IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1576/6/12/23

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Friday 10th March 2023

Before:

The Honourable Mr Justice Marcus Smith
Anna Walker CB
Michael Cutting

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Applicants

(1) Apple Inc.; (2) Apple Distribution International Limited; (3) Apple Europe Limited; (4) Apple (UK) Limited

V

Respondent

Competition & Markets Authority

A P P E A R AN C E S

Tim Otty KC, Tim Parker (Instructed by Gibson Dunn) on behalf of Apple Inc.

Sir James Eadie KC, David Bailey & Khatija Hafesji on behalf of the Competition & Markets Authority

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Friday, 10 March 2023

(10.30 am)

MR OTTY: [There is no recording of the first few words] ... I appear with Mr Parker for the Applicants, collectively referred to as Apple. Sir James Eadie, King's Counsel, Mr Bailey and Ms Hafesji appear for the CMA.

In terms of documentation before the tribunal, an agreed bundle was filed in accordance with your directions on 22 February, it comprises: bundle A with the parties' pleadings and the order; bundle B with the applicants' documents; C, the CMA's documents; and D containing the relevant statutory provisions and authorities, and various limited additions to that bundle B were made yesterday which I hope has been added to the tribunal's bundles.

THE PRESIDENT: I have certainly received them electronically.

MR OTTY: I'm grateful.

THE PRESIDENT: Mr Otty, before you begin with your submissions, three points; two of basic housekeeping and one a little bit more substantive.

First of all, the usual live-stream warning, these proceedings are being streamed, an official recording is being made and there will be an authorised transcript by my direction, but it is prohibited for anyone to make an unauthorised recording, audio or visual, to photograph or transmit these proceedings and a breach of that rule would be punishable as a contempt. I know no one will do that, but nevertheless it's important to be clear.

Secondly, we're very grateful to the parties for the bundles. We have read quite considerably, we've read the pleadings, we've gone through the statutory provisions with some care, we've looked at the annexes to both pleadings with the very helpful documents there appended. So you can take it that we are pretty well up on the factual history on the broad content of the decisions and on the statutory provisions. I suspect

if you tested us on the case law you cited, you might find us a little bit wanting, but that is essentially the limits or extent of our reading.

Moving on, then, to the third point, which is the -- really what I'm going to do is unpack a set of thoughts that we have which I hope will help focus both Apple's and the CMA's submissions in terms of what at the moment is troubling the tribunal about your application and the CMA's response to it. The reason I'm articulating it now is to enable you to push back as you wish on the points that we make, so do please take them in that light.

Now, in your application, paragraph 20.1, Apple suggest that the CMA are contending for a freestanding MIR under section 131 and it will be interesting to know just how far that freestanding section 131 MIR is being pressed.

But let's suppose that the CMA, not having made any decision about an MIR within the constraints of sections 131A and B, assuming they apply, but having done so makes an MIR outside, let us say, the time limits of 131B. Now, the question first will be: do those time limits apply, which is why the self-standing MIR point is so important? If they do then there's clearly been a breach of the timetabling duty and it seems to us that there would be a case for saying that there has been a breach of the timetable, a question as to vires and therefore quashing, which is essentially Apple's case.

MR OTTY: Yes.

THE PRESIDENT: Now that, I think, is an interesting but relatively straightforward proposition where one has got only one decision.

Now, here we have actually two decisions. We have the decision that is the subject of this application, the 22 November 2022 decision, and the earlier decision of 14 December 2021, not to make an MIR. It seems to us that it is quite important in determining your application in relation to the later decision to understand the interrelationship between the later decision and the earlier decision. And our thinking

at the moment is that there is such an interrelationship and it's important to tease out exactly what it is.

Now, I absolutely don't want to get into the facts of this case, so what I've done is I've compiled four hypothetical cases which I'm going to read out because I think that way we can see just what the relationship between the earlier and the later decision might be.

Let's take a first hypothetical. The CMA make the earlier decision entirely compliant with the statutory provisions as to consultation and timetable, but with an express reservation and the express reservation says something such as, this is our decision, we are not going make a reference, but we reserve the right to remake that decision at any time and for any reasons.

Now, I suspect the court would say we are not terribly impressed with this, terribly sorry, CMA, you have made your decision, you can't unilaterally extend the time limits under section 131B.

MR OTTY: That is what we will say.

THE PRESIDENT: That is what you will say, we will see what the CMA has to say, it's a hypothetical that we would like to know the answer to.

The next hypothetical, same case as before, but the CMA make an explicitly provisional decision for what is probably a bad reason. Let's say the CMA said on the face of the decision this is explicitly a provisional decision. We are not going make a reference but that is our conclusion provisionally. The reason we are making a provisional decision is because we are under some pressure resource wise and will review the decision in four months' time when the project is finished, and if on mature consideration after four months we think a reference is appropriate, we will change our provisional decision and make an MIR then.

Now, my cards on the table, I think that's quite a hard case not because the CMA

shouldn't have done this, I think they probably shouldn't, an irrelevant consideration, arguably, but it does render the earlier decision attackable on JR grounds. And if quashed, the question then would be: what would happen? Would the court direct the CMA to make another decision in place of the earlier decision? If so, could that decision be, well, we provisionally said no, but having considered it and being obliged to make a final decision, the answer is yes, we will make an MIR. Anyway, that's the second position and it will be very helpful to know what Apple's position is in due course when you come to it.

MR OTTY: I will develop it in the submissions when we get to it, certainly so. But our initial response is that the concept of provisional decision-making, the ground you just articulated, is not reflected in the statutory scheme at all.

THE PRESIDENT: Indeed. I think that's something which is relatively uncontroversial, but clearly you would want to hear the CMA on it. The question really is: what are the consequences of making a decision that is explicitly not envisaged by the statutory scheme because I think you are absolutely right, when in section 130 and following there's discussion of a decision, it means the decision once and for all.

MR OTTY: Yes.

THE PRESIDENT: And the provisional decision just doesn't cut the mustard. But that being the case, if it's quashable or if it's to be regarded as a final decision so you delete provisional and just treat the decision as final, well that is something which we may need to debate.

MR OTTY: Yes, thank you.

THE PRESIDENT: Hypothetical 3: the CMA make a regular earlier decision not to make a reference, and it then emerges that one of the parties that would have been investigated under the MIR has actually been making material misstatements about the position. And the CMA revisits the matter in the light of new information and in

a later decision decides to make an MIR.

So not this case, but it's one where again we would be interested in the answer.

MR OTTY: Are the CMA's hands tied in that circumstance?

THE PRESIDENT: Precisely so. It's not so much a material change in the circumstance as a material change in the CMA's understanding of the circumstances, and I've added a bit of rocket fuel to the example by postulating misrepresentation by one of the parties to make it an easy case, but you may want to discuss variance.

Final hypothetical -- and I promise I will shut up now -- is this: there's a material change in circumstance after the earlier decision's been made, not attributable to any misstatements, things have just moved on, can the CMA review an earlier decision in light of a later material change in circumstance without jumping through the various statutory hoops again?

Here, I think the question is: does timing matter? I mean, suppose the point is done shortly after the earlier decision, so a month or two later you discover that things have moved on, there's been a change of circumstance and say well, what we said a month ago is just not right, do we have to go through all the hoops or do we not?

How far does timing matter? I mean, suppose it's 25 years later and you say, you know, things have moved on, no surprises there, things have moved on, we'd like to revisit the decision 25 years on when the world has completely changed. Well, I suspect we all know the answer to that. So timing clearly does matter in terms of this hypothetical scenario.

So I apologise for the length of this question.

MR OTTY: No, that's extremely helpful, sir.

THE PRESIDENT: That is what we are thinking about and we felt that both parties were a little bit focused exclusively on the later decision, and we wanted to tie up this question of the nexus between the two decisions as something that at the moment

matters to us.

So I will hand back to you Mr Otty, I'm very sorry to have taken up your time.

MR OTTY: No, thank you very much indeed, sir. As I say, that's extremely helpful. Certainly I had prepared, in the course of my submissions, I hope to grapple with each of those conundra and I will seek to do so with greater targeting in the light of that helpful indication. So thank you very much.

Application by MR OTTY

MR OTTY: The proceedings, as the tribunal has seen, raise a pure question of law as to whether, notwithstanding the need to look at the whole chronological landscape that you just identified, whether a decision to make a Market Investigation Reference made in this case on 22 November 2022 was ultra vires because it was made outside of statutory time limits.

Apple's case can be summarised in what we hope are three quite straightforward propositions. Firstly, the effect of section 131A and B of the Enterprise Act is that where the CMA has published a Market Study Notice, then it is required to publish any proposal that there be a Market Investigation Reference in relation to the subject-matter of that notice within six months, and to take any decision that there should be such a reference within 12 months. The reference itself, must also be made by the 12-month mark. That is proposition 1.

Proposition 2 --

THE PRESIDENT: Just pausing there, those constraints are triggered where the CMA is proposing to make a reference under 131, in relation to a matter specified in the notice. So that's the gateway that has to be satisfied.

MR OTTY: Yes.

THE PRESIDENT: It's in relation to the matter specified in the notice.

MR OTTY: Yes.

THE PRESIDENT: Then all that follows. If it's not in relation to, then you obviously don't have to comply.

MR OTTY: No.

THE PRESIDENT: No. But you would say in relation to --

MR OTTY: Where you published the Market Study Notice, then that triggers the particular time limits and consultation periods and decision-making time limits which occupy the field. There's no room for what was referred to earlier as the freestanding power. It's fair to say that the CMA seems to wax and wane a bit on the extent to which it advocates for a freestanding power, but we will come to that in a moment.

THE PRESIDENT: You say there is a freestanding power, it just doesn't exist where in relation to test --

MR OTTY: Exactly. Where you have a Market Study Notice published and an identity of subject matter between the Market Study Notice and the purported reference, the freestanding power is displaced.

THE PRESIDENT: Thank you.

MR OTTY: So that is proposition 1.

Proposition 2, which we probably don't need to take a great deal of time on, but logically is the next one, on the facts of the present case, the CMA's decision of 22 November was made in breach of the relevant time limits, if they apply, and was accordingly ultra vires. The basic chronology that the tribunal has seen, of course, is the Market Study Notice was published 15 June 2021, so if the time limits apply in the way we say they did, then any proposal for a reference had to be made by 14 December 2021 and any decision that there should be a reference, not a proposal for consultation on a decision, any decision that there should be a reference had to be made by 14 June 2022. What, in fact, happened was way outside those time limits.

THE PRESIDENT: That's not controversial, Sir James, is it?

SIR JAMES EADIE: No.

MR OTTY: That is proposition 2. Proposition 3, if the 22 November decision was made outside permitted time limits, then we say the only appropriate remedy is a declaration that it was invalid and of no effect. We say that's the case because any other approach would undermine the statutory scheme which imposed the time limits in the first place. They were expressed to be mandatory, their purpose was to provide expedition and certainty, as a corollary of the granting of intrusive powers to the CMA, and their breach was not trivial but substantial. As I have just illustrated, the proposal for a reference after 12 months instead of six months, on our case, the reference was made after 17 months instead of 12 months on our case.

THE PRESIDENT: Again, just to tie that back to the statutory regime, if you look at section 131A(1)(a), the section applies where the CMA's published a Market Study Notice, and (a):

"The CMA is proposing to make a reference under section 131..."

Now, what you are saying, I think, is that you can propose until you are blue in the face but it means nothing unless you comply with the time limits and the consultation obligation in 131A and B.

MR OTTY: Exactly.

THE PRESIDENT: So if you propose after the time limits or without consulting, it's a thing writ in water and for that reason should be quashed.

MR OTTY: Yes, it completely undermines the statutory scheme.

THE PRESIDENT: Yes.

MR OTTY: Now, for its part, as you've seen, the CMA contends that on a proper interpretation of the legislation no time limits were breached, that is defence paragraphs 58 through 72, or alternatively, that even if the time limits were breached, then its 22 November decision should still stand.

Now, before addressing each of these propositions in turn and by way of preview I would like to just summarise, if I could, what we submit respectfully to be three central flaws in the CMA's response as articulated in its defence.

Firstly -- and obviously I will have to go to the wording, although I appreciate the tribunal has pored over it already -- firstly, we say their approach is contrary to the natural meaning of the words used in the legislation. It requires, we say, a reading in of words into the legislation which aren't present, an introduction, as I've already submitted, an introduction of a concept of provisional decision making which finds no reflection in the statutory scheme, and a de facto prolongation of the market study process beyond the 12-month period which the statute specifies to be the maximum permitted period. So that's the first basic flaw.

The second basic flaw is related, of course, but it's distinct, we say the CMA's approach to the time limits deprives them of any real substance or purpose and so runs counter to the statutory scheme. It would confine their application, we say, to a very narrow set of circumstances for no good reason and it would frustrate the clear statutory purposes of expedition and certainty evident both from the legislation itself and from admissible secondary materials. And it is, for good measure, an approach which is inconsistent with the CMA's own published guidance.

The third flaw is that the CMA's understandable and repeated invocation of its general obligation to have regard to relevant considerations cannot, we say, assist it if, on their true construction, the time limits are indeed applicable. Where, as we contend is the case here, Parliament has laid down particular time limits within which the CMA is to exercise its decision-making powers, then the CMA is obliged to consider all relevant considerations and representations within that timeframe, but not otherwise.

THE PRESIDENT: What you are saying is we can take as read the CMA's statutory responsibilities, the section 25(3) point --

MR OTTY: Yes.

THE PRESIDENT: -- to protect competition.

MR OTTY: Yes.

THE PRESIDENT: And maybe those responsibilities could be read into an ambiguity later on in the statute, which you would want to read in light of those responsibilities. But where the statutory regime is clear, you have a time limit, you can't use the very important responsibilities that the CMA has to introduce a wriggle-room that Parliament has itself not introduced.

MR OTTY: Exactly. And nothing in our case seeks to challenge or undercut the importance of the public interest that the CMA serves in its discharge of functions. Our point is really a very simple one in terms of the public interest, and that it is that it is multifaceted. Of course it has a very important component to protect the consumer and regulation of competition, but it also has, as the legislative scheme shows, as the explanatory notes show, critical importance of legal certainty, expedition of decision making and proper constraint of intrusive powers. Properly analysed and viewed from all perspectives, we say the public interest supports our submissions on this application. So that's an outline and overview. If I can go back to proposition 1.

I should say by way of comfort I won't be testing the tribunal on any of the case law, there's actually very little difference between us, I think, on any of the applicable legal principles, the question is how they apply to this particular legislation.

Proposition 1, then, relating to the time limits themselves. The correct interpretation of the section is, we say, as summarised in our application at paragraph 19, A11, and I know the tribunal has that well in mind.

For the purpose of establishing the correctness of those propositions in that summary I will obviously be going in a moment to the provisions themselves. I would just like to start and, as I say, I very much doubt there's any difference between us on this, but

I'd like to start, if I could, by summarising what we submit to be the key principles of statutory interpretation which apply here and I think six of them altogether.

Firstly, the legal meaning of a statutory provision is that which reflects its legislative intent.

Secondly, the primary source in identifying legislative intent is the legislative text itself, read in context, but the court is also entitled to consider admissible external aids to interpretation and those embrace publicly available consultation papers of the kind that the CMA refers to in its defence, and they embrace explanatory notes of the kind that we emphasise.

