr. Herga and Mr. Hawkins, but also by their legal advisors and by the other members of the team. I would apply to cross-examine them in those circumstances.

MR. GREEN: (a) It is utter nonsense. (b) It is far too late. (c) This is a silly point. If he wanted to cross-examine -- It is really up to Mr. Swift to say whether he wants to cross-examine on

waiver - not Ryanair. But, it is a hopeless application. I am not minded to spend any time on it unless you wish me to -- any more time.

THE PRESIDENT: The only thing I think would be useful is to have the references to the parts of the evidence that you say relate to those factor that you mention.

MR. GREEN: Absolutely. You have got Mr. Jowell's submission. If there are gaps in the evidence you can take those on board. You have a framework for analysis.

Issue four. The 2002 notice. What is the relevance of the 2002 notice? It is relevant as to the context to 2007. In order to analyse it the Tribunal needs to examine two points. I would invite you to address the relevance of 2002 in this way: first of all, ask yourself what is the nature of the underlying connection between Professor Moizer and MAG and how did the Competition Commission perceive it at the time? Those are two different questions. They are not automatically overlapping. They may be.

THE PRESIDENT: What is the connection between Moizer and MAG or ----?

MR. GREEN: Professor Moizer and MAG. What is the nature of the underlying connection between Professor Moizer and MAG and how did the Competition Commission perceive it at the time? You will appreciate the relevance of the fact that there were two questions. The fair-minded observer will both examine the underlying facts, but also, and quite independently, ask himself, "How did the Competition Commission perceive the position to be?" The fair-minded observer will assume the Competition Commission knows its own business, and if it takes steps which it concludes are necessary to avoid the conflict of interest, that there is no reason to gainsay that conclusion. So, there are two quite separate points. That is the first thing.

The second thing is simply to ask how, if at all, does this relate to the 2007 inquiry? So, you then take, as it were, the pre-existing facts and you apply them to the new facts arising in 2007.

I can make my submissions quite briefly about each of those two questions. I think then the relevance of them will become more apparent. Let us start with 2002. We are analysing it in and of itself and without considering the 2007 facts. The points to note are as follows: first, Professor Moizer himself acknowledged in 2002 that his connection with MAG was problematic. He analysed the relationship as we do, i.e. his clients owned MAG. We will give you the references in due course, so that you have them to hand.

Secondly, the Competition Commission unequivocally accepted this analysis – see in this regard Mr. Jones witness statement where he says, amongst other things, that as a result of it the Competition Commission wound not have permitted Professor Moizer to sit on the

MAG Inquiry, the logic of that being that his connections with MAG meant that he should never be in a position – and this is my analysis, it is not in the statement – to affect MAG actually or potentially. That was the logic underpinning their decision, he should not be in a position whereby he could actually or potentially affect MAG. You have seen their disclosure letter which was drafted in unequivocal terms, not precautionary terms, that he did have a conflict of interest and it was necessary to remove the conflicts by taking quarantining steps. That was the Competition Commission's perception at the time and the fair minded observer would have no reason to go behind that conclusion. One might say that is the start, the middle and the end of the entire case.

Point three, though, as to the relationship of his clients as shareholders, this was not an arm's length investor relationship. The clients of Professor Moizer owned 100 per cent of the company and MCC owned 55 per cent. The reference is in our skeleton. They wielded considerable power under the articles of association, there was a proactive relationship between the company and the shareholders, and we know that, as a fact, Professor Moizer's clients had a very close nexus with MAG because we were told that as a result of the tele-conference in 2009, when it was explained that the Fund's investment decisions were not arm's length, they were affected by the closeness of that connection.

THE PRESIDENT: The tele-conference between Mr. Jones and ----

MR. GREEN: That is right, yes. It is not relevant to the facts of 2002 because it concerned the way in which the closeness impacted on a bid, but the closeness itself is an important consideration.

Fourthly, there is the pensions' position. MAG contributes at present *circa* £300 million in contributions to the Fund and Professor Moizer advises the employer and employee representatives on the Fund. So he is advising at this point in an even more direct way MAG itself, albeit through representatives on the employment side. His decisions can influence whether MAG has to make pension contributions, whether there is a deficit to make up.

Fifthly, Professor Moizer is, himself, a distant consultant, he is a "wise man". He is part of, to use the Fund's own terminology, the "backbone". He is very influential, he almost has – and you will conclude when you look at the statements there is perhaps a degree of inconsistency – a power of veto.

