IN THE COMPETITION APPEAL TRIBUNAL Case No. 1224/6/8/14

Victoria House,
Bloomsbury Place,
London WC1A 2EB

4th April 2014

Before:

ANDREW LENON QC
(Chairman)
DR. CLIVE ELPHICK
PROFESSOR GAVIN REID

Sitting as a Tribunal in England and Wales

BETWEEN: Case No. 1224/6/8/14

LAFARGE TARMAC HOLDINGS LIMITED Applicant

- and -

THE COMPETITION AND MARKETS AUTHORITY Respondent

AND BETWEEN: Case No. 1225/6/8/14

HOPE CONSTRUCTION MATERIALS LIMITED Applicant

- and -

THE COMPETITION AND MARKETS AUTHORITY Respondent

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CASE MANAGEMENT CONFERENCE

A P P E A R A N C E S

Lord David Pannick QC and Mr. James Segan (instructed by Slaughter and May) appeared on behalf of the Applicant (Lafarge Tarmac Holdings Limited).

Mr. Thomas Sharpe QC (instructed by Mayer Brown International LLP) appeared on behalf of the Applicant (Hope Construction Materials Limited).

Mr. Rhodri Thompson QC, Mr. Rob Williams and Mr. Nicholas Gibson (instructed by the Treasury Solicitor) appeared on behalf of the Respondent.

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THE CHAIRMAN: Yes, Lord Pannick?

LORD PANNICK: Good afternoon, sir. Good afternoon gentlemen. I appear with James Segan for the applicant, Lafarge Tarmac Holdings Limited. The Competition and Markets Authority is represented by Rhodri Thompson, Rob Williams and Nicholas Gibson, and Hope Construction Materials Limited is represented by Thomas Sharpe.

Mr. Sharpe has asked me to ask you, sir, if it would be possible to deal with all the issues apart from the expert evidence issue first and then Mr. Sharpe, who is a very busy man, can go off and do other things given that he has no interest whatsoever, I suppose, other than an academic interest in the decision in that particular issue. I hope that is convenient.

THE CHAIRMAN: Yes, that is what we were going to do anyway.

LORD PANNICK: I am very grateful, and Mr. Sharpe is even more grateful to the Tribunal. The Tribunal helpfully sent on 27th March – tab 14 of the bundle that I hope you all have – an agenda of matters to be considered today. Many of those matters have been agreed, as is explained in the Treasury Solicitor's letter behind tab 28, and in the letter of the same date, that is 2nd April, from my instructing solicitors, Slaughter and May, at tab 29. I hope that the Tribunal have had an opportunity to look at a draft order, which is tab 6, that we have sent through, which identifies the issues that require further consideration.

I have four matters on my list of matters to raise other than expert evidence. The first is whether or not, and if so how, the Hope application should be heard together with the Lafarge Tarmac application, the second is the question of confidentiality, the third is the length of the hearing, and the fourth is the date of the hearing. Those are the contentious matters, or possibly contentious matters, that I had on my list, plus of course expert evidence that we can deal with, as you suggested, sir, at the end. If there are matters, sir, you want me to deal with, I am very happy to assist, or try to assist, but those seem to me to be all that was potentially still in issue.

I said confidentiality was one of those issues. There has been agreement between the Treasury Solicitor and Slaughter and May as to the way in which confidentiality issues should be addressed, and that is set out in the letters. The only reason I mention it is because we ought to clarify the position of Hope, assuming that the cases are somehow joined. I was suggesting to Mr. Sharpe just before we began, and he agreed, that if the cases are somehow joined together, or they are heard one after the other, the sensible way to proceed is that he and his professional clients should see all the material, the non-confidential material, and if they join in - it will be a matter for them if they choose to join in the confidentiality ring on the appropriate terms - then Hope's external legal advisers

would see the confidential material as well, subject to confidentiality terms. I think Mr. Sharpe thought that was a sensible approach. I have not, and I apologise, had a chance to raise that with Mr. Thompson because I was just discussing it with Mr. Sharpe when the Tribunal came in. Unless Mr. Thompson has any points on that, I would commend that to the Tribunal as the sensible way to proceed on confidentiality.

THE CHAIRMAN: Mr. Thompson?

MR. THOMPSON: Good afternoon, sir. I think the only point we have, and it is probably common to Hope and to Lafarge, is that I think there is a reasonably well identified group of advisers for Lafarge who have already seen confidential material, both in relation to Lafarge and in relation to Hope. I do not think we are prepared to enter into a sort of open-ended commitment as to who could be added to that list, but we would obviously look at it as and when necessary, and if we had any problems we would raise them with the Tribunal. I think that is the position. Can I just check with those behind me?

LORD PANNICK: We, for our part, certainly do not want to add to our list. I would suggest that the way to proceed is that Mr. Sharpe's clients, if we proceed along this route, notify the Treasury Solicitor and the Treasury Solicitor will say whether they are happy with the specific names that have been identified.