Thirdly, unsurprisingly, Parliament is to be presumed to act in a rational, reasonable way, pursuing a clear purpose in a coherent and principled manner.

Fourthly, the legislative meaning can embrace not just what is expressed in a statute, but what may be properly implied as a matter of common sense and having regard to potential consequences. That illustrates why it is, of course, necessary to consider some of the hypotheticals that you put to me earlier.

Fifthly, importantly, the principle of effectiveness means that an Act must be construed so that its provisions are given force and effect consistent with the statutory purpose identified, rather than being rendered nugatory or capable of evasion or bringing about an anomalous or illogical result.

Sixthly -- and they all flow together to some extent -- it's a basic principle of legal policy that law should serve the public interest. That principle forms part of the context against which legislation is enacted and falls to be interpreted and that brings into play the importance we say of a properly wide analysis of what the public interest entails in any given case.

So that's, as I say, I would anticipate, the relatively uncontroversial set of key principles against the background of which we then turn to the legislation itself.

You have that in bundle D beginning at page 1. We have the CMA's function, as set out for material purposes, here in section 5 embracing the obtaining, compiling and keeping under review of information about matters relating to the carrying out of its functions. As the tribunal knows, of course other functions embrace provision of information to the public, provision of information to ministers and so on, but they don't arise for consideration here.

The key provisions of relevance to this application are, of course, those that begin at section 130A beginning at D8 and they run through. The central provisions that the tribunal has to consider run through to 131C, but we say we get material assistance from a series of other later provisions, too, in interpreting the scheme and the purpose and so on.

So 130A(1) and (2) imposes an obligation on the CMA to publish a Market Study Notice where it's proposing to carry out its functions under section 5, the functions we've just seen, for the purposes identified in subsection (2). Those purposes are to consider the extent of actual or potential adverse effects on consumers and to assess remedial steps.

By section 130A(3), the Market Study Notice, when published, is required to specify the matter to which it relates, that's subparagraph (a), a period during which representations may be made to the CMA in relation to the matter, and the dates by which the CMA is required to comply with the requirements as set out in sections 131A and B. That's subparagraphs (b) and (c).

By section 131(1), the CMA is empowered to make a Market Investigation Reference where it has reasonable grounds for suspecting any feature or combination of feature restricts or distorts competition.

Then 131(4) states that no reference can be made if the making of a reference is prevented by section 156, which relates to undertakings offered and accepted in the

previous 12 months, or if a ministerial reference has already been made under section 132 but not yet determined.

Just pausing there and I will come to it in more detail, it appears to be at least hinted at at various stages in the CMA's case, that section 131(4) is an exhaustive list of the circumstances in which the CMA is precluded from making a reference and it follows that breach of the time limits can't prevent a reference. That may be an adjunct to what is left of the freestanding power submission, but that is wrong we say for a series of reasons. One, it's not stated to be an exhaustive list; two, we know it's not an exhaustive list because, as we will a see in due course, section 169 of the Act requires consultation to occur in advance of any MIR proposal -- sorry, in advance of any MIR outside the Market Study Notice context. We also know that, on any view, the CMA is constrained by ordinary public law principles of rationality, relevancy, good faith and so on, and it couldn't make a reference in breach of those principles.

THE PRESIDENT: But I mean I know what your answer is going to be, but I will ask the last question as a hint to the CMA. If this subsection 131(4) is read as an exhaustive list, what is the point of 131A and 131B and --

MR OTTY: It would deprive the time limits of any meaningful effect. In fairness to the CMA, at other passages in their defence which I will come to, paragraphs 60, 62, 77 and 82, they appear to contemplate that if the time limits apply and if they were in breach, then their powers were curtailed. And they rowed back and state the position that they didn't breach any time limit. But the argument is there, so I just wanted to touch upon it.

THE PRESIDENT: No, no, I'm very grateful.

MR OTTY: As we have that provision in front of us.

That is 131(4), and we then get onto obviously the critical 131A on D13 which is headed "Decisions about references under section 131: consultation", imposing

particular notification and consultation requirements on the CMA where it's published the Market Study Notice and it states at subsection (1) that the section applies where the CMA has published a Market Study Notice and where one of two circumstances is present.

Firstly, where the CMA is proposing to make an MIR, subparagraph (a), or secondly, where a representation has been made within the period specified in the notice to the effect that there should be one, but the CMA is proposing not to make one. That is subparagraph (b).

THE PRESIDENT: So it's (inaudible), one a positive decision to make a reference and the other a negative decision not to.

MR OTTY: Yes, in the face of representation --

THE PRESIDENT: In the face of representations.

MR OTTY: Section 131A then provides by subsection (2) the CMA must publish notice of either such proposal, so to make an MIR or not to make one despite representations to the contrary, and then it must consult relevant persons about it in such manner as it considers practicable. And that's important, we say, and it's important when one looks at subparagraph (6) of 131A(6) because we see from subparagraph (6) that in deciding what is practicable, the CMA is required, among other matters, to have regard to the restrictions imposed by the timetable for making the decision with a reference to section 131B which, as we will see in a moment, itself contains the overall 12-month time period for any decision to make an MIR.

Now, that is, we say, a clear indication that the time limits, which I'll come to next, are intended to occupy the field where proposals relating to a Market Investigation Reference and decisions relating to them are in play, in a market study context.

THE PRESIDENT: I make this point just to get it on the record for the CMA's benefit, that aren't the critical words in 131A and 131B the following. In 131A(1) this section

applies to a case, I mean there's no wiggle-room there saying, "Provided the conditions which you have gone through in 131(1) are met, this section applies".

So consultation has to follow and all the other provisions in 131A(2) through to (6).

And then 131B(1):

"Where a market study has been published in a case to which section 131A applies, the CMA shall..."

And again no wiggle-room. So what I'm putting -- and I know you'll agree, but I would like know whether the CMA disagrees -- what you have is a forcing into the 131 regime of a power to make a reference, certain non-derogable preconditions which have to be met.

MR OTTY: Yes. That is exactly how we put it. I should say, in fairness -- and I will come to it once we have looked at the whole statutory scheme -- that it could be characterised as an oversimplification simply to focus on the word "shall" and to say: right, that's the end of it, it's a mandatory provision so any breach of it must vitiate the power. Public law is more nuanced than that, I will accept, but once one looks at the statutory scheme here and the underlying purpose evident from that scheme and from the secondary materials, it is indeed mandatory; it means what it says.

THE PRESIDENT: Are you talking about remedy where there has been breach --

MR OTTY: Yes.

THE PRESIDENT: -- or you are talking about wiggle-room where "shall" does not quite mean shall?

MR OTTY: You are right, I'm talking about the former.

THE PRESIDENT: Yes, I see.

MR OTTY: So section 131B, you are ahead of me already, that is where I was going next, as you have just identified, through subparagraph (1) there are two triggers for the application. First, there has to have been a Market Study Notice published. It is

common ground of that, of course, is satisfied here. And secondly, this must be a case to which section 131A applies and as to that, as we have just seen and as you just pointed out, section 131A applies where the CMA is proposing to make a reference in relation to the matter specified in the Market Study Notice.

If those two triggers are met, then two things have to happen. First, the CMA has to publish its proposal to make a reference within six months of the notice being published; and secondly, it has to, within the same period, begin the process of consultation on any such proposal.

It follows, as a matter of common sense, we say, that if the CMA is itself to make a proposal for an MIR, it has to do so within six months of publication of the Market Study Notice because that is what will allow it to comply with the six-month time limit, and that is what will allow for practicable consultation in advance of the 12-month time limit, see subparagraph (6).

There shouldn't, if one takes a step back and considers how the public interest engages with all of this, there shouldn't be any practical difficulty at all with any of that. As we've seen already, section 130A(3) establishes that the publication of the Market Study Notice requires the CMA to set a time limit then for receipt of representations and that can be well in advance of any six-month period, as indeed it was in this case as the tribunal has seen, the Market Study Notice is published in June 2021, representations specifically on the question of a Market Investigation Reference are invited by 26 July 2021.

There shouldn't be any practical difficulties with that, there shouldn't be any practical difficulties also and importantly because, as I've already submitted and as we'll see in detail in a moment, the publication of the Market Study Notice itself immediately vests extensive intrusive statutory powers in the CMA enabling it to obtain whatever information it needs to make an informed decision in good time and importantly,

without crossing any evidential threshold, not even reasonable suspicion. The mere act of publishing a Market Study Notice clothes the CMA with these powers and therefore enables it to obtain whatever it needs to take a timely decision. That's all set out in section 174 which I will come to in a moment.

Going back to section 131B, if I may, subsections (2) and (3) address one particular scenario, namely, where a Market Study Notice has been published; where no representations calling for an MIR have been made within the time limit specified for representations; and where the CMA has itself decided not to make a reference.

In that scenario, subsection (3) requires that within six months of the Market Study Notice, the CMA has to publish notice of its decision not to make a reference.

As you've seen -- and as I'll come to when addressing the facts very briefly under our second proposition -- that is what, in fact, occurred here. But for the purposes of statutory interpretation and understanding the scheme of the legislative provision so as to correctly interpret the time limits, the tribunal will note immediately that the decision, as I have already submitted, sir, the decision referred to in the legislation here is described as just that, a decision. It's not described as a preliminary or indicative view, it's not described as a provisional or an interim decision or a mere proposal and there is no provision in the statute for publication alongside the decision of an Interim Report, purporting to qualify or circumscribe that decision or trigger some form of the consultation or representations on it.

Those concepts of provisional decision-making about a market investigation reference and qualification by reference to Interim Reporting, relied upon by the CMA here prominently in their pre-action correspondence but to some extent in their defence, simply find no reflection in the statutory scheme. Indeed, if, as the CMA would apparently have it, the decision referred to section 131B(2) and (3) is merely to be treated as provisional in nature and subject always to further representations and

reconsideration in the light of such representations, it's very difficult to see how analytically it's different from a proposal.

The different language, we say, used in the legislation is surely of significance. There is either a proposal to make an MIR, a proposal not to make an MIR where representations in favour of one being received, or a decision not to make one, absent such representations. And the unavoidable conclusion, we submit -- and I will come to how to grapple with the hypotheticals you put to me earlier, sir, in due course -- but the unavoidable conclusion is that the first two are provisional and the latter is final. It's a decision.

THE PRESIDENT: Yes. Does that give rise to a question that we need to answer which is exactly what was the nature of what I call the earlier decision? I mean, if one looks at it, it is unequivocal in terms of what it says in the substance of the decision. I mean, what it says is:

"We are deciding not to make a reference under section 131."

I mean, that is absolutely clear. The wriggle-room, if it exists, lies in note eight to the decision.

MR OTTY: **"**At this time".

THE PRESIDENT: **"**At this time". And we are not giving anyone a clean bill of health, we are not saying we find no concerns in the sector, and we have published alongside this notice an interim report. So we have a reference to the Interim Report, but it's not, on the face of it, incorporating the Interim Report by reference, it's referring to it. But it does say that in the Interim Report we've set out preliminary views on potential measures that may be invited -- that may be required to address certain concerns.

MR OTTY: It is critical, we say, in the context because of what the nature of our challenge is. The nature of our challenge is a vires challenge based upon the correct interpretation of the statute. It's not open to the CMA, doing whatever it wants to do,

to reserve to itself powers it doesn't have. Those notes, and the Interim Report that is published alongside those notes, would be a good answer if our public law challenge before this tribunal was one based upon legitimate expectation. That we had been led to believe the CMA was acting in a particular way and it's gone back on that. That's not a debate for today.

What you can't do, we say, on the face of a statutory scheme, is import into it what you would like. So that's our response to that.

THE PRESIDENT: Entirely understood. I quite see where you were coming from, it's a bright-line test. It's a bright-line test based upon the constraints in this case in 131A and B and you say there's no wiggle-room in that.

MR OTTY: Yes.

THE PRESIDENT: My question is slightly different, which is let's suppose the earlier decision had articulated the reservation of rights to reconsider in absolutely express terms. Let's suppose it had said in addition to what it did say, ie we are not going make a reference, it had said something like this: "The CMA considers that the test for making a reference under section 131(1) of the Act is met but it has chosen not to make a reference in anticipation of legislation conferring new powers on the CMA to investigate digital markets. Once those powers have been conferred, the CMA will consider their exercise. The CMA reserves the power to revisit this decision, not to make a reference if the legislation required to bring the proposed new regime into force has not been laid before Parliament after some reasonable time."

Now, let's suppose that is there in black and white.

MR OTTY: Properly analysed, we would submit that that is the CMA, in fact, not having decided not to make such a reference. So that the condition in subparagraph 2(c) would not be met, so the obligation to publish in subparagraph (3) wouldn't arise. That doesn't alter or displace for consideration the key question before this tribunal,

namely what are the time limits imposed in relation to when any proposal has to be made. It is jolly interesting that the CMA, on that hypothesis, has taken that course and not made a decision, but that doesn't allow it to ignore what we say is the correct interpretation of the legislation in determining the time limits for making a proposal.

THE PRESIDENT: I entirely understand. What you are saying is that my language "earlier decision" is actually showing an implied decision regarding the facts which needs to be examined. You are saying I shouldn't be using the words "earlier decision", it's not a decision at all, it is much more like a proposal and the only decision that we have is what I call the later decision which on that basis is an inaccurate label, it's only that decision and for the reasons you have articulated it's outside the power of the CMA to make that decision.

MR OTTY: Exactly.

THE PRESIDENT: I understand. Can I put to you then the alternative view so that you can push back on it?

Suppose you are wrong and it's not a proposal but it is a decision, albeit one that is taking into account an immaterial consideration, namely the future benefit of powers that might be more appropriate to investigate. So what one has is a decision not to make an MIR, but on flawed grounds.

If that is the case, in other words it's a decision but a flawed decision, do we get into the realm of well, it needs to be quashed, I appreciate there's no application before us, but it needs to be quashed, and that earlier decision re-made?

Now, I appreciate that that is not formally before us now as a point, but it does seem to us that we need to have it raised fairly and squarely because the one thing we don't want to have is for there to be what may or may not, subject to submissions, be a decision that is, on the face of it, wrong and for it, it is wrong, as it were, to colour what we all agree is a very important public power in the CMA to investigate that which

it considers needs investigation in its reasonable judgment.

MR OTTY: Yes. I'll have to reflect upon it --

THE PRESIDENT: Of course.

MR OTTY: -- if I may.

THE PRESIDENT: No, please do. I mean, I appreciate it's not the way you've put the application.

MR OTTY: It's not the way we put the application.

THE PRESIDENT: It's certainly not the way the CMA are defending their earlier decision, if it is indeed a decision, but it does seem to us that it is really quite important in terms of the substance of what is before us, namely whether there is a market reference to investigate these matters which obviously the CMA regards as important and which, to be clear, you are not gainsaying, you are saying it's important, but you are saying it's important in two ways. You have to go through particular statutory gateways because it's so intrusive which is why it's so important.

MR OTTY: Exactly. The critical decision, I will reflect, if I may, on the need to attack the basis for the December 21 decision, but the critical decision that matters here, of course, is the 22 November 2022 one because it's that that makes a reference.

THE PRESIDENT: You are absolutely right, Mr Otty, that is entirely correct. I must say that if the earlier thing is a proposal and not a decision and this is the only decision in town, then on the sort of statutory scheme you have a rather easier ride because there has to be a means of sidestepping the provisions in 131A and B that we've spent some time discussing. So that, as it seems to us, is the easier case.

