IN THE COMPETITION APPEAL TRIBUNAL

Case Nos. 1214/4/8/13

Victoria House,
Bloomsbury Place,
London WC1A 2EB

3rd October 2013

Before:

THE HON. MR JUSTICE GUY NEWEY
(Chairman)
ANDREW LENON QC
PROFESSOR JOHN BEATH

Sitting as a Tribunal in England and Wales

BETWEEN:

GLOBAL RADIO HOLDINGS LIMITED

Applicant

- and -

COMPETITION COMMISSION

Respondent

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H E A R I N G

DAY ONE

A P P E A R A N C E S

Lord Pannick QC, Mr. Jon Turner QC and Mr. Alistair Lindsay (instructed by Slaughter and May) appeared on behalf of the Applicant.

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

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THE CHAIRMAN: Lord Pannick?

LORD PANNICK: I appear with Jon Turner and Alistair Lindsay and the Commission is represented by Daniel Beard and Robert Palmer. I hope the members of Tribunal have each received four bundles of documents and there are two bundles of authorities.

THE CHAIRMAN: Yes.

LORD PANNICK: You will have seen that Global is challenging under s.120 of the Enterprise Act the Decision of the Competition Commission dated 21st May which is at volume 4, tab 11. The Commission found there was a substantial lessening of competition by reason of Global's acquisition of RSL and the Commission has decided to require the divestment of property. Under s.120, there is a no dispute, a review of the Decision is by reference to judicial review principles.

We identified three grounds of challenge. You will have seen the second of those grounds has not been pursued. That was a complaint about a failure to take reasonable steps to acquire survey evidence. The Tribunal will appreciate that Global remains aggrieved by that matter, and indeed many other aspects of the Commission's Decision with which it does not agree, but this is a judicial review, it is not an appeal on the merits, and we are focusing our challenge on aspects of the report which we say indicate errors of law and errors of principle.

First, we say that there is an error of law in relation to the Commission's approach to the meaning and the application of the statutory concept of a substantial lessening of competition, and we say that in the statutory context of a Decision which confers a power to divest property, the term "substantial" should generally be given a strong meaning. It means "large", "considerable", "very weighty". The Commission did not adopt that approach and therefore if we are correct on the legal test we say its finding cannot survive.

Our second complaint relates to the Commission's Decision on divestment in the Greater Manchester and North West region of the country, and we have identified what we say are three errors on the face of the reports, and we say for reasons which I will develop, the report in relation to divestment in Greater Manchester cannot stand, and I will come to that.

I am going to do my best to complete these submissions during the course of the morning. Can I then start with the meaning of "substantial lessening of competition". The relevant statutory provisions are in the first volume of authorities, and at the beginning of that volume tab A1 has the relevant provisions of the 2002 Act. The relevant provisions with which the Tribunal begin, using the numbering at the bottom of the page, p.9, the Tribunal should there have s.35:

"Questions to be decided in relation to completed mergers

(1) Subject to subsections (6) and (7) and 127(3), the Commission …"

and then there is a reference to the new body which is not yet in force -

"… shall, on a reference under section 22 …"

that is the reference here from the OFT -

"… decide the following questions -

(a) whether a relevant merger situations has been created …"

we are not concerned with that -

" (b) if so, whether the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services."

Then subsection (3):

"The Commission shall …"

so there is an obligation -

"… if it has decided on a reference under section 22 that there is an anti-competitive outcome …"

and that is defined in subsection (2) by reference to a substantial lessening of competition. So if there is an anti-competitive outcome:

it shall "decide the following additional questions -

(a) whether action should be taken by it under section 41(2) for the purpose of remedying, mitigating, or preventing the substantial lessening of competition concerned or any adverse effect which has resulted from, or may be expected to result from, the substantial lessening of competition …"

etc, etc, and s.41 is the section relating to remedies. It is p.19 at the bottom:

"(1) Subsection (2) applies where a report of Commission has been prepared and published under section 38 within the period permitted by section 39 and contains the decision that there is an anti-competitive …"

that is as defined in 35(2) -

"… the Commission shall take such action ... as it considers to be reasonable and practicable

(a) to remedy, mitigate or prevent the substantial lessening of competition concerned;

(b) to remedy, mitigate or prevent any adverse effects which have resulted from, or may be expected to result from, the substantial lessening of competition."

Under (3) the decision of the Commission [on remedies] must be consistent with its decisions as included in its report.

"(4) … the Commission shall, in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and any adverse effects resulting from it."

So that is the statutory concept addressing the mischief which the Commission is seeking to remedy.

The same concept, a substantial lessening of competition, also appears in the first stage - that is the decision of the OFT to make a reference to the Competition Commission. That is s.22, which is on p.1 of this tab,

"(1) The OFT shall, subject to subsections (2) and (3), make a reference to the Commission if the OFT believes that it is or may be the case that …"

Then there is (a) a relevant merger situation created, and (b) the substantial lessening of competition. So the concept is a crucial one.

Our case is that the Commission erred in law in its approach to the meaning and application of this statutory concept, and this is the basic principle of judicial review. If one goes to volume 3 of the authorities, and looks in tab 7, it is the *CCSU* case, the case after the Government decided to prevent civil servants at GCHQ being members of a trade union, a celebrated case. Volume 2 of the authorities, tab 7, there is a passage in Lord Diplock's speech with which the other members of the Appellate Committee agreed, and at p.410, at "F", the Tribunal sees:

"By 'illegality' as a ground of judicial review I mean the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the State is exercisable."

So there is no question of any deference or margin of appreciation for the Commission. They have either got it right in law or they have not.

Our case, as I have indicated, is that a large degree of lessening of competition and associated harm is required; that is what "substantial" means in this context. Issue is joined because the Commission say that that is not the applicable test. We see that in para. 54 of

their defence which appears in the bundle of documents at vol,1 at (b). If the Tribunal have vol. 1 of the documents at (b) there are two places where the Commission make its position clear. They say at bundle 1(b) p.75, para. 54: "Global Ground 1" – that is the one I am dealing with:

> "… proceeds from a false premise. The Commission did not consider, and did not need to consider, whether the 'lessening of competition' was 'considerable' or 'very weighty'. To have done so would have fallen into the error of seeking to redefine a deliberately imprecise and judgement-laden word into one of spurious precision, and to reduce it to some form of purely quantitative threshold test."

I will deal with the substance of that in a moment, but there is no doubt issue is joined. They say we are wrong, and at para. 42, if we go back a few pages to para. 42 of their defence, which is on p.13, they say:

> "The judgement is not assisted or constrained by the kind of quantitative definition or restrictions which Global seek to impose, found neither in the Act nor in the statutory device or information. They are not required to quantify the lessening of competition or its adverse effects in order to consider whether the lessening was of considerable magnitude, large, considerable, very weighty, very grave, or any other gloss that global might seek to put on the statute."

Our case is that we are not seeking to put any gloss on the words of the statute. We are inviting the Tribunal to interpret the word "substantial" in its context, and as I will seek to show the Tribunal from the authorities, that is precisely what courts and tribunals do when the word "substantial" is used in a statute. They interpret the word in the context in which it is used and the courts and tribunals identify at what point in the scale of possible meanings of "substantial" it is appropriate to place it.

I do not want to over-egg the pudding, but there is one final reference where the Commission say that they are right and we are wrong, and they did not apply this test and that is in their skeleton argument at para. 19, but I will not take time on that it is just another example of the same. So issue is joined.

The starting point here, of course, is that the concept: "substantial lessening of competition" is not defined in the Act. There is no definition of what Parliament meant by "substantial" lessening of competition. It could have said "lessening of competition" in which case the Commission's submissions, no doubt, would be exactly the same, but Parliament chose to use a further word "substantial". There is nothing in the Act that defines that word. There is assistance from the case law, in particular one decision of the Appellate Committee of the

House of Lords on the statutory concept in the same legislation – predecessor legislation – the words "a substantial part of the United Kingdom". Can we go to that case which is authorities bundle vol. 2, tab 14. *R v MMC Ex Parte South Yorkshire Transport*. The issue in that case was whether the Commission had erred in finding that it had jurisdiction to consider a merger reference from the Secretary of State. The question was whether the reference area, which was South Yorkshire was, or whether the Commission had power to decide that it was, a substantial part of the United Kingdom. South Yorkshire said it was too small, in essence.

The statutory provision can be found at p.25, if the Tribunal looks at the bottom of that page you will see s.64(1) of the 1973 Fair Trading Act, that is what the House of Lords were concerned with. It said:

> "64(1) A merger reference may be made to the Commission by the Secretary of State where it appears to him that it is or maybe the fact that two or more enterprises of which one at least was carried on in the United Kingdom … have, at a time or in circumstances falling within subsection (4) of this section, ceased to be distinct enterprises …"

And the conditions in (2) or (3) were satisfied. Condition 3 is between C and D on p.26:

> "(3) The condition referred to in subsection (1)(a) of this section, in relation to the supply of services of any description, is that the supply of services of that description in the United Kingdom, or in a substantial part of the United Kingdom, is, to the extent of at least one-quarter …" etc.

So the relevant question was whether the reference area was a substantial part of the United Kingdom, or could be a substantial part of the United Kingdom.

At p.25, if we turn back, between C and D, we are told:

> "The respondents [South Yorkshire] disagreed with the Commission, ... [they] recognised the conclusions and recommendations on ... public interest were not open to effective challenge in the courts. They did however contest by judicial review the finding of the Commission, crucial to its jurisdiction, that the geographical area by reference to which the existence of a merger situation had to be ascertained ('the reference area') was a 'substantial part' of the United Kingdom, within the meaning of section 64(3)."

This test, this share of supply test, is now still part of the legislation, it is in s.23(3) of the 2002 Act. That is at the preliminary stage when the OFT consider a reference to the

Commission. So what did Lord Mustill say on this question? He dealt with it, the other members of the appellate committee agreed, he dealt with it, starting at 29A he says:

> "Approaching the first stage as a matter of common language no recourse need be made to dictionaries to establish that 'substantial' accommodates a wide range of meanings. At one extreme, there is 'not trifling'. At the other there is 'nearly complete', as where someone says that he is in substantial agreement with what has just been said. In between, there exist many shades of meaning, drawing colour from their context. That the protean nature of the word has been reflected in the decided cases is made quite clear by the judgment of Otton J, [who discussed the authorities]. It is sufficient to say that although I do not accept that 'substantial' can never mean 'more than *de minimis*', or that in *Palser* … Viscount Simon was saying more than that in the particular statutory context it did not have this meaning, I am satisfied [says Lord Mustill] that in section 64(3) the word does indeed lie further up the spectrum than that. To say how far up is another matter. The courts have repeatedly warned against the dangers of taking an inherently imprecise word, and by re-defining it thrusting on it a spurious degree of precision. I will try to avoid such an error. Nevertheless I am glad to adopt, as a means of giving a general indication of where the meaning of the word in section 64(3) lies within the range of possible meanings, the expression of Nourse LJ [in the Court of Appeal] 'worthy of consideration for the purpose of the Act'".

And then, just above E:

> "Thus far, therefore, I accept the respondents' submission that if the Commission proceeded when examining its jurisdiction on the basis that it was enough for the reference area to be more than trifling this was a radical misconception".

He then adds, at p.31A in the third line:

> "As regards geographical extent the reference to a substantial part of the United Kingdom is enabling, not restrictive. [That is the distinction he draws in the context with which he is concerned]. Its purpose is simply to entitle the Secretary of State to refer to the Commission mergers whose effect is not nationwide. Like the asset-value criterion … the epithet 'substantial' is there to ensure that the expensive, laborious and time-consuming mechanism of a merger reference is not set in motion if the effort is not worthwhile. The reference area is thus enabled to be something less than the whole".

So that is Lord Mustill's approach, and he was satisfied that the Commission had not made a mistake, a legal mistake, in the case he was considering. We see that at p.30 just under letter E where he says:

> "Accordingly, although I appreciate the reasons why in the courts below it was held that the Commission had entirely misunderstood the content of the words, 'a substantial part', I have come to the conclusion that the report does not disclose this fundamental mistake".

Now, we seek to derive the following principles from Lord Mustill's analysis: First, although one must of course seek to avoid giving the word 'substantial' a spurious degree of precision, the word does have a meaning in the sense that it is necessary to identify where in the range of possible meanings — that is the range between 'trifling' and 'nearly complete' — where on the range it lies, and the tribunal sees that in his context Lord Mustill did precisely that. He adopted a test at 32B "of such size, character and importance as to make it worth consideration for the purposes of the Act". And he adopted, the tribunal will recall, Nourse LJ's test in the Court of Appeal at 29D. So, it does have a meaning and Lord Mustill gave it a meaning. That is the first point.

The second point that we derive or seek to derive from Lord Mustill's speech is that the answer to this question "Where in the range does 'substantial' lie?" depends on the context, depends on the statutory context. That is what Lord Mustill says at p.29A-D.

The third point we make is that there is in principle no difficulty in giving the statutory concept 'substantial' a meaning near the top of the scale if — if — the context so requires. That is what Lord Mustill says at 29A-B, and he refers, the Tribunal will have seen, he refers in that passage to the speech of Viscount Simon in the *Palser v Grinling* case. Can I just ask the Tribunal to turn to that, keeping open *South Yorkshire*. But if you turn back, please, to tab.10 you will see, the Tribunal will see the rent restriction case of *Palser v Grinling*, and I simply want to show the members of the Tribunal what Viscount Simon actually said, which is at p.317, very near the top of the page. In the third line at p.317, Viscount Simon says:

> "'Substantial' in this connection is not the same as 'not unsubstantial' ie just enough to avoid *de minimis*'".

And then he says this:

> "One of the primary meanings of the word is equivalent to 'considerable', 'solid', 'big', it is in this sense that we speak of 'a substantial fortune', 'a

substantial meal', 'a substantial man', 'a substantial argument or ground of defence'".

So that is a perfectly proper use of the word 'substantial'. So it all depends on the context. The fourth principle that we derive from Lord Mustill's analysis is this — if the statutory body has not correctly placed the word 'substantial' on the scale in the statutory context with which it is concerned, if it has got it wrong, that is an error of law which leads to a quashing of the decision. That appears from what Lord Mustill says at 29E. He refers to "If the Commission had got it wrong, it would be a radical misconception".

Now, our case is that in the context with which we are concerned, that is the substantial decision on the statutory mischief, is there a substantial lessening of competition, we say the word "substantial" is to be placed much higher up the scale than Lord Mustill placed it in the context with which he was concerned, the jurisdictional context.

Before explaining why I say that, can I just emphasise that we are not asking the Tribunal to give the word "substantial" a spurious degree of precision as the Commission contend. We accept for the purposes of judicial review that provided the Commission have correctly understood the word in context, and we say that means "considerable", "weighty", "solid", "large", of course they enjoy a discretion as to its application. On our case it is of course up to the Commission to apply the statutory concept to the facts of a particular case, and the Tribunal will be very slow to interfere with their judgment, but - and it is a very important but, and it is nothing to do with spurious degrees of precision - the Commission must correctly understood the concept. If, as we submit, the concept of substantial lessening of competition means "considerable", "large", "weighty", and the Commission have not adopted that approach, as they concede they have not adopted the approach, then they have erred in law, and we are entitled, we respectfully submit, to relief.

So why do we say that in the present context substantial ----

THE CHAIRMAN: Just pausing one moment, in terms of the *South Yorkshire* case Lord Mustill plainly said that in the context "substantial" lay further up the spectrum than just more than *de minimis*. He certainly did not say, did he, that you had to find a point on the spectrum?

LORD PANNICK: No, he was satisfied in his context that it meant worthy of consideration for the purposes of the Act. My submission will be that he was placing on the scale. He was rejecting a submission that in that context it meant, as it sometimes does, "weighty", "considerable", "large", and I have to distinguish his context, the context with which Lord Mustill was concerned, from the present context. That is what I seek to do.

THE CHAIRMAN: I know that this will all be debated more extensively later, but if we go back to 32 in *South Yorkshire*, the passage beginning just below F, Lord Mustill seems to be saying that it is a rather imprecise business and the decision maker is all right so long as he is acting rationally.

LORD PANNICK: In that context he declines the invitation which was advanced in submissions that the word "substantial" in the context of "substantial part of the United Kingdom" should be given a more weighty meaning, and it should be given a more precise meaning. He accepts it means more than "trifling", so he is placing it higher on the scale than "more than trifling", but he is refusing in his context to place it further higher up the scale. All it means in that context is "worthy of consideration", it is for the judgment of the Commission how worthy of consideration, self-evidently, and I have to distinguish that context from the context with which we are here concerned. That is what I seek to do.

I make two points and they merge into each other. The first point is that Lord Mustill's approach is understandable because he was considering the meaning of "substantial" in the context of a jurisdictional test. A finding under s.64 that the case concerned or did not concern a substantial part of the United Kingdom was the prelude to the Commission, the MMC, having a power to investigate the merger by reference to public interest considerations. It was part of the criteria, a crucial part of the criteria, which determined whether the substance of the merger should be investigated on public interest grounds. That is what its role was in that statutory context. If the merger did concern a substantial part of the United Kingdom, and the other jurisdictional criteria were satisfied, then, and only then, the MMC would consider the substance of the merger, and whether it operated against the public interest. That was the purpose of the test. Lord Mustill, himself, recognised this. If we go back to Lord Mustill's judgment at p.31 in the third line, the passage I have already read, he emphasises this. He says::

> "As regards geographical extent the reference to a substantial part of the United Kingdom is enabling, not restrictive."

That is the point. Its purpose is simply to entitle the Minister to refer to the Commission mergers whose effect is not nationwide. It is to ensure that the whole process does not occur unless there is something worth looking at. That is the point. There the use of the term "substantial" was, as he puts it, "enabling, not restrictive".

We say, by contrast, in the present case, the term "substantial" in the phrase with which this Tribunal is concerned, "substantial lessening of competition", is the defining concept which identifies whether, as a matter of substance, the merger is contrary to the public interest,

whether it has a anti-competitive outcome, to use the language of the legislation. In other words, in our context, the word is not enabling, it is restrictive, it is the exact opposite of that which Lord Mustill was referring to.

THE CHAIRMAN: What does it restrict?

LORD PANNICK: It restricts the type of lessening of competition which forms the mischief which confers the power to impose remedies.

THE CHAIRMAN: Could he not have said virtually the same thing in relation to "substantial part of the United Kingdom"?

LORD PANNICK: No, because there the context, as I submit, is to identify that merger which is then assessed on its merits to identify whether or not there is a sufficient mischief to give rise to the remedy.

THE CHAIRMAN: Does it not restrict the parts of the United Kingdom that are relevant in terms of giving the Commission power, or the OFT power, to do something?

LORD PANNICK: It certainly limits the types of merger which may be considered by the statutory mechanism. I certainly accept that. It is limited in that sense, but it is the contrast. I am not inventing this contrast, I am seeking to draw attention to the reasoning of Lord Mustill, because the case against me is that Lord Mustill in the same legislation - its predecessor, but it is the same language now - has addressed this question of "substantial". He has made a decision, and that of course is binding. I am drawing attention to the reasoning that Lord Mustill himself adopts. His reasoning is to focus on what he says is the enabling aspect of the use of the word at that stage. He is focusing on the fact, and it is a fact, that, as he says, the purpose of the use of the word in that context is simply to entitle the Secretary of State to refer matters to the Commission.

It is very different, we say, it is obviously different, when you are looking not at the preliminary stage and you are asking the question, "What gets referred?" You are asking the question, "What mischief entitles the Commission, indeed obliges the Commission to impose remedies, and very serious remedies, as I shall submit, remedies that attract Convention questions of the right to property, what mischief attracts ----

THE CHAIRMAN: Can I just query the word "oblige"? Is it your case that where there is an SLC found the Commission is obliged to do something?

LORD PANNICK: The Commission is obliged by s.41(3) to do something unless it is one of those exceptional cases in which it regards it as not reasonable or practicable or proportionate to do so.

THE CHAIRMAN: That is where 35(3) applies, is it?

LORD PANNICK: Yes, that is 41(3).

THE CHAIRMAN: 41(3) takes you back to 35(3), does it?

LORD PANNICK: Yes, which are, of course, consistent, and I will show you ----

THE CHAIRMAN: If we go back to 35(3) ----

LORD PANNICK: I will show the Tribunal, if I may, in a moment how the Commission, itself, understands this when we come to remedies, because it makes it very clear that it will be a quite exceptional case for it not to impose a substantial remedy, a very weighty remedy, in relation to a finding of an anti-competitive outcome, but I will show ----

THE CHAIRMAN: I follow that. Can we just focus on 35(3) for a moment.

LORD PANNICK: Yes, of course.

> "The Commission shall, if it has decided on a reference … that there is an anti-competitive outcome ... decide the following additional questions:
>
> (a) whether action should be taken by it … for the purpose of remedying, mitigating or preventing …"

That gives a discretion on its wording, but it has to be read together with 41, and 41(2):

> "The Commission shall take such action … as it considers to be reasonable and practicable -
>
> (a) to remedy …."

So it has a duty to take action unless it considers it not reasonable and practicable to do so.

THE CHAIRMAN: That is right, is it, even though 41(3) says that it has to be consistent with its decisions and then refers to 35(3)?

LORD PANNICK: That is its decisions on the substantive issue, as I understand it. It may not much matter because the Commission has itself emphasised that although it is not obliged to impose a remedy, it would require a very exceptional case for it not to do so. I am not submitting that it has an absolute duty to order divestment. That is not my submission at all.