Accordingly, and ignoring all the connections arising because the Fund might participate in a bid for BAA – which of course was not foreseeable in 2002, it was not even on the horizon, however far one looked out for it – the pre-existing links were powerful, created a

conflict, and was recognised as such by the Competition Commission. That is the first way of looking at it.

The second question we invite you to ask is how the facts of 2007 influenced that pre-existing state of affairs. The reason why that has to be the relevant question, because the point in time at which you are making your assessment is the point in time at which he was appointed, namely April 2007. That is the point at which the decision was taken in which a conflict might first arise.

As of 2007 the issue now is simply to see how the fact of the inquiry affected the pre-existing facts, and as to this I think there are four broad points to make. First, there is the OFT report which contemplates divestiture as a possibility, and any sensible, fair minded observer reading that report would note that MAG is identified as a rival to a BAA, and for your reference it is bundle 3, tab 12, p.14, the OFT report 912, tab 3.1. So as of the date of the report MAG was a possible rival who might, and I only put it at "might", be interested in a bid for BAA assets.

The second broad point to take account of is that, as such, MAG was likely to be adopting a position adverse to BAA from the start of the inquiry, not the case in the quinquennial review.

Point three, MAG and BAA were now parties in the same case, the same *lis*, not the case of quinquennial reviews.

Point four, so far as the Fund itself was concerned, whereas in 2002 there was no prospect of the Fund itself being involved in the MAG quinquennial review, now there was at least a possibility. Again, it is only a possibility that the Fund might be called upon to assist MAG in the bid. They have got the same "dad". We know, because Mr. Taylor of the Fund explained it on 18th February, that the Fund's investment decisions are affected by the closeness of its relationship with MAG. The Competition Commission was told this and one can therefore assume – it is reasonable to assume – that the same applied in April 2007.

So how does one therefore analyse the 2002 situation? In 2007 Professor Moizer's position was one of conflict. It was a more severe conflict than existed in 2002 because of those exacerbating factors I have just identified. The 2007 notice did not come close to addressing these relevant facts, and you simply hold the 02 notice up against the 07 notice and compare and contrast, and that, frankly, is the end of it.

My final point, which will probably take me five minutes, is issue five, severance. Our first point is that severance is not possible. Once a conflict arises the consequence is inevitable,

and we have set out authorities from the House of Lords to that effect in our skeleton argument from para.19 onwards.

THE PRESIDENT: By "severance" are you talking about severing the group or severance of the personnel decision makers?

MR. GREEN: Yes. The point I have just dealt with, and indeed the point I made last night, addresses the temporal question of severance. Mr. Swift accepts that if you find a conflict as of 07 that is the end of the matter, there is nothing to sever, the report collapses. His case is limited to ----

THE PRESIDENT: Subject to his point on waiver.

MR. GREEN: Subject to waiver, yes. His point is that if you only identify a conflict in the very, very limited sense, as he advanced, based on specific knowledge of a specific bid limited to Gatwick, then you can push the facts backwards and backwards and backwards until late 2009, and then he says no retrospective severance, the whole thing stands, you cannot retrospectively attack the report. So he has tried to push all the relevant facts as far up to the end date as he possibly can. He is forced to do this because that is the earliest that the Competition Commission acknowledged there ever to be a conflict on the facts – only in relation to Gatwick, only an actual bid, only arising very, very late in the day which they say they addressed adequately. That is the corner that he has backed into. I am not going to go into the cases again, you will have the chance to look at them and form your own view about them.

We have the counterpoint to what we say is the strict position, which is *Re Medicaments*, which suggests that there may be a factual element to it. Again, I am not going to repeat our submissions which you have in mind. The standard in *Re Medicaments* is extremely low, in the sense the hurdle is very low. They simply asked, "Did Dr. Rowlett discuss the issues with her colleagues?" Answer, "Yes". "Did the issue arise late?" In other words, was there an extensive period of discussion. Answer, "Yes". Then the Court of Appeal said, "It is inevitable that the other two are thereby tainted". All of this accepts that the other two, and indeed the person tainted, may have acted in good faith because good faith is a complete irrelevance here because this is an objective test.