The harder case is if you have something which is parasitic upon an ill-advised earlier decision, which doesn't affect the outcome of the later decision, it's a thing writ in water, but its very existence is arising out of an earlier improper reservation in an earlier decision. I am re-treading the old ground but --

MR OTTY: I suppose I am slightly struggling to the grapple with the best response to it at the moment is, of course, we are quite happy with the December 21 decision. We didn't consider it to be flawed --

THE PRESIDENT: Yes.

MR OTTY: -- and we don't consider, for the record, any of the subsequent events that the CMA characterises as new events justifying a change of course to be properly characterised as novel or incapable of anticipation.

Just to encapsulate them very briefly. One is the legislative timetable didn't turn out to be what we envisaged it to be. That possibility was actually expressly contemplated in the Interim Report, as you've seen, and of course by definition legislative timetable pre-enactment is uncertain.

The second supposedly new development is a raft of representations made by other stakeholders. Those can't alter the landscape when you've had not one but two periods within which those stakeholders are able to make representations, so up to the 26 July and up to December 21.

Then the third one, which is very much sotto voce, we conducted very technical analyses in the second six months which illustrated that inventions that we thought were tricky beforehand aren't so tricky after all. No attempt by the CMA to explain or justify why those analyses couldn't have been done in the first six months.

So if one tests -- I mean, perhaps the better way -- one way of addressing the relevance of these considerations is to see whether, once one has regard to the examples that they provide, they illustrate that the submission we are contending for in terms of correct interpretation of the statutory scheme is too strained and can't serve the public interest. They don't do anything like that.

THE PRESIDENT: No, Mr Otty, please don't get me wrong, I appreciate that you are having bowled at you certain balls which are at the moment not even been taken by

the CMA.

MR OTTY: Yes.

THE PRESIDENT: I mean they haven't suggested that there is anything impugnable about what I will continue to call the earlier decision, but I have well in mind you say it's not a decision at all. The reason I'm doing so is because I don't want the CMA to be under any illusions about how we are seeing this case.

You are characterising the later events as a material change in circumstance and you are saying there isn't a material change in circumstance because everyone can expect that legislation that is, as it were, mooted may not occur. Later consultation -- well, the whole point about section 131A is to embed consultation in the time limits that you discussed, and new investigation. Well, of course you can make new investigations at any time, but the whole point about these things is there is a time constraint in which you need to do the investigations and that is that.

So I quite see your point about there being nothing in a material change in circumstance argument so as to enable the revisiting of an earlier decision which in any event you say isn't a decision.

My point is slightly different, which is that assuming again the early decision is indeed a decision, is it an improper decision because what the CMA has done is erred in law in deciding to exercise its present duties to look at competition and protect it, coloured by the mere spectre of a future legislative change.

One can see a pretty strong case for saying that the CMA should exercise its duties in light of its present powers and responsibilities and that it is an error of law, to put it pretty bluntly, an error of law to look to future legislative changes. In other words, all parties, Apple in particular, are entitled to expect the CMA to conclude the difficult questions that come before it on the basis of the law as it stands and the powers that they have at the time of the decision. If you say well, I'm going to pull my punches,

I'm not going exercise this power because I'm hopeful there's going to be something better coming down in the future, well that is in itself an error of law or an irrelevant consideration which vitiates the decision. And then we are into the ballpark of debating what one does if there is a vitiated decision earlier on.

Now, I appreciate this is very difficult for you to deal with because your application is not focused on this, and the CMA are not at the moment saying that the earlier decision is anything other than regular.

MR OTTY: Yes.

THE PRESIDENT: So I do understand the problems, but it is something which is, as you can see, exercising us.

MR OTTY: I can see that and I understand that. I think the key in a way, from our perspective at least, I think, is to focus on which goal we are shooting at.

Assume for the minute that the December 21 decision was flawed on public law grounds, what are the consequences of that? Would a flawed decision of that kind, as at December 2021, alter the statutory landscape defining when the CMA has to make any proposal for a market investigation reference, which is the critical question before the tribunal? We say the answer to that is no. The statutory scheme is clear that any proposal for a Market Investigation Reference has to be made within six months. That's it.

Now, the fact that the CMA may or may not have taken flawed public law -- sorry, public law flawed decisions on the way to not making such proposal is analytically, we say, irrelevant. The question is what is the time limit, (a), and (b), whether it's been breached or not, and the answer is, we say, six months and yes.

Can I go back --

THE PRESIDENT: Sorry to interrupt you.

MR OTTY: No, it's been extremely helpful. I may or may not do better -- when better

informed people alongside me or behind me have given me insight later, but that is what we say for now.

THE PRESIDENT: I'm very grateful.

MR OTTY: If I can go back to the statutory scheme itself. I think I was at 131B(3), we dealt with, so we have done (1), (2) and (3) and I will be making the point that this was a decision not an interim decision and so forth.

Section 131B(4) then, of course, provides the CMA has to publish a report in relation to the subject-matter within 12 months, the market study report, and it requires the report to set out both the CMA's findings and the action which it proposes to take. I will come to this again in more detail, but just to preview it, the tribunal will have seen that the CMA seeks to suggest as its last-ditch argument that this reference to action which the CMA proposes to take somehow opens the door to a proposal for a Market Investigation Reference at that stage if all else has failed in its arguments.

Now, that's not right, we say. It would create an entirely open-ended process without any time limitations at all and it would, in other words, entirely bypass the statutory time limits and create precisely the uncertainty that they are obviously intended to avoid.

For the Tribunal's reference, I don't think we need go to it, there is one definition of the term "action" in the Act, but it doesn't really help us. It's at section 183 and it defines action as including omission and states that the taking of action includes the refraining from action, but that doesn't advance this particular debate.

Section 131B(5) is important, we say, it again uses the formulation, this is on D14, that it applies when section 131A applies. So where a Market Study Notice has been published and where the CMA has either proposed there should be an MIR or proposes there should not be one in the face of representations to the contrary.

The subsection then states that in either of those circumstances the Market Study

Report must set out the CMA's decision to make an MIR, to accept undertakings or not to make an MIR, together with the reasons for the decision taken.

Now, just pausing there and to emphasise the point that emerges from the chronology, on the facts here there can be no doubt at all that by June 2022 section 131A did apply, a Market Study Notice had been published and the CMA was indeed proposing that an MIR be made. It's telling, we say, the CMA's defence fails, so far as I have seen, to address section 131B(5) at all. 131B(6) provides that where a report contains a decision do make an MIR, then the reference should be made at the same time.

So to recap, sir, the whole scheme of these provisions contemplates, in line with Apple's case, that an informed and final position on whether or not proposing an MIR will be taken within six months. That is why the Market Study Notice is required at the outset to set a period for representations, 130A(3). That is why a consultation on any proposal to make or not make an MIR has to commence within six months.

That is why such consultation has to be carried out in a manner which is practicable, having regard expressly to the 12-month timetable. That is why a decision not to make an MIR at the six-month point has to be published and why it's not described in the legislation as anything other than final. That's why the final deadline for the market study report is set at 12 months. It's why, in a case where an MIR has been proposed, the report itself at the 12-month point has to set out any decision on the issue. And that is why the actual reference has to be made at the same time at the 12-month point.

Moving on in the legislation, we then have section 131C which allows the Secretary of State to make an order amending section 131B to reduce the time period which it contains, and that is, we say, another strong indicator from the statutory wording itself that the time limits provided are outer limits.

THE PRESIDENT: In other words, it's asymmetric.

MR OTTY: Exactly.

THE PRESIDENT: The Secretary of State can cut it down, but can't expand.

MR OTTY: Exactly.

THE PRESIDENT: Yes.

MR OTTY: So those core provisions very strongly support the interpretation that we've sought to encapsulate at paragraph 19 of our application notice.

They are supported, those propositions, by the remainder of the legislation and by the explanatory notes which accompany the introduction of the time limits as well as the CMA's guidance. I will come to notes in the guidance, but just to run through the remaining provisions in the legislation which we say assist because, as I submitted from the outset, the legislation is, of course, the primary port of call for interpretative purposes.

Section 137 further underscores the importance of finality and expedition. It's relating to the MIR itself and it requires completion of any MIR within 18 months of the reference with a single extension of up to six months permitted. Again, although those periods are capable of alteration by ministerial order, they can't be extended by that process. That is the effect of sections 137(3) and 137(4).

Section 138 then allows the CMA to take such remedial action as it considers reasonable and practicable, and 138A sets further outer time limits for that to occur.

Section 156 is, we say, also informative as providing a further clear indication that breach of the time limits is indeed intended to curtail the CMA's powers to make a reference. You have that at D28 and 29. It's a provision dealing with a different context, dealing with the impact of undertakings on the CMA's powers, but for present purposes it's section 156(3) which we say assists.

That states that:

"The expiry of the period mentioned in section 131B(4) [so that is the 12-month period

for publication of a market study report that we've seen] does not prevent the making of a Market Investigation Reference if the CMA has accepted an undertaking and—" either that undertaking has been breached or the CMA has been misled.

Now, the corollary of that, of course, is that this legislative provision is contemplating that if those criteria, those two criteria are not met, then the expiry of the time period would indeed bar a reference in other circumstances, so again provides a strong indication, we say, that breach of the time limits does indeed matter and it does indeed curtail the CMA's powers in the manner that Apple contends.

Section 169 is relevant too, it's a provision I have mentioned already and it concerns the general duty of the CMA to consult interested persons and by section 169(2) the CMA is required, so far as practicable, to consult any interested person about a relevant decision.

Then by section 169(6)(a), just over the page at D32, a relevant decision is itself defined as:

"Any decision by the CMA to make a reference under section 131 […] where the CMA has not published a Market Study Notice."

So again, we say, that's a strong indication within the statute itself that where a Market Study Notice has been published, it is the provisions which we've already looked at which I've said occupy the field. And there's not some wider freestanding power to consult on and make an MIR regardless of those time limits which those provisions enact.

Finally, as far as the statutes are concerned, it would be very familiar to the tribunal, but section 174 is, of course, we say, important because it's by virtue of subsections 1(a) and (2) to (5), at D34 to 35, that the CMA obtains a series of far-reaching investigative powers the moment it publishes a Market Study Notice. As I've said before, without crossing any evidential threshold and the provisions, as I say, are well

known but they embrace compulsory attendance to give evidence, production of documents and backed by significant penalties for non-compliance.

So that is legislation itself. All of it, as a matter of natural interpretation, we submit, and scheme consistent with Apple's case.

It's a case which we say is also supported by the secondary materials in the form of the explanatory notes and indeed, to the extent that they assist at all, the materials that the CMA seeks to rely upon.

Now, the key passages from the explanatory notes that we rely upon are, for your reference, quoted at paragraphs 22 and 24 to 25 of our application at A13 to 14. I would like to just go to the notes themselves too which are D64 in the authorities bundle, the next tab.

THE PRESIDENT: Mr Otty, of course do say, it may be that those are points best taken in reply if we have identified the flaws that the CMA say exist in your analysis, so if you are happy then we don't need you to go to those materials now, you have made your case very clear on the statutory provisions.

MR OTTY: I'm very grateful. I won't take time on it in that case.

THE PRESIDENT: But obviously if in reply you need to, then you will be able to take the gloves off and go to them.

MR OTTY: Thank you very much indeed. You have seen the references, you have seen the passages and as I have submitted, the key points that they illustrate, without going to them, are that the statutory purpose is expedition and certainty and reflective of the fact that time limits go hand in glove with the conferral of intrusive powers from day 1.

That is reflected in the explanatory notes, it is reflected in the materials the CMA relies upon, it's reflected also in the CMA's guidance which, strictly speaking, probably isn't materially relevant to statutory interpretation, but perhaps does show there's no vice

here in terms of overall public interest.

That is proposition 1, really, and how we put our case on proposition 1 and although I have taken some time on it, we say it's actually quite straightforward.

I will attempt next to grapple with -- to the extent I haven't already -- what the CMA says in response on this and that may, I hope, allow me to address some of the hypotheticals that you put to me right at the outset, sir, as well to the extent I haven't done so.

The first point the CMA makes at paragraph 44 of its defence is to assert that we contend that the CMA permanently lost its power to make a reference due to sections 131A and 131B and that the time limits prevent the CMA from acting rationally and proposing further actions based upon all the circumstances, evidence and representations. We say, with respect, that neither assertion is accurate.

Apple's case relates only to the time limits which Parliament has chosen to apply in the context of a published Market Study Notice. When, as here, a Market Study Notice has been published, that triggers the particular and mandatory time limits and it's those, of course, which we rely upon. But we don't need to submit that the CMA permanently lost any power at all to make a reference at any time in the future.

THE PRESIDENT: No, I mean, can I just try and frame what I think you are saying and you can tell me how far I'm wrong. There is nothing jurisdictionally to prevent the CMA from making another Market Study Notice in relation to exactly the same thing.

MR OTTY: Exactly.

THE PRESIDENT: Nor is there any fetter that you are contending for to make a reference under 131(1) independent of the Market Study Notice. These things have to be considered on the facts as they are being made. What I think you probably are saying though is that to have, as it were, like buses coming in succession, one Market Study Notice after another on the same subject matter might raise public law questions

of a different sort --

MR OTTY: Yes.

THE PRESIDENT: -- which we are not going to go into because that's not a matter before us. But you are not saying there's a jurisdictional fetter which precludes this investigation. It may be that if tomorrow a second Market Study Notice on precisely the same thing were published, that would be questionable on other grounds. But that's not a matter we --

MR OTTY: (Overspeaking).

THE PRESIDENT: Exactly.

MR OTTY: In fairness to the CMA, they appear to contemplate at least twice, in their defence at paragraphs 5(f) and 43, the potential for issuing of a second Market Study Notice and that would be the response, we say, that would be appropriate if -- to give either of the hypotheticals that you put to me earlier -- it was evident that the CMA had been deliberately misled by a market participant.

That could easily be cured by the issuing of a Market Study Notice and that's why I went to section 5 right at the outset which emphasises the functions of the CMA which are relevant for those purposes, embrace the review of information. So that's a clear gateway to the issue of a fresh Market Study Notice in that context.

The other hypothetical you put to me was what happens 25 years on. The easy answer, which isn't really an answer well, is that's not this case, but the substantive answer is really twofold. One, it would be very unlikely in a context 25 years on that there would be that overlap of subject matter. So it would be very unlikely that Apple, or anyone else, would be able to say aha, 25 years ago there was a Market Study Notice into the same subject matter, because by definition the world would be very different, particularly in this type of context.

THE PRESIDENT: But assuming exactly the same legislative landscape, your point

is simply that 25 years means there is almost bound to be -- particularly in these markets, but almost certainly generally -- there is always bound to be a change in circumstance that would warrant a second Market Study Notice.

MR OTTY: It will be a change in circumstance warranting a second Market Study Notice or the factual landscape will have changed so much that you can't say a situation B is the same as situation A, or you don't have the overlap to --

THE PRESIDENT: I think what you're saying is actually my 25 years is not a very interesting example because it's so much a no-brainer that we shouldn't really debate it.

MR OTTY: Yes.

THE PRESIDENT: But at the other extreme, three days is probably something where you would say well, not question the jurisdiction, but you would have to look carefully at why you are doing it.