Can I come on in a moment to remedies, but can I just complete the first point. We do say, using the language of Lord Mustill himself, that there is a distinction which he draws between those cases which are enabling and those case which are restrictive. It is a very real distinction, because at the stage with which he was concerned, he is asking the question, "What confers jurisdiction on the Commission?" He is not looking at the substantive test of those anti-competitive outcomes which give rise to the powers to impose remedies. He is not looking at the substantive mischief.

There is a second linked reason why we say in the present legal context the word "substantial" should be given a much stronger meaning, and that is the remedies question. I am grateful, sir, you have already taken me to s.35 and s.41 to which I was coming. You have seen those provisions. The Commission adopts the approach, we say, as Parliament intended, that where there is an anti-competitive outcome such remedies will normally involve the forced divestment of assets, not invariably, not always, but normally, subject to unusual cases. This is in the remedies guidelines, and if I could take the Tribunal to vol 1of the authorities, and invite the Tribunal's attention in that to tab A, no.7, where I hope you will find: "Merger Remedies: Competition Commission Guidelines. If, please, you go in that to para. 2.14 (p.187 of the bundle). It is in a section headed: "Selection of remedies". They say at 2.14:

> "In merger inquiries the Commission will generally prefer structural remedies, such as divestiture, prohibition, rather than behavioural remedies because:
>
> (a) structural remedies are likely to deal with an SLC and its resulting adverse effects directly and comprehensively at source by restoring rivalry;
>
> (b) behavioural remedies may not have an effective impact on the SLC and its resulting adverse effects, and may create significant costly distortions in market outcomes; and
>
> (c) structural remedies do not normally require monitoring and enforcement.
>
> 2.15 In practice therefore, the CC has selected structural remedies in the great majority of merger inquiries that have required remedies under the Enterprise Act regime. In some of these inquiries behavioural remedies have, however, been required in a supporting role, for example to protect the divested entity for a limited period …" etc.

So that shows the practice and it shows, in my submission, what Parliament would have understood, that where there is an anti-competitive outcome the expectation in, as the Commission puts it, the great majority of cases, is that there is going to be a structural remedy, divestiture or prohibition.

Our first point was this contrast that Lord Mustill was drawing in a different statutory context here. We are emphasising that because the context that we are now considering, SLC, involves the determination of the substantive criterion which governs whether the Commission orders that a person must divest itself of property, Parliament will have been well aware of Article 1 of the first Protocol to the European Convention, as applied by the Human Rights Act.

In authorities vol. 1 in section A, behind no.3 you should find, members of the Tribunal, the relevant provision of the Human Rights Act, which is s.3 on p. 50. It is very familiar: s.3 "Interpretation of legislation". Subsection (1):

> "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

Of course, no such issue arose in *South Yorkshire*. *South Yorkshire* was not concerned with any such issue precisely because it was only concerned with the jurisdiction of the Commission.

The European Court has explained how Article 1 of the first Protocol to the Convention applies, that is the right to property, and we refer to one case, which is in the same volume, vol. 1 of the authorities, and it is in the second half , tab B at 1. I hope you have there the case of *Amato Gauci v Malta*. It was a case about someone who owned a flat and there were rent restrictions and other restrictions relating to his relationship with tenants. The facts I do not think matter at all for our purposes.

If you would go, please, to p.9, Members of the Tribunal will see: "Alleged violation of article 1 of Protocol No.1 to the Convention." Then para. 26 sets out what article 1 of the Protocol says. Paragraph 26 in the quotation:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law …" etc.
>
> "The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

So that is the principle, that is article 1 of the first Protocol, which the Human Rights Act applies in this Country. The principles are then set out on p.14, para. 56. These are the principles:

> "56. Any interference with property must also satisfy the requirement of proportionality. As the Court has repeatedly stated, a fair balance must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights, the search for such a fair balance being inherent in the whole of the Convention. The requisite

balance will not be struck where the person concerned bears an individual and excessive burden.

57. The concern to achieve this balance is reflected in the structure of art.1 of the Protocol No.1 as a whole. In each case involving an alleged violation of that article the Court must therefore ascertain whether by reason of the state's interference the person concerned had to bear a disproportionate and excessive burden.

58. In assessing compliance with art.1 of the Protocol No.1, the Court must make an overall examination of the various interests in issue, bearing in mind that the Convention is intended to safeguard rights that are 'practical' and 'effective'. It must look behind appearances and investigate the realities of the situation complained of."

Our submission is that in the context with which we are concerned, that is SLC, the factors are very different from those which Lord Mustill was looking at. Our submission is that the principle of proportionality, which is applied by article 1 of the Protocol, as the Tribunal has just seen, cannot be satisfied and Parliament must have intended that it could not be satisfied unless the public interest, which is said to justify a divestment, is truly a **substantial** – emphasis – lessening of competition in the sense of being considerable, large, weighty. Anything less than that, if there is no substantial lessening of competition in the sense of considerable, large or weighty, then we say that simply cannot justify an interference with the rights of the property owner and a requirement of divestment.

THE CHAIRMAN: Just to be clear, supposing, for the sake of argument that "significant" can be taken to mean something different from "substantial" which I assume is part of your case.

LORD PANNICK: Indeed.

THE CHAIRMAN: Do you say that a significant lessening of competition cannot, in Human Rights terms, justify an intervention.

LORD PANNICK: Not if "significant" simply means, as Lord Mustill thought "substantial" meant in his context, worthy of consideration. There has to be something that in the judgment of the Commission, and the application is for the Commission. There has to be something that in the judgment of the Commission is a lessening of competition which is considerable, it is large, it is weighty, because unless it is considerable, large or weighty it cannot, in my submission, satisfy a proportionality test.

THE CHAIRMAN: Why could not a significant lessening of competition satisfy a proportionality test?

LORD PANNICK: Sir, when you put to me "significant" you are putting to me that that means something that is considerable, large or weighty.

THE CHAIRMAN: No, I am not because the Commission has said: "Yes, we think there was a significant lessening of competition". Your case, as I understand it, is that is not good enough ----

LORD PANNICK: Yes.

THE CHAIRMAN: -- because it has to be substantial. So on this hypothesis we assume that there is a lessening of competition which is significant but which is not substantial.

LORD PANNICK: It is not considerable, large or weighty.

THE CHAIRMAN: Yes, all right, but it is still significant on this hypothesis.

LORD PANNICK: Yes. Not good enough, I say, because the Commission have told the Tribunal, and I have shown you the references, that they have not asked themselves whether or not the lessening of competition that they have found is considerable, large or weighty.

THE CHAIRMAN: That I understand. But just in terms of this particular argument, the article 1 argument, you say the proportionality requirement cannot be satisfied on the Commission's approach.

LORD PANNICK: Yes.

THE CHAIRMAN: Just to understand that, why do you say you could not have the proportionality requirement satisfied on the basis of a significant lessening of competition?

LORD PANNICK: Because the nature of the remedy that is divestment, which is the remedy that normally applies, as we have seen, is so intrusive a remedy in relation to the right to property, which is in issue, that I say on a proportionality test one can only outweigh on a fair balance test, because it is fair balance we are talking about, the property owner's interests and rights if there is something to weigh in the balance which is considerable, large, weighty. That is my submission. Anything less than that, anything less than something which is considerable, large or weighty is inherently going to be inadequate on a fair balance test to say to a property owner: "We are going to interfere with your property rights."

THE CHAIRMAN: So just to be clear about the submission. It is your case, is it, that it is impossible for a Government to legislate to deal with significant lessenings of competition which are not substantial?

LORD PANNICK: Yes, but I want to be very clear, I am making that submission on the basis that the Commission, by the use of the word 'significant' means something less ----

THE CHAIRMAN: No, I follow that.

LORD PANNICK: But it is very important.

THE CHAIRMAN: Absolutely, that is key to your case as I understand it.

LORD PANNICK: Of course, they are entitled to say as an adjective this is significant, they are entitled to use that epithet as long as they are applying the correct legal test. It is my submission that in this context, where Parliament was setting up a regime which was intended to result in the divestment of property, a compulsion 'you must divest property that is otherwise yours', Parliament cannot have intended to authorise such intrusive remedies, consistent with Article 1 of the first Protocol unless there is something that is considerable, large or weighty. To talk of 'significant' if it means less than that is not good enough in my submission.

THE CHAIRMAN: Just to be clear, is that dependent on the fact that there is the prospect of divestment?

LORD PANNICK: Yes.

THE CHAIRMAN: So, it would not be your case that Parliament could not legislate in some other way to deal with significant lessenings of competition, assuming again that significant is less than —

LORD PANNICK: I have got two submissions. My first submission is that, by contrast with Lord Mustill's approach, here we are dealing with something that is restrictive rather than enabling, therefore we are on the other side and therefore, even adopting Lord Mustill's approach one must place the test much higher up the spectrum than Lord Mustill approached it. But I have a second point, which is this point — that it is the intrusive nature of the remedy which as I have shown the Tribunal, the Commission envisage will be applied in the vast majority of cases, that is the normal remedy that is imposed, Parliament must be taken to have understood that. Therefore I submit that Parliament must have intended when it used the word "substantial" and it is the word Parliament has used, it must have intended to give it the meaning that is more than a meaning that allows the Commission to decide that something is substantial, even though it is not "considerable", "large", or "weighty".

THE CHAIRMAN: I think you have answered my point, but just so I am absolutely clear what the position is, is it or is it not your case that Parliament could consistently with the Convention legislate to provide for some consequence leave aside divestment, some consequence, and to apply where there is a significant but less than considerable lessening of competition?

LORD PANNICK: Yes, well if the remedy that they are imposing does not require divestment of property, well then either one is not in the area of Article 1 at all, or one is in an area where the right to property is less gravely affected, and therefore it would follow that my answer, sir, to your question is yes, I entirely accept there may be other remedies that could be imposed by Parliament in another context, or maybe even in this context, but the forced divestment of property assaults (I do not wish to use a pejorative term) it affects the right to property in the gravest manner. It is saying to someone, "This is what you own, but you can't own it any more". And my submission is that Parliament conferred that power only if there is a substantial lessening of competition. It did so for a very good reason, it did so because it knew that a fair balanced test must be applied, and in this context you need something considerable or weighty before a fair balanced test can be satisfied. That is the submission. Other contexts, other remedies are a different matter.

Now, the Commission has a number of answers. Let me just try to respond to them. And first of all it says that a distinction should be drawn between the meaning of "substantial" in section 35 and the choice of remedy if and when a substantial lessening of competition is found. They say they are two different matters. Our answer is that the criterion SLC cannot be dissociated as the Commission are suggesting, from the remedies which affect the right to property. The Act links the two, and the Tribunal has seen that, that is section 35 and it is section 41, and it is not just that the Act links the two. It is also, and I have shown the Tribunal this, the Commission's remedies guidelines recognise that when an SLC is found, it follows in the vast majority of cases that you impose a divestment remedy. That was paragraphs 214-215 at authorities volume.1 at A7. I will not go back to it unless you want me to. And I remind the Tribunal that the case that I showed the Tribunal, the European Court of Human Rights *Gauci* case, *Gauci v Malta* specifically says, it was paragraph 58, I will not go back to it unless you want me to, it specifically said that, "The Convention safeguards rights that are practical and effective, it looks behind appearances and investigates the realities". You will remember, sir, paragraph 58, and the reality of the situation, the practical reality as Parliament knew and intended is that if an SLC is found, it follows in the great majority of cases that divestment is the remedy. So one cannot in practical terms seek to dissociate the finding of an SLC from a remedy. Indeed, the Commission's point that SLC is somehow to be dissociated from remedies is also, with great respect, a false point for this reason as well — the Commission is not seeking to put off until the stage of remedies consideration of whether the lessening of competition is considerable or weighty. The Commission do not look at that at all, that is not the test they

apply either when they are determining SLC or when they are deciding on remedies. Their approach, there is no doubt about this, no dispute about this, their approach is once they have found an SLC which on their view does not require considerable weighty lessening of competition, the remedies are imposed.

They have a number of further arguments which I need briefly to address, if I may. First, they rely on the presumption that where the draftsman of legislation uses a word twice or more in the same statute it has the same meaning on each occasion unless the contrary intention is shown. And the argument from my friend is, "Well, the word 'substantial' is used in the phrase 'substantial part of the United Kingdom' it is now in section 23(3) and that must have the same meaning therefore applying the presumption as the use of the word in the phrase 'SLC'" — to which the answer is that the presumption applies except where the context suggests otherwise. It is only a presumption. And I have given my submissions as to why we say the two contexts in which the word substantial are used are different in relevant respects. But there is also an authority which we gave to my friends I think yesterday or the day before, and of which we have copies for the Tribunal of a recent case. It is the celebrated or infamous (it depends how you look at it) case of Julian Assange, still in the Ecuadorian Embassy, and this was before he took up his residence so close to Harrods but unable to get into Harrods in Knightsbridge. I think he left there just before, I think he joined there just before the judgment was handed down, but in any event if you go in the speech or the judgment, rather, of Lord Phillips in this case at p.510, and there is a passage in the judgment, starting at 74:

> "Miss Rose [who was appearing for Mr. Assange] submitted that this line of authority conclusively established the meaning of [the words] 'judicial authority' ... This was coupled with the submission that those two words had to be given the same meaning wherever they appeared in the Decision. I consider that both submissions are unsound".

And then at 75, Lord Phillips says this:

> "When considering the meaning of a word or phrase that is used more than once in the same instrument one starts with the presumption that it bears the same meaning wherever it appears. That is not, however, an irrebuttable presumption. It depends upon the nature of the word or phrase in question and the contexts in which it appears in the instrument. In the Framework Decision the same phrase is used to describe different authorities performing different functions at different stages of the process.

> The phrase is capable of applying to a variety of different authorities. The contexts … do not require that all the authorities have the same characteristics", etcetera etcetera.

And we say the same is true here. We are concerned, different stages, different functions, different contexts, and indeed the nature of the word, that is the word "substantial" as the Tribunal has seen, is a word that has a variety of meanings depending on the precise context in which it is used.

And one further authority that may assist on this question, it is in volume 2 of the authorities, it is the *IBA Healthcare* case, it is volume 2 of the authorities and it is at tab.9. It is a Court of Appeal judgment. If the Tribunal would please go to using the number in the Law Report at the top of the page, tab.9 p.1120 and the Vice-Chancellor, Sir Andrew Morritt, is dealing with an issue of statutory interpretation under the 2002 Act, and he is dealing with the approach to be adopted at the stage of a reference from the OFT and if, members of the Tribunal, you have 1120, letter G, Sir Andrew Morritt, with whom the others agreed, other members of the Court of Appeal agreed, says:

> "The test for the OFT is only whether the anticipated merger 'may result in a relevant merger situation' or not. This is consistent with the respective functions of the OFT and the commission. The former is a first screen, the latter decides the matter. Accordingly, although the word 'may' appears in the opening phrase of s.33(1) and in para.(b) of both ss.33(1) and 36(1) it is clear that the opening phrase 'believes that it … may be the case' imports a lower degree of likelihood than para.(b) in ss.33(1) or 36(1) would by itself involve", etcetera etcetera.

So, even in our Act in sections 33 and 36 in the context of a reference from the OFT to the Commission, the Court of Appeal have accepted that a word, the word "may", has two different meanings in the two different parts of the relevant sections. So, context is vital here. So, that is our answer to the first point that is made, a presumption that the word "substantial" must have the same meaning wherever it is used.

Then the Commission argues that what Parliament has done is to eliminate small scale cases by other means. And the argument, as I understand it, is that the Act prevents the OFT from referring matters to the Commission unless it is a relevant merger situation, and that is defined and I do not need to take you through, it is there on the face of the Act, it is defined in sections 22-23, by reference to factors such as control, turnover, share of supply, there are a number of jurisdictional questions. They also point out there are exceptions. The Act identifies a series of exceptions under section 22(2).

Our answer is that these are all further examples of enabling provisions, to use Lord Mustill's word. They are all matters that go to whether the case is one "worthy of consideration" by the Commission. They are all addressing the jurisdiction of the Commission by reference to size or characteristics of the merger itself. But when it gets to the Commission, the test is a different one. The test that the Commission must apply, the crucial test, is not the characteristics of the merger itself, the crucial question is the impact which the merger has on competition, and that is the SLC test, and it is that test which determines whether the intrusive remedies are applicable, and it is at that stage that Parliament has said it is not enough to have a lessening of competition, it must be substantial, and that is the quote "restrictive" unquote element of the case. We respectfully say that argument does not take the case any further.

There is a third argument, which I do not think is put at the forefront of my friend's case, but let me identify it. It is at the end of para.18 of his skeleton argument where he says that property rights are attenuated by the fact that the rights are only taken subject to regulatory clearance. In other words, when my clients acquired RSL they knew that it was subject to regulatory clearance. In my submission, that does not take the matter any further forward because it is the interference with property rights by reason of the merger control regime which must be justified. Whether it has been completed or it is anticipated is nothing to the point. All that stands in the way of my clients enjoying the property is Parliament's test of SLC. So it simply restates the issue. There is nothing further that goes forward.

There is a fourth argument, a final argument, that I need to address. It is an argument which is given some weight in the Commission's skeleton argument - it is paras.21 to 31. The Commission say that there is a distinction between the lessening of competition which occurs when there is a reduction in rivalry - three competitors go down to two - and on the other hand the adverse effects on customers. They say there is a distinction between those two concepts. The Commission say that we, Global, have misunderstood the Commission's reasoning, because we, they say, have focused on the assessment of adverse effects - that is the proportion of adversely affected customers, the magnitude of the detriment. The Commission's reasoning, says the Commission now, is that there is a reduction in the number of rival radio operators. There are a number of paragraphs that address this point. My first response to this, with great respect, is none of it much matters, if at all, because if I am correct on the legal test of "substantial" - I am either right or I am wrong. If I am wrong that is the end of this point. If I am right that Ground 1 is sustained, "substantial" means

"considerable", "weighty", "large", then that is not the test that has been applied. There is no dispute about that. Therefore, the report, we say, cannot stand.

For what it is worth, I also fundamentally on behalf of Global, reject the Commission's argument on this, as they put it, vital distinction between lessening of competition by a reduction in rivalry and the adverse effects. I do so because the Commission's own Merger Assessment Guidelines show that there is no such distinction, they merge into each other, and the report itself does not adopt this approach.

Can I just show you the Merger Assessment Guidelines, authorities volume 1, Part A, tab 5. If the Tribunal would go to p.72 in the Merger Assessment Guidelines, you will see para.4.1.3. It is under the heading "What is an SLC?" At para.4.1.3, they tell us six lines up from the bottom:

> "A merger gives rise to an SLC when it has a significant effect on rivalry over time, and therefore on the competitive pressure on firms to improve their offer to customers or become more efficient or innovative. A merger that gives rise to an SLC will be expected to lead to an adverse effect for customers. Evidence on like adverse effects will therefore play a key role in assessing mergers."

So one cannot distinguish the two. The effect on the customers is crucial. It is key to an assessment of the competitive impact of the merger.

That is exactly how the Commission approached this case. They did not say in this case that in some areas there is a reduction of rivals of three to two, therefore there is an SLC. They assessed, and had to assess, the effect on customers, not least because a crucial part of this case was that for many customers - there were disputes as to how many - advertisers that is, it was not simply a choice, "Do I advertise on the three, or now the two radio stations?" There were other media through which those customers could advertise, whether it is local newspapers, whether it is billboards, whatever it might have been. Of course the Commission had to assess, they did assess, how many customers were affected by the reduction of three to two and how they were affected. It is simply wrong to suggest that one can approach this case either in theory, or that the Commission did approach it, by asking the question: has the number of rival radio operators been reduced from three to two?

If one goes to the report, volume 4, tab 11 - as I say, I do not want to make a meal of this, but let me just show the Tribunal how the Commission dealt with the matter - Chapter 4 starts at p.93 of the report. At the top of the page the Tribunal will see "Conclusions on the SLC test", and at 8.6 it says:

"We considered the extent of the likely effect on competition in these overlap areas. In doing so we took into account our Guidelines which state, among other things, that we view competition as a process of rivalry between firms, that the likely adverse effect on customers plays a key role in assessing mergers; and we consider any merger in terms of its effect on rivalry over time."

That is entirely consistent with the Guidelines.

In 8.7 they say:

"Our view is that the loss of rivalry as a result of the merger is significant because in each of the seven overlap areas it involve[d] … the loss of one of three main competitors. As such, the merger would give the merger parties high market shares of listeners and non-contracted revenue in each of the seven overlap areas and reduce the number of radio competitors … We note in this context our Guidelines which refer to the consequences of a loss of rivalry over time on the competitive pressures on firms to improve their offer to customers or become more efficient or innovative."

Then in 8.8 they were concerned about:

"… the effect of the merger on non-contracted advertisers buying largely regional and local airtime … We noted that prices for these advertisers are negotiated for each campaign. The nature of the bilateral negotiations between radio stations and advertisers mean that we would expect to see higher prices where advertisers' alternatives have been significantly reduced as this reduces their bargaining strength relevant to the radio station concerned. The availability of good alternatives for some advertisers does not protect those who do not have good alternatives from price increases. Therefore, in those campaigns where the alternatives are weak, we would expect the parties to be able to achieve a higher price in the negotiations."

That depends upon assessing whether the alternatives were or were not weak, taking in the round all the available evidence. they say at 8.9:

"…. on the proportion of campaigns likely to be affected and the scale of the likely effect on individual prices, we conclude that the loss of competition in the seven overlap areas is likely to lead to a significant change in the balance of negotiating power between Global and non-contracted customers such that prices in each of the seven areas would be on average higher."