MR. THOMPSON: I am assuming it is external counsel and external legal advisers. I imagine that is not a problem, but obviously anything wider is potentially quite problematic.

THE CHAIRMAN: In other words, we probably do not need to trouble ourselves with that now.

MR. THOMPSON: It does not sound like it. Regarding the terms of the mechanics of the confidentiality ring, we do not currently have one of those rather elaborate drafts. It is simply a question of who is going to produce one; whether the Tribunal wishes to produce its own, or whether the Treasury Solicitor should do it or whether Lafarge should do it, but that is just a matter of mechanics.

THE CHAIRMAN: I was under the impression that we were going to produce one. The Tribunal can produce one.

MR. THOMPSON: That is easy then, sir.

LORD PANNICK: Thank you very much, sir. The next issue is how we deal with the Hope application. It does seem to us, and I think Mr. Sharpe agrees, that the most appropriate way to proceed is for the Tribunal to order, if it agrees with this approach, that the cases be heard one after the other, obviously before the same Tribunal. Mr. Sharpe would have the opportunity to make his submissions on his points, as set out in Hope's notice of application, and they would be taken into account in both of the decisions. Mr. Thompson

obviously would have the opportunity to respond to both of them. It does not seem to us necessary to make some elaborate formal order, other than that the cases be heard one after the other on that basis. Obviously, I am very happy to assist further if others take a different view.

MR. THOMPSON: I did briefly discuss it with Mr. Sharpe. I think it is only really a question - Lord Pannick said "one after the other" - of whether or not there are three speeches; Lord Pannick, Mr. Sharpe and then me, or whether Mr. Sharpe comes on afterwards, as it were, a discrete issue on remedy. I think it is simpler just to take it as a single hearing, but that is a matter for the Tribunal, whether Mr. Sharpe would follow Lord Pannick and I would then answer both of them, but it is a question of which is going to be more convenient for the Tribunal.

THE CHAIRMAN: Again, what we had in mind was an order in the terms of paragraph 7 of the draft order, that they be heard together. For present purposes that seems to us to suffice. We can worry about order of speeches, and so on, nearer the day.

MR. THOMPSON: Exactly, there is always this technical question about joinder and intervention, but in substance I think it should be treated as a single hearing.

THE CHAIRMAN: We could not really see the need for anything apart from an order that they be heard together.

MR. THOMPSON: Indeed, sir, that was, I think, my client's thinking.

THE CHAIRMAN: Mr. Sharpe?

MR. SHARPE: That is absolutely right. Our notice of intervention application would lapse in the event that the applications were heard together. We are very happy with that.

THE CHAIRMAN: We do not need to make any directions about service of the notice of application or anything like that?

MR. SHARPE: No. I think we all understand the position and we can all work within that very happily, thank you, sir.

LORD PANNICK: The other two issues are the time estimate and the hearing date. There is a disagreement on the time estimate because the Competition and Markets Authority's position is that all issues including the Hope aspect of the case can be dealt with in three and a half days. We are less optimistic. We think five days, given the number of issues that are raised in our grounds of application and given the factual complexity of some of them, not all of them. Some of them are complex matters and there is a lot of material. We would respectfully suggest that it is better to err on the side of caution. One way forward might be to allocate four days with a fifth day reserved, if necessary, without in any way encouraging

an expectation that we will need a fifth day. It would be unfortunate, I think, to find that if, unhappily, the case went into a fifth day, time was not available. That would be my proposal in relation to this matter.

MR. THOMPSON: I think it partly interacts with the other two issues outstanding; the availability of the Tribunal as to dates and also the question of whether expert evidence is to be admitted. Our basic position, and I know the Tribunal in some cases has been quite stringent in terms of timetabling, is that this matter could be dealt with as a judicial review within a three and a half day timetable. If the Tribunal takes a different view, we will obviously comply with that. That is our essential position. We have no problem with leaving open four days, but whether it is necessary to leave open five is very much a matter for the Tribunal, I think.

THE CHAIRMAN: I take Lord Pannick's point that, in a sense, it is better to err on the side of caution, without encouraging anybody to go on longer than they need to, in which case four or five days would seem to us to be sensible.

MR. THOMPSON: In practice, we have not come on to the issue of timing, but one of the suggestions has been the last week in July going on into August. In a sense, if that is a possibility, then that is a week and the question of what happens on the Friday can be left open. Our suggestion at the moment is, given the nature of this review, three and a half days is enough.

THE CHAIRMAN: Shall we talk about dates before we finally commit ourselves to estimates? There is a problem with these dates. The Tribunal cannot do the week starting 28th July, or the week starting 15th September. We could do the week beginning - I am looking at the Treasury Solicitor's letter of today - 22nd September or any of (c) to (g), 22nd September, 29th September, 6th October, 13th October and 27th October. I understand Mr. Sharpe cannot do the week beginning 6th October.