MR OTTY: You are constrained, sir.

THE PRESIDENT: I'm grateful.

MR OTTY: But I think we also say -- and it's a point I have already made to some extent -- we also say it's important not to overstate the hypothetical difficulties that Apple's case could give rise to and that's why I've emphasised the whole statutory scheme in the way that I have and the full suite of powers available on day 1 to the CMA to take what the guidance describes as robust speedy decisions.

So in any context about statutory interpretation, it's possible to dream-up hypotheticals and say aha, that shows that your interpretation can't be right. It all gets a bit outlandish, we say, from the CMA's perspective.

THE PRESIDENT: What you are saying is there's actually no problem here, it works in the legislative scheme that you are contending for on interpretation.

MR OTTY: Exactly. Because as you have identified because of the potential for

a fresh Market Study Notice.

MR CUTTING: Can I ask a question? Are you saying, then, that a second or later Market Study Notice is always required? Is that the only route or can they go down the more informal information gathering and section 169 route?

MR OTTY: Assuming identity of subject matter, the subject of scrutiny in market study 1, and the attempt to revisit that through whatever gateway, I'm saying it's market study -- fresh Market Study Notice only. You can't go simply oh well, we'll go for another section 131 and pretend that what has happened before hasn't occurred.

The reason for that or the reason that is right, rather, as a submission, is given by the terms of section 169(2) because that shows you that that general obligation to consult in relation to the making of a Market Investigation Reference applies to decisions where a Market Study Notice has not been published. Where a market -- and so the corollary of that is where a Market Study Notice, on this hypothesis, in the identical subject matter has been published, then it's the notification and consultation requirement of 131A and B which occupy the field.

So if you have breached those time limits, that's it. Save for the potential of issuing a fresh Market Study Notice, if you can genuinely show that something not capable of anticipation, entirely novel, or misleading has occurred to justify that, and that's why you go back to section 5 which shows that you can have a Market Study Notice where you are reviewing information relevant to your functions.

So thank you for picking me up on that. We do say it's Market Study Notice or nothing to cure the problem.

THE PRESIDENT: Just to be clear, I think Mr Cutting is trying to work out what Apple's position is regarding references independent of Market Study Notices.

MR OTTY: Yes.

THE PRESIDENT: Now, I think it's common ground, but let's make sure it is, that

section 131(1) is wide enough to entitle the CMA to make a reference without there being a Market Study Notice.

MR OTTY: Yes.

THE PRESIDENT: Now, we don't -- we may have to, we'll see, I don't think we need go into what those circumstances are for the purposes of today except perhaps where one has a Market Study Notice in play, but you are also contending for a self-standing right. We don't need to debate the circumstances in which it's appropriate to make a reference without any kind of Market Study Notice whatsoever.

MR OTTY: No, it's common ground from Airwave and so on that if you don't have a Market Study Notice, then it's a reasonable suspicion threshold and a broad discretion and so on and off you go. The point for our purposes perhaps to emphasise is that there's no -- and indeed that there's no obligation beyond a consultation obligation in section 169 before that power is exercised -- there is no anomaly that that gives rise to here because, as you've seen from the explanatory notes, the whole purpose of these time limits was to limit the period in which market participants were subject to markets work.

Once you have got a market -- if you've only gone down the market investigation reference route from day one, then you have one period, you have a 24-month period essentially with, I think, a potential for an extension, but 24 -- 18 months extendable to 24, sorry.

THE PRESIDENT: Yes.

MR OTTY: Those are the outer limits of the time limits which apply.

But if you decide to go down the Market Study Notice route, you are exposing the market participant to another 12 months, on our case, of market study work and that's why those limits need to be policed and it's why you can't interpose in the middle of them what the CMA wants to do, a completely open-ended consultation period. That

would frustrate both the statutory scheme and the underlying purpose.

THE PRESIDENT: Entirely understood.

MR CUTTING: Actually, my question was broader. Supposing a year has gone by, suppose two years have gone by, three years, I mean --

MR OTTY: (Inaudible due to overspeaking).

MR CUTTING: No, well petrol retailing is, what, 14 from one reference to another, supermarkets seems to be every sort of five/six years. I'm wondering whether your case is, or you are saying that the law is, it always has to be an MSN next time round when, you know, the CMA might say we did an MSN, we used all those powers, very intrusive, actually if we want to update our information base we could do it by non-statutory -- we don't need attendance of witnesses, we can do it through the more informal information gathering and a consultation. And if that happened three years later, four years later, is it really right to have to go down -- once they've done an MSN into an industry, it can only ever go down the MSN route for every time it wants to update its enquiries. That is a big statement that you are contending for.

MR OTTY: I think I misunderstood the premise of the question. If you are talking only about informal information gathering and not a market investigation reference, then there is no constraint.

MR CUTTING: I mean, the reason why I asked it is -- the question I think that the President put was, you know, what happens after the MSN notice and what happens to subsequent enquiries? And you said section 169(2) means that because the MSN is in relation to that subject matter, whenever the CMA wants to look at that subject matter later in time they could only go down the MSN route because of 169. That feels to me a big statement.

MR OTTY: If their destination is a market investigation reference, they can only go down the MSN route. If their destination is simply we want to gather more information

or we want to use our other Competition Act powers, whatever they may be, then none of that's affected by my argument.

The focus of our argument is what are the constraints that Parliament has imposed on when a market investigation reference could be made, and if that very specific tool is to be used, and assuming for the purposes of this argument there is an identity of subject matter, then there has to be a fresh Market Study Notice.

THE PRESIDENT: Okay, to be absolutely clear, I'm talking about second bites of the cherry here.

MR OTTY: Yes.

THE PRESIDENT: We have the first bite which is, let's say, the present case of a notice in relation to mobile apps. Five years on, the CMA wants to look at it again and we are agreed that's not a problem provided, having regard to the CMA's functions, is the proper thing to do. But it's not an unreasonable thing to be thinking about.

MR OTTY: No.

THE PRESIDENT: When one is looking at that five years on investigation, the CMA has a range of weapons that it can use, it can do the informal examination, just digging around, using its non-notice and non-reference powers to work out what's going on, and that may be enough. Or, it can publish a Market Study Notice and go through this whole thing again, or it can go down the Motorola route and do a 131(1) reference without a market study notice and look at it that way. So it has a range of choices. I don't understand you saying that it's constrained in any one of those three options. What you are saying, I think, is that if the second bite of the cherry comes so soon after the first bite, then one must examine whatever route one is using to make sure that one is not circumventing the protections that exist in 131A and 131B.

MR OTTY: Yes.

THE PRESIDENT: But that point applies whether you are choosing to do the informal route, the market study notice route, or the market reference route.

MR OTTY: Yes. I agree with all of that subject to one reservation which is that we do contend that if the second bite at the cherry is genuinely a second bite of exactly the same cherry, then once you publish the statutory scheme says -- without mixing too many metaphors -- once you publish the Market Study Notice in relation to that cherry, there are particular time limits which apply in relation to proposing a Market Investigation Reference.

By definition, on this hypothesis, you are out of time on the original Market Study Notice, so your only route is to issue a fresh one saying: we think the facts have changed and we want to have a new Market Study Notice to look at this cherry again. Now, it's of course entirely possible that the CMA can truncate that market study. Nothing says that it has to take 12 months to do it. Nothing says it has to ignore everything that's gone before, it could have a contracted timescale for consultation, it could have a contracted timescale for its decision and a very focused enquiry. But that is the route, we say, we don't -- just to be clear, we don't accept that there would be, this is back in the sense of the freestanding power, sitting alongside the availability of a second Market Study Notice you can just say well, forget about everything that's gone before, we'll just go down section 131(1).

THE PRESIDENT: Indeed. I think -- I see where you are coming from I'm just wondering whether you are putting the inability to make a self-standing 131(1) reference, whether you are putting inability to do that a little bit too broadly, in the sense that -- I quite understand that you can't, if you've made a decision under the Market Study Notice process which you regret, if you've made that decision or have made a decision and you regret that, you can't go round curing that by saying oh, well, we'll just do 131(1) or indeed do a further duplicative Market Study Notice. I'm not

saying there's no jurisdiction. I'm saying you have to think about what is a proper public step.

MR OTTY: Yes.

THE PRESIDENT: You having had the ability.

But going to the effluxion of time point, if you are looking five, ten years hence, and you are revisiting the question entirely properly because a lot of water has flown under the bridge, I don't understand you to be saying that when you are looking at that essentially new question you are constrained only to do a Market Study Notice or an informal investigation, you could, if so advised, do a straight 131(1) reference, without the market study.

MR OTTY: I think that's right sir, because on that hypothesis it would be very difficult to say at that point in time that you are looking at the same thing.

THE PRESIDENT: Yes, it's not in relation to --

MR OTTY: Yes.

THE PRESIDENT: -- the market. Yes, exactly.

MR OTTY: Yes.

THE PRESIDENT: Well, I am grateful. I just wanted to make sure we were on the same territory there.

MR OTTY: So going back to the CMA's defence, we then get -- after what we say is a mischaracterisation of our case -- we then get three preliminary observations and three arguments. The three preliminary observations begin at page 56, paragraph 47. The first preliminary observation is that at 48 to 49 where emphasis is placed, understandably, on the public interest served by the CMA's power to make Market Investigation References and the fact that the CMA can make a Market Investigation Reference without a market study, without triggering time limits. Well, that's all true, as we've just been discussing, but it doesn't assist, we say, in determining the issue

before the tribunal and, as I emphasised earlier or sought to emphasise earlier, the public interest is multifaceted in the way we contend for. Yes, we accept entirely it contains the component that the CMA identifies, but it also embraces the promotion of certainty and expedition and the proper fettering of intrusive public law powers. That is the first preliminary observation.

The second preliminary observation is that set out at paragraph 50 and following to the effect that the CMA says the ordinary meaning of the time limits is that the CMA must consult on a possible reference within six months of publishing a notice in cases where the CMA is proposing to make a reference.

Well, it's true that this obligation of consultation is imposed, but that just doesn't answer the material question, namely whether at the six-month point the CMA must decide whether to propose an MIR or not. And as I've sought to submit earlier, the whole scheme of the relevant legislative provisions is indeed to that effect.

Paragraphs 51 and 52 contains citations from government consultation documents which I won't go to beyond saying that, as I said earlier, if anything they assist Apple, they emphasise the essential nature and importance of the statutory time limits, they emphasise that they go hand-in-hand with the enhanced investigatory powers, and they show that all market studies are to be completed within a 12-month period.

There is a concept of ‘envisaging’ that is introduced in paragraphs 52 to 53 where the CMA contends the time limits apply whenever an MIR is envisaged as an outcome by the CMA. And that, if anything, also supports Apple's case on the facts here -- there's no doubt at all that the possibility of an MIR was at least envisaged by the CMA from the outset. That's why the CMA asked for representations on it by 26 July.

At 53, footnote 60, the CMA relies upon the fact that section 131(4), which we looked at, specifies particular circumstances in which the CMA cannot make a reference and didn't include among those the expiry of the time limits. I think you have my

submissions on that point already.

The third preliminary observation then is set out at 55, and it's to rely upon the proposition that a public authority has to be able to take into account facts that it couldn't reasonably have known or found be out in time for an early decision.

And it has to take into account relevant considerations as a matter of good administration and so on.

None of that is in dispute as a general proposition, but we say none of it assists the CMA in defending its decision-making in the present case.

If we are correct, if we are correct that Parliament has set that particular timeframe in which proposals are to be made, then there is no obligation to consider matters arising outside of that timeframe, it's really as simple as that.

THE PRESIDENT: Yes.

MR OTTY: So those are the three preliminary observations and then there are the three arguments that the CMA advances.

THE PRESIDENT: Mr Otty, I see the time. When you reach a moment we probably should have a transcriber break.

MR OTTY: Yes, of course, I'm sorry. Now would be an entirely convenient moment.

THE PRESIDENT: I'm very grateful. In that case, we will rise and resume at quarter past midday.

(12.06 pm)

(A short break)

(12.20 pm)

THE PRESIDENT: Mr Otty.

MR OTTY: Thank you, sir.

I was addressing the three preliminary observations and I will turn briefly, because I have already trailed, I think, our response to them, but I will turn briefly to three

specific arguments that the CMA then advances in its grounds at 58 through to 72. Sorry, in its defence at 58 to 72.

First of all, the CMA says at 58 to 62 that section 131A did not apply to this case at all because it only applies where the CMA is proposing a Market Investigation Reference and at the time of the Interim Report, the CMA was not making any such proposal. Thus, the CMA says, at paragraph 59, it was not obliged to publish notice of my proposal.

So on the CMA's construction of the Act, Parliament is said to have imposed a time limit that applies if, but only if, the CMA does intend within the first six months of a market study to propose an Market Investigation Reference, but somehow neglects to do so. When or why such a scenario, which seems highly unlikely, we would submit, on its face, might occur in reality is not explained.

In addition to the inherent unlikelihood of Parliament having chosen to act in this way, there are at least four further problems with that argument, for the CMA's primary argument as it is.

First, section 131A does not direct its focus to the time of publication of any Interim Report and, in fact, as I've submitted, the legislation doesn't actually contemplate Interim Reports. It states only that it applies whenever a Market Study Notice has been published and where the CMA is proposing a Market Investigation Reference.

Secondly, as I have already submitted, on the facts of this case, by June 2022 at least, the CMA certainly had published a Market Study Notice and it certainly was proposing a market investigation reference. So on its natural reading, section 131A undoubtedly applied then.

Thirdly, this submission of the CMA simply ignores the key interpretative issue raised by our challenge, namely whether on any common sense view sections 131A and B,

read together, show that any proposal for a Market Investigation Reference had to be made within six months of the Market Study Notice and, as I've already submitted, that, we say, is the only interpretation which makes sense once one looks at the statutory scheme as a whole, a scheme necessarily contemplating an informed and final position on whether or not it is proposing a Market Investigation Reference within six months so the consultation can occur and any final decision about making a reference be announced at the 12-month point.

Fourthly and relatedly, the CMA's point makes the introduction of the time limits of very little value at all. Very narrowly confining them for no apparent purpose. All that would need to occur on the CMA's case for them to simply fall away would be for the CMA to delay forming a view on whether to propose a Market Investigation Reference until after the six-month point.

So on the CMA's case, notwithstanding the very extensive powers it gets on day 1, the more it delays -- the greater time it waits to make a decision -- the greater prospect that the mandatory time limits imposed by Parliament, as a quid pro quo for those intrusive powers, would simply fall away. That would do very little, we say, to serve the twin purposes of expedition and certainty evident from the statutory scheme itself, and from the notes that we've referred to. It would confer, in other words, a very significant benefit on the CMA in the early acquisition of significant intrusive powers without any material burden.

The CMA's second and related argument is that it was entitled to take into account all the circumstances and materials at the time of the final report and this is the argument which is trailed at 36, 41, 44, 53 and 55 of the defence and developed again at 63 to 69 and it's the subject in essence of the third preliminary observation which I've already referred to.

As I've submitted, our short answer to this point is that if the CMA is wrong on the

primary issue of statutory interpretation, then no separate issue arises in respect of the duty to take into account relevant considerations. Parliament has laid down a fixed period in which particular decisions are to be taken and the CMA is entitled and obliged to consider relevant considerations arising and representations made within that time period.