Let us just look at the underlying reality to Professor Moizer's role, and none of this is seriously contested or indeed at all. Professor Moizer was an important player in the Competition Commission's inquiry. Mr. Clarke in his witness statement confirms that and we will give you the reference. He was the key financial wizard and he was particularly brought in because of his experience of airports in the course of the 2002 quinquennial

review. You have no statements before you from other members of the panel saying, in terms, that his views were unimportant or uninfluential, because they could not possibly say that. A reflection of his importance lies in Mr. Clarke's insistence that he should be kept on after the decisions of 24th February until 3rd March. We know that he participated even after he was so-called "quarantined", and we have set out the details of that in the annex to our skeleton. We have set out the dates upon which he participated so far as we can judge them, and we know that even after the very limited quarantine he participated extensively in Competition Commission deliberations. That is schedule B to our original skeleton, which is entitled "Professor Moizer's involvement in the market investigation". We know, for example, that he attended a hearing with BAA on 20th January in which he cross-questioned BAA on matters in which he was critical about BAA – that is 20th January again. We will provide references to the transcript and we will do the cross-references in that to the chronology and skeleton.

He played a full and influential role throughout and nobody has suggested he did not.

As to the suggestion, and I am really reverse engineering the points I made last night, that if you find bias in relation to the Fund's bid then there is no retrospectivity then your starting date is still, on the basis of that logic, still going to be April 2007, because that was the date upon which it was foreseeable that the Fund might, and I emphasise the word "might", be interested in bidding as part of a consortium, or in some way participating. As of that date it was quite foreseeable that they "might" participate. So if one is adopting even the very limited definition of a conflict, which is wholly related to MAG, itself, but is limited to the Fund and nothing else, and then limited to the Fund not as a pensions body but as a potential investor, even if you take that extremely limited perspective, that was still on the cards as a possibility in April. If it was not April, then it was certainly October 2007 when MAG told the Competition Commission specifically that it was interested in bids for all BAA assets. If it was not October 2007 then it must be June 2008 when "fleet of foot" was first mooted because the fund was then looking at a much more aggressive approach in the market place for investments. If it was not June 2008 when the fund started looking towards the recession-market, it was the summer - in particular, August - when MAG went into the press to say that it had shareholder consent for a bid. All of these make the fund itself an ever more probable participant. If it was not August, then it was 21st November when Professor Moizer advised on the use of Fleet of Foot. If it was then, then it was December 2nd when Professor Moizer knew, constructively or otherwise, that the fund was interested in bidding. So, 09 is far, far too late a starting point, even on the very myopic

analysis of the Competition Commission. Quarantine was never enough, even on their own analysis. They limited it to the actual bid as opposed to a bid the fund might be involved in after the report came out. Professor Moizer was entitled to sit on the Commission on matters relating to Gatwick, but not related to the specific particularities of the sale.

So, all in all, it boils down to the fact that for a very large number of different reasons. The entire inquiry was permeated through with an intolerable conflict from the start. It exacerbated in nature from Day One until the end. There was never an attempt to make proper disclosure . The consequence, we say, is an inevitable one in law. It is in fact a question of law, a question of bias, because the House of Lords say that this is not a question of fact; it is a question of law.

Those are our submissions in reply to the Competition Commission's submissions.

THE PRESIDENT: Thank you. Mr. Green, as I understand it, you do not question that it would have been perfectly possible for your clients or their advisors to ascertain the common ownership, if you like, of the fund and MAG.

MR. GREEN: Yes. From the internet.

THE PRESIDENT: Yes, or from other sources.

MR. GREEN: We did after the event. It took quite a lot of work, and it was not easy. But, you know, if we put an inquiry agent on it -- or given Herbert Smith the task, or Freshfields the task, they would have found out. Yes. Not all of the information -- For example, not all of the minutes of the fund are on the internet.

THE PRESIDENT: No. You mentioned the giving of Fleet of Foot.

MR. GREEN: Yes. But, we do not know what -- It does not tell us about the exact nature of Professor Moizer's involvement. But, yes, certainly, core facts could be unearthed on the net. We found them. We had to dig around and find them out in order to prepare this case.

MR. SWIFT: Sir, before you rise, if I may, I did not seek to intervene in the course of Mr. Green's reply, but to the extent that the reply was not just a reply but, to an extent, a re-formulation of the case presented on Day One, there are just two matters that would like to make some observations on.

The first is in relation to Mr. Green's first issue, which was the lack of concern and the delay. The Tribunal will have noted - and the transcript will reveal - the number of occasions in which Mr. Green has effectively accused the Commission of making misleading statements. These are serious allegations made against the Commission. This re-formulation appeared to me to go much further than Mr. Green had put it - in particular,

the suggestion that the Commission did not correct the mis-information communicated on 12th. That is a reference to the meeting between Mr. Jones and Mr. Herga.