MR SHARPE: I'm afraid I have a very cautious clerk. I could do the week beginning 6th October.

THE CHAIRMAN: Does 6th October suit everybody?

LORD PANNICK: It suits everybody apart from Mr. Segan, but I am afraid that if everybody else can do it then I will have to explain to Mr. Segan's clerk why he cannot do it. I think 6th October, if all members of the Tribunal are available, and all three leading counsel can do that date – we will all stand between Mr. Sharpe and his clerk in the circumstances – that would be convenient for everybody.

THE CHAIRMAN: Then let us go for that. Thank you very much. In terms of the time estimate, four days with a fifth day reserved as Lord Pannick suggests?

MR. THOMPSON: Yes, it does not sound from the indications from the Tribunal that this will follow cases I have done where they have said: “You will have a day" or, "you will have three hours”, and everyone gets on. But if you are content to leave it to the consensus of the parties then that seems a perfectly manageable way forward.

THE CHAIRMAN: For the moment we are. For the moment, yes.

LORD PANNICK: Could I suggest for the moment that one says four days plus a fifth day in reserve, because, of course, matters may change. We will receive in due course the Competition and Markets Authority’s response to our application and we will, of course, review the matter in the light of the material they put before us, and it is possible – I am not making any promises, far from it – but it is possible in the light of what they say that some of the issues may look rather different; they may, and that will affect the time estimate. So I would be very grateful if that is the order you make, four days with a fifth day reserved if needed. I think those were all the issues Mr. Sharpe was concerned with.

MR. SHARPE: Sir, I must apologise, in my enthusiasm to be flexible and attribute all fault to my clerk, I have made a mistake. I read “16” as “6”. The week of the 6th, and actually that period onwards, I am not available. I am sorry to unwind all this, I really am. I am tied up probably until 15th October.

THE CHAIRMAN: We are either back to September or forward to later in October.

MR. SHARPE: Insofar as I am not available until 15th October, any time in the rest of October, I am at your disposal. Once again, I apologise – I need better glasses.

THE CHAIRMAN: What about 22nd September or 29th September, those weeks?

LORD PANNICK: I am available the week of 29th September, I do not know about Mr. Jowell.

MR. THOMPSON: I think we have been flexible in that period, so that would work if we simply move it forward a week, if that is acceptable to Mr. Sharpe and his glasses!

MR. SHARPE: Yes, that would be fine for me.

LORD PANNICK: There will be a special reason that will affect, certainly Mr. Jowell and myself, why we will not be keen to keep the Tribunal late on the Friday, and that is that it is the beginning of the Jewish Day of Atonement. So we will both want to get away early on Friday, 3rd October, so that may well be suitable for everybody, and it will have the happy eventuality that Mr. Segan will be joining us as well.

THE CHAIRMAN: Very good.

LORD PANNICK: So I think everybody will be happy if the Tribunal can do the week of 29th September.

MR. SHARPE: With your leave, sir ----

THE CHAIRMAN: Thank you very much.

MR. THOMPSON: I do not want to detain things, but I do not know whether the order of skeletons and such matters need to be dealt with before Mr. Sharpe leaves, or whether he is happy to comply with the direction, but we have not got that far yet. If we are going to do 29th September then there will be an issue about when the papers should be in.

LORD PANNICK: Mr. Sharpe, I am sure, will be happy to leave us to deal with that.

THE CHAIRMAN: Shall we deal with it now, as a discrete issue before we come on to expert evidence?

LORD PANNICK: I am very happy to comply, sir, with whatever you think appropriate. I always find it more helpful in a case to have sequential skeleton arguments. It seems to me to be much more sensible that we go first with Mr. Sharpe at the same time, and the Competition and Markets Authority respond so that they know what they are dealing with, rather than dealing with it in the abstract. It seems to be much more sensible.

MR. THOMPSON: That was certainly going to be our suggestion, so I think it is really a matter of when Lord Pannick feels able to fire the first shot, as it were.

LORD PANNICK: If we work back, the case is on 29th September and therefore we will need the skeleton argument from the Competition and Markets Authority, I would have thought, 14 days before the hearing – does that sound sensible? So 15th September is the date by which the Competition and Markets Authority need to produce their skeleton argument. The difficulty then is that we go back into the holiday period, but I think that cannot be avoided, we will have to do the work probably by the end of July, but I see no reason why we should be obliged to produce a document more than two weeks before 15th September, which is 1st September. It would seem to me to be reasonable. So we produce our material 1st September, and the Competition and Markets Authority replies on 15th September.

MR. THOMPSON: Yes, I believe those are Mondays, are they? Obviously if you wanted a bit longer and to push our date back a little bit that could work, but ----

LORD PANNICK: I would rather not, because then we would have less time, and the Tribunal would have less time, between receiving your document and the hearing date.