Not substantially or significantly higher, but higher.

At 8.12:

> "We therefore concluded that the merger has or may be expected to result in a substantial lessening of competition in a UK market."

So the Commission did not adopt the approach, nor could they have done, that there was an SLC simply because rivalry in the areas was reduced from three to two. They needed to assess - and this is the conclusion, what precedes it is the detailed assessment - the non-radio alternatives, and they did assess the effect on customers both to proportion affected - that is the advertisers - and the extent to which they were affected.

So the Commission's point that there is this fundamental distinction between reduction in rivalry and adverse effects is not just wrong in principle - that is by reference to the Merger Assessment Guidelines - it is actually not what they did in this case.

I repeat, this does not matter if we are right on our first ground, which is a point of law as to the proper meaning to be given to the epithet "substantial". On that I have made my case.

If we are correct in law, we say the report so far as it is adverse to the applicant, must be quashed. Nothing else will do. If they have applied the wrong test that is the end of the matter. That is our first ground of challenge.

The other ground of challenge concerns the Commission's decision requiring divestment in Greater Manchester. Here the Tribunal will want to have in mind the position in Greater Manchester. If the Tribunal would pick up our skeleton argument.

THE CHAIRMAN: Just pause a moment, Lord Pannick. I have managed to give myself an array of files. I need what for the next part of the argument?

LORD PANNICK: You will need the report and there may be other documents I am going to go to, but I shall keep it as limited as possible.

THE CHAIRMAN: Do I need the authorities at this stage?

LORD PANNICK: Not at this stage, no. I hope, Sir, you and the members of the Tribunal have our skeleton argument separately. We can supply further copies if necessary.

THE CHAIRMAN: I think we have got more than one already.

LORD PANNICK: I hope it repays it reading more than once! We have identified at paras.42 and 43 who owned what in Greater Manchester. If you have p.11 of our skeleton, para.42, Global has three radio stations that serve Greater Manchester - there is Capital, there is Xfm and there is Gold. There is also a Global station that serves a small part of the North West, that is Heart North West and Wales, but no significance attaches to that at all. No doubt it does for the listeners, but it does not for the purposes of this hearing. It broadcasts around Cheshire and the Wirral. RSL only has one radio station serving Greater Manchester, that is

Real XS, but it also has two regional stations serving the North West generally, that is 'Smooth' and 'Real'. What the Commission decided in relation to Greater Manchester and the North West can be seen in the Decision at para. 9.99 p.111 of the report, and there is a table. It deals with each of the seven areas, we are only concerned with Greater Manchester. The fourth in the table is Greater Manchester and the North West. The Commission's view was that the potentially effective options, i.e. the options that they were prepared to consider were that there should be a divestiture of capital, that is one of Global Stations in Manchester, or Real XS, which was RSL's station in Greater Manchester, but not on its own, it had to be with either 'Real' or 'Smooth' with one of the two regional stations.

There is no dispute about this, it follows from that, that the Commission's approach to divestment in Greater Manchester, was that a more intrusive remedy was required than simply protecting competition amongst radio stations within Greater Manchester itself. Why do I say that? Because if the Commission's concern was only about radio stations within Greater Manchester itself, it would have sufficed to require divestment of 'Real XS'. Real XS was the only station that RSL owned in Greater Manchester before the merger. So if the Commission's concern was the radio market in Greater Manchester, that is the stations in Greater Manchester it would have sufficed to require Global after the merger to divest itself of Real XS.

So why is it that the Commission was not satisfied with that. It required the divestment of Real XS plus, as you have seen either Real or Smooth, that is one of the two regional stations.

The reason why the Commission wanted more than the divestment of Real XS, the Manchester station was because they had a concern that advertisers in Greater Manchester might use Real or Smooth, even though they were regional stations, that is stations not dedicated to Greater Manchester, but stations that were heard in Greater Manchester – that was the thinking.

Can I come to the three complaints that we have to the approach that was adopted by the Commission on this issue. The first complaint is that although that was the thinking of the Commission, it made no finding that advertisers who are primarily focused on Greater Manchester do, in fact, use the regional stations Real and Smooth, they made an assumption, and they made an assumption without adequately or, indeed, at all, assessing the evidence. We see this in the report. If we go to the report at para. 7.93, p.70, under the

heading in the middle of the page: "Our assessment". At the bottom of the page 7.93 they say this:

> "The main radio alternatives for advertisers in Greater Manchester would therefore effectively reduce from three to two."

The third is Bauer, that is the other alternative radio station.

> "Real XS [RSL station] has 8 per cent of listening hours and 5 - 9 per cent of non-contracted advertising revenue; in the absence of other radio alternatives to Bauer its loss as an option is significant especially given its similarity to Global's Xfm."

- to which, of course, the answer is, well, require the divestment of Real XS. That is the solution to that problem.

> "Also, the only regional radio stations covering Greater Manchester and beyond would be brought together by the merger. The loss of Real and Smooth [the regional stations] as alternatives for those a advertisers primarily focused on Greater Manchester will therefore also reduce competition.
>
> As we noted in para. 6.101 …"

- I will go back to that. "… regional stations **can**" and I emphasise the word "can":

> "… compete for advertisers primarily targeting customers in a smaller part of the region. In this context, we note that about 50 per cent of Real and Smooth's listeners are in Greater Manchester."

It also follows, of course, that 50 per cent of them are not. So we say that what is clear from that paragraph is that there is no actual finding as to whether or not Real and Smooth, as the regional stations, do in fact compete for customer from advertisers primarily focused on Greater Manchester, given that there is no dispute that 50 per cent of the listeners are wastage in that sense because they are not listeners in Greater Manchester.

One then needs to go to the paragraph to which the Commission itself directs attention, which is 6.101, p.49. At 6.101, and this is the paragraph to which the Commission itself directs the reader's attention:

> "We were also told that regional stations and local stations sometimes …"

I invite you to underline the word "sometimes":

> "… competed for the same advertisers even where the regional stations could not offer advertising on separate transmitters."

That is plainly the case here.

> "A competitor told us that local advertisers were prepared to use regional stations if …"

- I emphasise "if":

> "… they could negotiate a good price and that stations covering a large TSA [total survey area] might …"

- I emphasise "might":

> "… reduce their prices to compete more effectively with local stations and compensate local advertisers for 'wasted advertising' …" etc.

So 6.101, far from containing any finding that this invariably does occur, that is that regional stations do compete for the local audience, 6.101 expressly states repeatedly that it may or may not occur. Our criticism of the crucial paragraph 7.93 read with 6.101, and it is crucial for the reason I have given, that but for this concern the appropriate divestment is of Real XS, and only Real XS, our criticism is that there is no analysis of whether or not, in fact, the regional stations, Real and Smooth do compete for business from advertisers seeking to target Greater Manchester and, indeed, whether they, prior to the merger had obtained such business, given the wastage of 50 per cent of listeners to the station. Much, no doubt, would depend upon whether they wanted to compete, whether they were giving the right prices to attract the advertisers who know that 50 per cent of the audience would not be their target audience.

All of this is very striking for a further reason, we say, and the reason is the contrast between the approach which the Commission took in this same report to the same issue, or very similar issue, in another part of the country.

If one goes to p. 62 of the report, one sees the approach that was taken by the Commission in the context of the West Midlands, and it is 7.40, under the heading "Our assessment".

> "7.40 Looking first at Birmingham, we note that Smooth [the regional station] covers a wider area than Capital and that advertisers who want to advertise in Birmingham only are likely to perceive Orion's Free Radio Birmingham to be a better geographic alternative. We also note the difference in the average age of listeners between Capital and Smooth and the fact that Orion attracts a more similar demographic to Capital than Smooth. We therefore do not consider that the loss of rivalry from Smooth to Capital [the regional to the local] is likely to have significant adverse effects for customers wishing to advertise only in Birmingham because Orion appears to be a closer alternative, both in geographic overlap and in demographics."

I am not complaining about that, far from it. I simply draw attention to it to show that in another area of the country the Commission did not proceed on an assumption based upon

the possibility that a regional station can compete with a local station; they actually made some findings, and that is precisely what they did not do in Greater Manchester, despite the fact, as I have submitted, it being absolutely crucial to the question whether or not it was sufficient to require the divestment of Real XS, which was the only local station that RSL had in Greater Manchester itself. So this is a crucial part of the reasoning on divestment and yet there is no finding, there is an assumption despite 6.101 saying sometimes yes, sometimes no. That, we say, is not good enough. The Commission needs to make a finding. What they say in answer to this is there was evidence on which they could rationally reach a conclusion that there would be loss of competition in relation to the Greater Manchester audience and advertising by bringing the regional stations under common ownership. Even if that is right, even if there was evidence, they have not addressed it, they have not assessed it, they have not made a finding. They have proceeded on an assumption which their own report shows sometimes is true, sometimes is not true. But, in any event, the evidence is not contained in the report, there is nothing in the paragraphs that I have read to the Tribunal, i.e. 7.93 or 6.101, or in any other part of the decision itself, which supports a finding that the regional stations Real and Smooth do in fact compete and compete successfully for the business of the advertisers focused on Greater Manchester. It is true that the Commission refer to one piece of evidence that they heard, and here we need to go to volume 4 of the materials bundle, volume 4 of the main bundles, and it is tab.12, this is a summary, this is the appendix, I am sorry, this is appendix L to the report. And if we go in appendix in that document to p.1346 (numbering at the bottom of the page) 1346, the Tribunal will find appendix L which is headed "Analysis of overlap areas", and at p.1394 there is a passage at paragraph 197 under "Third party views", where Bauer is recorded as saying, this was their evidence, Bauer said that Key 103, that was Bauer's Greater Manchester local station, competes with each of Capital, Real, Smooth, and Real XS in the Manchester area since local advertisers are also prepared to use the regional stations to target the Greater Manchester area. They said that although wastage can be an issue.

So that was the part of the evidence, but if you turn back, please, members of the Tribunal, to the previous page you will see the parties' views at 186 that is Global and RSL. The parties told us that when looking at Greater Manchester. Real and Smooth listening shares should not be included as it was not possible to split their transmission geographically and hence (this is because of wastage) they are not cost effective alternatives for advertisers looking to target Greater Manchester. Similarly, they said that for advertisers wishing to

target Chester, Wrexham or The Wirral only, Real and Smooth were not realistic alternatives. So there was from each side competing evidence on this question. My point is that this evidence has not been assessed by the Commission and they have certainly not made a finding on it; and yet, for the reason I have already given, it is crucial to whether or not the divestment remedy needed to go further than require the divestment of RSL's only station in Greater Manchester Real XS.

THE CHAIRMAN: Can I just understand the legal framework of the argument?

LORD PANNICK: Yes.

THE CHAIRMAN: An argument might be there was no or no sufficient evidence that could entitle the Commission to find that the regional stations competed. Is that part of your argument, or is the focus rather on the Commission could not reasonably —

LORD PANNICK: No, the submission is that this question was crucial to the findings, to the conclusion that the divestment of Real XS was inadequate, and yet they have not made a finding on a question of fact crucial to their determination, the question of fact being whether or not the regional stations do compete for the local advertising. And, not merely have they not made a finding, they have not assessed the evidence and its competing evidence on this question. The legal framework, if one wants a legal principle, the best I can do is to take the Tribunal back to the *IBA* health case, I said I would not go to authorities and I broke that undertaking because it is in volume 2 of the authorities. It is at tab.9, *Office of Fair Trading & Ors v IBA Healthcare* and if the Tribunal goes to paragraph 45 which is on p.1119 of the Law Reports, it is the judgment of the Vice-Chancellor for the Court of Appeal. The Vice-Chancellor quotes with approval *Secretary of State for Education and Science v Metropolitan Borough of Tameside* where:

> "… the question was whether the Secretary of State 'is satisfied' …. Lord Wilberforce pointed out … 'This form of section is quite well known, and at first sight might seem to exclude judicial review. Sections in this form may, no doubt, exclude judicial review on what is or has become a matter of pure judgment. But I do not think that they go further than that. If a judgment requires, before it can be made, the existence of some facts, then, although the evaluation of those facts is for the Secretary of State alone, the court must enquire whether those facts exist, and have been taken into account, whether the judgment has been made on a proper self-direction as to those facts, whether the judgment has not been made on other facts which ought not to have been taken into account'" etcetera etcetera.

And that is also approved further by the Vice-Chancellor, if it matters, at paragraph 66 of his judgment and Lord Justice Carnwath agrees specifically that that is the relevant principle, at paragraph 93. And our complaint is that here, the Commission on a matter crucial to divestment has not made a proper self direction. They have not asked themselves the crucial question. The crucial question is whether or not the regional stations Real and Smooth do in fact in practice compete for the business of those seeking to advertise to a Greater Manchester audience. And it is not good enough to say, "Well, sometimes regional stations do, sometimes they don't". (See paragraph 6.101) Particularly when we know that the Commission itself in Birmingham grappled with the facts and formed a decision.

THE CHAIRMAN: It may be I am trying to impose a structure that does not quite fit, I do not know, but if one were to try to look at this in GCHQ terms, we are in irrationality not illegality, are we?

LORD PANNICK: We are not in the area of illegality, no.

THE CHAIRMAN: So, it is broadly *Wednesbury* criteria.

LORD PANNICK: Yes, but it is not as that passage from Lord Wilberforce's speech is designed to indicate a matter purely for the judgment of the Commission unless I can show that they have acted in a way that no sensible person would have acted. They must, there is a constraint imposed by judicial review as Lord Wilberforce indicates, that they have to ask themselves the right question and they have to direct themselves correctly by reference to the facts.

THE CHAIRMAN: I am probably just muddling this up, Lord Pannick, but if you ask yourself the wrong question in law, that is illegality as I understand it.

LORD PANNICK: That is illegality, yes.

THE CHAIRMAN: And we are not really in that territory.

LORD PANNICK: We are not in the territory of them not applying the governing legal concept of SLC, because we are past that. We are assuming —

THE CHAIRMAN: Yes.

LORD PANNICK: — that they are directing their minds correctly to whether or not there is an SLC. But on divestment judicial review imposes, as it does on all discretionary decisions, a constraint that is not merely a constraint that they must act reasonably. It is not enough for my friend to say, "Well, we acted reasonably. We didn't take leave of our senses". The *Tameside* principle requires that they identify correctly the relevant legal question in the context with which they are concerned, and the context here is divestment, and they are rejecting as a solution the divestment only of Real XS. They are saying "That is not good

enough". "It's not good enough". Why is it not good enough? Well, it is not good enough because the regional stations operate as a competitive constraint.

THE CHAIRMAN: Just as I try to unpack it, it is not your submission that the Commission could not rationally arrive at the conclusion it did without first finding that the regional stations competed?

LORD PANNICK: No, I am not putting it like that.

THE CHAIRMAN: No.

LORD PANNICK: No, I am saying that in this context where this is a crucial element of a finding that my client must divest not merely Real XS, but must divest one of the regional stations as well, it is absolutely essential that they adopt, as Lord Wilberforce puts it, "a proper self direction". And, as he says, they are required, if a judgment requires before it can be made the existence of some facts, then they have to direct themselves properly. They have to make a finding. They cannot just proceed on an assumption that, "Well, this sometimes happens". This is crucial, this is in the area, again, of taking away someone's property. And you cannot just make an assumption. You have got evidence. You must assess it. You must weigh it. You must decide whether or not the case is established to your satisfaction or it is not established. And they have not done that. What they have done in the crucial paragraph is to say, "Well, regional stations can compete. They can", in other words, "Sometimes they do; sometimes they don't" (that is 7.93) and they have directed attention back to 6.101 where that point is emphasised. That is not good enough, not good enough in public law terms. They have to make a finding whether it is or it is not the case. And once they have made a finding, well, obviously the court, the Tribunal, gives them a very broad discretion. But they must make a finding, I mean, this is crucial. That is how I put it. It is not an attack on their reasonableness, it is an attack on the inherent logic of their decision.

THE CHAIRMAN: Let us suppose they would say, "Well, we find that there is a risk. We can't quantify it". Would that do?

LORD PANNICK: No. Not if you are going to take away someone's property. You have got to assess — this is a question of fact. They have got competing evidence. Bauer say one thing, my client says something else. They themselves acknowledge that sometimes regional stations compete, sometimes they do not. They make a finding in the Birmingham context. Why should they not be required on a matter of this significance, central significance to the conclusion they have reached, to make a finding? It is not even as if they say "Well, there is an overwhelming probability". That is not how they put it. They do not

say, "Well, you know, we can't make a finding of fact, but we'll say there's an overwhelming probability that Real and Smooth do compete". They do not even say that. What they say is, "Regional stations can compete (see paragraph 6.101) sometimes they do, sometimes they don't". And that is not good enough. Really is not good enough to be the foundation stone of a requirement that my clients divest not just the local station but one of the regional stations as well. It is absolutely crucial.

THE CHAIRMAN: I am having trouble fitting it into a legal framework. I could follow the logic of an argument where you say, "Well, even if you find X, you cannot reasonably conclude Y".

LORD PANNICK: Yes.

THE CHAIRMAN: I find it harder to see in the statutory scheme something saying — I am not saying this is this case, but suppose they said, "Well, we think there is a serious risk and we think that therefore X should happen", where does the statute say that that is wrong?

LORD PANNICK: The statute does not say. It is the principles of judicial review. The Commission has a discretion in making decisions about SLC and about divestment, but it must comply with the basic principles of judicial review, one of which is what is said by Lord Wilberforce in *Tameside*. There is also Lord Diplock.

THE CHAIRMAN: Let us just look at that. *Tameside* says if a judgment requires before it is made the existence of some facts, then you have got to look at the facts.

LORD PANNICK: Yes.

THE CHAIRMAN: Who is to say whether the fact is that there is competition or there is a risk of competition?

LORD PANNICK: The Commission are the ones who have to find the facts, but they have to direct themselves properly in relation to that. They cannot make a finding based purely upon an assumption in a context which they, themselves, recognise is sometimes true and sometimes is not.

Can we go to *Tameside*, because it may assist if we look at that. It is volume 2 of the authorities, tab 17. The passage I have already referred to is Lord Wilberforce at 1047, and I say the judgment here has not been made upon a self-direction as to the facts. That is my complaint, they have simply not made a finding, and a finding is crucial to the conclusion.

It goes on:

> "If these requirements are not met, then the exercise of judgment, however *bona fide* it may be, becomes capable of challenge."

It is not enough, it is their judgment, they have to make a judgment on the facts.

The other passage is Lord Diplock at 1065A

> "… it is for a court of law to determine whether it has been established that in reaching his decision unfavourable to the council he had directed himself in law and had in consequence taken into consideration matters which upon the true construction of the Act he ought to have considered and excluded from his consideration matters that were irrelevant … Or, put more compendiously, the question for the court, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?"

I say they did not ask themselves the right question.

THE CHAIRMAN: That sounds like an illegality challenge rather than irrationality challenge.

LORD PANNICK: In my respectful submission, it has often been said in judicial review cases that it is quite wrong nowadays to try to pigeonhole the grounds of judicial review into three or four categories. The question, as was said in one of the cases, I am not sure we have got it here, is whether something has gone wrong of a nature that justifies interference by the court. This is a serious error. In my submission, they really have not asked themselves the right question relevant to a crucial finding that they are making. If they are going to make the determination whether divestment of XS is not sufficient, dependent upon the position of the regional stations, they really have to address the evidence and make a finding about it given that there was competing material before them, and that is what they have not done. That is the first of the three complaints in relation to divestment.

We have a second complaint. Our second complaint concerns the report, the Decision, at para.9.79. This is on p.107 of the Decision. The Tribunal will see the assessment of remedies in Greater Manchester starts on p.106 at the top and it finishes up at 107 at 9.79. Our second complaint is about 9.79::

> "We therefore concluded that the divestiture of either Capital on its own, or Real XS in combination with either Real or Smooth, could form the basis of an effective remedy to the significant adverse effects we found in Greater Manchester and the North West.,"

It is the words "and the North West" that we are complaining about. That was not what they found. They did not find that there were significant adverse effects in the North West. One sees this if one goes back to the finding which is at p.71 at 7.95 - this is the contrast, this is the substantive part of the report:

> "*Conclusion*

> We therefore conclude that, in the absence of any countervailing factors, there are likely to be significant adverse effects in Greater Manchester as a result of the merger and that competition will be reduced across the North West."

That is very different from what is said in the remedies part at 9.79.

This is addressed in my friend's skeleton argument, and I want to take the Tribunal to the end of para.47, the penultimate page, second line, where they say:

> "If the wording of 9.79 might be said to be infelicitous, it nonetheless gives rise to no legal error …"

I will deal with that in a moment.

"Infelicitous" - we would prefer to use a different description, "fundamentally wrong". That is what 9.79 is. It is just wrong, and it is the concluding paragraph of a short section that addresses remedies in Greater Manchester. It wrongly suggests that the Commission had found - let me go back to it - significant adverse effects in the North West as well as in Greater Manchester. This matters because, as I have already said, if it was only Greater Manchester that we were concerned with, that the Commission was concerned with, the remedy, the divestment, is very simple. You require divestments of the only Greater Manchester station that RSL owned prior to the merger, which is Real XS. No, the Commission want more than that.