There are, to some extent, different recollections as between those two witnesses, as does tend to happen on occasions such as this, even within five minutes of the end of a very short meeting. What I would ask the Tribunal is for us to consider again, carefully, what has been said this morning by reference to the transcript and to put in, if we may, a supplementary note from the Commission correcting what we would say is a serious mis-statement by Mr. Green about what Mr. Jones is alleged to have said to Mr. Herga on 12th. Mr. Green, replying to an intervention by my friend, said that, "No application was made to cross-examine any witnesses in this case". That is right. There was an agreement reached at the CMC that we thought as in ordinary judicial review proceedings we would proceed on the basis of written statements. Lord Justice Scott Baker - I think it is in the *Al-Sweady* case - expressed his concern that there may be injustice caused in cases where there is no possibility for cross-examination. But, as Mr. Green said, it is far too late. But, in those circumstances there has been a quite specific allegation (a) that Mr. Jones personally mis-informed Mr. Herga; and (b) the Commission failed to correct that. We are in a position to put our side of the case in writing, which of course my learned friends will be able to comment on. I would not like this Day Five to end with our accepting anything of what has been said by Mr. Green in relation to that serious allegation ----

THE PRESIDENT: I think, to be fair, I seem to recall that he made that comment in opening - that, as it were, the Commission gleaned information from Mr. Taylor (or whoever they had their conversation with at the fund after the discussions between Mr. Herga and Mr. Jones). I seem to recall that from his opening. He certainly returned to it again today.

Speaking for myself, without having consulted my colleagues, what I am keen to avoid is that we have a whole round of written submissions following on.

MR. SWIFT: Very short. Simply an opportunity to look at what is in the transcript and, in our submission, if what is stated in the transcript cannot be derived from the evidence, or if there was a clear doubt as to that, that those doubts should at least be before this Tribunal when you consider your final decision.

MR. GREEN: I have certainly got no objection to that, and it is quite right and proper that you should look at both statements. *Re. Medicaments* makes it clear that so far as bias is concerned you do not have to resolve issues of fact. So, it is quite right that you look at both statements. If my learned friend wishes to draw certain points to your attention, I have got no objection whatsoever.

MR. SWIFT: I am grateful.

THE PRESIDENT: For my part, I do not want to encourage there to be another round. That sounds very limited. It would come in pretty soon, would it?

MR. SWIFT: It will come in very soon. It is an allegation that a professional person owing a duty to his ... has misled a party to the inquiry. It is a very serious allegation.

The second point - and Mr. Green put it in the third person about the Competition Commission's own submission in relation to the question from Lord Carlile, and that his professional clients were dismayed as to what I had said -- May I just say that when the Tribunal comes to consider that, could they please look at the transcript at Day Two, starting at p.64, line 16 when I was first raising this issue. It then goes on to p.68, line 15 where I cited the evidence given by Mr. Christopher Clarke (Defence, Tab 5, para. 18) as to what is the purpose of a disclosure notice. I would ask the Tribunal to consider whether Mr. Green's summary of what I said is fair, taking account of the context in which the submissions were put. There was certainly no suggestion on my part that in any way disclosure was, or was not, intended to be an unreliable set of information.

Those are my comments.

THE PRESIDENT: Thank you very much, Mr. Swift.

MR. GREEN: I am perfectly prepared to take my friend's position on that. On our side we would be perfectly content for the Competition Commission to clarify that it does not say that its statements are intended to be unreliable. That is how we have always understood it. Just to be precise - and my friend has got it. The words that we alighted upon - perhaps unfairly - are 'but experience suggests that this is far from complete'. If my friend is saying that he is happy for his client to confirm - and, indeed, I am sure it would be the City's preferred position - that disclosure notices were intended to be complete and reliable, then we would be very pleased.

MR. SWIFT: Disclosure notices are intended to be reliable. It is a matter for the judgment of the person putting the notice out as to the fullness or extent of the information, but is certainly not intended to be unreliable; nor did I even use the expression 'unreliable' in what I said to this Tribunal yesterday.

THE PRESIDENT: Mr. Swift, we very gratefully took the suggestion that in relation to his submissions just now Mr. Green is going to put some references next to some of the assertions to evidence and documents which will obviously be helpful to u in the absence of a note. We obviously would not preclude anyone else from doing the same if they thought that that would assist us.

MR. SWIFT: I am grateful.

THE PRESIDENT: I can just say thank you very much to all parties for the great assistance they have given us. You obviously will not be surprised to know that we have got a lot of thinking to do. We will obviously reserve our decision.