MR. THOMPSON: It is mainly a matter for you, I think.

LORD PANNICK: I think I would prefer to stick with the 1st and the 15th.

THE CHAIRMAN: So 4 pm on both of those days.

LORD PANNICK: Yes. I think the other dates are already set out, are they not, in the agreed order as to the dates for evidence. They are agreed dates, as I understand it, subject to the Tribunal's consent. I do not think those dates are affected by any of this. It is obviously desirable that the evidential issues are determined well in advance of the period when skeleton arguments are being thought about.

MR. THOMPSON: I think the advantage of this timetable is that there is plenty of time for the pleadings to be concluded in June, and then there will be a difference between the pleadings and the skeletons, whereas in some of these cases the reply and the skeleton argument get compressed together and it seems rather pointless to have both. But in this situation the timing works quite nicely, subject to Lord Pannick and his team's holidays. I am grateful.

THE CHAIRMAN: Thank you.

LORD PANNICK: That leaves, sir, the question, subject to any other points that you have for us, of Professor Higson's report, the expert report. May I deal with that point. I hope you have had a chance to see the expert report which is buried away in tab 26 of the main bundle, but I think we have got copies.

THE CHAIRMAN: We have it.

LORD PANNICK: You will also have seen in the bundle of today at tab 3 the application to adduce this expert evidence which sets out our reasoning. Of course, this will be a hearing in September applying judicial review principles, s.179(4), and we have emphasised that it is now well-established that expert evidence is admissible in judicial review proceedings where the court is required to review the proportionality of a proposed measure. Expert evidence can assist - and often does - the court properly to view the balance which the decision-maker has struck. The authority is the *Southampton Port Health Authority* case. There is a bundle of authorities which the Competition and Markets Authority has helpfully produced. I do not know whether you have had slotted into it, sir, members of Tribunal, at tab 3 the full judgment in the *Southampton* case. It is a case under Community law. I do not think the detailed facts matter other than that it concerned a cargo of frozen cooked shrimps - Mr. Thompson is obviously one of the leading experts at the Bar on that subject. The relevant part is at paragraph 33 of the judgment of Lord Justice Buxton, speaking for the Court of Appeal. His Lordship identifies at paragraph 33 that the test was proportionality. That is the issue under Community law. At paragraph 34 his Lordship says this:

> "While in some cases it will be possible for a court to reach a conclusion on an issue of proportionality on the basis of common sense and its own

> understanding of the process of government and administration, I doubt whether it will often be wise for a court to undertake that task in a case involving technical or professional decision-making without the benefit of evidence as to normal practices and the practicability of the suggested alternatives."

He refers to the *Daly* case, which tells us what proportionality requires, and at paragraph 35 Lord Justice Buxton adds:

> "It is difficult to see how, in a case involving decision-making on a technical issue, the court can pursue either of those enquiries, and in particular the first of them, without the benefit of technical evidence."

My friend Mr. Thompson's skeleton argument seeks to distinguish that authority essentially on its facts, to which my response is that it is a statement of general principle, and, with respect, a very wise one, relating to the application of the principle of proportionality, which, unlike irrationality, of course requires the court or tribunal to some extent to, as it were, get its hands dirty to assess the balance that the decision-maker, here the CC, has made. Of course, it is not an appeal on the facts, proportionality, but it does require some intimate assessment of the relevant factors and the balancing exercise to identify whether that has been conducted on a proportionate basis, and, says Lord Justice Buxton, that is often assisted by expert evidence.

THE CHAIRMAN: I think one of the points that is made is that there is a bit of a difference between expecting the High Court to know about cleaning prawns and expecting the Competition Appeal Tribunal to know about economics and accountancy. This is a specialist Tribunal, those matters are, one would expect, within our expertise.

LORD PANNICK: Can I put it most respectfully in this way: in general terms competition issues are within the expertise of this Tribunal, but the issues, as I shall explain to the Tribunal in a moment, that Professor Higson is addressing, are matters of some technical expertise on which this Tribunal, whatever expertise it has, and it has a great deal, is assisted by seeing what he has to say on these questions, from his expertise and his experience. It will be the judgment of this Tribunal that matters. No one is suggesting that Professor Higson replaces, nor could he, the judgment of this Tribunal. However experienced this Tribunal is, it will benefit, in my respectful submission, from the evidence. I do say it is very difficult to start from the position, this early in the case, that what Professor Higson has to say cannot assist, or will not assist, or will not throw light on the matters that this Tribunal is going to address, coming to the case with its expertise. One is at such an early stage of these proceedings that to shut out this material would, I

respectfully submit, do a disservice to the object which is to get the right answer on issues of proportionality. So I invite this Tribunal, notwithstanding the expertise it has, to operate on a principle that it will be assisted, or at the least may be assisted, by hearing from someone who has undoubted expertise on questions of accountancy, assessing profits and looking at costs, and the detriments of the approach that the Commission has taken. That is how I put it.