This is a highly material error, or at least may be a highly material error on the reasoning of the Commission. Indeed, the error does not just appear there in the report. That is bad enough. It also appears in the Remedies working paper. Can I take you to volume 3 of the materials bundle, tab 7. This is the Remedies working paper produced by the Commission, and there is one paragraph in that that I draw to the attention of the Tribunal. It is at p.872, para.109, the first sentence, where they say:

> "We provisionally conclude, based on the evidence above, that the divestment of either Capital on its own, or Smooth or Real in combination with Real XS would remedy the SLC in Greater Manchester and the North West."

They have never been concerned - never been concerned - with an SLC in the North West. That has never been the case.

So the error can be traced back in relation to remedies to a fundamental mistake, and I say that is an important mistake.

What is the legal test in relation to an error of this sort? There is an authority, Lord Neuberger in the Court of Appeal, the *FDA* case - *Regina (FDA and others) v. Secretary of State for Wok and Pensions and anor*. This is last year, Lord Neuberger MR presiding in

the Court of Appeal. It is a challenge to aspects of social security law, the details of which I am sure are very, very well interesting but need not detain us. It is the principle on p.461 stated by Lord Neuberger, with whom the other members of the court agreed, and can I invite the Tribunal's attention to para.67 where Lord Neuberger says:

> "Where a decision-maker has taken a legally irrelevant factor into account when making his decision, the normal principle is that the decision is liable to be held to be invalid unless the factor played no significant part in the decision-making exercise."

Then there is some authority cited. Then para.68:

> "Even where the irrelevant factor played a significant or substantial part in the decision-maker's thinking, the decision may, exceptionally, still be upheld, provided that the court is satisfied that it is clear that, even without the irrelevant factor, the decision-maker would have reached the same conclusion."

There is some authority given for that.

Then in 69:

> "There is, in theory at least, a possibility that, even if the court concludes that it ought otherwise to set aside a decision on the ground that a legally irrelevant factor as taken into account, it can none the less uphold the decision, if it is satisfied that it would be pointless to require the decision-maker to reconsider the question afresh, because he would reach the same answer. It appears to me that that is a theoretical point, at least in this case, because, if the Secretary of State cannot succeed in showing …"

I emphasise where the onus lies -

> "… if the Secretary of State cannot succeed in showing that the irrelevant factor was not a significant factor in his thinking or that he would have selected CPI as the relevant index anyway, it is hard to see how he could hope to persuade the court that there would be no point in setting aside the decision and requiring it to be reconsidered."

I say that this the applicable principle, and that may assist on the first of these three matters on divestment as well as the second.

We say, applying that, that there is no basis upon which my friend can hope to persuade this Tribunal that para.9.79 and the irrelevant matter that is there introduced played no significant part in the decision-making exercise in the sense it was insignificant. It is there, it is part of the concluding paragraph in a context where it was vital, as I have repeatedly

said, to the reasoning of the Commission, to establish that it was not good enough, on their view, simply to require the divestment of the local Manchester station Real XS. I say, applying Lord Neuberger's approach, that the Commission cannot establish that "exceptionally", that is the word used, the Tribunal can be satisfied that it is clear – that is the test – that even without this error, which one can trace back, the same conclusion on remedies, on divestment would have been reached. It is quite impossible.

On a judicial review test this Tribunal is not itself deciding merits. If there is a material error I say the only conclusion in this type of case, on these facts, is to quash the divestment decision in relation to Greater Manchester, and require the Commission to look at it again and do the job properly. That is our second complaint in relation to Greater Manchester.

There is one other authority relied on by my friend; I should just mention it. It is vol.2 of the authorities and it is tab 16A, it is the *Ermakov* decision, which my friends rely upon. *R v Westminster City Council, ex parte Ermakov*. The relevant passage is in the Judgment of Lord Justice Hutchison for the Court of Appeal. The relevant passage is at 315 at H where Lord Justice Hutchison says:

> "The court can and, in appropriate cases should admit evidence …"

- I emphasise "evidence" -

> "… to elucidate, or exceptionally correct, or add to the reasons; but should, consistently with Steyn LJ's observations in *Ex p Graham*, be very cautious about doing so. I have in mind cases where, for example, an error has been made in transcription, or expression, or a word or words inadvertently omitted, or where the language used may be in some way lacking in clarity. These examples are not intended to be exhaustive, but rather to reflect my view that the function of such evidence should be elucidation not fundamental alteration, confirmation not contradiction."

But we do not have any evidence here and, in any event, what my friend is seeking to invite the Tribunal to do is not to elucidate, it is to contradict, it is to cross out or amend words that the Commission has itself chosen to put in the report and which can be traced back, as I have said, to the earlier document as part of the section addressing the crucial question of remedies in Greater Manchester. So I say that really will not do.

The third point, and I will finish this by lunch time – the third point is much shorter. It is a point that is summarised in our skeleton argument. So you have the point if you, please, Members of the Tribunal, if you have our skeleton argument at para. 56, it is Ground 3(c), now 2(c). Our point is that the Commission erred in law in assessing the remedy proposed

by Global for Greater Manchester. The Commission merely, we say, compared it with a remedy that the Commission had determined would be acceptable, namely the disposal of Capital, and it failed to assess whether our proposal met the test in s.35(3) to (5) of the Act. If one goes to the Decision in relation to this one sees at para. 9.65, and I must be careful not to read out anything that is highlighted. Members of the Tribunal will see at the beginning of 9.65 that Global's position was that:

> "… if required, it would be prepared to divest all three stations (Gold, Real XS and Xfm)"

- they are three local Manchester stations, and that is what they were prepared to do. As I have said, repeatedly, on its face that would deal with the problem in relation to Greater Manchester stations, because the merged company would not continue to own RSL's only Greater Manchester station, Real XS, and Global would be divesting itself of two of its previous three Greater Manchester stations, that is Gold and Xfm. It would only be left with one Greater Manchester station, and that, of course, is Capital.

Why did the Commission reject that proposal? It rejected it for the reasons given at 9.73, which contains three sentences. This is what they say at para. 9.73 of the report:

> "We consider that based on the share of listening hours and revenue the divestiture of any one of Capital, Real or Smooth would appear to provide advertisers with a viable third choice by competition with Global and Bauer in Greater Manchester and the North West."

So that is their preferred solution. They say: "By contrast, Gold, Real XS and Xfm" they are the three Greater Manchester stations:

> "… individually or collectively do not have sufficient reach and revenue shares to provide an effective constraint in Greater Manchester."

Third sentence:

> "In Greater Manchester individually they are significantly smaller than Capital, Real or Smooth and although combined their share of listening hours is comparable with Capital's their revenue share is significantly lower."

Our complaint is this, our submission is the second and third sentences read together - because they are the only ones that address Global's proposal – mean that the reason why, in the Commission's view, the divestment of Gold, Real XS and Xfm was inadequate, was because their combined revenue share was significantly lower than Capital's, which was the preferred solution disposal of any one of Capital, Real or Smooth. So the analysis by the Commission, we say, was a comparative one, that is divestiture of capital will suffice, but

divestment of Gold, Real XS and Xfm would not suffice because their revenue share is significantly lower than Capital's. Our complaint is that the Commission have not applied the statutory test in sections 35 and 41 of identifying whether Global's proposed remedy met the statutory criteria, rather they have adopted the approach that their (i.e. the Commission's) solution would satisfy the statutory test, and Global's proposal was not as good as the Commission's proposal. That is how we summarise it in our skeleton argument – if I could just take you back to that. We say the relevant question for the Commission was not whether Global's remedy proposal involved a lower revenue share than a divestment which the Commission judged was suitable, it was whether Global's proposed divestment met the test in the Act, therefore they misdirected themselves. There is no independent analysis by the Commission of what level of revenue share a divestment proposal would need to meet in order to be an effective constraint. So our complaint is that their approach was comparative by reference to what they thought would suffice and did not involve an independent assessment by them of the adequacy or otherwise of our proposed divestment on the basis that there was an SLC.

It is one minute to one, I do not wish to inhibit the Tribunal, I am very happy to seek to answer any questions, but that is our case, those are the points that we want to raise for the consideration of the Tribunal as to why we say the Commission erred, and either there should be a remedy quashing the whole of the report insofar as it is unfavourable to us if we are right on Ground 1, or a quashing of the divestment remedy but only in relation to Greater Manchester, because that is all we are complaining about on the remedy part of it, if we are right on the three strands of ground 2.

THE CHAIRMAN: When you say "the three strands" any of the three would suffice.

LORD PANNICK: Any of them, yes. They are separate. They are not cumulative, they are distinct and, as I said in opening, Global has many other criticisms of the Commission's approach and conclusions but we recognise that this is not an appeal body and we sought to confine ourselves to what we say are reviewable errors on a judicial review approach.

Those are my submissions. I am very grateful for your patience.

THE CHAIRMAN: Notwithstanding Tribunal interventions, you have kept admirably to time. 2 o'clock.

(Adjourned for a short time)

THE CHAIRMAN: Mr. Beard.

MR. BEARD: Well, I will unadventurously start with ground 1. As originally pleaded, the allegation from Global was that the Competition Commission had misdirected itself as to

the meaning of “substantial lessening of competition”, in that it had interpreted "substantial" to mean anything more than merely “just discernible” or merely “trifling”. We dealt with that in the defence and now, of course, the alternative argument is that the Competition Commission was obliged in law to adopt a criterion of “considerable”, “large” or “weighty” lessening of competition as a synonym for "substantial". But the truth is that the Competition Commission just did not engage in any sort of game of identifying synonyms for "substantial". It simply applied the concept to the facts and assessments it made in this case in the light of the statutory framework. It was plainly entitled to reach the conclusion it did on the basis of its analysis of all the circumstances and it is going to therefore be important not only to look at some of the legal background, but it is also going to be important to look at what the Competition Commission actually did a little bit in the report. Indeed, as we will see, Lord Mustill said as much in *South Yorkshire Transport*. So, as I say, I will go to the report, but before I do so I will go back to the legal scheme. If I may, I will go back to the beginning where Lord Pannick started, which is the statutory scheme, so, authorities bundle 1 tab.1, if you could just turn up section 22. I am sorry that you will have seen some of this material before. I will re-read some of it, but I just want to take you through certain additional parts and it is easiest to do this by reference to the statute. So, section 22 this is the “Duty to make references in relation to completed mergers”. We do not have the parallel provision in relation to anticipated mergers, but you get a similar control structure in relation to mergers that have not yet occurred.

> “OFT [so this is the first stage] shall, subject to subsections (2) and (3) make a reference to the Commission if the OFT believes that it is or may be the case that …
>
> (a) a relevant merger situation has been created; and
>
> (b) the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services”.

So, you have got two thresholds. You have got to identify a relevant merger situation and that the situation has resulted or may be expected to result in a substantial lessening of competition and the overall test is a “may” test. The reason I just emphasise that is because *IBA* was actually concerned with the interpretation of this strange “double may” test for the OFT and that was what the court was there dealing with.

But whilst we are in section 22 it is worth just going on to subsection (2)

> “The OFT … may decide not to make a reference under this section if it believes that —

(a) the market concerned is not, or the markets concerned are not, of sufficient importance to justify the making of a reference to the Commission"

Now, Lord Pannick when he dealt with some of the arguments that have been set out by the Competition Commission about the interpretation of "substantial lessening of competition", said, "Well yes, but these exceptions are to do with the characteristics of the merger". They are not. They are to do with the characteristics of the market that you are concerned with and the seriousness or the importance of the markets concerned.

And then the second exception is:

"(b) Any relevant customer benefits in relation to the creation of the relevant merger situation concerned outweigh the substantial lessening of competition concerned and any adverse effects of the substantial lessening of competition concerned".

So again, you are not just looking at some sort of formal characteristics of the merger, you have actually got a statutory scheme that says, "You, apply the 'double may' test of OFT with relevant merger situation and SLC, but there are going to be cases where the markets concerned are not sufficiently important or the consumer benefits that flow are such as to outweigh the concerns you have, well, you should not refer". In other words, if it is not important or there are countervailing benefits you do not have to get into second stage scrutiny". Obviously, I anticipate the submission I am going to make in a moment, which is you do not need to read any of the terms involved in RMS or SLC at a high level for the supposed policy purpose for which Lord Pannick suggests they should be read down because, actually, Parliament has been doing this sort of thing here by including specific exceptions.

There are also a set of provisions about no reference being made in relation to certain formal situations, for instance another reference had already occurred. So you could have a situation where an anticipated merger reference had been made, it would obviously be pointless for there to be then a completed merger reference if the parties had gone on and actually consummated a proposed transaction.

I am not sure that anything particular requires to be dealt with furthermore in section 22, although I do note, down at the bottom of section 22(7), that this statute does not get itself into the same tangle that the framework regulation did in *Assange*. It makes sure that decision-making authorities are properly defined for separate stages.

But what I do then want to move on to is section 23, because section 23 is unpacking that concept of relevant merger situation that is one of the key thresholds along with SLC for a reference. And so 23(1):

"For the purpose of this Part, a relevant merger situation has been created if —

(a) two or more enterprises have ceased to be distinct enterprises at a time or in circumstances falling within section 24"

We are not blessed with section 24 here. What it does is, it says two businesses, two enterprises, need to have come together within the past four months, effectively. So it builds in a temporal constraint as well. And then it says:

"… and (b) the value of turnover in the United Kingdom of the enterprise being taken over exceeds £70 million".

Now that is a criterion that refers to the nature of the merger, because it is looking at the scale of the acquired business. But again, although it looks at the nature of the merger, ie the acquired enterprise, again it is effectively saying, "We are not going to have scrutiny of very small mergers, here".

Then 23(2):

"For the purposes of this Part, a relevant merger situation has also been created if —

(a) two or more enterprises have ceased to be distinct enterprises at a time or in circumstances falling within section 24 [so again it is the four month thing]; and

(b) as a result, one or both of the conditions mentioned in subsections (3) and (4) below prevails or prevails to a greater extent".

I am just going to focus on (3) because (3) is goods and (4) is services, but they are structured in the same way. Subsection (3) says:

"The condition mentioned in this subsection is that, in relation to the supply of goods of any description, at least one-quarter of all the goods of that description which are supplied in the United Kingdom, or in a substantial part of the United Kingdom —

(a) are supplied by one and the same person or are supplied to one and the same person; or

(b) are supplied by the persons by whom the enterprises concerned are carried on, or are supplied to those persons".

Now, it is not easy drafting to parse, but what effectively is being done and what it is referred to as a test is a "share of supply" test, and what it is saying is if these two enterprises cease to be distinct and it means that either together there is a supply of goods of more than 25 per cent of any description in the UK or a substantial part of the UK or one or other of them already had more than 25 per cent but there is an incremental uplift, then that test is fulfilled.

The reason again I emphasise this is because here Parliament is putting in place a threshold that looks at share of supply in a market. Now, you might say, "Well, that is a characteristic of merger. It depends what the enterprises do because if they are involved in communal shares of supplies or shares of supplies of the same goods, then that is just a function of the merger". But we say that is looking at it too narrowly. What this is doing is, again, laying down a threshold in the statute that says, "Well, if you're not crossing 25 per cent you've really not got a great deal of market power. So there is not a big issue here in competition terms, so we are not interested in scrutiny of those sorts of mergers".

So, again, the structure we have in relation to the statutory scheme builds in a set of criteria where you do not catch too many mergers which are unlikely to give rise to concerns. And the share or supply test is one that is actually looking at a form of market power. Now, I know good economists will say, "Well, you know, looking at market shares at 25 per cent, particularly when there is a loose definition of a market here is a very poor substitute for identifying market power", but that is the inevitable trade-off between the precision of good economics and the necessity of having some sort of lines in law. So, 23, if we then move on, if I may, to — I will just mention we have got 30 in there which is to do with relevant customer benefits that I referred to as one of the countervailing tests in 22. But if we move then on to 35, this is phase 2. So, what we have got here is a situation where the thresholds in section 22 or section 33 have been met, so that a reference has been made. And then when the reference has been made, the Commission is charged within six months to provide a report, and the statute structures what questions it has to answer. And 35(1) says: "Subject to subsections (6) and (7) and section 127(3), the Commission … shall, on a reference … decide the following questions [so this is "decide" the following questions. With the OFT it was "may be the case that". Here it is "decide"]

> (a) whether a relevant merger situation has been created [so precisely the same language as section 22]; and
>
> (b) if so, whether the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services".

Precisely the same language. So what you have is a scheme that has been built so that you have a first phase process which has certain exceptions, that does not unnecessarily catch small scale mergers or ones that are to do with markets that are not significant, but carries the same test across into the substantive test to be carried out by the authority that carries out an investigation. There is no reason to treat any of the terms differently between

section 35 and section 22 and it is no part of Global's case to do so. And this of course undermines the proposition that was put forward in Global's skeleton that somehow you can distinguish jurisdiction and non-jurisdictional uses of the term. It becomes an unnecessary semantic argument here because what you have is a scheme that is designed to ensure that it catches what may be of concern in terms of lessening of competition that will impact on customers and consumers in the UK.

If you do not cross the first threshold you do not go into the longer scrutiny, but if you go into the longer scrutiny it is because there are concerns about those sorts of matters. Again, that will matter for consideration of Article 1, protocol 1, as I will come on to.

35(2) sets out that there is an anti-competitive outcome if (a) a relevant merger situation has [resulted] or may be expected to result, in a substantial lessening of competition", so it is actually just taking the definition or the reference in 1(b) and calling it an anti-competitive outcome because that is a term that is then used elsewhere. And then (3) I will just stress for a moment:

> "The Commission … shall, [and 'shall' is obviously emphasised by Lord Pannick] if it has decided on a reference under section 22 that there is an anti-competitive outcome (within the meaning given by subsection (2)(1)), decide the following additional questions —

So, it is mandated to consider the questions and decide them. And then the questions are:

> "(a) whether action should be taken [not <u>what</u> action should be taken but <u>whether</u> action should be taken] for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effect which has resulted from, or may be expected to result from, the substantial lessening of competition".

And I stress "at this junction" there, because in his submissions Lord Pannick said, "Well, 'adverse effect', it is referred to in the competition guidance as being a key consideration for analysis. You can kind of treat them in the same way as being 'the substantial lessening of competition'". You cannot. There is a separate step. The question that the Competition Commission has to ask is whether or not there is a substantial lessening of competition, and then it is asked to take action by way of remedy to decide whether to do so. Remedying the SLC itself or the adverse effects that flow from it, two issues, and of course it naturally follows that if you think, if you have concerns that a particular arrangement, a particular merger, will give rise to adverse effects, that analysis may well assist you in deciding whether or not there is an SLC in relation to that merger, and that is all that the guidance is

saying. It is not conflating the two terms. It is saying that "If you have got a market structure by way of merger that gives someone market power so that they will be able to exploit customers and consumers, you might expect that you would have concerns about adverse effects on customers and consumers. If you think that because of what is going on there would be adverse effects on customers or consumers, or they are likely to arise, that tells you that there might well have been an SLC identified here, and that is what the Guidance is saying, and I will come back to that. In law, there is a distinction, and it is important to maintain.

So two points from there: whether action should be taken and the distinction between SLC and adverse effect.

Then (b) is whether it should recommend the taking of action by others. This is often to do with asking other Governments to do things.

Then (c), in either case, if action should be taken what action should be taken and what is to remedied, mitigated or prevented?

Again, it is reinforcing the fact that this is not a mandatory scheme of taking action, it is a discretionary scheme of action. That, of course, is critical and wholly flaws Lord Pannick's account of Article 1, Protocol 1, here:

> "35(4) In deciding the questions mentioned in subsection (3), the Commission shall, in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and any adverse effects resulting from it."

So what we are talking about here is reasonableness, practicability and, of course, as is recognised explicitly in the report throughout the Guidance, those remedies, if they are going to be put in place, the action has to be proportionate.

So I will move on to s.41, which is on p.19. This is the duty to remedy completed or anticipated mergers. To be fair to Lord Pannick, I do not think he says this suddenly transforms what was dealt with in s.35 into a mandatory obligation to take action, and it plainly could not do so. What it does is when you have put in place in your report, you have then got to act on it. Of course, this legislative scheme replaced a legislative scheme under the Fair Trading Act where what used to happen was the MMC would make a report, it would then go to the Minister and the Minister would execute the consequences of the decisions taken. That changed with the advent of the Enterprise Act, and in cases outside public interest cases, it is the Competition Commission dealing with merger control, that not only makes the decisions in its report but then takes the action as well.

Section 41 is dealing with that, and it says:

"(1) Subsection (2) applies where a report of the Commission has been prepared and published under section 35 within the [relevant] period …"

That is six months. There is a short extension period but generally six months -

"… and contains the decision that there is an anti-competitive outcome."

Going back to that provision in 35, anti-competitive outcome is an SLC finding.

"(2) The Commission shall take such action under section 82 or 84 …"

which are the powers that confer the ability to impose remedies, and so on -

"… as it considers to be reasonable and practicable -

(a) to remedy, mitigate or prevent the substantial lessening of competition concerned …"

so that is one route -

"(b) to remedy, mitigate or prevent any adverse effects which have resulted from …"

So again separation of the two concepts.

"(3) The decision of the Commission under subsection (2) shall be consistent with its decisions as included in its report by virtue of section 35(3) …"

We have already seen that 35(3) is those relevant questions in relation to what action should be taken, if any. Lord Pannick referred to those as being substantive decisions. I do not think that is quite correct. It is, as we have seen, the question as to whether or not to take action and, if so, what.

There is a caveat here:

"… unless there has been a material change of circumstances since the preparation of the report or the Commission otherwise has a special reason for deciding differently."