The third argument that the CMA advances, which again I've previewed already, relates to 131B(4). It is previewed at paragraph 23 of the defence and developed at 70 to 72 and it is to the effect that the words in section 131B(4) relating to what the market study must set out, namely the action, if any, which the CMA proposes to take in relation to the matter are so broad that they can encompass, even at that stage, simply a proposal for an MIR.

We have three answers to that contention. Firstly, we say it is inconsistent with the natural meaning of the words. The section speaks of action which the CMA proposes to take having now concluded its market study, not action which it is still considering taking and which it wishes to consult upon.

Secondly, it is inconsistent with the scheme of the Act which contemplates commencement of any consultation on a proposal for an MIR within six months of publication of the notice and a consultation process which is practicable so as to allow compliance with the 12-month time period.

In other words, if we are right about the applicable time limits, then the reference in section 131B(4) to action couldn't logically be understood as including consultation on action which is no longer open to the CMA by virtue of the other subsections.

And thirdly, again contrary to the purposes of expedition and certainty evident throughout the legislation in the secondary materials, the CMA's approach would leave a timetable for the substantive end of the market study process and the commencement of any timetable for a Market Investigation Reference itself entirely

open-ended, and dependent on the period the CMA subjectively chose without any constraint to allow for any consultation period or the period it chose to take any decision after such consultation.

So that is our case on the first proposition.

The second proposition, as I say, really flows from the chronology. On the facts of this case, the decision of 22 November was made in breach of the relevant time periods and it was accordingly ultra vires. If we are correct as to time limits, then it follows from the chronology that the tribunal has seen that they were breached, and you have all the dates, I don't think for any I need to go through them.

THE PRESIDENT: No, you don't.

MR OTTY: It is then our third proposition really which matters. If the 22 November decision was made outside the permitted time limits, then we say the only appropriate remedy is a declaration that it was invalid and of no effect. That is the consequence, we say, indicated by the statutory scheme and all the provisions that I've shown the tribunal and that is really the end of it.

If one gets to this stage of the analysis, the breaches of the time limits were, on any view, not trivial, they were substantial. Any other approach allowing the 22 November decision to stand would entirely undermine the statutory scheme which imposed them.

The argument that Apple makes on this is set out at paragraphs 53 to 77 and the CMA's case is in its defence at 83 to 89. Our position, as I say, is really very straightforward. The time limits Apple relies upon are set out in mandatory terms. Our application at paragraph 56, as you've seen from the legislation, that's right.

Secondly, there is provision for them to be curtailed but not extended. Again that is right on the legislation. That is paragraph 58 of our application.

Thirdly, in contrast, there is provision for other time limits to be the extended. There isn't in relation to this one, these ones. Instead, the legislative background we have

looked at as well as the legislation itself are all geared towards expedition and certainty, as a quid pro quo for a grant of intrusive powers on day 1.

They all point to the need for decisions to be taken, or made, or proposals made, at the six-month point and certainty being arrived at at the 12-month point at the latest.

We submit it would entirely undermine those objectives of expedition and certainty to interpret the Act as disclosing intention for steps taken outside and in breach of the applicable time limits to nevertheless still stand.

Even if it were relevant, as I say, even it were relevant to go on to consider questions as to substantial observance or compliance with the time limits or prejudice, then those questions would also -- the answer to those questions would lead to the same outcome and at this stage of the analysis, it's of course important to proceed on the premise the time limits have indeed been imposed for the purposes that I've identified, and that the CMA has failed to comply with them in the manner I've contended.

The tribunal has seen it on the chronology, but the CMA, on our analysis of the legislation, breached four separate statutory provisions. It took almost double the period permitted to make its first proposal for an MIR, and the decision it finally took was taken five months after it should have been. At the 17-month point, rather than the 12-month point. None of that can be mitigated in any way or avoided, we say, by the CMA.

So there's manifestly, we say, been a substantial breach of the time limits sufficient to support the conclusion that a declaration of invalidity is appropriate.

Now, so far as prejudice is concerned, we submit that to allow the decision to stand would give rise to precisely the prejudice the legislation was designed to guard against. It would frustrate the legislative purposes of expedition and finality and it's no answer in that context to say well, Apple's a huge company, it can hardly be said to suffer prejudice.

The analysis, we respectfully submit, the tribunal has to undertake has to have regard to market participants as a whole and it has to be an objective one so as to be consistent for all market participants large or small. So for all those reasons, sir, we submit that the third proposition is also sound. You get to that conclusion most clearly and immediately by considering the statutory scheme and what it envisages and any other approach would undermine that scheme.

Sir, unless I can attempt to assist any further, that is how we put our application and our three propositions.

THE PRESIDENT: No, I'm very grateful to you. Just on the last utility point, I mean, normally it arises where you have a decision-maker that has made a decision that is in some way wrong, you don't normally have the kind of time limit regime that we have here, you simply have a decision which is impeachable on certain grounds and what the decision-maker says is, well look, I've got to make the decision, I'm obliged I'm entitled indeed to make it again. The outcome's going to be the same for whatever reasons. Don't make me do it because it's a waste of time, hence futility.

Here you are suggesting -- and I'm going to try and articulate why you are suggesting -- the position is rather different.

Now, let's start by assuming that the earlier December decision is a decision and not a proposal. Now, if that is the case and you have a reservation of rights in the decision to revisit, you have a question of whether you can or can't do that, you say that you can't. On that basis, absent any kind of quashing, the earlier decision stands, you are very happy with it, and that's that. The later decision is only relevant if you can reserve the rights. If you can't, then it is a thing that is, as you say, not a decision at all because you can't revisit what you said earlier.

Taking the other instance of the earlier decision not being a decision but merely a proposal, then we only have one decision, you say it's outside the time limit and that

doesn't appear to be seriously pushed back on. If that's right, then it's not a question of being able to reconsider and reaching the same decision, it's a question of not having the right to look at it again because section 131A makes clear that where the CMA is proposing to make a reference, it must do certain things. 131B makes clear that if 131A applies, certain time limits apply. So the CMA can very easily have a view that it's proposing to make a reference X years after the event, but because of 131B that makes no difference. In other words, this isn't necessarily a case of futility, it's a question of there being a window in which can you make a proposal. Once that window has passed, the door slams shut or the window slams shut, and that's it.

MR OTTY: Yes. We're in fundamentally different territory, the classic public law quashing or not quashing debate because of the nature of our challenge, namely no power.

THE PRESIDENT: Yes. I'm grateful Mr Otty, thank you very much.

Mr Eadie, before you start -- and take them in whatever time you want -- but at some point we will want to understand the CMA's position in relation to the 14 December 2021, the earlier decision, on three questions.

First of all, in response to Mr Otty's submission is it a decision at all or is it just a proposal.

Secondly, if it is a decision and not a proposal, is it a decision that is a qualified decision, reserving to the CMA the right to revisit it in the future, or is it a decision that is unequivocal and final without such qualification?

Thirdly, if it is a qualified decision, is that decision a proper one in public law terms or is it one that is liable to be set aside on the basis that it has either made an error of law or taken into account an irrelevant consideration. I am sorry to throw that at you, but those are the things that we are interested in and we would be very grateful for your submissions in due course.

Submissions by MR EADIE

SIR JAMES EADIE: Sir, yes, I have had the misfortune, I'm afraid, to disagree not merely with Mr Otty's conception of what this legislative scheme does, but it sounds very like I have a graver misfortune of fundamentally disagreeing with the tribunal's provisional view about what this legislative scheme does and does not do. I hope you will forgive me if I address that first, not at least because I will pick up the points you have raised there and I will pick up the four points that you raised at the beginning. Those four points that you raised at the beginning are all essentially premised on the idea that we are in a track which imposes the sort of time limits for which Mr Otty contended.

Then the questions arise: what can we do about this? Do you treat it in that way or this way? If you quash it and if you do quash it can you come back? Are there different types of material change of circumstance? All of those things would then arise. We fundamentally disagree with your provisional view about what this legislative scheme is designed to allow the CMA to do in a process that has started with an MSN.

THE PRESIDENT: That is exactly why we framed it as we did because --

SIR JAMES EADIE: I'm very grateful.

THE PRESIDENT: -- we are very grateful to you for grappling the bull by the horns.

SIR JAMES EADIE: You made it very clear it was a provisional view and of course it would have to be until at least I had spoken on it. But I do want the opportunity to seek to persuade you that that conception is not the right one.

THE PRESIDENT: No, Sir James, take as long as you like about this because obviously that is the thing which is troubling us the most.

SIR JAMES EADIE: Yes. I suspect that some of it -- if my learned friend Mr Otty is right, I suspect some of the rest of the questions then become a great deal easier and simpler to answer and there may not be that much between us at that point, but we

respectfully submit that he is wrong.

I start with three key points going to the context that frames the issue of interpretation which confronts you.

The first of them you are very well aware of, my learned friend has touched on it already, it is that the CMA exercises its powers in the public interest. The legislation evidently recognises and sets out processes for dealing with questions about whether one or more features of a market is or is not restricting or distorting competition in the UK and then works through the steps that should and can be taken to remedy any adverse effects.

There is an obvious and very powerful public interest, again underpinning the basic elements of the legislative scheme in there being appropriate reaction to deal with such restriction or distortion if it is occurring, ensuring that businesses are fair and competitive, with all the well-known benefits that that brings. All of this, I suspect, is now common ground. There was doubt in relation to Apple's application as to whether or not they were taking the extreme position that says that on their case the shutters come down at six months and that is that.

If the position is, as it now appears to be, that their position is a slightly less extreme one, which says the shutters come down, but there is an opportunity, at least jurisdictionally, to come back and address the sort of reference that I've just described with all the public interest attached to it, but you have to go through at least some hoops again -- query what hoops – an MSN re-issued or 131(1) or something informal. If that's the limit of it, as it now appears to be, then there is obviously less concern in relation to the public interest than the full-blown shutdown with no opportunity to revisit. There is, nevertheless, at least the real potential for a slightly different public interest to be in play, which is that this regime stands, even on my learned friend's case, for a fair but at least an effective and efficient resolution of these issues and if the position

is that you do have to go back and reinvent the wheel through whatever jurisdictional route, be it a new MSN issued or a section 131(1) decision made, with a duty to consult or not, or something more than that, then that has the real capacity for either putting it into a never-ending circle for which you are permanently having to re-do this every time new material facts emerge, or at the very least to go back through a process for potentially no terribly good reason, but on any view, you would have for go back through a process which has its own incidence attached and you would therefore be replicating and that doesn't smell or sound like a very efficient or effective way of managing the process. The alternative, of course, being that Parliament has given you more of a procedural bubble, if I can put it in that way, in which to operate rather than the strict time limits including in particular the bringing down of some form of shutter at 6 months for which my learned friend contends.

So we do respectfully submit that that public interest is engaged, even on the lesser species of case that is now evidently being advanced, and of course there is a slightly separate element to that which is the one that you highlighted by drawing, if I may respectfully say so, the correct distinction that needs to be borne in mind between a jurisdictional ability to react, and the vulnerability of any such exercise of jurisdiction to public law challenge.

Of course another element of built-in complication and potential difficulty and potential impact on the public interest in the efficient and effective and timeous resolution of these sorts of issues is that ability.

I quite understand why Mr Otty was very, very concerned to seek to preserve his ability to return to you and say here we are, they've done it again, but this time we are going to tell you there aren't any material changes of circumstances, they did it too quickly or not quite on the basis of enough new facts or something. All of that ability to challenge the exercise of the jurisdiction which it appears, if only grudgingly, was

accepted, is itself something which has the capacity to impact on the efficient resolution of a set of issues that might arise once an MSN has been launched.

So, our first case, our first preliminary point, is to slightly unpack the public interest in that way.

THE PRESIDENT: Sir James, that is extremely helpful. Just to articulate where we understood Apple to have ended up, whatever the start of the position was, we don't understand there to be any point taken, as you say, on the jurisdictional level. In other words, you can --

SIR JAMES EADIE: Do the variety of things we can do.

THE PRESIDENT: Do the things you can, whether it's an MSN reference or informal, and that as a jurisdiction exists. But I think where Mr Otty would be pushing back quite hard on the non-jurisdictional public law objections is if you were, as it were, literally reinventing the wheel. In other words, you are, of course, entitled to do what jurisdictionally you can do, but one doesn't expect a retreading of that which has been done before. Even when one has the jurisdiction to do it, one expects the resources of the authority to be deployed on questions that it has not considered and not to retread the identical question that it has considered and decided.

SIR JAMES EADIE: Yes. I don't want to unfairly seek to box him in by saying yes to that summary because he may have a whole load of extremely imaginative grounds in public law on the basis of which he could challenge the exercise of that jurisdiction, but I do entirely take the point.

My point is a slightly different one, which is that you start as a matter of interpretation by recognising the public interest context in which this legislation sits, and on any issue of interpretation you will have rival interpretations which will take you down different routes that impact on the public interest in different ways.

My concern here is not to take an extreme point on the public interest for forensic

reasons which is not open to him in the light of the way the case has been presented and in the way it's now been clarified which is helpful, obviously if it was the more extreme form of public interest, though shalt never go there again, that will be a very, very significant problem.

My submission on the public interest is the lesser one which says there is still capacity to impact. It impacts on the efficiency of decision-making, these rival interpretations going one way or the other, mine or his, it impacts on the efficiency of decision-making processes which Parliament plainly would have a strong public interest in and legislative policy interest in and it impacts as a matter of specifics or as an aspect of that because of my learned friend's entirely understandable reservation of right to challenge the exercise of the jurisdiction. The jurisdiction itself is not controversial.

The second key feature by way of framing the context in which the issue of interpretation arises is that it is, we submit, inherent in the effective and efficient exercise of regulatory power in the public interest, whether in this context or in any other, that a person on whom the relevant functions are conferred is able to react to new developments and new facts that might be material to those functions. That might be thought to be an entirely self-evident proposition. It's a proposition which to some extent depends upon -- or is effected by public law, because there are perhaps two things of public law that one needs to bear in mind when considering those and they may be of particular interest because at least some of the four preliminary questions that you identified at the beginning were positing variations of material change of circumstance. None at all would just reserve the right, ghastly misleading, or something else. So it may be of some interest at least to outline the two points of public law that may impact on the proposition that I've just outlined.

The first of them is that as a matter of public law, if such a development was of that ilk, there may very well be not merely the basis therefore for the ability to take it into

account, there may well be an obligation, a positive obligation as a matter of public law, to take matters into account that are relevant.

Parliament will and can be taken to have well understood that well-established principle and reality, including that new evidence might emerge, new arguments might be made and there may be a range of other important developments. So it's not just an ability, there may be a positive obligation as a matter of public law is the first thing to emphasise, again self-evident and you probably didn't even need me to say it.

The second thing to bear in mind --

THE PRESIDENT: No, I accept it is self-evident. But the mechanism by which that obligation to take into account new developments bites, that is something which is a little bit tricky.

Let's suppose we have a case, as here, where the power to make a reference under 131(1) is constrained because 131A and B bite. So you have the obligation to consult under 131A and the time limits under 131B and doing that exercise you make a decision not to refer because the facts don't justify making a reference and you make a decision --

SIR JAMES EADIE: At a particular point in time.

THE PRESIDENT: At a particular point in time. So say --

SIR JAMES EADIE: Say, six months.