The Competition and Markets Authority also rely on the *Lynch* case - that is the judgment of Mr. Justice Collins - which is at tab 4 of this bundle. This was a case where Mr. Justice Collins was very dismissive of expert evidence. I draw attention to the fact that at p.1166, paragraph 18, we see that Mr. Justice Collins was considering a claim based on irrationality. I, therefore, respectfully submit that this authority is not going to assist when one looks at the distinct question of the extent to which expert evidence assists in relation to a claim based on proportionality, which was the issue addressed in the *Seahawk* authority.

As I was indicating, I do say that the expert evidence will assist, or at least may assist, in this case given that one is not going to go into the details of it today. I make two points: first, this is a proportionality case; a challenge to a divestment order. Divestment, because it involves a serious interference with property rights, has to be able to withstand, and is only lawful if it can withstand, a proportionality challenge; that is the first point.

The second point is that the evidence that we have put before the Tribunal on which we wish to rely does address two technical topics which are central to our proportionality challenge. They are the profitability assessment and the cost benefit analysis. Not in the abstract but in the context of this particular case.

What is said by the Competition and Markets Authority is that Professor Higson has already provided evidence to the Competition Commission during the inquiry, and that is absolutely right. My submission is that far from leading to the conclusion that Professor Higson should be prevented from adducing further evidence, this is the very reason why evidence from him will assist the Tribunal and that is why we wish to rely upon his evidence to assess the report of the Commission and to explain the technical reasons why the report's analysis fails the proportionality test. Indeed, if I can put it this way, most respectfully, these are points which I am going to make in any event by way of submission; this is our case. I am going to be relying on what is said by Professor Higson.

It seems to us, with the greatest of respect, much to the benefit of everybody, by which I mean to the benefit of my clients, to the benefit of the Commission in knowing the case that they are going to have to respond to, and to the benefit, with respect, of this Tribunal in

understanding the points that I am going to be making on 29th September, if the Tribunal has the benefit of those points set out in the form of the expert report, and so the Commission has the opportunity – if it wishes to do so, it may not wish to do so – to respond to them during the period of time that it has to put in further evidence. Surely that is a more convenient process than me putting in all these points by way of submissions to the Tribunal. Indeed, to have these points set out in this expert report is likely to shorten rather than lengthen the hearing, because the criticisms that we make are presented in a structured, coherent manner. If this is all a waste of time, if this is all unpersuasive, then there are ample costs provisions that will protect the interests of the Commission. If we lose the case the normal order would be that we would pay the costs. If we win on some other point and the Commission makes a submission which finds favour, that the expert evidence was unhelpful or a waste of time, then any costs of the Commission would, no doubt, be met by my client. So I do say that in the context of this case it would be disproportionate to the legitimate aims of ensuring the efficient conduct of these proceedings to prevent us from relying on this expert report, on issues of undoubted technical complexity which are central to the proportionality challenge. I am happy, or at least prepared, to go through what Professor Higson says, but I do not anticipate that the judgment of this Tribunal today on this point is going to depend upon the fine content of what Professor Higson says.

It is a matter of general principle and policy whether this Tribunal is prepared to allow this material to go in or not. I do not think the argument depends on the strength of the points that Professor Higson is making, or their weaknesses, because that is not the purpose of today's hearing. So, although I am prepared to take you through that, sir, members of the Tribunal, I do not myself anticipate that that will be a useful use of your time today.

That is what I want to say in support of this. We have explained in the application that all of Professor Higson's points are central to our proportionality challenge. Given the importance of the proportionality challenge to my clients, we do respectfully submit that it would be most unfortunate to prevent them from putting their best case forward at the hearing, given that there would be no adverse consequences for the Competition and Markets Authority.

I should, perhaps, add one point, because my friend suggested, when we were dealing with timing, that the points may be interrelated. I have no intention whatsoever of calling evidence from Professor Higson. As I say, I anticipate that at the hearing I shall be using his material as a useful aide-mémoire in order to present our points on proportionality.

They will either be good points or they will be bad points and they will be determined by reference to the answers that the Competition and Markets Authority present, either by way of argument or by reference to the report we already have or, indeed, by reference to other written evidence which they adduce. This is not a matter of credibility on which one is going to have oral evidence, where it is put to Professor Higson that he is mistaken or he is a liar or something; that is simply not likely.

Those are my submissions.

THE CHAIRMAN: Thank you very much, Lord Pannick. Mr. Thompson?

MR. THOMPSON: Sir, we have submitted a full skeleton argument and unless the Tribunal directs me otherwise I do not propose to go through it blow by blow, I am hoping the Tribunal has had the opportunity to look at it.

THE CHAIRMAN: We have.