So you have to follow the report unless there has been a change of circumstance. Those are pretty rare. The one time it has occurred in recent years was in relation to BAA being required to divest Stansted Airport, and in that case there was litigation that challenged the outturn of that Decision and the time taken for the litigation meant that the market situation had changed, so there had to be a reconsideration.

THE CHAIRMAN: Can I just pause here? If the Commission thinks that it is reasonable and practicable to do something to deal with the substantial lessening of competition, does it have to?

MR. BEARD: If it considers that it is reasonable and practicable to do so, and the outcome would be an effective remedy for a substantial lessening of competition, it is difficult to see in what circumstances it could appropriately not act and say, "We have identified that there is a problem here, we have got an effective and proportionate remedy, but we are not going to do anything about it". The idea that that would have arisen in the s.41 context is rather difficult, because that would be an issue which would have been considered in the report in answering the s.35 questions, of course. Section 35 includes the same reasonableness, practicability and comprehensive criteria.

THE CHAIRMAN: I am not sure how much this matters in the end, but if one goes back to 35, 35(3), as you say, has the "whethers", you have to decide whether you should do something. Then 35(4) says you are supposed to have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition.

MR. BEARD: Yes, that is a "have regard" requirement. I just anticipate the situation where the conclusion you hypothesise, Sir, is identified in a report, nothing is then done and then the Competition Commission appears before this Tribunal faced with a judicial review challenge by another party, a competitor, who says, "You should have done something here, it was irrational for you not to have done anything". At that point, if you have identified that there is a reasonable, practicable, effective remedy, you have the power to do so. You are going to need to be spelling out some sort of reason why you have not gone down that route in your report.

That does not tell you about the nature of the remedy, because of course there is a vast range of remedies that can be put in place, from requiring companies to provide information when they makes sale to, at the other end of the scale, divestments, with all sorts of behavioural controls in between. So there were all sorts of issues that would occur there. I am concerned not to go too far into the hypothetical, but I hope that assists without necessarily being an absolute answer.

I will not go into 82 and 84. They are the provisions that provide final powers to the CC. What I would ask you to turn to is the reference section, s.106, which is at p.27. What is interesting about this is, because of the concepts that are in play, Parliament decided that there would actually be a requirement to publish guidance. So 106(1) says:

> "As soon as reasonable practicable after the passing of this Act, the OFT shall prepare and publish general advice and information about the making of references by it under section 22 or 23.

(4) The Commission may at any time published revised, or new, advice or information.

(5) Advice and information published under this section shall be prepared with a view to -

(a) explaining relevant provisions of this Part to persons who are likely to be affected by them; and

(b) indicating how the OFT or (as the case may be) the Commission expects such provisions to operate."

So there was a statutory scheme for putting in place the Guidance as well.

THE CHAIRMAN: Just pausing there, is it accepted that the advice has no significance in terms of the construction of the Act?

MR. BEARD: That it has no significance, I think that would probably be putting it rather high when you have got a statutory scheme that suggests that guidance must be published. In the end it must be a court to determine the interpretation of a statutory word, that is right, and therefore the OFT or the CC's Guidance is not binding. To say it is irrelevant I think would probably be taking it too far.

THE CHAIRMAN: Let us take that example. Suppose that the Guidance expresses a view as to the meaning of a particular word in the statue, that may be very interesting in the same sense that counsel's submissions are very interesting, but that is it, is it?

MR. BEARD: I think, even with respect to Lord Pannick, the Guidance is more interesting than counsel's submissions in this regard, because the Guidance is a piece of work that has been done subject to consideration and consultation about how it is that those that are expert and those that are actually applying these terms should be applying these terms and promulgating that understanding more widely. Therefore, I think more weight has to be given to the Guidance than mere counsel's submissions in this regard. That does not suddenly change the legal hierarchy, but I think, yes, it does have greater significance than counsel's submissions. I think otherwise it is difficult to understand why Parliament was bothering to require that sort of action.

Let us then move on to the interpretation of the term "substantial" in "substantial lessening of competition". The first thing just to note, although Lord Pannick moved over it rather swiftly, is that there is a relatively strong presumption that where the same word is used in more than one place in an Act then it is presumed to mean the same thing. We have got some copies of the extract from **Bennion** that we cited in the skeleton that did not quite make it into the bundle. I am not going to go through those, but I think the proposition is

relatively uncontroversial. It is not an irrebutable presumption, but undoubtedly some legwork needs to be done to show why it is that where you have a scheme which uses the term "substantial", first in relation to the lessening of competition, and secondly, in relation to the definition of the relevant merger situation test, both of which are criteria that are applied by the OFT and the Competition Commission, you should somehow be adopting a different meaning for each. Notwithstanding that, Lord Pannick has stressed on behalf of Global that actually the context of the legislation suggests that there should be a high threshold meaning for "substantial" when it is in "substantial lessening of competition", and he holds that in contrast to the meaning of "substantial" as interpreted by Lord Mustill in *South Yorkshire Transport* in relation to the meaning of "relevant merger situation". These are, of course, adjacent sections in the Act, s.22 and s.23.

THE CHAIRMAN: You say that "substantial" here has the same meaning as in *South Yorkshire*?

MR. BEARD: We are saying that what actually Lord Mustill said was you were not looking for a particular point on a register, what he was actually saying was there is a spread of meanings, it is clearly above the purely nominal, no doubt about that. After that you do not have to identify some particular point. When you look at what constitutes "substantial" in terms of "substantial lessening of competition", you look at all the circumstances in which you are applying it, and it does afford the decision maker a broad discretion as to where "substantial" lies on his notional spectrum. I will come back to Lord Mustill.

Lord Pannick, I think, carefully did not take you to a passage in that judgment which identified why that was the appropriate approach.

As I say, that approach is reinforced by the fact that drawing out this notion of a distinction between a jurisdictional and a non-jurisdictional meaning does not help. Trying to refer to the turnover and share of supply thresholds by Global means that when it is saying you have to have this substantial lessening of completion threshold set high because otherwise you will be catching mergers that really you should not be catching actually is a whole different mechanism that should be operating there, both in relation to turnover and share of supply and in relation to the exceptions that already exist in relation to the reference mechanism.

I pose this question rhetorically, and I will come back to it: why would Parliament have acted in such a way as to leave a position where a lessening of competition, which could have adverse effects, would be left without any remedy, or rather a potential remedy, under this scheme of merger control? Nowhere does Global engage with that problem. What we are talking about here is ensuring that our domestic merger control scheme is able to

scrutinise mergers where there is a real concern that they may have the effect of lessening competition and potential adverse effects on customers.

I think in that context an important part of Lord Pannick's argument become the idea that there was a natural flow-through from any identification of an SLC to a draconian remedy, as he refers to it, the idea of divestment. First of all, it is whether there should be taken. Sir, you asked about whether there could be circumstances where there is no action to be taken, it may be that there are, and I will actually identify in the Guidance circumstances where you do not for particular reasons.

To say that it leads to a most intrusive imposition on a person's property rights is simply not right. It does not do that, it leads to consideration of those matters.

At this point, and before going back to article 1, Protocol 1 in more detail, it is perhaps just worth turning up *South Yorkshire*, if I may – authorities bundle 2, tab 14. Lord Pannick took you to the passage that indicates that s.64 of the Fair Trading Act mirrored what is effectively s.23 of the Enterprise Act. He also took you to p.29 and read from that part of the Judgment. I am not going to re-read it. It is of course recognised that at term like substantial can have a wide range of meanings. Emphasis was placed by Lord Pannick on the adoption of the expression by Lord Justice Nourse of "a threshold being worthy of consideration for the purpose of the Act."

There are two points to make in relation to that. He refers to that as setting a point on a spectrum "worthy of consideration for the purposes of the Act" is not setting some precise point on a spectrum at all. It is a matter of assessment by a specialised body what is worthy of consideration in looking at all of the circumstances. Of course, that is why when Lord Mustill says: "Nevertheless, I am glad to adopt, as a means of giving a general indication where the meaning likes within the range" that he adopts Lord Justice Nourse's approach.

Then, what is interesting in the next section which Lord Pannick did not read through, is that actually in his report the Commission had applied, or articulated the relevant test as being that it was identifying an area that is "something more than merely nominal" – that was the wording it used.

So the Commission obviously had something of an uphill struggle in that case, given that Lord Mustill was saying something more than merely nominal is the wrong test, you have gone beyond that spectrum of meanings that is acceptable for this. Lord Mustill then says that they may have said that but that was not actually what they did, and so he goes on and articulates that, and it was actually why I think the MMC (as it then was) lost in the court below because they took the report very much at face value and Lord Mustill did not.

He then goes on and explains why, in fact, the analysis, if you turn over the page to p.30:

> "As I read it this passage embodies an analysis much wider than the consideration simply of whether the reference area was larger than de minimis; and the discussion in the remainder of Chapter 2 bears this out …"

So actually, Lord Mustill is very concerned not to get carried away with some sort of medieval theological debate about the precise point on some hypothetical spectrum where you put the term substantial. He is saying it is a broad concept that affords a decision maker a broad range of discretion and, actually, even if you write it down wrongly, I am not worried about that, I am interested in what you actually did.

That perhaps then explains the bit that was then quoted by Lord Pannick at just under E:

> "Accordingly, although I appreciate the reasons why in the courts below it was held that the commission had entirely misunderstood the content of the words 'a substantial part' I have come to the conclusion that the report does not disclose this fundamental mistake."

Let us just put that in context. Then we get into p.31 where Lord Pannick emphasised fairly heavily as regards to geographical extent the reference to a substantial part of the UK is enabling and not restrictive, and he places a great deal of weight on that. The difficulty we have with this distinction about enabling or not restricting, it is difficult to work out how it carries over to different components of parts of the relevant test, for example, as applied by the OFT when it is deciding whether or not to refer and, indeed, when one is talking about what Parliament actually had as a purpose for the Act. Lord Pannick says that substantial lessening of competition should be read restrictively, and you, Sir, asked "restrictive of what?" and I am still not entirely clear restrictive of what it would be.

When one looks at the purpose of the Act, which is to enable proper scrutiny of mergers which may give rise to concerns, and therefore afford the ability of the State to take action in relation to them, there is no real reason why "restrictive" is more appropriate in relation to any component of those tests in the structure that I have referred the Tribunal to.

It says: "Like the asset value criterion", so this is the turnover threshold effectively in the present scheme.

> "The epithet 'substantial' is there to ensure that the expensive, laborious and time consuming mechanism of a merger reference is not set in motion if the effort is not worthwhile."

We say that is absolutely right but that does not tell you that somehow you move 'substantial' way up this putative scale or that you play this semantic game of pin the tail on the spectrum anywhere on the particular range.

Then, when we go on to p.32 there is a reiteration of the formulation of Lord Justice Nourse, already mentioned as a general guide. To make the geographical function, he says, is:

> "… the part must be 'of such size, character and importance as to make it worth consideration for the purposes of the Act'."

There is a sort of parallel here, I suppose because what we are looking at is lessening of competition that is suspected such as would be worthwhile for potential remedy. But I do not want to pin them too closely together, because that would be me falling into the trap of being too refined about precisely how you define "substantial" and you do not need to.

Actually, the answer is given at the bottom of the page. The passage that Lord Pannick did not refer you to, just under H:

> "Even after eliminating inappropriate senses of 'substantial' …"

So that is perhaps the bottom end of nominal and just above nominal, and at the top end complete and just below complete:

> "… one is left with a meaning broad enough to call for the exercise of judgment rather than an exact quantitative measurement."

That is the conclusion of the *South Yorkshire Transport* case. That is why we say that this exercise in semantic definition that Lord Pannick and Global have engaged in is the wrong exercise, we are not playing a parlour game of trying to find new synonyms for a term.

It is an assessment to be taken in the round.

If we could then go to authorities bundle 1, section A, tab 5. I just want to pick up points made by Lord Pannick about this guidance. This was guidance that has been promulgated pursuant to the requirements of s.106, it is joint OFT and Competition Commission guidance. If we go to p.72, which is in Part 4 – "A substantial lessening of competition". Paragraph 4.1.1 – SLC is not defined in the Act. 4.1.2:

> "Competition is viewed by the Authorities as a process of rivalry between firms seeking to win customers' business over time by offering them a better deal. Rivalry creates incentives for firms to cut price, increase output, improve quality enhance efficiency, or introduce new and better products because it provides the opportunity for successful firms to take business away from competitors, and poses

> the threat that firms will lose business to others if they do not compete successfully."

That is what the authorities quite properly say – and this is not some radical new economic interpretation of the concept of competition – they say a substantial lessening of competition is focused upon the loss of rivalry. That is what SLC is to do with in their understanding. Then 4.1.3:

> "The Authorities will consider any merger in terms of its effect on rivalry over time in the market or markets affected by it. Many mergers are either pro-competitive or benign in their effect on rivalry. But when levels of rivalry are reduced, firms' competitive incentives are dulled, to the likely detriment of customers. Some mergers will lessen competition but not substantially so because sufficient post-merger competitive constraints will remain to ensure that rivalry continues to discipline commercial behaviour of the merger firms. A merger gives rise to an SLC when it has a significant effect on rivalry over time."

So we are straying into using other terms here, but nonetheless it is identifying how the concept of rivalry is key here.

> "… and therefore on the competitive pressure on firms to improve their offer to customers or become more efficient or innovative."

And this is the pay-off, this is the bit that Lord Pannick emphasised:

> "A merger that gives rise to an SLC will be expected to lead to adverse effect for customers. Evidence on likely adverse effects will therefore play a key role in assessing mergers."

We do not take issue with any of that, but the key concept for SLC is rivalry, loss of rivalry. The reason that is important is because that was the focus of the report, and so when Lord Pannick referred to bits in the report where the discussions were concerned with movements from 3 to 2, or 2 to 1 in areas, those are the biggest losses of rivalry you can have in markets. So there is a slight concern here that all this theological discussion about substantiality is taking no one anywhere, because if the key concept is loss of rivalry, and the Competition Commission has conscientiously gone through and said that we see the way that this market structure works as being that in particular areas your closest competitors are going to be the ones you are merging with, you just do not get a bigger loss of rivalry.

THE CHAIRMAN: As you mentioned a moment ago one does see here the word "significant".

MR. BEARD: Yes.

THE CHAIRMAN: At first blush one might think that 'significant' is less than 'substantial'.

MR. BEARD: I am not sure one can reach that conclusion in that context. There is not a neat order. The debate between yourself and Lord Pannick focused on whether significant was a threshold that if that was the only threshold to be met somehow divestment remedies would be prohibited by Article 1 of Protocol 1. It was just striking sitting here that European merger control applies the significant impediment to effective competition test. I think it would be news in Brussels if, in fact, the Strasbourg Court could strike down all of merger control because it is wrongly operating so long as a divestment remedy gets put in place. It just does not matter. This is medieval theology, or some terrible, terrible branch of philosophy and linguistics, but nevertheless, none of it is good trying to distinguish between substantial and significant in these contexts, and that is not the exercise that is appropriate. It is not the exercise that Lord Mustill suggested, and it is not the exercise that the statutory scheme either warrants or requires.

If I just briefly pick up that point though about rivalry. What we are focusing on here, and the reason I am mentioning it is because if substantial lessening of competition is to do with loss of rivalry, then those concerns about how you assess lessening of competition must be considered in relation to points on rivalry which I will pick up, as to whether or not we approach that in the right way, when I come to the report. Before I do that, just on Article 1 of Protocol 1, we have responded to this issue in the Defence at paras. 50 to 53, but Article 1 of Protocol 1 imports an obligation to ensure that if remedial action is taken in respect of a relevant merger situation it is proportionate, and that does mean proportionate to the SLC and its adverse effects, proportionate to the costs that will be imposed. Indeed, there is a whole section in the report, in the Remedial chapter, chapter 9 from 9.191, that talks about proportionality of remedies, and that is in all reports where remedies are raised proportionality issues are at the forefront.

But when it comes to actually applying Article 1 of Protocol 1, it just does not add anything to this analysis because you have peaceful enjoyment of property subject to control of use in the general interest, or deprivation in the public interest and subject to law. So when we look at the process of scrutiny, that is not impinging upon your peaceful enjoyment and it is not deprivation of use. When it comes to remedial actions of course behavioural remedies can control your use of property and to that extent they could be interfering with your property and they will have to be proportionate. That is what the Competition Commission recognises when it does the remedy exercises, they have to be proportionate. And when it comes to deprivation of property, i.e. divestment, then again they have to be proportionate.

But that point is relevant to consideration under section 35(3) as to relevant remedial action and under section 41(2) but it does not operate to somehow constrain at a prior stage the scope of supervision that may be offered by regulatory authorities. It is nothing to do with the substantial lessening of competition test, it is to do with the proportionality of the remedy that is going to be put in place.

That of course means that you do not end up with the situation where you have got a concern about a lessening of competition that may be such as to cause real detriment, but somehow it can drop out of the scheme of scrutiny but at the same time if you have got concerns about a lessening of competition it will get reviewed on this long review by the Competition Commission who may conclude it is not significant and there is no SLC, or that it is not reasonable or practicable to take steps in relation to these matters, and I will come back if I may to some of the remedies guidance when we touch at the end. No, if I may, it is probably easiest just to pick it up now. If we could look at authorities bundle 1 at tab.7, p.178. So, this is further guidance that is being put in place. If one turns on, 178 is the start of it, and it sets out the objectives of remedial action. I will not read all through it, but if one just looks at it, it spells out how if an SLC has been identified you have to decide whether or not to take action, whether action should be taken by others, and then 1.7:

> "The Act requires that the CC, when considering these remedial actions, shall 'in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the [SLC] and any adverse effects resulting from it. To fulfil this requirement the CC will seek remedies that are effective in addressing the SLC and its resulting adverse effects and will then select the least costly and intrusive remedy that it considers to be effective".

So, it is effectively (I am sorry, that is the wrong word to use in this context) there are two stages in the overall scheme of consideration of remedies: "Effectiveness", which is then moved on to; and then over the page, "The cost of remedies and proportionality". And just in partial answer to the question you posed earlier, sir, at 1.12 if one goes down the page, this is under "The cost of remedies and proportionality":

> "In exceptional circumstances, even the least costly but effective remedy might be expected to incur costs that are disproportionate to the scale of the SLC and its adverse effects …. In these exceptional circumstances, the CC would not pursue the remedy in question".

But I am conscious that it says "exceptional circumstances", which is why I was cautious about my response to you earlier. If one then moves on (I am going to try and just move

along relatively quickly here) you have the summary of the remedies process, but if one then goes on to choice of remedies, on p.185, you have a flow chart referred to as "the universe of merger remedies" so the remedies universe is made of structural remedies, behavioural remedies, and recommendations on regulations and conduct, and then within structural remedies you have got divestiture and prohibition. Of course it is just worth emphasising here when we talk about divestiture and prohibition, divestiture was where you have completed a merger, prohibition is where you have not. And the reason we mention this is because Lord Pannick and Global have emphasised this notion that the importance of Article 1 of Protocol 1 and they have quite fairly accepted that the same criteria must apply in section 22 cases and section 33 cases, and all we have said is in section 33 cases you do not have any property rights, not in the orthodox sense. We are not getting into some high falutin' discussion about how Article 1 ofProtocol 1 applies in these circumstances. But at that point you are intending to merge with someone and acquire them. You have not actually done it. And so there are all sorts of questions about precisely how it is anticipated it works there. We leave that to one side. We are not getting into that today. But the point that is important is, Global having accepted Article 1 Protocol 1 must apply symmetrically in those sorts of circumstances, it is just worth stressing that when you buy an enterprise and you do it subject to merger control, you know that there is a legal scheme out there at domestic level and at European level that can say, "If we have competition concerns, you are going to have to divest", and conditional rights under the case law in relation to Article 1 of Protocol 1 are treated differently from absolute rights. But we do not need to get into that. We have not supplied you with acres of ECHR related case law. We did not think it was actually necessary for these purposes. Nonetheless, remedies universe, structural remedies, behavioural remedies and those recommendations. And then if we turn on, it works its way through those various heads and then we get to the "Selection of remedies" bit that Lord Pannick read out, which says, 2.13:

> "… the choice of remedies will reflect the circumstances of each inquiry and the CC will … select remedies that will effectively address the SLC and its resulting adverse effects and that are the least costly, effective remedies.
>
> 2.14 In merger inquiries, the CC will generally prefer structural remedies, such as divestiture or prohibition, rather than behavioural remedies because:
>
> > (a) structural remedies are likely to deal with an SLC and its resulting adverse effects directly and comprehensively at source by restoring rivalry".

Well, it is just a statement of the completely obvious. If a merger results in a loss of rivalry, the most straightforward way of restoring that rivalry is to undo the merger. That is a divestment if you have completed the merger, or a prohibition if you have not. It is no more than that. It has been the subject of consideration and case law. Can the CC use this as a starting point? Yes it can, but it is not the end point. You then do have to carry on and consider how it is that the alternative remedies that might be put forward; less intrusive remedies potentially, although behavioural remedies can be highly intrusive, would instead be appropriate. And it is just worth casting an eye down paragraphs 2.15 and 2.16 where it recognises that in the great majority of merger inquiries, structural remedies will be found. There are a set of conditions that will normally apply where behavioural remedies are preferred, for instance the SLC might be expected to be in short duration. And then it is the emphasis, this 2.17:

> "… the CC will prefer to use enabling measures that 'work with the grain of competition such as access remedies",

So, it will consider other sorts of remedies that fit together as part of a package to go with the grain of competition such as access remedies. So it will consider other sorts of remedies that fit together as part of a package to go with the grain of competition.