THE PRESIDENT: So six months later, or at some point before you concluded your market study, let's assume that, you discover that there's been a change of circumstance, very significant, you are obliged to consider it, we agree with that. What do you do? How is the route by which you establish the making of a reference achieved?

SIR JAMES EADIE: That's the question.

THE PRESIDENT: Yes, it is.

SIR JAMES EADIE: That's the million dollar question. Unsurprisingly, when I come to explore the statutory provisions, you won't, I suspect, be at all surprised to hear me say that the particular focus of my submissions is going to be on that very period, that period, if I can put it this way, between 6 and 12. You know why that's significant because 12 is the time at which you have to produce the report and do the action, and 6 is, as it were, halfway through the period of that end point. The question you are positing is what happens if there's a material change in circumstance in that period. Now, on Mr Otty's view of the world, you can't accommodate that within the six to 12-month period, and you have to go down the jurisdictional route with the opportunity to challenge as a matter of JR. On our conception of the world you can accommodate that.

Indeed, it would be very surprising if you couldn't because Parliament could be taken to recognise that if there is such a change of circumstance, I can argue about whether there is or isn't, but if there is such a change of circumstance, it would be very, very surprising if Parliament precluded what would otherwise be an obligation to take into account a relevant consideration.

Now, I fully accept that to some extent that's circular because it depends on what your conception is of the six-month point and what it brings and what the 12 month point is and what it brings, but it is at least a point of context that as a matter of basic public law, if there is a material change of circumstance, there isn't merely an ability, there may well be an obligation. That was the first point I wanted to draw out in relation to the second contextual feature of the regime.

The second bit perhaps as a matter of public law that one needs to bear in mind is -- just to keep Mr Otty calm on the possibility of a challenge to the exercise of jurisdiction -- it is that the question whether or not there has been a material change of circumstance is not an objective question for the court to determine, it is a question

of rational judgment for the decision-maker.

Now, you don't, I think, have in the authorities -- I think there is a CAT authority directly on point, Mr Justice Sales in BAA, we can no doubt get that to you if we need to, but I would hope it's not a controversial proposition of public law that material change of circumstances, whether something is of materiality so as to bear on the decision-making process, whether it's the Secretary of State or the CMA or whatever else it may be, that is a matter of rational judgment.

Again, that feeds into what one does in that six to 12-month period. There may be an obligation if it is relevant, and there is this ability to make rational judgments about whether something is material.

As I say, rationality brings an end point because if no reasonable regulatory authority or minister could conclude otherwise that it was relevant, then they would be obliged to consider it and their discretion to consider it material would shrink to nothing.

THE PRESIDENT: Sir James, I suspect it's more a mixed question, isn't it? Let me articulate why I'm saying that.

Let's take our 0, 6, 12 temporal spectrum. So from 0 to 6 you do everything that you are supposed to do under 131A and 131B, and you reach a decision considering whether you want to make a reference, you decide not to.

Now, if something occurs in the way the market is operating to make that decision effectively one that you regret, because it's not right in the circumstances that now pertain, regret is probably not the right word, but you feel obliged to revisit, well I suspect you get very little pushback on that point from the tribunal.

But if the material change of circumstance is, let us say, a consultee changing their mind when they've had the opportunity to consult within period 0 to 6 and suddenly coming in and saying well, for the following reasons we think you should have made a reference, well, I would question whether that is something that the authority could

properly regard as a change of circumstance. That, I think, would be a question of law not rational judgment, because simply having a consultee whose views have been elicited by a statutory process in 131A changes their mind, well that is out of the court by virtue of the statutory regime, not by virtue of any material change of circumstance. I put that to you to see how far you want to push back on that.

SIR JAMES EADIE: Well, I wouldn't accept that proposition.

THE PRESIDENT: No.

SIR JAMES EADIE: It's always a question of rational judgment as to whether or not --

THE PRESIDENT: I see.

SIR JAMES EADIE: -- a thing is material. There is no a priori determination of the relevance of material facts in the statutory scheme. It would always a question of judgment.

Now, that is not to say, just to feather that a little bit in your favour, that is not to say that if you had a particular species or type of change, the tribunal, or indeed the admin court or whoever it was that was looking at it, would not say well, you can't really rationally treat that as a material change of circumstance because it's something that is just not rationally capable of being a material change of circumstance, but you would have to hit that standard.

The reason I put it that way is because even in the circumstance you outlined of someone changing their mind, if it's just a straightforward change of mind about what the right conclusion was and nothing else had changed, then you might well be in that difficult territory from the decision-maker's perspective. If, on the other hand, what they did was to introduce a new and highly significant fact by way of further representations that perhaps they could have produced earlier but didn't, but nevertheless it was highly material to how the market worked, then you might get to a different answer.

So in principle, my submission is it would always be a question of rational judgment and then you would have a debate around all the particular circumstances of the particular thing you were thinking about.

THE PRESIDENT: Today would be --

SIR JAMES EADIE: Not determined a priori by the legislation.

THE PRESIDENT: In the arena of rationality rather than the arena of (overspeaking).

SIR JAMES EADIE: Exactly.

THE PRESIDENT: Just on that, it is a convenient hook, why was there such a change in terms of attitude towards a reference during the first and during the second consultation phases? I mean, after the initial process of consultation are referred to in the June 2021 Market Study Notices elicited, as far as we could tell, nothing by way of adequacy for a reference, yet in the second consultation everyone is very keen for a reference. Is there --

SIR JAMES EADIE: I'm not sure precisely why that is. We set out paragraph 9.14 of the final report and in paragraph 39 of our defence and if you wanted it in the raw it's in bundle B, at tab 5, page 815. But I think that's the closest one gets to it on the facts. It seems a little odd, I rather agree, but there we are.

THE PRESIDENT: No, I just wanted to check whether there was something --

SIR JAMES EADIE: Unless somebody corrects me, I don't think that there is anything that obviously explains all that.

THE PRESIDENT: Very grateful.

SIR JAMES EADIE: Anyway, that is the second contextual feature.

The third textual feature -- and these are all points of context going to how you approach these legislative provisions when we get to the chase and we start looking at those. If I may, I will make these points shortly and that might be then the convenient moment.

Some legislation, is the third proposition, is left, deliberately loose in terms of functions, ie powers and duties, and the sequencing of processes and some legislation is drafted evidently expressly and prescriptively in the sense of confronting the various possibilities in some detail and making express provision for them. For example, as to what the conditions to be met in the exercise of powers or as trigger for duties is. That basic nature of the legislation is important in terms of the interpretive exercise, it's important because the key task of the court or tribunal is to discern Parliamentary intention primarily through the words that it has used.

Perhaps the best modern exposition of all the various bits and pieces that feed into how interpretation should work is Lord Hodge in a case called "O" which you have in the bundle behind tab 20 at page 610 in the electronic numbering and the page numbering. But "O", just by way of -- just to give the paragraph numbers, it's 29 in particular on the basic task; 30 on external aid to interpretation; and 31 on the objective assessment of meaning. But one of the features that was particularly taken into account there was that Parliament, through primary and secondary legislation, had effectively built up a great big scheme which governed when people had to pay to make applications for naturalisation as British citizens.

It had started as being a kind of free-line power in some primary legislation, and over the years the complications were recognised and the legislation accreted and became, by the time it got to the Supreme Court in O, had become a legislative scheme in which various stages of authority were granted in more prescriptive terms and then more prescriptive terms and there were tiers of primary and second legislation. So the scheme was ultimately very prescriptive.

Unsurprisingly, the claimant in that case came to court and said we can't afford to pay and that is shutting us out from a right to be a British citizen in circumstances where the preconditions are satisfied and we can't get there because we can't pay. So a

pretty compelling merits case, but the Supreme Court said no, no, we are doing this as an exercise of interpretation, the legislation is prescriptive, it has accreted in that way, but there is now a super detailed provision on how all that should work. That means, to put it in very brief summary, that there is a premium on taking the express words and the various powers at their face value. That's the true significance of that authority.

We do submit that if you have a scheme in primary or the combination of primary or secondary in which there has been very careful and detailed prescription of the various routes by which you arrive at a particular point or the various processes that have to be followed, if you are in that territory, implication or not taking the words at their face value is very, very difficult because Parliament, as it were, not left a big old open void into which lots of court imposed things can be placed.

So that's the third point and I'm going to come after the short adjournment, if I may, to the various provisions themselves.

THE PRESIDENT: I'm very grateful, Sir James. I don't want either Mr Otty's reply or you more particularly in responding to Mr Otty to feel under any constraints of time. So first of all, would it assist if we sat a little earlier at 1.45 just to make sure you are not worried about the clock and, to be clear, I think we can sit a bit later than 4.30, if needed?

SIR JAMES EADIE: I would very much welcome quarter-to, but I am under a bit of a constraint at the end of the day. I'm afraid, I have a meeting I can't get out of at 4.30.

THE PRESIDENT: Very good. We will work to 4.30, but we will say 20-to in that case.

SIR JAMES EADIE: As long as that doesn't inconvenience --

THE PRESIDENT: I'm very grateful to you both. Thank you very much.

(1.05 pm)

(The short adjournment)

(1.40 pm)

THE PRESIDENT: Mr Eadie, good afternoon.

SIR JAMES EADIE: (Inaudible) for the meaning and effect of the relevant provisions through 7 heads, as it were. The first of them is the focus on the power in 131 itself on page D11 and my submission is that 131 is in broad terms and contains its own preconditions to the exercise of the power that it confers. The power is triggered if the CMA has reasonable grounds for suspecting, et cetera, that one of the bases for action in the public interest is in play.

Now, the existence of that trigger could, of course, be challenged in public law, but that might be extremely difficult given the breadth of the concept and given that in QX recently in the Court of Appeal they said reasonable grounds for suspicion, in a piece of legislation such as this, equals Secretary of State's rational view that there are reasonable grounds to suspect. But that doesn't matter for present purposes.

There are preconditions set out in 131(1), which are the preconditions to the exercise of that power. So this is a case -- this is a case on which, on the face of that provision, one can conclude that Parliament would expect that power to be exercised in the public interest if that hurdle is overcome, if that precondition is met. But there is, of course, still a discretion, the CMA may, but the public interest considerations would be triggered, and subject to exceptional matters no doubt there would be.

There is, of course, no precondition to the section 131 exercise, that there should have been or would need to be an MSN process that exists as a freestanding power. Again that is obvious. Also obvious, there is no limitation within 131 as to the time at which that power can be exercised provided there are reasonable grounds for suspecting that it is met.

THE PRESIDENT: Is there anything in the points that section 131A and B were inserted later by the 2013 Act?

SIR JAMES EADIE: Sorry, 131(2A), you mean?

THE PRESIDENT: You take 131, that's in the original Act?

SIR JAMES EADIE: Yes.

THE PRESIDENT: 131A and 131B come in later, my Purple Book says it comes in under the 2013 Enterprise and Regulatory Reform Act which may explain why one has a lack of tinkering with 131, but one has the deliberate insertion of -- well, I call them constraints.

SIR JAMES EADIE: I'm not sure so much attaches to that. If the proposition is that you have to read 131 as it currently stands, subject to 131A and 131B, that is obviously a proposition I accept.

THE PRESIDENT: Yes.

SIR JAMES EADIE: You have to construe the legislation as it currently sits in all its component parts whenever introduced.

THE PRESIDENT: Yes.

SIR JAMES EADIE: So this is not a submission that seeks to do that, this is a submission that says you have that block scheme, including 131A and 1341B, but you also have 131 and the question is how do those tectonic plates sit with each other.

THE PRESIDENT: Well, indeed.

SIR JAMES EADIE: My Lord, yes, I accept, of course, they are brought in subsequently. The important point is that they exist and they exist within the same statutory scheme.

That's 131 and again the points we take from it are essentially that if you have a situation in which there are reasonable grounds to suspect, that is the big public interest, as it were, triggered. It would be quite surprising if things were shut down if that were to be the position. That is an interpretive tool that can be used in that way.

Secondly, 131A, to come to that on D13, the headline submission in relation to that is

that it specifically and clearly and expressly sets out the limits of its application.

THE PRESIDENT: Yes.

SIR JAMES EADIE: In the light of that express set of provisions and their clarity, there is, we submit, no proper interpretative basis for extending those express statutory limits of its application.

Provision in 131A(1) states in terms:

"This section applies..."

So it's the limit of the application. This is when -- and you have seen the concept continuing on when you get into 131B, but when does the section 131A apply? Well, (1) gives you the answer to that:

"[It] applies to a case where the CMA has published a Market Study Notice and ..."

Then there are two alternatives. So there are two bits of that. One that the Market Study Notice has been served or published, and secondly, either the CMA is proposing to make a reference under section 131 in relation to the matters specified in the notice, or a representation's been made to the CMA and so on to the effect that such a reference should be made, but the CMA is proposing not to make a reference.

Here, of course, an MSN was published in relation to the supply of mobile ecosystems in the UK on 15 June 2021, but the CMA was not, we submit, proposing at that point in time -- and this is a time point, it's the beginning of a time point -- my submission is that the correct conception of this legislation is that it says various points in time when the CMA has to make decisions. I don't really care whether you call them interim or final or anything else, the language of the Act does not use those adjectives, they posit various points of time at which the CMA has to have a view.

This section is positing the position in which the MSN is issued and it inevitably follows from any sensible reading of one that the proposing to make a reference bit, if that's what you are considering, is to be judged at the date when that notice is published.

So this the first point in time and the question at that point in time and they may have enough information to enable them to say yes we are proposing to make a reference at that point in time, but we need to issue an MSN to do some further investigation, further gathering of information using the section 5 function, we are proposing to make a reference and, if so, well, there we are. Then section 131A would be in play.

At this point in time, as a matter of fact, the CMA was not proposing to make a reference under section 131A(1) and proposing to make a reference is not the same and is self-evidently not treated as being the same as being under the statutory scheme as acknowledging the possibility that the end of the MSN process or when they have done some investigation they might. It is not the same as a possibility. This is whether or not, at the time the Market Study Notice is published, they are proposing to make a reference and nor at that time had any representation been made, (b), that such a reference should be made within the period specified, and so on.

All of the duties that follow 131A are under the scheme of this Act, and one could have issue of interpretation I just described, but all of the duties that follow in 131A itself and in 131B, by way of time conditions, are consequential.

The application of the section is expressly conditioned, however, on one of those two things in A and B being in play. I will come to that in a little more detail in a second, but just look at how the regulation works.

The time limits, then, in 131B, you will see, note as you go as it were, that in 131A there are various duties to do various things depending upon which of the A and B within 1 you are within. There are various duties under 131A itself, but it doesn't matter for present purposes.

Go to 131B, the time limits in 131B also apply -- and this is the third submission -- they also apply in accordance with their own express and clear provision/conditions.

So, just to trace those through, 131B on page 14, subparagraph (1) applies in

accordance with its own express and clear provisions. It applies where the CMA has published an MSN in a case to which section 131A applies; that language. We know what that means because we've just seen it defined in 131A(1).

Then there are duties. If it's published a notice they have within the period of six months beginning with that date to publish the notice under 131A(2)(a), so that's a specific reference back to when they are proposing to make a reference at the point at which to publish it, they have to publish that notice, and begin the process of consultation within the six-month period as well, if they are within 131A(2)(b). But all of that one applies where an MSN has been published in a case to which section 131A applies. In other words, the two preconditions in 131A(1) are met.