MR. THOMPSON: The question of proportionality and irrationality and the difference between them, has been a vexed matter of public law for some 20 years, and I do not propose to go into that in any detail today. Suffice to say that there is ample authority both at the Community level and at the domestic level that when one is engaged in a review of an expert body's decision, there is a substantial overlap between the two – I put it no higher than that. This was considered in some detail in the *BAA* case to which Lord Pannick refers in his original application, and in particular certain conclusions were reached at paragraph 20(5) of the *BAA* judgment which is at tab 5 of the authorities bundle and, in particular, in the context of divestment. It may be a helpful summary of the issues and, indeed, the Tribunal will see half way down that the *Daly* case, which is part of the reasoning in the *Seahawk* case, is expressly referred to by Mr. Justice Sales there. I particularly refer the Tribunal to the bottom of the page where Mr. Justice Sales says this:

> "Where, as here, a divestment order is made so as to further the public interest in securing effective competition in a relevant market, a judgment turning on the evaluative assessments by an expert body of the character of the CC whether a relevant AEC exists and regarding the measures required to provide an effective remedy, it is the 'manifestly without reasonable foundation' standard which applies. One may compare, in this regard, the similar standard of review of assessments of expert bodies in proportionality analysis under EU law, where a court will only check to see that an act taken by such a body 'is not vitiated by a manifest error or a misuse of powers and that it did not clearly exceed the bounds of its discretion."

So I think the Tribunal will see there that there is a considerable overlap between such a test and an irrationality test in a judicial review context.

Turning to the question of admissibility of evidence, we would say that in summary, in judicial review proceedings, the hurdle for the admission of additional evidence at all is a very high one and I do not think Lord Pannick takes any issue with the general *Powis* principles, which are set out in the first authority in the bundle; nor does he contend, I think, that any of those three exceptional principles are satisfied in this case, so I will take that matter very briefly.

The three principles are set out at paragraph 595 G to H:

> "… the court can receive evidence to show what material was before the minister or inferior tribunal".

Clearly, a new expert report would not assist in that respect.

> "(2) where the jurisdiction of the minister or inferior tribunal depends on a question of fact, or where the question is whether essential procedural requirements were observed …"

That clearly does not apply, and then:

> "(3) where the proceedings are tainted by misconduct on the part of the minister or member of the inferior tribunal …"

That clearly does not apply. So the basic rule is that this is nowhere near the ordinary position for admission of evidence and so the relevant authority on general principle is the *Lynch* case and, in this particular context, the reasoning of Mr. Justice Sales in the *BAA* case. Lord Pannick took you through some of the judgment in the *Lynch* case, but if we turn back to it briefly - tab 4. If one looks at the headnote one can see about a third of the way down by "e", the finding is:

> "In a truly technical field, where the significance of a particular process is in issue, fresh expert evidence can be admitted to explain the process and its significance."

And that is obviously similar to the *Seahawk* sort of case where the court knows nothing about frozen shrimps and whether they pose a risk to health, and so it may be useful to have some expert evidence in that sort of context.

Further down at "f":

> "… the court must be careful to recognise and apply the distinction between an expert's report which seeks to explain what is involved in a particular process, and how complicated it is, and one which goes on to opine that it was irrational for the body or Tribunal to have reached the conclusion that it did. In cases where the

> Tribunal or body is itself composed of experts or has been advised by an expert assessor it will be virtually impossible to justify the submission of expert evidence which goes beyond explanation of technical terms since it will almost inevitably involve an attempt to challenge the factual conclusions and judgment of an expert."

In my submission that is absolutely squarely this case, and one sees the reasoning at paragraph 25 of the judgment, p.1168, the second half is effectively quoted in the headnote. In my submission that is the relevant finding, and there is nothing in *Seahawk* that goes against it. On the contrary, the judgment that Lord Pannick relied on in his application as the procedure that he had followed - the *BAA* judgment applies that in the present context precisely at paragraphs 79 to 81 and, in particular, the principles are set out at paragraph 79. Having referred to *Powis* Mr. Justice Sales says:

> "The new evidence did not fall into any of the categories identified there of material which will be admitted as evidence on a judicial review: it was not evidence …"

and then he gives the three examples.

> "Mr. Green submitted that it was evidence which should be admitted to enable the Tribunal to carry out its review function properly, relying on the modest adjustment to the *Powis* categories which Collins J was prepared to accept in *Lynch*. Unlike in *Lynch*, we were not at all persuaded that we needed to see the expert reports in order to understand the submissions made by Mr. Green under Ground (4)."

Then, the Tribunal goes on with this general point:

> "In our view, attempts to introduce detailed technical expert evidence in reviews under section 179 of the Act should be strongly discouraged and disallowed other than in very clear cases. Otherwise, there is an obvious danger that costs will be wastefully multiplied with no significant benefit for the speedy and efficient dispute resolution procedure which is supposed to be provided for by a section 179 review, as with judicial review generally."