But in all of this, the exercise is one of proportionality and — just so that we do not need to come back to this later — if we could turn on to p.190 "Divestiture and intellectual property remedies", when considering what to require divestment of in completed merger cases, the Competition Commission obviously considers relevant divestiture risks. If the proposed divestiture package is not going to work to restore rivalry and therefore avoid the SLC, then it is not an effective remedy. And it is just worth noting, in 3.3, the three types of risks that are identified.

> "Composition risks — these are risks that the scope of the divestiture package may be too constrained or not appropriately configured to attract a suitable purchaser or may not allow a purchaser to operate as an effective competitor in the market".

And the reason I mention that is because it will come back in relation to ground 3. And you have got "Purchaser risks", will not find a suitable purchaser, and "Asset risks". They tend to be to do with deterioration. Those are not relevant today.

And then there is actually further consideration of the scope of divestiture packages over the page, and just note — so that is at 3.6 to 3.11, and then actually at 3.12 there is a "Preference for avoiding [what is called] 'mix-and-match' divestitures which is where you complete a merger with a group of businesses and then rather than getting rid of the

acquired businesses you say, "I'd like to get rid of some of the bits of the acquired business and some bits of my business", and that actually gives rise to a whole set of composition risks because you are reconstituting something through a regulatory remedy that has never existed as business previously.

I think that is probably all that needs to be taken out of the Remedies section. But what I am stressing here is that there are a range of remedies, those are carefully considered by the Commission. It is a question of proportionality. That proportionality exercise was undertaken in this case. In the circumstances the idea that Article 1 Protocol 1 bite anywhere but at the remedies stage is wrong. It certainly does not have any impact on the interpretation of substantiality and the substantial lessening of competition testing. In those circumstances, the simple conclusion is that the Competition Commission in relation to legal test was not under an obligation to direct itself specifically to whether a lessening of competition was very weighty or very grave or any other synonym. It was required to correctly direct itself to whether or not the lessening of competition was substantial. It applied its own published statutory guidelines in arriving at that answer. Those statutory guidelines were entirely appropriate and sensible. Having done so it ensured that the remedy upon which it ultimately decided struck a fair balance between the interference with Gobal's rights under Article 1 Protocol 1 and the demands of the general interests of the community by considering the nature and extent of the SLC and ensuring that the remedy required was no more intrusive than was necessary to be effective. It was not disproportionate to the SLC or its adverse effects, and no error of law has been disclosed.

With that in mind, if I may I would like briefly just to turn to some passages in the report. No doubt the Tribunal has already read substantial parts of the report in preparation for the hearing, but if I could just highlight one or two passages relatively briefly, in order to short-cut this process if I may, this is in volume 4 at tab.11.

THE CHAIRMAN: Just so I understand the exercise on which we are about to embark, we are looking at this because — to bear out what point?

MR. BEARD: Well, I was going to take you to the parts of the report that indicated how it was that the CC considered what the lessening of competition was by way of a reduction in rivalry and how it approached that and how it did so through a comprehensive analysis of the material before it. If the Tribunal thinks that that is a submission that it is well covered in relation to, I am very happy to move on.

THE CHAIRMAN: I do not think I should discourage you from doing it, but at the same time on ground 1 as I understand it, the parties really pin their colours to the mast of whether or not

"substantial" means “large”. If it does not mean “large”. I do not think Lord Pannick says that you are in the wrong. If it does mean “large” then -----

MR. BEARD: We say you have got large lessenings of competition here.

THE CHAIRMAN: In that case we had better look at the report.

MR. BEARD: It goes to what Lord Mustill was saying about you have to look at it all in the circumstances to assess whether or not there is a substantial lessening. It also goes to what was actually identified, which was another part of the project he indicated it was appropriate for any Tribunal to do. As I say, I will try and shortcut it, if I may, but just looking at the summary as a preliminary. Page 1068 is the external numbering, but it is p.3 of the internal numbering of the report. Can we just zip through, para.6 indicates what it was that the CC decided to undertake as an exercise:

> “To be able to assess whether as a result of the merger, there was, or might be expected to be, a substantial lessening of competition (SLC) within any market or markets in the UK … we considered the situation that would have prevailed absent the merger (the counterfactual). We concluded that RSL would have continued to operate independently of Global, either under the continued ownership of GMG or under the ownership of an alternative buyer … We considered these alternatives to be broadly equivalent in terms of their likely competitive impact.”

Therefore, the CC went on and considered the pre-merger market shares locally and nationally as a reasonable basis against which to assess the competitive effects of the merger.

> “We also examined as part of our analysis the counterfactual, the pre-existing National Sales Agency Agreement …”

but that was not then the focus of the concern later.

Then 8, however, is important because it summarises how it considered markets:

> “We noted that radio was a two-sided market in which competition occurred both for listeners [on one side] and for advertisers …”

In other words, advertisers want to go to stations so that they can get listeners, and therefore demand for listeners and demand for advertisers may interrelate.

> “… and included both commercial stations and BBC radio stations. We noted that the requirements on the BBC, and regulation of commercial radio, sought, among other things, to ensure the availability of radio content that appeals to a wide variety of listener tastes … In our view therefore, the interests of listeners

were largely protected from the effect of a merger between commercial radio stations …"

That structure, so listeners dropped out of the picture to a great extent.

"In considering the competitive effects of this merger, we focused our analysis primarily on the effects on the other side of the two-sided product: radio advertising."

Then importantly, they carried out a market definition, which is in section 5, but they summarise it:

"We did not identify separate markets at a local or regional level but we took geographic differences into account in our assessment of the competitive effects of the merger. We concluded that there was a UK market for radio including, on the listener side, BBC radio stations. We recognized that it was important that our assessment of existing competition between commercial radio stations and the competitive effects of the merger on advertisers should include an assessment of constraints on radio advertising from other media as well as constraints from other radio stations."

That I just highlight because the Commission was very careful about considering other sources of pressure on advertising prices charged by commercial radio stations, including for instance the press and other sources.

At one point Lord Pannick took you to chapter 8, and I will come on to that, where he talked about alternatives. The word "alternatives" in those paragraphs is alternative radio, it is not other alternatives. That was a wrong reading of that section, but I will come to that.

In para.10:

"We did not further subdivide the market by reference to the way radio advertising is bought but we identified two customer segments within the advertising side …"

This is the non-contracted and contracted advertising:

"… advertising buying airtime on a campaign-by-campaign basis from local and regional stations or through small, local or regional agencies [are treated as non-contracted] …"

Then those buying through bigger agencies or national advertisers are treated as contracted because those deals are done on more than a campaign by campaign basis. That again is important because of the focus on that part of the market that was of real concern. So they were not forgetting about where it was that they were focused at any time, and there is also

what is called "sponsorship and promotion" (S&P), which occurred both in relation to non-contracted and contracted.

Then 11:

> "We assessed the level of pre-merger competition. In doing so, we considered the way prices for radio advertising were set; the constraint from other types of media advertising; and competition between commercial radio for advertising at a national, and at a regional and local level.
>
> We noted that prices for radio advertising were not published and were the outcome of negotiations between the advertiser or agency and the radio station or group. Advertisers commonly negotiated with more than one seller and played sellers off against each other."

The focus of the report comes to be non-contracted advertising, and a key part of it is the manner in which non-contracted advertising deals are done, it is through negotiation, bilateral negotiations sometimes using other players to play off against one another. The reason that that matters is because in the non-contracted advertising sector it means that if you lose a rival that loss of rivalry has a potentially very significant impact on the ability of you to put pressure on the radio station with whom you want to do deals.

That is what is touched on here:

> "… [we] found that prices varied significantly between campaigns. We concluded that prices were affected by the quality of the alternatives available to the advertiser."

Then 13 about advertising on other media being a potential alternative, and it says further down:

> "However, taking all the evidence in the round, we concluded that the availability of other media was not in itself sufficient to constrain the price of radio advertising and there was a significant proportion of campaigns for which radio advertising was not easily substitutable for other media. The level of competition between radio stations was therefore an important determinant of price."

Then this is important for the way in which they then go and analyse the national arrangements:

> "We considered the factors that advertisers took into account when choosing radio stations. We found that the relative strength of competing radio stations as alternatives for advertisers depended on the interaction of audience levels,

> geographic overlap and the demographics of the audience reached by the available stations. We concluded that demographics were of less importance to advertisers than the extent of the overlap and audience share, particularly where radio options were limited. We also recognized that the way stations overlap in individual areas, and the extent to which individual stations were under common ownership, varied. Radio advertisers' choices were therefore likely to be affected by the merger in different ways in each area where the parties' stations overlapped."

So that is the focus. Then 15:

> "[The merging parties] radio stations overlapped and competed for advertisers in each of the nine areas where RSL operated pre-merger."

So there were nine areas of concern.

> "We concluded that the extent of this competition, and therefore the effect of the loss of competition as a result of the merger, depended on the divide characteristics of the radio market in the overlap areas and how advertisers bought radio advertising."

So that is how they came to analysis the nine areas, because those were the areas of geographical overlap and audience share in relation to a national radio market, or a market for radio in the UK, more exactly.

Then at 18 we see:

> "We concluded that significant effects on competition were unlikely to arise in London and the West Midlands. We identified seven areas where the possible overlap which we considered would be likely to lead to significant adverse effects: the East Midlands, Cardiff, North Wales, South and West Yorkshire, Greater Manchester …"

which is obviously the subject of Ground 3 -

> "… the North East and Central Scotland."

There were three other sub-areas that lead to significant adverse effects, Cardiff, South and West Yorkshire and Greater Manchester which:

> "… would be likely to contribute to a loss of competition across the wider areas of South Wales, Yorkshire, Humberside and Lincolnshire and the North West respectively."

I just mention that because what is being said here in relation to Greater Manchester is, "We have concerns about Greater Manchester and we also concluded that that would be likely to

contribute to a loss of competition in the North West", and as you can anticipate this is part of the story that goes to explain why the one sentence that Global have fixed on for the purposes of 3(b) is actually not somehow altering the whole account of the report by suggesting that there was a substantial lessening of competition found in the North West. There was not. It was not the consideration. That was not what the Commission was doing. Then, as I say, 19 indicates that the focus was on non-contracted advertisers in the area, and just note the end of that final sentence in 19:

> "… [it] was likely to lead to a significant change in the balance of negotiating advantage between Global and its non-contracted customers such that prices in each of the seven areas would be on average higher."

So significant change in the balance of negotiating advantage in an industry where the CC, having taken all the evidence, has decided that this negotiation in relation to non-contractual advertising is critically important.

Then at 20, and this is really the nub of it:

> "In each of these areas we found that the loss of rivalry as a result of the merger was significant. It involved either the loss of one of three main competitors or, in some cases the only main competitor, in the radio market. As such, the merger would give the merger parties high market shares of listeners and non-contracted revenue in each of the seven overlap areas and reduce the number of radio competitors from either three to two or two to one."

Where you have identified competition as rivalry, where you have identified a market structure where negotiation in relation to non-contractual advertising is critical in the way in which these parties interact, and you have said if you lose rivalry that will affect the balance of negotiation, and we have identified that prices would, on average, be higher. In those circumstances, there is a rhetorical question to go to Global: it does not matter where you set your threshold on your hypothetical spectrum. A merger that reduces rivalry from two to one - in other words, from some to none - is the largest reduction in rivalry you can effectively have between two parties.

The reduction in rivalry from three to two is the next largest reduction in rivalry you can have between two parties. In those circumstances, it is very difficult to understand on what possible basis it could be said that this ever could be considered not a substantial lessening of competition in rivalry terms.

THE CHAIRMAN: I just have to be clear how far you take it. Suppose we accept Lord Pannick's submission that "substantial" means "large". Do you say that we can read

this report as showing that the Commission has taken the view that there has been a large lessening of competition?

MR. BEARD: What we say is that we directed our mind to the question of "substantial". We said it was a substantial lessening, we did not carry out some synonymous analysis. So the Commission was not directing its mind to "large" and whether "large" was different. Taking into account what has actually been done here and looking at the fact that you are dealing with a reduction in rivalry and that rivalry, and loss of rivalry is the loss of competition, it is difficult to understand on what basis it can be said, whether you call it "large", "contribute", "very weighty", whatever, that it is not a substantial lessening of competition here.

THE CHAIRMAN: I suppose there could be two points. One is when you actually read the report as a whole you can see that the Commission thought that it was a large lessening of competition. I am not sure you are really saying that because the Commission was not applying its mind to that question, as such.

MR. BEARD: No.

THE CHAIRMAN: The other possibility is that the only reasonable conclusion that you can draw is that there has been a large lessening of competition and that is quite a large step to try to take, is it not?

MR. BEARD: I am only looking at what the criteria for the lessening of competition were, the structure of the report and the analysis that was undertaken and what was actually concluded. The point we are making is that if you are talking about loss of rivalry, which is the core focus of the conclusion on lessening of competition it is difficult to understand what more there could be.

THE CHAIRMAN: At the risk of straying into the world of economics, which I am certainly not a master of, take your numerical analysis, you have three players in the field, two of them between them have a market share of 98 per cent, the third has a market share of 2 per cent.

MR. BEARD: Yes.

THE CHAIRMAN: More than that, there are all sorts of readily available substitutes. Can you really say: "Oh, look, we have gone from 3 to 2 because the 2 per cent chap has dropped out, therefore there is no reasonable alternative to concluding that there has been a substantial lessening of competition.

MR. BEARD: I am referring to these 3 to 2 as shorthand, because first of all there is a whole bunch of analysis about the lack of potential entry, so that is all covered off. There is also a complete analysis of listen and revenue shares in relation to all of the areas here, so I am

only referring to the summary. The point I am making is that when you go through and you look at those revenue shares, listener shares, and the fact that there could not be potential entry, it is impossible to see how you could not say: "This is a substantial lessening of competition."

THE CHAIRMAN: So, do you say that the only reasonable conclusion that the Commission could have arrived at on the basis of their findings was that there was a substantial lessening of competition in the sense of a large lessening of competition.

MR. BEARD: The only reasonable conclusion that it could have done so in relation to a large lessening of competition – I am not going so far as to try and work out what large means, because that involves another game effectively, but what we are trying to say is in circumstances where a set of synonyms are being put forward, we do not understand, actually, looking at the report, why any of those synonyms could not be treated as being fulfilled by this analysis.

THE CHAIRMAN: I suppose this is the point I am trying to get at. I quite follow if "substantial" does not mean "large" I think it is accepted you win on Ground 1. If "substantial" does mean "large" does it necessarily follow that you lose on ground 1?

MR. BEARD: What we are saying is that we do not understand how it follows that we would lose on Ground 1 because, on the basis of this analysis, you would be picking a synonym that the Competition Commission had not used, and then looking at the report and saying: "Actually, there was not a large lessening of competition on the basis of this analysis".

THE CHAIRMAN: This is where I come back to where I was before. Either it is *South Yorkshire*-type territory where you say that whatever words the decision-maker used, you can see that actually he thought X and that satisfies the test, so the Commission can be seen, in fact, to have taken the view that there was a large lessening of competition. Or, if you cannot say that, I cannot see how you avoid the conclusion that you quash the decision, unless, perhaps, it can be said that any reasonable decision maker would have concluded that there was a large lessening of competition and, understandably, I am not sure you are going that far.

MR. BEARD: No, I am not trying to go that far, because when a reasonable decision-maker looks at all the facts in relation to a particular situation the point I am making is a narrower one that in circumstances where you are dealing with a situation where there has plainly been a finding in relation to rivalry and, actually, the sort of issues that you were covering – I have dealt with by shorthand – plainly, very significant reductions in rivalry, this Tribunal to come along and say: "Actually, I am going to pick a synonym, one of Lord Pannick's

portfolio of synonyms, I will pick that one and I will say that is what substantiality means in these circumstances. So substantial lessening of competition has to cross this threshold. When I look at this report, do I think it has crossed that threshold, even though that was not the precise term to which the Competition Commission was directing its mind?" We say that we cannot see any of these synonyms posing any real problem in that regard because actually what was being found was significant. I am concerned not to stray into other synonyms, because if I say "substantial" I am circling back to where we were already.

THE CHAIRMAN: Yes.

MR. BEARD: As I say, if one goes down to 22, you have:

> "We did not consider either entry or expansion likely, timely and sufficient to offset a potential SLC. We also concluded that any potential rivalry enhancing efficiencies were not timely, likely, or sufficient to prevent the SLC."

I will just give you a reference because it may be of assistance, the discussion of non-contracted advertising, which was obviously the core of this is discussed at para. 6.15 through to 6.23. That is significant because it describes how it is that rivalry and the loss of rivalry impacts upon that section of customers that are particularly of concern in this overall analysis. This is all part of section 6, which is on pre-merger competition which is concluded at 6.135 where the identification of concerns in relation to overlapping markets, which I have already adverted to in the summary, is covered.

Then you have section 7, which is the lengthy section on the assessment of the competitive effects of the merger. What you see at 7.8 is how it was that the Competition Commission looked at how you considered the impact of the merger on the overlap areas, so drilling down to each of the areas, and I will come back to that in relation to ground 3. But just to note that 7.16, somewhat spells out both the shares of listening hours and non-contractual revenue, and also the increases that are flowing from the merger itself.

7.17, which is the preamble to going through the various areas:

> "For each of the overlap areas, and in some cases smaller areas within a wider overlap area, we outline the parties' stations and how they overlap with each other and competitor stations; the strength of the parties' stations, that of other stations in the relevant area, the demographics reached by competing stations; views of the parties and third parties and our assessment of the likely effects of the merger."

So it is overlaps and effects, looking at the rivalry.

Then, of course, after the long section 7, detailing the effects on competition, we get to section 8, the "Conclusions on the SLC test". This was a passage that Lord Pannick took you to, or parts of it. It is just important to recognise that:

> "8.1 Our analysis led us to conclude that the relevant market was a radio market … We concluded that other media could be a substitute for some radio advertising but that it was often bought as a complement to radio rather than a substitute for it. We considered that the evidence suggested there were a significant proportion of campaigns for which the availability of a good radio alternative was the main factor in determining the price paid.
>
> 8.2 We found that radio stations competed for national, regional and local campaigns."

Then we concluded that the potential creation of the national brands did not matter – that is 8.4. Then it 8.5 rehearses the nine areas that we have already seen put in a summary.

> "8.6 We considered the extent of the likely effect on competition in these overlap areas. In doing so we took into account our Guidelines which state, among other things, that we view competition as a process of rivalry…that the likely adverse effect on customers plays a key role in assessing merger; and we consider any merger in terms of its effect on rivalry over time.
>
> 8.7 Our view is that the loss of rivalry as a result of the merger is significant because in each of the seven overlap areas it involves either the loss of one of three main competitors…"

-Lord Pannick did not take you to this:

> "… or, in some cases, the only main competitor. As such the merger would give the merger parties high market shares of listeners and non-contracted revenue … and reduce the number of radio competitors from 3 to 2, or 2 to 1. We note in this context our Guidelines which refer to the consequences of loss of rivalry over time on competitive pressure on firms to improve their offer to customers and become more efficient and innovative."

Then 8.8 is concerned with the bilateral negotiations, and this again I think Lord Pannick took you to:

> "We were concerned about the effect of the merger on non-contracted advertisers buying largely regional and local airtime and S&P. We noted the prices for these advertisers are negotiated for each campaign. The nature of the bilateral negotiations between radio stations and advertisers mean that we would expect to

> see higher prices where advertisers' alternatives have been significantly reduced as this reduces their bargaining strength relative to the radio station concerned."

He seemed to be suggesting here that the alternative could be other media; it is not.

> "The availability of good alternatives for some advertisers does not protect those who do not have good alternatives from price increases."

So this is about radio advertising only.

> "Taking in the round all the available evidence on the proportion of campaigns likely to be affected and the scale of likely affects on individual prices we conclude that the loss of competition in the seven overlap areas is likely to lead to a significant change in the balance of negotiating power between Global and its non-contracted customers."

So you see this was what was picked up in the summary. Then 8.10, we also expect that to persist over time.

Then we get into the long section on "Remedies", whereby a remedies consideration is undertaken in relation to each of the relevant areas, and that is introduced at p.97 by consideration of partial divestiture. I am sorry, initially there is a consideration at p.96 of full divestiture, which is concluded to be effective, but may well be disproportionate in the circumstances, and therefore partial divestiture is considered. I will pick this up now because it is relevant to Ground 3. At 9.19:

> "In assessing whether a particular local divestiture would be effective we considered whether a divestiture package would be of sufficient scale and coherence to remedy effectively the loss of competition resulting from the merger at local level. We also have regard to the potential ability of any divestiture package to operate effectively as a standalone competitor and the likelihood of finding a suitable purchaser."

So in considering these alternative packages those issues that have been identified in the guidelines were taken carefully into account.

Then 9.20 sets out Global's proposed divestitures. In relation to the proposals they made proposals in relation to five of the seven relevant areas, and four of them were rejected as being inadequate and one was subject to certain queries.

I will come back to the Manchester and North West analysis which is at 104 in a moment, but just to highlight that point I made about the existence of the proportionality and the cost of effective remedies' analysis, if you go on to 127 what you have there is consideration of proportionality from 9.191 onwards, including the nature and extent of the SLC at 9.193

through to 195. Obviously, it refers back to other parts of the report and I am not going to go through them, but just to make good the fact that those proportionality issues were fully taken into account.