THE PRESIDENT: Yes.

SIR JAMES EADIE: That's subparagraph (1) of B. Subparagraph (2) of B applies where the conditions in subparagraph (2) are met. So subparagraph (3) imposes an obligation on the CMA within the period of six months beginning with the date on which it publishes the Market Study Notice to publish notice of the decision, not to make a reference.

THE PRESIDENT: Yes.

SIR JAMES EADIE: And the conditions that are specified are those you see set out in subparagraph (2).

THE PRESIDENT: Yes.

SIR JAMES EADIE: (4) then applies slightly differently:

"Where the CMA has published a Market Study Notice..."

At all, you don't have anything that says in a case to which section 131A applies, so:

"Where the CMA has published a Market Study Notice it shall, within the period of 12 months beginning with the date on which it publishes the notice, prepare and publish a report ..."

And so on.

THE PRESIDENT: Yes.

SIR JAMES EADIE: So that is covering, because it is not restricted to section 131A's application, it's not restricted in the same way as (1), it applies both to those cases where 131A is in play, because the CMA proposes to make, at the time the MSN is issued, a reference or representations have been made and it proposes not to, this covers all scenarios after the MSN has been issued. So not a condition --

THE PRESIDENT: But I think it is -- I mean, I think the set is complete, but it is applying only where -- well, 131A and 131B are code dealing with market studies and references. I accept that.

SIR JAMES EADIE: Yes, not a complete code, if that's the suggestion, and the adjective wasn't in the question. It's not a complete code, the thesis against me is you have to ignore these references to when section 131A applies. You have to ignore the fact that (4) here is not conditioned on that, other than in relation to limited duties that are imposed under subparagraph (5) in relation to contents of a report which be to be dealt with in a case where 131A applies. You have to ignore all that.

Our conception of this as a time sequence thing is if you at the point you issue the MSN can say yes, we propose to make a reference - to take that as the (a) example, the 1(a) example, if can you say that then you go down this route. But what this is doing is to impose, as it were, the 12-month period as the date for the report with the obligations and the powers that are then triggered for all cases, whether or not they are cases that fall within or where section 131A applies, or they don't. And so this covers and provides, as it were, a time long-stop at 12 months.

This covers all situations, including 131A applying and not applying, and that, we respectfully submit, is a perfectly sensible and coherent way of approaching these provisions, it gives specific and clear import to the circumstances in which Parliament

has expressly said that some conditions or duties or powers are conditioned on 131A applying and some not.

So you have this 12-month period which stops the clock running. At that point you have to take a decision and they have to produce some action. It applies, subparagraph (4) applies, and it is important it applies across the board. It doesn't just apply when 131A applies. It is simply on the basis that the MSN has been published and what is then required is a report at the end of the 12-month period setting out the CMA findings in relation to the matters specified in the MSN, and the action, if any, which the CMA proposes to take.

Of course the use of the words "action (if any)" or those words, are very important because what is required to be done by subparagraph (4) is a full finding at the end of the full 12 months period, you have to set out everything that the CMA has rationally concluded should be found as a result of what it knows by that point, deeply bizarre if it had to ignore the bits that had happened up to that point. It makes its findings. It provides a long-stop date thereby sorting the legislative policy that says we need to do this timeously for the protection of those who might be required to engage in this exercise. Then what is required at the end of it is that the market study report sets out what action, if any, the CMA proposes to take.

Now, that action, the word "action" must refer in context to any action which the CMA is entitled under the legislative regime to take. It is a deliberately broad concept which covers not merely a decision, as it were, to shut down or to make a reference or not to make a reference, the CMA has power to call for a bit of further information, if that's what it needs, to call for a further short consultation to happen, if that's what it needs to do. Of course, all of that exercise of power would be controlled by public law, but as a matter of interpreting the statute, those words, "action (if any)", are important because they cover the range of things that the CMA could do at the end of that

12-month period.

THE PRESIDENT: But to be clear, you are saying "action (if any)", embraces an action to make a reference under section 131(1).

SIR JAMES EADIE: I do.

THE PRESIDENT: Yes.

SIR JAMES EADIE: I do say that.

MR CUTTING: I don't know whether this is the right time to ask, what then is the nature of the decision not to make a reference under subsection (2)(c)?

SIR JAMES EADIE: Under subsection 2(c)? As far as 2(c) is concerned, that is exactly the -- either you are going to make a proposal or you are not going to make a proposal, but at the first stage. They have to make a decision at the six month point. It doesn't have to be a final decision, it doesn't have to be a "yes" or "no" and then the shutters come down for reasons I will go into in one second, it is simply a decision, if that's where they are, not to make a reference at that point.

MR CUTTING: Then why wouldn't the draftsman use the concept of a proposal in 131A?

SIR JAMES EADIE: Because they could have -- they could decide not to make a reference at that point.

THE PRESIDENT: That's what, in fact, they did.

SIR JAMES EADIE: That's what, in fact, they did.

Just stand back from it, because one can get too sucked into the woods for the trees, as it were, on our conception of it, as I say, you have a perfectly coherent and logical regulatory structure set up by Parliament. On day 1, when the MSN gets issued, the CMA either does or does not have a basis for saying we are proposing to make a reference. It is important that it should say that as a proposal at that stage because it's still waiting for views, as it were, that is the thing that launches it off. But it has to

form that view. That takes you within 131A or it doesn't.

At the six-month point they look at what they have again and say, what are we now going to do? If they are going to decide not to make a reference at that point, then you say that. Or you could say well, we're not in a position to make a decision to make a reference now so we are not going to make a reference, so we carry on, as it were. But you have to view all parts of this coherently. You are ultimately left with subparagraph (4) which applies simply when the MSN has been issued and is not conditioned on falling within the 131A thing. You have a 12-month break at the end. That's when you have to produce the report.

When you produce that report you set out your final views, as it were, and any action which they propose to take. That's a perfectly coherent position. It allows the CMA to react to information as it comes in, the six-month period is going to be important. If they can reach a decision by then, they do; if they can't, it goes to the final report.

It's clear, we respectfully submit, that Parliament envisages, this is the fourth point, that the structure of those time limits and the provisions at 131B(4) are critical to this argument. That's the fourth proposition. It's clear that Parliament envisages that there will be a period of a full 12 months from MSN to report. It can't escape from that under subparagraph (4) and that chimes with the policy intention to shorten the end-to-end process.

It shortens it because it's now a 12-month period to final report. As I said, if halfway through that 12-month period the CMA has decided not to make a reference, then it must say so. That's the obligation imposed by 131B(3), but the structure makes entirely clear that that is not and is not intended to be an immutable decision. That's the critical point. Such a conclusion would be entirely inconsistent with the structure and indeed the express terms of 131B(4) and that is because it involves and envisage a full market study report a full six months later.

If I can invite my learned friend to respond to one rhetorical question without wishing to put him unduly on the spot: what, on his conception of how this scheme works, is everyone going to be doing in the final six months of that period? On his conception, the only thing that they can be doing is writing a report that explains a final decision that they took at the six-month point and indeed, on his conception of it, they have to write that report even if a month after six months has expired there is a staggeringly important change of circumstance. All of that becomes irrelevant in his case.

THE PRESIDENT: They are going to have to anyway on your case because you will be having to, in 12 months, write a report which is a market study report which sets out the action, if any, that you are proposing to take. So you are going to have do it anyway, aren't you?

SIR JAMES EADIE: We are going to have do it on the 12-month point. But on his conception of it, you have to do that report simply about what the position was six months earlier.

MR OTTY: If it helps Sir James, given his time constraints later, the answer to rhetorical question as to what was envisaged to happen in the second six months is exactly what the CMA said they were going to do in the second six months in their Interim Report, namely consult on a whole range of other interventions, not involving a market investigation reference, which they then invited consultation on. So there is no mystery to it at all.

SIR JAMES EADIE: One can go down all of that route and that will be included, presumably, on that argument within the concept of action, but nevertheless implicitly, on my learned friend's case, the concept of action whilst including all of that has excluded a 131(1) reference at the end of 12 months. I respectfully submit that doesn't make any sense.

True it is that at the end of 12 months they have to produce a report, but you can

produce a report at the end of 12 months and there we are. What is not explicable is the idea that Parliament would have created a period of six months between the final decision of six months and then 12 months, whilst excluding at the end of that 12-month period the 131 reference. That just doesn't make any sense.

THE PRESIDENT: But what -- I suspect the answer to what makes sense or not is an understanding what actually at the six-month point the CMA decided in this case.

SIR JAMES EADIE: It can't solely depend on that because (overspeaking) general interpretation.

THE PRESIDENT: I didn't say solely depend, I said the answer to the question may depend on an understanding of what was decided at the six-month stage. At the moment, I'm afraid, I don't really understand what the CMA says was decided at the six-month stage, if anything.

SIR JAMES EADIE: What the CMA decided at the six-month stage, I submit, is that they were not going to make a reference at that point, they decided not to make a reference at that point for the reasons that were set out in the Interim Report and explained, but what they were not doing, as it were, was making a final decision not to make a reference and bringing down the shutters at that point. And nor, under the statutory scheme, did they have to do that.

The debate between us is whether Parliament decided that everything had to finish at six months, in terms of reference at least, subject only to writing a report that had to come out six months later, and that excluded the possibility of considering new material that might emerge thereafter, and taking account of that in deciding what action to take, which is the language used in 131B(4).

THE PRESIDENT: Isn't that rather important? Are you saying that this is the case of new material or new matters, in terms of changed circumstance, occurring between six and 12?

SIR JAMES EADIE: We are saying that, but the challenge is not to that.

THE PRESIDENT: No, no --

SIR JAMES EADIE: It's not to the rationale of that.

THE PRESIDENT: I understand that is Apple's case, I am trying to understand yours. So the position is that no material changes of circumstance after month six, you can't remake --

SIR JAMES EADIE: No, that is not what I said. That is not what I said.

THE PRESIDENT: Do help me.

SIR JAMES EADIE: My submission is that you have a point at six months in which the CMA review whether or not they are going to make a reference, whether they are in a position to make a reference at that point. That doesn't bring down the shutters from anyone producing further representations thereafter, it doesn't preclude the CMA from doing further analysis thereafter, it doesn't the preclude material change of circumstances thereafter. There are a range of things that can happen.

THE PRESIDENT: Let's get bundle B, volume 1, tab 3 up because I think we had better look at the actual thing we are talking about here. So B, page 24:

"The CMA hereby publishes for the purposes of section 131B of the Act notice of its decision not to make a reference."

That is not a review, it's not a taking of a temporary stance, it's a decision. Now --

SIR JAMES EADIE: Hang on, pause if you may.

THE PRESIDENT: Sure, of course.

SIR JAMES EADIE: It's a decision, it's not -- but your question posed that as a contrast to something which was provisional or not provisional or binding.

THE PRESIDENT: You said something about a review and I don't think it's a review that we are talking about.

SIR JAMES EADIE: No, my Lord, then I stand corrected. It is a decision, but it is not

a decision which has or necessarily has to have under the statutory scheme the adjective "interim" or "final" next door to it. It is simply a decision at that point in time.

THE PRESIDENT: Okay, so what has it decided?

SIR JAMES EADIE: Not to make a reference at that point in time.

THE PRESIDENT: Therefore, you are saying, or are you saying -- this is dated 14 December -- are you saying that one can properly on 15 December say we are changing our mind?

SIR JAMES EADIE: Yes.

THE PRESIDENT: Okay. That's very helpful.

SIR JAMES EADIE: And I'm also saying, if that sounds stark -- and I don't think it does -- but I'm also saying that if on 15 December, forget the month, if, on 15 December or 16 December, some new material change of circumstance on any view material occurred, you would not have to go round the hamster wheel all over again. You would be allowed to take it into account.

MR CUTTING: But isn't that a bit odd in the context, in the statutory context, that a proposal not to make a reference under 131A is clearly subject to explicit statutory direction to the CMA to go out and consult? But on your hypothesis, a decision at the six-month stage not to make a reference is not subject to an explicit statutory duty to consult within 131A and B.

SIR JAMES EADIE: I wouldn't accept that is an oddity. That's the way in which the Act has been set up. The Act has been set up so that the preconditions to going down the route of consultation in this way and all the other duties that flow from that is set. They are all set by reference to whether or not the concept of whether or not section 131A applies, and if it doesn't then you end up in (4) at 12 months.

There's no deficit in that. Because at the end of 12 months, on any view, you have to produce a final report and you have to say what action is to be taken. By that stage,

the consultation and the representations in the period and the investigations and everything else that's going to happen, they will all have happened. Lots of matters would have been considered.

The difference between us is really as to whether or not the final cut-off point -- and I use the adjective guardedly because the Act simply uses "proposal", as you rightly point out, and then "decision" -- but, I mean, at the end of that 12-month period there is finality. The only difference between us is whether or not you are obliged in a scheme which recognises that even if you have gone down that route you are still going to get to the end of 12 months and you still have to produce a report. What is the position in the second six-month period?

In the second six-month period, is it an inherent part of this scheme, that you are, in effect, required to ignore all developments, ignore and treat as irrelevant any further representations that are made, ignore and treat as irrelevant any further analysis you might do, well why would Parliament do that?

THE PRESIDENT: But I think the question is --

MR CUTTING: I think the question running round my head is that since the scheme in 131A and 131B is so prescriptive about steps to consult and publish and what the reports have to contain, then all of a sudden it's not very prescriptive about what would happen in the scenario where they make a decision not to make a reference under 131B(2), but somehow, on your hypothesis, I think, they are then allowed to go on and get back into the 131A route because at the end of -- in the second six months they've decided they are going to make a reference.

SIR JAMES EADIE: They haven't necessarily decided that. They haven't necessarily decided that. They are simply in a period where they haven't made that decision at 6 months.

MR CUTTING: They have made a decision not to refer.

SIR JAMES EADIE: They have made a decision not to refer at six-months otherwise that would be the end of it.

MR CUTTING: But on the face of the Act, it's clear that there is something prescriptive that happens. If they make a decision not to refer at six months, they still have to do a report.

SIR JAMES EADIE: They do.

MR CUTTING: So they are prescriptive about that.

SIR JAMES EADIE: Yes.

MR CUTTING: If that report, on your hypothesis, then includes a decision to make a reference, since it's a decision to make a reference following a market study, we are back into 131A.

SIR JAMES EADIE: It depends when. It would depend when. You don't -- you are not necessarily back into 131A.

MR CUTTING: Well, I am sorry, actually you were very clear that we look at the wording. 131A says:

"This section applies to a case where the CMA has published a Market Study Notice ..."

They have, and are proposing to make a reference under 131, which I posited you do. Now, that is following a process in which they've also and prior made the decision under 131B(2). So somehow or other there has to be a route to go from making a decision under 131B(2) not to refer to a decision to refer which since it follows a Market Study Notice is under 131A.

What I'm saying is that it's just -- there's bit of a gap in such a prescriptive regime that there's no route anticipated by Parliament for the route that says you make a decision not to refer, that you change your mind within six months.

SIR JAMES EADIE: Well -- but that is met by the fact that to some extent one

has -- one had gone down something of a prescriptive route anyway to get to the point of making the decision at six months.

MR CUTTING: The question is, one of inference that is quite easy to draw, it is that if you have got a no reference decision, it gets written up pretty quickly, and that's the end of it, rather than it's a whole new process that triggers a -- at the end of which there's a reference. When there is no provision in this part of it for the degree of the consultation that follows that.