Then he goes on to apply those principles to the present facts. So with that legal approach, in my submission, this is a very weak application. It is clear that this is not an exceptional case; on the contrary, it is precisely the sort of case where further expert evidence would be unnecessary and contrary to principle. Indeed, Lord Pannick appeared to say that because we are at an early stage it was good enough that it might help. In my submission, that is the converse of an exceptional principles test.

Turning to the reality of the matter, Lafarge submitted three expert reports at the administrative stage, two by Professor Higson himself, and one by RBB Economics, and they are to be found at tabs 19, 20 and 22 of the bundles – I do not think it is necessary to turn them up. Lafarge could have submitted whatever expert submissions they wished within the timetable of the Competition Commission investigation, including in response to the detailed provisional findings and, of course, they can submit that we failed properly to consider the expert reports that they did submit, including the two by Professor Higson. Appendix 7.7 – I can give the references if it would assist the Tribunal – dealt in considerable detail with Lafarge's various submissions on the issue of profitability, including, in particular, reliance on the expert evidence of Professor Higson. We would say that the substance of Mr. Higson's evidence seems to be a classic second bite of the cherry – or, indeed, a third bite of the cherry attempt to argue that the Commission's final approach was wrong or irrational and there is, indeed, reference to irrationality in the application itself at paragraph 8. We say that is precisely a matter for the Tribunal, as an expert Tribunal tasked with reviewing the Commission which was, itself, an expert economic regulator.

Lord Pannick makes various points at paragraph 6 of his skeleton argument. First of all, at paragraph 8 of the skeleton argument there is reference to Professor Higson's independent views being highly helpful to the Tribunal. In my submission, any technical issues raised on profitability will have already been fully debated by the parties, and the Tribunal is very well able to understand those issues with the assistance of counsel. The suggestion that Professor Higson's submissions are any better structured than the submissions that Lord Pannick is likely to make, in my submission, is not a credible one, or that this Tribunal lacks the expertise to understand those submissions. Further, the fact that Professor Higson is not apparently to be called or cross-examined casts further doubt as to whether or not another document from Professor Higson could help.

Secondly, Lord Pannick says that Professor Higson has not had an opportunity to respond to the reasons given in the final report. It is obviously contrary to any normal principle of judicial review for one of the parties to be given a right to respond to the final decision unless there has been some failure to consult, which is not arguable in relation to the evidence of Professor Higson, which has obviously been before the Commission at all stages.

The other two points, that the Competition and Markets Authority could respond if it wanted to, and could make submissions about weight, are not, in my submission, reasons to

allow this evidence. On the contrary, the risk that the expert evidence issue might get out of control was one of the very reasons why the Tribunal in *BAA* refused admissibility of the evidence, because they did not want a battle of experts, and more generally, the final point about weight is strongly redolent of an appeal on the merits, and the Competition and Markets Authority would say that it is very important that the Tribunal confirms that the judicial review jurisdiction that it has in this case and in merger cases is respected, and it observes the express limits on that jurisdiction laid down by Parliament.

Just to conclude, in summary, the Competition and Markets Authority is content to engage with the issues at whatever level of scrutiny or detail the Tribunal deems appropriate. However, we would say that nothing in Lafarge's application or its skeleton suggests that this is, in reality, an exceptional case. On the contrary, it is a normal case and the Competition and Markets Authority submits that the application should be rejected.

Unless I can assist further, those are our submissions.

THE CHAIRMAN: Thank you.

LORD PANNICK: If I may reply briefly, my friend began by saying that there is a substantial overlap between proportionality and irrationality, but there is, nevertheless, an important difference, and it is the difference that was identified in *Seahawk*, which was at tab 3, in the passage I did not read at the end of paragraph 34 of the judgment of Lord Justice Buxton, citing from Lord Steyn's speech for the appellate committee in the *Daly* case. It is tab 3, paragraph 34, where Lord Steyn says:

> "… the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relevant weight accorded to interests and considerations."

The precise requirements of proportionality will, no doubt, be the subject of detailed argument beginning on 29th September.

My friend relied on the *Powis* case, the 1981 judgment on the circumstances in which fresh evidence may be adduced in a judicial review case. That, of course, was dealing with traditional judicial review, not with issues of proportionality. Since 1981 the law has moved on - see the *Seahawk* case, where the Court of Appeal recognised that where the issue is proportionality, as I think it never was in a judicial review in 1981, then expert evidence can and does assist on technical issues.

My friend emphasised the *Lynch* case; Mr. Justice Collins' analysis. Mr. Justice Collins applied the *Powis* judgment, understandably so, because, as I indicated, *Lynch* was not a case about proportionality.