In going through that, I hope I have trailed some of the issues that I am going to pick up in relation to ground 3, and perhaps shorten the process, but what I have done in doing that is both fulfil the requirements that Lord Mustill set out, which is actually to look at what the decision maker was doing, shown how it was conscientiously considering the relevant criteria of rivalry, and directing its mind to substantial lessening of competition in line with the statutory framework and, indeed, the statutory guidance in reaching its conclusions.

Mr. Palmer, I think quite properly, although I am moving through relatively quickly, suggests that the paragraphs under the nature and extent of the SLC are ones that repay careful consideration because where we have not engaged in a discussion about what it was that the parties were arguing through this process and what was being assessed by the CC, it is clear that Global was arguing that the scale of the SLC was trivial, so you can have an SLC but it is small, and the SLC was only likely to affect a small minority of the parties' non-contracted customers within the geographic areas that we found. So, again, it is small and therefore small SLC should not be accepted.

Now, I am not saying that consistency is a virtue. The fact that Lord Pannick is putting a different case from that that was put previously by Global is neither here nor there, but 9.94, we disagree, so they actually engaged with this. We concluded in paragraphs 8.7 to 8.10 the effect of the merger in the overlap areas would be likely to have a significant adverse effect on rivalry between competitors in the radio market, a significant proportion of campaigns would be affected, and the effect on prices for advertisers on individual campaigns could be large. We also expect a loss of rivalry in these areas and the adverse effects would persist for a relatively long time. So, again, it resonates with the conclusions that have already been articulated in the summary that are based on the prior chapters and the analysis in them which of course does draw on a vast collection of annexes and appendices.

THE CHAIRMAN: I will not quiz you, Mr. Beard, if you look at 9.195 on whether the significance of significant loss of rivalry is more or less than the substantial/insubstantial detrimental effect two lines later.

MR. BEARD: That may be a parlour game for another day. Yes, well, I think it really goes to indicate that trying to delineate between these terms is not helpful. One does actually have to look at what is being discussed, and the fact that when one talks about loss of rivalry one

uses one term, and detrimental effect one uses another does not somehow mean that they can be ordinarily ranked.

The other point that Mr. Palmer reminds me of in relation to what 9.195, it is just that here there is a specific distinction being drawn between the SLC and the harm, the adverse effects thereafter. So, again, reflecting the statutory scheme properly and conscientiously.

I think there may just be two last cases just to pick up. I do not need to take you to them. I have already dealt, I think, with *IBA*. I do not think *IBA* takes anyone further forward because it was dealing with the "double may" test and actually working out what precise meaning was being put to the different words "may" in that section is far from clear. It is certainly far from clear that actually different "mays" were being used rather than cumulative effect of two "mays" as compared with one.

The other case that was referred to by Lord Pannick in this context was the *Assange* case where they were concerned with different authorities in different places having different functions, and at that point judicial authority had to take on a different meaning at different time. We entirely accept that in circumstances like that where it would be absurd and would make no sense for the same term to take the same meaning through the piece of legislation, you do have to flex it. What we are saying here is you do not need to do that, and that presumption therefore works against Lord Pannick rather than with him.

With that in mind I will go to ground 3, and since we are in the report I am actually going to start at one of the appendices, because I think it may just help, I hope, clarify where we go in relation to it. If one could go to tab.12, p.1387, it is the same volume, volume 4, it is just behind the main report so, just whilst we are in there. I am going to take the map out of the bundle. Just because I think this helps understand what was going on in relation to ground 3 a little bit. You should I hope have coloured versions.

What one sees there is the map of north-west England and you can see Manchester over on the right in an area that has lines across it and dots. It is also encircled by a green boundary and if you look carefully it is also within a much wider dotted on mine sort of purply-brown boundary that goes right out past Burnley up towards Lancaster, comes back down the coast and almost touches Wrexham as it loops round.

That long brown boundary is the area covered by the RSL's regional stations Smooth and Real. You can see that (the key is just down on the left). It is quite small text but it is RSL first is Smooth and second is Real, and they have a congruent area each of them over which they operate.

The next one to pick out is obviously the one with lines, which Real XS which is another RSL station, and then the green boundary that I referred to is Global Radio, and it is Gold Manchester, Capital Manchester and Xfm. You can just about see Xfm above the green. So, if you look at Manchester itself and the area immediately round Manchester, what you have is the ability to listen to Smooth, Real and Real XS which are all RSL stations, Gold Manchester, Capital Manchester and Xfm. And there is one other station that is picked out her that you can listen to which is the dots, which is Bauer Media Key 103.

What we have already seen from the summary from passages that I have already taken the Tribunal to is that the finding that was made in the substantive part of the analysis in the report was that there were significant adverse effects on competition in the Greater Manchester area and those resulted from the fact that Global would be acquiring Smooth, Real, and Real XS, in other words the three RSL stations, two of which cover Manchester but wider areas of the north-west, one of which only covers Manchester — and it would leave as a key competitor Key 103 as the only one. So this would be in simple terms a three to two situation for Greater Manchester.

For the wider north-west the situation is obviously different because beyond Manchester itself obviously the area covered by Gold Manchester, Capital Manchester and Xfm extends more widely and covers outwards Bolton and beyond. But obviously there, as you can see, there are both other Bauer stations that may have reach but also UTV stations that may have reach and a local radio company station as well, I think, no, I am sorry, that may just be round Burnley, I am sorry. And so the overlaps between the RSL and Gold stations beyond Greater Manchester still exist but there are other radio stations there.

And really what all of this boils down to is a challenge somehow to the contention that when the CC made its finding that actually there were significant effects on competition round Greater Manchester, it was somehow also making a finding for the purposes of remedies that there was a significant effect on competition across the north-west, and that it fed that into the analysis in relation to its remedial conclusions even though it does not say that elsewhere in the report in the substantive section. And the truth is this is picking up an error of drafting in one paragraph in the report.

We referred in our defence and in our skeleton to the fact that you have to read the report as a whole, that is precisely what has not been done in relation to ground B. But before I get to ground B, on ground A, I am just going to take up the skeleton argument to spell out what ground A is because there was some discussion between you, Mr. Chairman, and Lord Pannick about what the head was in ground A. As we understand it from the skeleton

argument, paragraph 45, the contention is no evidential basis for the CC's findings on the extent to which RSL's north-west regional stations Smooth and Real operated as a competitive restraint on Greater Manchester stations. Well, I am going to come on to the details in a moment, but you almost only have to look at that map because it is plain that Smooth and Real operate across the Greater Manchester area. It is accepted that 50 per cent of their listeners are in the Greater Manchester area. And what is being suggested is that notwithstanding that there is no evidential basis for the CC's findings that Smooth and Real operate as constraint on Greater Manchester stations in relation to non-contracted advertising. So, commercial stations plainly covering the area, half their listeners coming from there, and yet they do not operate as a competitive constraint.

I think, though, we do need to go back into the main part of the report. If we could turn first to paragraph 7.82 which is on p.69 (sorry it is not 7.82 itself, I just want to start the right section). If you remember, as I was whirling through section 7 it is the section concerned with analysis of the competitive effects of the merger and it worked through that the relevant nine areas, two of which in the end it decided there were not significant effects on competition in relation to. But this is the Greater Manchester and North-West area.

So, first of all, it looks at the available stations and geographic overlap, bearing in mind that earlier in the report it is being said overlap and audience share are the key components of how radio stations compete. So, it is here, "Available stations and geographic overlap":

> "7.82 … RSL has two stations which cover the whole region, Real and Smooth, and a Greater Manchester station Real XS. [And then there are various other bits and pieces] … Global's stations overlap with … [I am sorry, I will read on] Global's Heart North West and Wales station overlaps with Real and Smooth in a relatively small part of the region, around Cheshire and the Wirral. Global also overlaps in Greater Manchester with its Gold, Capital and Xfm stations".

So that was the green line we saw on the map.

> "7.83 While Global's stations overlaps with parts of the Real and Smooth region, there are significant parts of the North West where Global does not operate [which we saw on the map]. In particular, Global does not have coverage in Liverpool or significant areas to the north of Manchester. Bauer has a number of stations …
>
> 7.84 In Greater Manchester, the parties' stations overlaps in broadly the same TSA. [So all of the stations that are being referred to]. The main competitor [to them] is Bauer with its Key 103 FM station and its Magic AM station. UTV has three stations

which overlap on the edges of the Greater Manchester area covered by Capital and Key 103".

Then there is a discussion of share of listing hours and revenue which is concerned with Real, Smooth and Real XS on the RSL side and with the other Greater Manchester stations of Global on the other side.

Then there is consideration of strength of competitor stations and in particular looking at Bauer in relation to Greater Manchester, and then I just skip through, there is discussion of party views, and then our assessment. First of all, at 7.91:

> "For advertisers looking for other radio options to RSL across the North West [there is a discussion about] Global stations currently offer an alternative if bought with other local stations. Post-merger the parties would have two of the three regional alternatives available"

So, that is focused on the North-West generally, and then:

> "7.92 Looking at Greater Manchester, we consider that Bauer's Key 103 … is likely to be a good alternative to the parties for many advertise wishing to target Manchester and the Greater Manchester area. It will, however, be the only good alternative post-merger and the parties will have four stations … in the TSA [So that is focused in Greater Manchester] We do not consider UTV stations to be a good alternative ….
>
> 7.93 The main radio alternatives for advertisers in Greater Manchester would therefore effectively reduce from three to two. Real XS has 7 per cent of listening hours and [5-9] per cent of non-contracted advertising revenue, in the absence of other radio alternatives to Bauer its loss as an option is significant especially given its similarity to Global's Xfm. Also, the only regional radio stations covering Greater Manchester and beyond would be brought together by the merger: the loss of Real and Smooth as alternatives for those advertisers primarily focused on Greater Manchester will therefore also reduce competition".

And then there is this cross-reference back to 6.101. And it is said that finding apparently has no basis in evidence. Just to pick up at the bottom, 7.95, because this is the reference to the challenge at 3(b):

> "We therefore conclude that, in the absence of any countervailing factors, there are likely be significant adverse effects in Greater Manchester, as a result of the merger and that competition will be reduced across the North West."

I anticipate that that is the operative conclusion, and the challenge in 3(b) is actually just referring back to this and referring back to it not entirely accurately.

So there we have the relevant considerations in that part of the operative section. If we go back to 6.101, which is the paragraph which Lord Pannick took you to part of where he emphasised that in section 6, which is about pre-merger competition, there was consideration at 6.101, p.49 of the internal page numbering:

> "We were also told that regional stations and local stations sometimes competed for the same advertisers even where the regional stations could not offer advertising on separate transmitters."

We accept that this is a case where a separate transmitter and separation does not occur.

> "A competitor told us that local advertisers were prepared to use regional stations if they could negotiate a good price …"

He emphasised the "if", but so long as you can obtain a good price, that is suggesting that they are competitor -

> "… and the stations covering a large TSA might reduce their prices to compete more effectively with local stations and compensate local advertisers for 'wasted advertising'."

He stopped there.

> "This competitor also provided evidence of local advertisers who had turned down an offer on one of their local stations for a lower price from a regional station."

So this is not general, this is particular.

> "Another competitor noted that regional stations reduce their prices to attract local advisers where they have unsold airtime."

So the operators are competitive pressure there.

> "Evidence from RSL showed that their regional stations pitched for advertising from advertisers seeking to target customers in local areas though the parties do not agree that there is competition between regional and single local stations for the same campaigns and said these pitches were unsuccessful because the advertisers were targeting a smaller area than that covered by the regional RSL station. There was a broad consensus that advertisers bought combinations of local stations as an alternative to a regional station."

It is said that those findings betray a complete lack of underpinning of evidence.

Then it is worth just going back to highlight one or two bits appendix L, because apart from noting that 6.101 is effectively digesting the evidence and making general statements about the interaction and competitive pressure between local and regional operators, it specifically

refers to comments by competitors as evidence of the fact that local and regional stations compete. If we go to L49, which is at 1394, which is in tab 12, you will see there (this is in the section of annex L, which will includes consideration of the Greater Manchester area) under the heading "Third party views", at 197:

> "Bauer said that Key 103 competes with each of Capital, Real, Smooth and Real XS in the Manchester area …"

We are not betraying any secrecy, but that is a competitor that is referred to back in 6.101. So Bauer, who would be the only remaining competitor in the Manchester area are saying, "We, who do not compete regionally through Key 103, we only compete in the Greater Manchester area, compete with Capital and Real and Smooth" - in other words, the regional operators.

> "… since local advertisers are also prepared to use the regional stations (Real and Smooth) to target the Greater Manchester area. They said that, although wastage can be an issue …"

Then they gave some particular details that are confidential.

Apparently that is not evidence. Then we go on to 199:

> "Two non-contracted agencies expressed their concern about the merger as they felt it would reduce competition and as a result advertisers would be left with no effective alternatives. Conversely, seven advertisers expressed their support in favour of the merger …"

So non-contracting agencies are expressing their views.

Lord Pannick may say that is in very general terms. It is, it is in the section on Greater Manchester and the North West. So views are coming in from third parties which inform the way in which the analysis should go.

I am not going to go through all of this material, but if I could just turn on to other relevant documents, at 205 there is a reference to a planning document, the text of which is confidential. I am not going to read it out but I would ask the Tribunal just to read through it. All I am going to do is highlight for you the name of the entity, the radio station that is seen as a "prominent competitor", and the stations with which it is a prominent competitor. Then if one goes back to the map you can easily do a compare and contrast of the area covered by the prominent competitor and the areas covered by those with whom it is competing.

So 601, in fact, is dealing with evidence, it is saying that the CC had been told that regional stations and local stations competed for advertisers. A competitor has specifically

confirmed that in relation to the Manchester area. There has been information about local advertisers turning down offers from local stations for lower prices from regional stations, and that regional stations have been known to reduce their prices to attract local advertisers. I will give you another couple of references, if I may. At 547 there is also some material on overlapping local and regional stations.

THE CHAIRMAN: Sorry, 547 in the report?

MR. BEARD: In the report, I am sorry, yes. I was then going to just take you, if I may, back to 6.114. We were looking at 6.101 and the challenge is that there is no evidence. We say plainly there is evidence. What 6.101 was doing was summarising some of that evidence. It is also instructive to look at the conclusion that is reached in the light of that consideration, and so if we go to p.51 in the internal number of, p.1116 of the bundle, 6.108 to 6.121 provide the CC's assessment of the way that radio stations competed for advertisers and the factors which influenced how closely they competed in the particular circumstances. Its conclusions in this regard were just a general application, they were not limited to particular regions. I would just note 5.114 first:

> "We concluded that there is some competition between local and regional stations for the same campaigns even where the regional station cannot offer advertising on split transmitters, though these stations will in general be weaker substitutes for campaigns targeting local within a large regional TSA. We noted also that for regional campaigns a bundle of local stations may be bought as a potential alternative to a regional station or used to help negotiate lower prices."

So this is a finding in relation to what you start off with as being the sort of conclusion that you expect would happen and along the way you have had evidence supporting you, you have not just rested that initial analysis. You have not gone with the map and said that is enough, you have listened to the evidence, you have gathered the evidence, you have considered it. I did not take you to table 22 in annex L, but it is worth just noting that there the Competition Commission specifically spelled out listener shares in relation to Greater Manchester, including in relation to the regional stations, so it was breaking things down. 6.115 carries on that:

> "We therefore concluded that where the geographic coverage of overlapping radio stations was very different these stations were weaker substitutes. Where stations overlap but one station covers a much wider area, these stations may still compete for the same campaigns depending on the area targeted by the advertiser and the relative price of the stations. The closeness of competition

between a local and regional station will also be affected by advertisers' ability to target the overlapping area by buying advertising from a split transmitter from the large station. it will also be affected by whether a combination of stations including the smaller station can achieve [the same outlook]. We therefore took into account the extent to which stations overlap and … whether advertising were sold via split transmitters and whether a combination of stations [could offer an alternative]."

I have already referred to the share of listening hours. That is actually detailed at 7.85 on p.69. This is obviously in the section on Greater Manchester and the North West, and I zip through this, but it is worth emphasising at 7.85:

"In Greater Manchester, the parties' share of listening hours will be 67 per cent with an increment of 39 per cent from the addition of Real, Smooth and Real XS."

There are the increments.

"The revenue figures are likely to understate the combined strength of the Global and RSL stations in Greater Manchester as they do not include any revenue for Real and Smooth (which cannot offer airtime for advertising in Greater Manchester only), even though Greater Manchester stations compete to some extent with regional stations for the same campaigns."

So what we have here was a conclusion being reached thereafter in the assessment section recalling the evidence referred to at 6.101, which in turn drew on the Appendix L material that regional stations can compete for advertisers, it noted the context about 50 per cent of Real and Smooth's listeners being in Greater Manchester, with the result that an advertiser could certainly reach the Greater Manchester area and the listeners there through Real and Smooth, and that was effectively the highest share of listening hours in Greater Manchester. These supports supported the conclusion, the same paragraph, that the loss of Real and Smooth as alternatives for those advertisers primarily focused on Greater Manchester will reduce competition.

It was the CC considering the effect on rivalry, the loss of not only one Greater Manchester station, Real XS, but also the loss of the only regional radio stations and therefore the effect on competitive pressure. The consequences of such loss of rivalry and competitive pressure will be that non-contracted advertisers would be weakened in price negotiations in which the advertisers' ability to obtain lower prices would depend in part on their ability to play

different sellers off against each other. So again it goes back to the broader conclusions that have already been considered by the Commission in its report.

The CC was not then required in order to reach to that conclusion to make some sort of additional express findings as to whether or to what extent Real and Smooth are, in fact, winning business from Greater Manchester advertisers at the moment. It is not required to do that or pose any of the other questions set at para.47 in the skeleton argument of Global for the Competition Commission, nor is there any inconsistency in this approach between Greater Manchester or Birmingham. The conclusions in relation to West Midlands did not contradict its finding that in principle regional stations can do compete for local advertisers' business, nor does it contradict the evidential material that was drawn upon by the CC in its consideration of Greater Manchester. There is therefore no irrationality on the part of the CC.

The only other point I would just highlight in relation to these matters is that when it comes to the question about the relevant legal test as to what evidence is required, we have obviously provided citation in our defence in relation to these matters. In particular, we have cited the case of *BAA v Competition Commission* at para. 20.3 of that Judgment which is in authorities bundle 1 at tab B2, which talks about the fact that:

> "The CC, as decision-maker, must take reasonable steps to acquaint itself with the relevant information …"

and do what is necessary to put itself in a position properly to decide the statutory questions.

> "The extent to which it is necessary to carry out investigations …will require an evaluative assessments to be made by the CC."

So what is being said there is, yes, we recognise *Tameside* is a relevant decision, but the evaluative assessments as to what to do and what to find are themselves subject to an irrationality threshold only.

> "… as to which it has a wide margin of appreciation as it does in relation to other assessments to be made by it … In the present context, we accept [the] submission that the standard to be applied in judging the steps taken by the CC in carrying forward its investigations to put itself in to a position properly to decide the statutory questions is a rationality test."

That we emphasise in this context, and we have cited some other cases. Just for your notes this is at paras 23 and 24 of the defence. At para. 25 of our defence (vol.1, tab B) we have cited the *Stagecoach* decision which concerned the question about whether or not sufficient evidence had been obtained by the CC in relation to that particular inquiry, and for your

notes that is in vol.2 of the authorities at tab 19. I just refer to you para. 45 that we have quoted:

> "Where [the applicant] asserts that there is no or no sufficient evidence to support one of the Commission's key findings [it] must show either that there is simply no evidence at all to support the Commission's conclusions or that on the basis of the evidence the Commission could not reasonably have come to the conclusions that it did. The fact that the evidence might have supported alternative conclusions, whether or not more favourable to [the applicant], is not determinative of unreasonableness in respect of the conclusion actually reached by the Commission. We must be wary of a challenge which is in reality an attempt to pursue a challenge to the merits of the Decision under the guise of judicial review."

With that in mind I will move on to Ground 3(b) unless the Tribunal has any questions. Ground 3(b) is essentially an attack on a sentence. It is an attack on the sentence in para.9.79 of the report and, if I can, I will take the Tribunal back to that. 9.79 is the final paragraph in the remedies section concerning Greater Manchester and the North West. 9.79 says: "We therefore concluded …" on the basis of the analysis that has just proceeded:

> "… that the divestiture of either Capital on its own, or Real XS in combination with either Real or Smooth, could form the basis of an effective remedy to the significant adverse effects we found …"

Now, those significant adverse effects are not found in the remedies section, they were found earlier in section 7. "… we found in Greater Manchester and the North West". Lord Pannick's whole case is predicated on the fact that he says this indicates there were significant adverse effects findings in the North West, they were not properly taken into account, an irrelevant consideration has been considered, there was not a proper evidential basis for it – a whole raft of challenges, actually, on the basis of it. It is just wrong.

In section 7 at 7.95, as I emphasised as I was going through that section earlier, and it is perhaps just worth turning back to it at p.71 of the report. This is the last paragraph in the section on the effect on competition in Greater Manchester and the North West that starts 7.82:

> "We therefore conclude that, in the absence of any countervailing factors, there are likely to be significant adverse effects in Greater Manchester as a result of the merger, and that competition will be reduced across the North West."

That is the operative conclusion. It has not been accurately replicated in 9.79. But 9.79 is the conclusory paragraph of the section which is dealing with remedies to that finding

earlier as to significant adverse effects in section 7 that fed into the SLC finding in section 8.