My friend, in relation to authority, finally emphasised the *BAA* judgment. Could I take the Tribunal back, please, to tab 5 of the authorities. It is important to recollect what the issue was in *BAA*. My friend drew attention to paragraph 78 where Mr. Justice Sales began his analysis of the issue of expert evidence, and he begins paragraph 78 by explaining that this arose under ground 4 of the complaint. The Tribunal will find ground 4 of the complaint at paragraph 13(4) of the judgment on page 6. Sub-paragraph (4) is ground 4. If one turns back to the beginning of paragraph 13 on page 5, we see that there were four grounds of challenge. The fourth of them:

> "In assessing whether the remedy of divestiture of Stansted remained proportionate … the CC took into account the monetary cost to BAA of selling Stansted (…) but failed to take into account a relevant consideration, namely the substantial impairment to shareholder value … In relation to this ground of challenge, BAA made an application in the course of the hearing to adduce new evidence which the Tribunal dismissed for reasons set out below."

Two points I emphasise: far from being a proportionality challenge of the sort that was envisaged in *Seahawk* and is made in the present case, this appears to have been a traditional judicial review ground of a failure to take account of a relevant consideration. That is a traditional ground of judicial review. That is the first point.

The second point I make most respectfully is that Mr. Justice Sales was addressing the value of the expert evidence during the substantive hearing. He was, on the basis of all the arguments that he was considering, well able to assess the value - if any, the additional value - provided by the expert evidence. I would respectfully submit the need to be a little bit more circumspect in relation to the present case where the Tribunal, with great respect, cannot have a panoramic command of all the material that would be required to identify the additional value that will be provided by Professor Higson's evidence. At the very least, I respectfully submit, I can say that there are good prospects that admitting this evidence will assist in the presentation of the case without causing any detriment whatsoever to the Competition and Markets Authority.

My friend emphasised that Professor Higson's evidence was relied on before by Lafarge Tarmac. I addressed this in opening. That is not a reason for excluding his expert report because his expert report focuses, as his earlier evidence could not, on the reasoning of the Commission in the Final Report.

My friend's response to that is to say that we are seeking a second bite of the cherry. We are not. What we are seeking to do is to advance, as we are entitled to do, our case on why

the Commission's approach in the Final Report was not a proportionate one. In principle, unless we are wasting the time of the Tribunal, we are entitled to adduce evidence and argument in support of our legitimate proportionality complaint.

Finally, my friend said there is a concern that expert evidence will get out of control. There is no question of expert evidence getting out of control. There is one expert report, that addresses matters central to the proportionality challenge which the Commission can respond to if they see fit, and there is no reason to think, addressing my friend's final point, that this in any way undermines, as he put it, the judicial review jurisdiction and suggests an appeal on the merits. It does not. The issue was, is and will be proportionality.

I respectfully submit that Professor Higson's report will assist or, at the very least, may assist, and it would be disproportionate to exclude it.

That is my submission.

THE CHAIRMAN: Thank you very much. We will rise to consider our judgment.

(Short break)

(For Ruling see separate transcript)

MR. THOMPSON: Thank you very much. I am grateful. It is an unusual situation at a CMC, but we would make an application in relation to costs for this application because, in our submission, it was really not a well-founded one. I am not asking for a specific sum, but I am instructed to ask for our costs of the application.

THE CHAIRMAN: Lord Pannick, do you have anything to say about that?

LORD PANNICK: Yes. I am surprised at that application, because we had to come here anyway. A limited amount of time and effort has been devoted to the expert evidence issue. In my submission, the appropriate order would be that the costs of today should be part of the general costs of the proceedings, which will be determined at a later stage.

THE CHAIRMAN: It does not seem to us that this was a wholly unreasonable application to make, and in those circumstances it seems to us that the appropriate order should be just costs in the case.

MR. THOMPSON: I can see that there is certainly pragmatic advantage to that in any event, so I am grateful, but I was instructed to make the application. We are obviously grateful for the decision.

THE CHAIRMAN: There is one other small matter. Have you got the draft order there? It is tab 6. Can you go to paragraph 13? I am reminded, although I must admit I have not checked the point myself, that the earlier application has not actually been stayed. What I was going

to suggest was that it now be stayed. Thank you. The earlier order was that the application be stayed until after the publication of the final report, so it has been unstayed, if you like.

LORD PANNICK: We are very grateful, sir. It should say "be stayed".

THE CHAIRMAN: Thank you very much.

MR. THOMPSON: Can I just make one other point, which is to apologise to my learned friend's clients if I have referred to them repeatedly as "Lafarge". I think, for obvious reasons, they prefer to be called Lafarge Tarmac. I simply put it on the record that that is how I intended to refer to them, and that is how I will try to refer to them in future.

THE CHAIRMAN: Thank you. I should probably apologise to your clients for referring to them as the "Competition Commission".

MR. THOMPSON: I think we do not mind about that. There are a large number of documents which have that as the name, although we will all try and learn that we are, in fact, the Authority, rather than the Commission in future.

LORD PANNICK: We look forward to seeing you on 29th September, and to seeing the Competition Commission or the Competition and Markets Authority or both of them.

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