9.79 is not trying to reconfigure the competition findings. It is considering the remedy to those competition findings and actually when you read this section as a whole it is plain what is going on, because if you turn back to p.104, to 9.63, under the heading: "Greater Manchester and the North West." In para. 7.82 to 7.89 we describe the main features of the Greater Manchester and North West commercial radio market. In our assessment, paras. 7.91 to 7.94, which is then subject to the conclusion in 7.95 to which I have just taken you, we found that the merger will effectively reduce the radio alternatives for advertisers in Greater Manchester from 3 to 2, as well as bringing under the same ownership two stations with almost exactly the same geographic and demographic coverage Real XS and Xfm. The only regional stations covering Greater Manchester and beyond would be brought together by the merger. The loss of Real and Smooth as alternatives for those advertisers primarily focused on Greater Manchester will also reduce competition. In addition, the relative strength of the merger parties in Greater Manchester would reduce the options for regional advertisers across the North West. That is actually the other way around, so a merger in Greater Manchester affecting a wider area. Then there is a final bit that is confidential. It is all about Greater Manchester.

Then we turn on and we see a discussion of the parties' views and the views of third parties, and then our assessment of the remedy at 9.69, and it is all to do with what has been identified previously as the problem in relation to significant adverse effects in Greater Manchester. There are, of course, references to the North West here, but they are not suddenly creating a new competition analysis in relation to the North West.

The only additional point, I think, to make is that Lord Pannick highlighted one paragraph in the remedies notice. Apart from the fact that a number of things changed from the remedies notice to the report, again the same problem arises: (a) it is selecting only one paragraph in the remedies notice, and actually when you read it as a whole the same sort of proceeding analysis focus on Greater Manchester precedes the paragraph to which he referred and I just refer you in para. 104 of that document. But the broader point is it is the remedies notice. It is not the substantive analysis notice. That was dealt with in provisional findings.

I am sorry, Mr. Palmer corrects my terminology, that one was a remedies working paper. I apologise. The points still stand.

Unless I can assist on 3(b) that takes me on to 3(c). I will try to deal with this very briefly, as Lord Pannick creditably did.

The truth is that the remedies assessment which, in relation to Greater Manchester, was in the section to which I have just been referring, in particular at paras. 9.69 through to 9.73, is entirely sound.

The Competition Commission, in assessing what will be an effective remedy, has a very broad margin of appreciation. There is no doubt about that and particularly in circumstances, if you are moving beyond a simple divestiture of a whole acquired business to packages of businesses or assets, there are a range of considerations that will be taken into account, not least issues of viability.

Earlier, I highlighted the sections in the Commission's guidance, and I will just give you those for your notes, they are in authorities bundle 1, tab A7, the paragraphs are, in particular, 1.8, which is all the section on effectiveness, and I also took you to 3.3, which is at p.90, in relation to these matters.

What was decided here was that full divestment would be effective, but the CC would consider packages of alternative stations because it recognised that full divestment might be unnecessarily onerous, disproportionate in the circumstances. It invited the merger parties to come forward with proposals, and the proposals that came forward from Global none of them were without problem. Four of them were rejected, one of them was left with a query and, in relation to the other two areas of the seven that were of concern, no proposals were made.

The focus here is: "you have not carried out your assessment quite properly in relation to the situation in Manchester where we offered Gold, Real XS and Xfm, and you should have stuck with that." Then it is said: "You have not gone far enough in your analysis of these matters. You took into account listening share, we think that is right. You took into account revenue matters, we do not dispute that is right, but given that listener share of this collection was rather similar to the listener share of Capital, and you say divesting Capital is good enough, that means this group must be good enough, and revenue alone concerns are not sufficient". We say: "No, we are looking at whether or not this package that you are putting together really offered an effective constraint to restore the rivalry that has been lost by reason of the merger, and we do look at the considerations, both in relation to listener reach, because that is an indication of the extent to which you will be, as a collection, a real competitor in future, but we also do look at revenue as a rough and ready measure of this existing attractiveness to advertisers. We note that whilst revenue reflects only a snapshot

of the current position it is relevant to that broader consideration of viability. If you have higher revenues and higher listener share, you have greater prospects of survival as an effective, independent competitive constraint in future.

Just as the CC has done in numerous other cases, it used its judgment on the basis of all the information it had. It looked at the three proposed stations to be divested as an alternative, and said it does not provide a sufficiently effective constraint for us. We are not going to accept that as an alternative, but they did not then say: "Oh, it has to be Capital". They actually went further, there are three options that are open to emerging parties as a divestiture remedy in relation to Greater Manchester: Capital, which has listener share and revenue and relevant demographics as well. But we also noted – this is from 9.75 – that both Real and Smooth are regional stations and, although they provide a credible option for some advertisers they do not represent as well a targeted remedy option as Capital.

> "Consequently, to address adequately the loss of competition in Manchester , the divestiture of a Greater Manchester only station would also be required if either Real or Smooth were divested."

and that means that there are three options: one is Capital alone; one is Real with a Greater Manchester station; the second is Smooth with a Greater Manchester station. The Competition Commission carefully directed its mind to these matters. There is no basis to impugn that finding on the basis of irrationality, it was a sensible approach to adopt.

Unless I can assist the Tribunal further, those are the submissions of the Competition Commission.

THE CHAIRMAN: Thank you very much. Lord Pannick.

LORD PANNICK: Thank you very much, sir. Is the Tribunal able to sit a little late? I was allocated 30 minutes for reply, I do not want to trespass upon your evening, but I hope that I might be allowed 30 minutes.

THE CHAIRMAN: I am sure that is the best course.

LORD PANNICK: Because I think we all agree, subject of course to the views of the Tribunal it is highly desirable to finish this.

THE CHAIRMAN: It is certainly going to cost a lot of money to have everybody back again.

MR. BEARD: I apologise …

LORD PANNICK: No, no, it was not a criticism — all very enlightening! Can I deal first with ground 1, and my friend began his submissions by saying that the Commission his clients did not engage in a game of looking for synonyms, it is not, he said, a mediaeval debate. Well of course it is not. It is not a game. It is a question of statutory interpretation to which

there is a right answer and a wrong answer, and the question of statutory interpretation is whether the epithet “substantial” does or does not have a legal meaning that requires the lessening of competition to be large or considerable. If so, then the Commission is legally obliged to ask itself that question, and the answer it gives, if it asks the right question will command a very large degree of respect in this Tribunal and in the courts. But if it asks itself the wrong question, then other than in the most exceptional circumstances on a matter of this centrality, its report must be quashed.

My friend turned to sections 22 and 23, the tests at the first stage for addressing whether there is a relevant merger situation, but those criteria of course do not go at all to the quantity of lessening of competition which determines the Commission’s power to impose remedies. Sections 22 and 23 are not concerned in relation to the relevant merger situation with the quantity of lessening of competition. A relevant merger situation may or may not lead to a substantial lessening of competition. These are two distinct questions, as is clear from section 22.1(a) and (b) and 35.1(a) and (b). And of course one does not get any real assistance from the first stage on the question with which the Tribunal is concerned because it is, after all, a filter stage screening out cases that do not get over the jurisdiction threshold. Nor is the issue of law, in my submission, this was a question posed by you, sir, to my friend, I say that the issue of law is not to be determined by the reference to the guidance. I mean, plainly there may be some argument in the guidance that assists, but the mere fact that the Commission in the guidance have proceeded on a particular view is neither here nor there. The word “substantial” means what it means, and this Tribunal has had the benefit (I hope it is of benefit) of hearing the competing arguments that enable it to arrive at the correct legal answer.

Then my friend referred to the presumption that where a word is used in a statute more than once it means the same on each occasion, well, I attempted to respond to that in opening, it is a weak presumption, see *Assange* particularly in relation to a word such a "substantial" which does have a variety of meanings and which one is relevant depends very much on context.

My friend then criticised the distinction which he said rightly is one of the limbs of our argument, the distinction between “enabling” and “restrictive”. But, sir, it is not my distinction, it is the distinction that Lord Mustill thought illuminated the appropriate approach in the context of *South Yorkshire* and the statutory concept of a substantial part of the United Kingdom. And I maintain the submission, having heard my friend I maintain the submission that there is a clear contrast here with the *South Yorkshire* context where here

we are concerned with a restrictive use, restrictive in this sense — that Parliament has restricted the amount of lessening of competition which will suffice in this context. It has addressed how much restriction, how much lessening of competition needs to be established before the Commission enjoys the power to impose remedies. Parliament could have said lessening of competition, it could have said as much lessening of competition as the Commission in its judgment thinks appropriate or thinks justifies a remedy. One could easily draft something that would give the result for which my friend contends. But Parliament added an epithet, in my submission, to emphasise the need for size, for amount, for quantity. And there is a contrast with *South Yorkshire*, that context, why was "substantial" added to the phrase "part of the United Kingdom?" It was added to ensure that jurisdiction did not depend on showing that the merger related to the whole of the United Kingdom. It was "enabling", to use Lord Mustill's words, in the sense that without the word "substantial" the Commission would only have jurisdiction if the relevant merger applied to the United Kingdom. The phrase "a substantial part of" was therefore enabling in that context. It broadened the jurisdiction of the Commission.

My friend emphasised Lord Mustill's speech, and he criticised me for not going to a particular passage, so can I take the Tribunal back to authorities volume 1, or was it volume 2, tab.14, volume 2, tab.14 and the particular passage to which my friend drew attention was at p.32 at letter H, the bottom of the page, some six lines up from the bottom. The sentence,

> "Even after eliminating inappropriate senses of 'substantial' one is still left with a meaning broad enough to call for the exercise of judgment rather than an exact quantitative measurement".

But the reason why Lord Mustill speaks of the exercise of judgment is because he has already concluded, at 32B that the appropriate test is in that context is, "… of such size, character and importance as to make it worth consideration for the purposes of the Act". That is inherently a judgmental approach to the issue, and it does not assist in relation to our context if I am otherwise right in my submissions.

My friend did ask rhetorically why should Parliament wish to allow for the lessening of competition which is not considerable or weighty to go unremedied? Why should Parliament allow such a mischief to continue? But the answer is that just as Parliament thought (see sections 22 and 23) that small scale merger situations should be excluded, and my friend made that point, so Parliament thought it was simply not appropriate to allow for these remedies, including remedies of divestment, unless there was a substantial mischief.

That is a considerable or a large lessening of competition. That is a perfectly proper, understandable, coherent Parliamentary objective, there is nothing surprising about it.

My friend then says that Article 1 of the First Protocol is not engaged. He says it is not engaged because the SLC is not determining remedies. There are two distinct stages, and he says that I am quite wrong in suggesting that the meaning of SLC therefore can be influenced by Article 1 First Protocol factors. Well, we do not accept that, with respect. And I indicated in opening, can I very briefly say again, there is no dispute on the statutory language that divestment depends on a finding of SLC. Without SLC there can be no divestment.

Secondly, for the Commission, and you saw, Sir, members of the Tribunal the remedies guidelines when I opened this case, for the Commission divestment follows from a finding of SLC in the vast majority of cases. That is what they say, remedies guidelines paragraphs 2.14, 2.15, it was authorities volume 1 at A7.

Thirdly, the Article 1 of the protocol case law which my friend did not dispute, *Amato Gauci*, it was authorities volume 1 at B1, paragraph 58, emphasises that for Article 1 purposes, indeed for the Convention as a whole, you look at the practical realities, and the practical reality is that divestment follows other than in very unusual cases, it follows from SLC.

Finally, if that were not enough, let us be clear what the position here is. My friend is arguing that one puts off the Article 1 issue to the separate remedies stage, and he says, rightly, that when remedies are considered, the Commission looks at proportionality. But what he does not say — and indeed what he cannot say because it is not the case — is that the Commission only imposes divestment remedies when the lessening of competition is considerable or large. So it does not help him in any event to seek to divorce the two stages. SLC and remedies on the Commission's case whether the lessening of competition is large or considerable is never the test, not simply not the test at the liability stage. So, for all those reasons I maintain the submission that this context is different in fundamental terms from the context addressed by Lord Mustill, not just because this is restrictive not enabling, but also because of the application of Article 1 of the protocol which has no relevance whatsoever to the preliminary stage of sending the matter for assessment.

You, sir, observed to Mr. Beard that at first blush the word "significant" means "less than substantial", and we would respectfully agree, but this is not, in my submission, a difficult point in this case. It is not the point in this case because there is no dispute on the material that the Commission did not ask itself the question, "Is the lessening of competition large or

considerable?" They concede in their defence that was not the test that they applied. And putting it at its lowest, the word "significant" can mean "of a minor quantity". One can easily think of contexts in which "significant" does not mean "considerable" or "large", for example "statistically significant", something that is statistically significant is not necessarily large or considerable.

My friend devoted some time in his submissions to the contention that this case was all about the loss of rivalry, three goes down to two. If that was sufficient it would be a very simple investigation because there is no doubt that in many contexts, radio contexts here, three did go down to two. That is simplistic and is not the approach that the Commission itself adopted to this case. They recognised that you cannot dissociate the reduction in rivalry from an assessment in practical terms of the adverse effects. That is clear in principle. In many situations, two firms may compete as intensively, or sometimes more intensively, than three. It all depends. In this case the Commission did not simply state there is a reduction in rivalry. They could not have done so sensibly, because they had to consider other alternatives for advertising, and they had to consider the impact of the reduction in rivalry in terms of its effect on advertisers.

The report is replete with such references. If, for example, one goes to 5.30, if I can take you back to the report (p.26), there they say:

> "As already noted, our Guidelines state that the purpose of market definition in merger analysis is to provide a framework for the analysis of competitive effects, not to determine the outcome of the analysis in a mechanistic way."

Saying that there is a reduction from three to two is the most mechanistic approach one could possibly adopt.

> "We recognized that our assessment of the competitive effects of the merger should take into account competition from other (non-radio) media advertising."

My friend was anxious to emphasise that at various places they are not talking about non-radio advertising. Here they clearly are:

> "… and we set out our assessment on the evidence on competition from other media companies for radio advertising [below]. This included an assessment of all relevant evidence including the views of customers on the substitutability of other media for radio advertising, our quantitative analysis of the average prices paid … and other evidence, including evidence from the parties' surveys."

So the first matter that has to be assessed, and was assessed, is whether or not there are non-radio advertisers which provide competitive constraints in this market. Having done that

then they look at the impact in relation to the radio advertising. If one goes, for example, to p.76, one sees the conclusion at 7.125:

> "We took into account the evidence on the proportion of campaigns affected …"

So it is not good enough to say three down to two, you have got to ask what proportion of advertising campaigns are affected, and that will depend in large part, not exclusively, on what non-radio alternatives there are -

> "… and the likely effect on individual negotiated prices. As a result, and taking all the available evidence in the round, we conclude that the loss of competition in the seven overlap areas is likely to lead to a significant change in the balance of negotiating advantage between Global and its non-contracted customers such that prices in each of the seven areas would be on average higher."

Not substantially higher, on average higher.

So my friend's suggestion that reduction in rivalry is somewhat relevant or even determinative of Ground 1 is, with great respect, quite unsustainable. It is contrary, that approach, to the Guidance, which emphasises that rivalry cannot be looked at in the abstract - that is para.4.13, authorities bundle 1, tab 5 - and it is contrary to what the Commission did in this case.

Therefore, I say, concluding on Ground 1, if the Commission did fail to apply the correct test, if I am able to persuade the Tribunal that that the best of "substantial", the meaning of "substantial", is "considerable" or "large", it is quite impossible, I submit, for my friend to suggest that the report can nevertheless be upheld. I would certainly accept that it is possible that the Commission, on looking at this matter again, may conclude that there is a large lessening of competition. That is a matter for their judgment, but they may not. It is a matter for them, it would be quite wrong in principle for the Tribunal to place itself in the position of the Commission and to seek to determine what the Commission itself did not determine, and expressly did not determine. My friend expressly said in answer to you, Sir, that he was not submitting that any reasonable decision maker would say that there was here a large or considerable lessening of competition. That was his answer to you.

In my submission, if we are right on Ground 1, it is not a parlour game, it is not a theoretical debate, it is a question of statutory construction, this report cannot stand. That is my submission on Ground 1.

On Ground 2 the Tribunal will recall there are three points. The first point goes to para.7.93. Can I just take you back to that, so I can remind you of what we are talking about. At the end of 7.93, p.71, the Commission notes in the final sentence:

> "… that about 50 per cent of Real and Smooth's listeners are in Greater Manchester."

Therefore, 50 per cent are not. Why does that matter? It matters because of wastage. The Commission tell us that. I should have shown the Tribunal this paragraph in opening, and I forgot. It is p.49, and it is para.6.99 where they say:

> "At a local and regional level, radio stations and advertisers told us that a station's transmission area relative to the catchment area of the advertiser's business was the most important factor when considering radio. We were told that advertisers want to minimise 'wasted' advertising: that is, advertising heard by listeners outside the area from which the advertiser's customers are likely to travel. When considering radio, advertisers take into account the audience of radio stations in their target area with the aim of reaching as many potential customers as possible."

So that is what they are told, and that is what they accept because they are told it by the stations and the advertisers.

That is why it matters whether or not the regional stations, Real and Smooth, are going to be used by those who are seeking to attract an audience in Greater Manchester. They may or may not use the regional stations because they know that 50 per cent of the coverage is wasted.

My friend drew attention to para.6.101, and he says there is a finding. With great respect to him, there is no finding in 6.101 relating to Greater Manchester. This is a general paragraph. It is not in a section that is addressing Greater Manchester, it is a paragraph that assesses the generality that sometimes, as it says, customers, advertisers, use regional stations, sometimes they do not. My friend referred to what followed after that paragraph, but perhaps the most important paragraph in this respect is 6.121 on p.53, which begins, "In summary". Can I show the Tribunal, because I do not think we have looked at it previously, p.53, para.6.121:

> "In summary, we considered that the relative strength of competing radio stations as alternatives for advertisers depends on the interaction of audience levels, geographic overlap and the demographics of the audience reached by the available stations. We concluded that demographics were of less importance

than the extent of the overlap and audience share, particularly where radio options were limited. We also recognised that the way stations overlap in individual areas, and the extent to which individual stations are under common ownership, vary. Radio advertisers' choices were therefore likely to be affected by the merger in different ways in each overlap area."

So the idea that this is a finding about use of regional stations in Greater Manchester is quite unsustainable.

When one adds to that a finding in Birmingham, and I took the Tribunal to this in opening, at 7.40, an assessment that finds that the regional stations are not used in Birmingham, then the question is why was there no such assessment and no such finding in the Greater Manchester area at 7.93? Yes, I accept that the Commission had before it some evidence suggesting that the regional stations are used by those who target in Greater Manchester, but there was competing evidence, I showed the Tribunal in opening, that the regional stations are not used for this purpose. My objection, my complaint, is that 7.93, and indeed throughout the whole of the report, there is no assessment of this competing evidence, no finding, and yet this, as I suggested in opening, is crucial, because unless Real and Smooth are used for the purpose of those who are seeking to reach listeners in Greater Manchester, the remedy of divestment of Real XS would suffice. So it is absolutely crucial. My complaint is no finding, no assessment of the evidence, it is not enough for my friend to say, referring to the *Stagecoach* case and the *BAA* case that the Commission has a discretion as to how much investigation there should be. My complaint is that they made no finding and they made no assessment of the evidence. There is a complete absence on this crucial point of the divestment decision.

That is the first part of Ground 2.

Ground 2(b) is, you will recall, about para.9.79. My friend says this is an error of drafting, we are attacking, he says, one sentence. Let us put this in context. This is the paragraph which states the conclusion of the Commission on the question of the remedy divestment for Greater Manchester. If it matters I showed the Tribunal that the error can be traced back to the remedies working paper, and if it matters there is also references in what precedes 9.79, not just to Greater Manchester, but to the North West generally. (see 9.70 line 1, 9.75 line 2, and 9.73 line 4).

My friend has offered the Tribunal no explanation whatsoever of how this fundamental error occurred in 9.79, or why it occurred. The Tribunal is completely in the dark as to how this passage was included.

My friend devotes his argument to section 7 of the report but that cannot avail him because it is not concerned with remedies, it is concerned with the substance, the SLC issue. Our complaint is about the remedy and the remedy is addressed in section 9 of the report. We are not seeking to use 9.79 to overturn the findings on SLC, we are referring to 9.79 in order to indicate a fundamental error in the Commission's approach to remedies. The fact of the matter, in my submission, is they took their eye off the ball when they came to remedies. My friend says he has only one paragraph. Well, of course, there is no principle of judicial review that we need to identify a fundamental error in several paragraphs, one error will do. Again, it is an important matter because only if one looks at the stations that are regional, covering the North West generally can one explain why it is the Commission were not satisfied with the divestment of Real XS alone.

The third aspect, para. 9.73 is a short point, none the worse for that in my submission. Mr. Beard contended - advocates in his position normally do – that the Commission has a broad margin of appreciation, but however broad the margin of appreciation the Commission is obliged to ask itself the right question, and our submission, as the Tribunal knows, is that the second and third sentences of 9.73 (the first sentence is simply irrelevant to this issue) tell us that the Commission asked itself not whether Global's proposed divestment of Real XS would satisfy the s.41 test – that is the right question; they asked themselves whether Global's proposed divestment would be as effective as the remedy which they, the Commission thought was appropriate, and that is the wrong test, it is quite simple. It is the wrong test and therefore the divestment decision cannot stand.

Those are my responses to my friend's submissions. I am very grateful to all members of the Tribunal for your patience today.

THE CHAIRMAN: Thank you all very much. We obviously will not be giving a decision here and now; we will reserve it.

LORD PANNICK: Thank you very much.

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