SIR JAMES EADIE: But then there still needs to be force given to the idea that Parliament has deliberately set up routes that go down 131A applies, here's that route and here is another route.

If it was all going to be the same, if it was all going to contain that level of prescription at all stages, then Parliament could have said, would have said, whenever MSN is issued, you have to get to this place and here are the conditions. Here is the timeframe. They could have said that and it didn't. Instead of which it said go down this route, go down that route, there are the conclusions.

I'm sorry I don't mean to be obtuse about this, I do get the idea that says it's slightly strange that there are lots of degrees of prescription leading up to that point and then you have something of a hiatus or you have less prescription if you get to the 12-month point if you don't fall within 131A.

I do entirely understand that point. My answer, I think -- my best answer I think -- is to say at that point well, Parliament has set it up so you do have to go down these routes. It does not say an MSN is issued, here then is the timetable. It doesn't matter whether someone has invited you to make a reference or made representations to that effect and they're not proposing to, or you are proposing to at that point in time. So the question is how do you marry those bits up.

My submission is that there is very little deficit in going down our route because all that

that means is not that there is some open-ended ignoring of the need to have tight timeframes, it simply means that for the second six-month period you are not simply doing, as it were, report writing on something that was historic with everything frozen at a point six months earlier. You are not required to ignore all of the things that I identified, further representations, further analysis, or new and material developments. That's really the way -- that's the dilemma for you.

MR CUTTING: Thank you.

THE PRESIDENT: Well, it does, I think, beg the question of what 131A and 131B are actually doing, and if you are right and you can, as you said earlier, make a decision on the 14 December 2021, and remake it on 15 December 2021, what's the point of it all?

SIR JAMES EADIE: Well, the point of it is that you've got the various points set out by the Act, and you have conscientiously, as the regulator making the decision, to address the question am I or am I not going to make a reference or am I or am I not proposing to make a reference at those points in time.

THE PRESIDENT: Okay.

SIR JAMES EADIE: I said, yes, it's almost like jurisdiction versus discretion again on the 15 to 16 December example, because if it was just a mechanism for abusing, as it were, then you could no doubt rely upon that to say you didn't conscientiously address the question that you were required to address on the 14th, because the day after nothing has changed and so you are not making a proper decision on that basis. But the control of that would be public law, not jurisdiction.

THE PRESIDENT: I can see why you say that. But my concern is that one does need to understand, in order to work out the legality of the later decision, what the earlier decision is actually purporting to do.

Now, at the moment -- and I'm sure it's my fault not yours -- at the moment I have

a sense that of course you have to make the 14 December decision properly, but there is nothing to stop you changing your mind for whatever reason, not just material change of circumstance, but for whatever reason, provided you are behaving properly a week later.

SIR JAMES EADIE: Providing you conscientiously address at the six-month point.

THE PRESIDENT: Okay.

SIR JAMES EADIE: Am I going to make a reference.

THE PRESIDENT: And can address the change of mind later on.

SIR JAMES EADIE: Yes.

THE PRESIDENT: You don't need a material change of circumstance at all, you just need a change of mind.

SIR JAMES EADIE: It depends. You might be in very dangerous public law territory if there was nothing, as it were, between the one and the other, because then the inference might very well readily be drawn by a court that say you hadn't properly addressed it at that point in time.

THE PRESIDENT: Well suppose you think I made a mistake?

SIR JAMES EADIE: Well, then you would say "I think I've made a mistake." You would have to explain why it was that that mistake was made and the court would have to make that assessment. Was that a lawful change of mind or not.

What we are arguing about here is the jurisdictional -- how does the Act sit? Of course, you are perfectly entitled to test it against those propositions and you are.

THE PRESIDENT: That's what I'm doing, yes.

SIR JAMES EADIE: But my submission is that under the statutory scheme, there are points at day 0, there is a point at six months, and there is then a point of 12 months. At 12 months the legislation is set out so that you can take any action or not. And any action means anything you have the power to do under the CMA.

THE PRESIDENT: Yes, but you are going further than that, you saying not just in 12 months but at any point of time between six and 12 months.

SIR JAMES EADIE: Yes, well the 12 months is a long-stop. You have to have produced the report by --

THE PRESIDENT: Yes, and that is where your action, if any, comes in.

SIR JAMES EADIE: Yes.

THE PRESIDENT: The 12-month point when the report is issued, but you are going beyond that, you are saying before 12 months you can change your mind.

SIR JAMES EADIE: From --

THE PRESIDENT: From the six-month decision.

SIR JAMES EADIE: You could change your mind -- but if you decided that you were at that point going to take action, then you would have to produce the report that set out why you had taken --

THE PRESIDENT: I see. Okay. So your --

SIR JAMES EADIE: 12 months is only a longstop, it's not a ...

THE PRESIDENT: In fact, your answer to my question: could you change the 14 December 2021 decision on the 15th is actually in need of qualification, because you need to publish your market study and set out the action, if any, that you are proposing to take that action in that case, hypothesis, being the reference?

SIR JAMES EADIE: Yes.

THE PRESIDENT: Okay. So it's more than simply just writing a further decision saying we are going to go and --

SIR JAMES EADIE: You would have to explain it because -- it's the production of that report which triggers the power.

THE PRESIDENT: You would have to do more than explain it, you would have to explain it within the framework of (overspeaking).

SIR JAMES EADIE: (Overspeaking) report. You would. You would.

THE PRESIDENT: Yes.

SIR JAMES EADIE: As I say, we fully acknowledge that it's not entirely clear how it all works, but in those situations one tends to stick to the firm ground amidst a swamp. We know that Parliament has specified different forks. We know that it has used the concept of 131A being applicable or not, it has not gone for a generalised thing that says, MSN, here is the process, here is the end point, mandatory decision at six months. It's deliberately split up the pathways and therefore left open other pathways by implication as the necessary implication from that.

We know also that there is no deficit on our interpretation in terms of a basic legislative intention upon which my learned friend relies which is to provide an end point. All that happens is that end point is at 12 or somewhere back from 12 and you produce the report, but we know that that's the position.

We know also that there is at the very least an oddity with my learned friend's case -- and we will put it higher than that -- which is that if he is right, Parliament has legislated for a scheme which requires a report to be produced a full six months after you have done all the hard work and has allowed you a very, very long period for that (overspeaking).

THE PRESIDENT: That's just a long-stop. So if you actually had a case in which there was no MIR and actually no other action or might be the case, which I think the guidance anticipates, clean bills of health, it may be that your report follows quite quickly.

SIR JAMES EADIE: That's true, but for purpose of this point you can take up to 12 months, and so the question is what can you do and what can happen in that six-month period. In my learned friend's conception of the scheme, all you are allowed to do is write the report and take lesser steps. There are some things that are cut out

of action, despite the generality of that wording, and they include perhaps the most important thing which is making a 131 reference.

THE PRESIDENT: Fair enough. An awful lot is riding on words in 131B(4)(b), "the action (if any) which the CMA proposes to take."

SIR JAMES EADIE: Yes.

THE PRESIDENT: I think it would help if we understood whether there are any limits to the action that can be proposed. Let's suppose we are with you, that you can, jurisdictionally, propose an action on that provision which involves making the reference under 131(1) that is not within a Market Study Notice but is a self-standing reference, okay? So jurisdiction okay.

What factors go into the action that is there proposed? Is it a decision you remake completely fresh? (Inaudible) to paper and just decide rationally what action needs to be taken? Or is it an action that is decided upon coloured by the six-month decision? And if it is coloured by the six-month decision, to what extent can you move away from it?

SIR JAMES EADIE: My submission is that it's the former. You have to decide on the date on which you are making the decision, which is the date of the report as we have discussed, what is the appropriate action.

THE PRESIDENT: I see.

SIR JAMES EADIE: You don't have to -- that is a matter of rational judgment for you, you have to be acting within your powers, they have to be powers properly available to you, consultation, 131 reference, combination of the two, that's what "any action" means.

But subject to that jurisdictional limit, you have to take into account everything that is material at that point in time and make your own judgment about it. There is no basis, I respectfully submit, for it within the statutory scheme for saying you need to give

a particular species of weight to the fact that a month, a week, six months earlier you made the negative decision that is referred to in (3), and that, as a matter of public law, would be the correct analysis, I submit. You would need something in the legislative scheme of real force and clarity to require you to give a particular degree of weight to one relevant factor, namely that you'd made the decision that you had at the six-month point.

THE PRESIDENT: You accept it as being a relevant factor then?

SIR JAMES EADIE: Well, it could be a relevant factor. You take it into account. It's happened. And your reasoning in that report would be something you would expect a decision-maker to take into account.

THE PRESIDENT: Well, yes, I understand that. I mean, as an analogy probably helps, one must be careful with all analogies. I'm thinking about an order of the court, and orders are intended to be final, but even final orders can be varied if there is a change in circumstance, and the extent to which one could change an order made very much depends upon the type of order it is. So at one extreme, if it is a case management order, the change in circumstance that is required to require that order to be varied is really rather tiny.

Now, to what extent does that sort of consideration apply to your six-month decision?

SIR JAMES EADIE: It doesn't.

THE PRESIDENT: It doesn't.

SIR JAMES EADIE: It doesn't. It's a non-analogy is my submission. It's a non-analogy because what you are positing is a court decision that leads to a court order, very often in a case of the sort of order where the margin for variation is vanishingly small, it would be an order that had been reached that formally reflects in terms of mandatory, or other order, a judgment of the court following a trial.

THE PRESIDENT: Well no, I'm postulating an order that --

SIR JAMES EADIE: (Overspeaking) short case management. But again, it's the same thing, there's been a judicial consideration of the issue and a conclusion reached which leads to the order. You are not in the sphere of public law decision-making. The wraparound to this legislation is public law.

THE PRESIDENT: No, I understand that.

SIR JAMES EADIE: That is a submission that is very different from what a judge does.

THE PRESIDENT: I don't think you are quite getting what I'm saying, which is that actually when one has a decision of the court at an interlocutory stage, it can be changed very easily because what constitutes a material change in circumstance --

SIR JAMES EADIE: Might be very light.

THE PRESIDENT: -- is very light.

Now, if you are saying that is an analogy that I should just take and throw in the bin (overspeaking) --

SIR JAMES EADIE: I'm afraid, having mistaken your original premise as being a point against me, now you put it for me, I can't take advantage of it. My answer is the same.

THE PRESIDENT: Your answer is the same.

SIR JAMES EADIE: It's a different exercise. You are not governed by public law. This is a judicial order following a judicial decision. Following a consideration of an issue by a court.

THE PRESIDENT: Yes.

SIR JAMES EADIE: On appeal, for the sake of argument, the Court of Appeal might have to conclude that you were wrong, but it doesn't give you a rationality standard. It's a very different thing.

THE PRESIDENT: Okay. So looking, then, at points that were considered or ought to have been considered in the six-month decision, there is no reason one can't revisit

those, so nothing has changed in the six to 12-month period, but there's no reason you can't revisit those, and provided you say well, we said this at month six, but for these reasons we've changed our mind, there's no reason why when the report is published you can't do exactly that.

SIR JAMES EADIE: There isn't as long as you are behaving rationally.

THE PRESIDENT: I understand.

SIR JAMES EADIE: And I understand why you put that to me as the most extreme end of the spectrum, but you need to bear in mind that the spectrum goes to the like the other way, which is you also have to be able to take into account, and can take into account, maybe obliged to take into account, in that second six-month period things that are not simply changes of mind, a difference of view. They may well be significant developments, like the idea that legislation might be brought in which will solve the problem; like further representations from people; like further analysis by the CMA. All of those things, on my learned friend's conception, have to be treated as irrelevant at the 12-month point on his conception of it and that, I submit, is a very, very surprising thing.

I'm not sure I can make it much better, but that is the -- that's the argument and there are pretty stark alternatives. One says bring the shutters down at six, you then have six months to do nothing but write a report and you cannot react, however truly material the change of circumstances may be, all you have to do in that six-month period is write a historic report. To our conception which says there are three relevant points in time. True it is that at the first and the second you can make decisions which may turn out not to be the same at the end of the process, but it requires the CMA to think about things at day 1 and day six months, but you are then entitled, throughout the entirety of the 12-month period to think about everything that has arisen and then you make your decision.

I do submit that there is a lot of weight. My Lord is right to ask me is a lot of weight riding on any action? Yes, it is. I do respectfully submit that's perhaps the most important feature of this, this scheme, alongside the thing that says I'm afraid Parliament, for all the difficulties that were drawn to my attention, Parliament has created different pathways and has done that in quite an intricate way, which goes back to the point I made at the beginning which is when you have this sort of scheme which sets up this degree of intricacy, then you take Parliament at its word. Unless something is shut down, on the face of the legislation Parliament did not intend it to be shut down.

That isn't just a literal approach to the legislation, it's an approach which thoroughly conforms to the basic purposes and intents, both regulatory in terms of protecting the public, and also protective for the people who are engaged in the process and the subject of compulsory powers because there is an end and the end is at 12 months.

Would you give me a moment. (Inaudible) whispered that. Forgive me. **(Pause)**

It's been drawn to my attention perfectly fairly -- and I am not sure it is a point of enormous significance -- but 129(1), I don't think it's in the bundle, defines "action" in a broad way says:

"'action' includes omission; and references to the taking of action include references to refraining from action."

MR OTTY: Same as 183.

SIR JAMES EADIE: Same as 183. Thank you.

THE PRESIDENT: Yes.

SIR JAMES EADIE: For completeness there it is.

THE PRESIDENT: No, it's very helpful.

SIR JAMES EADIE: I suspect I have gone quite a long way into my fifth, sixth and seventh propositions which would be a mercy for everybody.

The fifth proposition, just to have them by way of structure, was going to be there is nothing in the provisions which restricts representations arguing for a reference to the first six-month period so that any representation after that time must be ignored as irrelevant. Nothing to suggest that and that will be a strange thing to imply.

The sixth proposition is that there is no warrant or basis in the statutory scheme in such a situation to start the process afresh. Again it goes to our different conceptions of how the scheme is designed to work. I think as a result of the clarification this morning everyone has surrounded the proposition that there is jurisdiction under 131. Assume a material change of circumstance, I am not going to argue about when that happens or not, but assume one, everyone surrounds the proposition that 131 would be available, simpliciter. You could go and do hamster loop again on MSNs, but 131 would be available. So assume there was a material change of circumstances of real significance in that six to 12-month period.

On our conception of the statutory scheme, that can be taken into account, can feed into the final report, and can lead to a conclusion about what action should be taken at the 12-month point.

On my learned friend's conception of it, that has to be ignored as irrelevant for the purpose of that, as it were, MSN process because it's happened after the shutters have come down at six months. You have nevertheless still got to write a historic report that explains the decision made at the six-month point, which on his conception is the final point at which you could make a decision. You do that in the report and that would be the limit of the report.

So the world may have completely changed as a result of the material change of circumstances, but that report simply is explaining the historic decision at six months and then, he says, you can do a 131 thing at that point, and at that point, assume there will be no material change of circumstances, that would be fine. Because assuming

you have no public law challenges to the exercise of that jurisdiction, you could do it then.

So you are either embedded in the process, or you have to start at least to some degree afresh and that isn't an entirely neutral exercise because, as you will be aware, MSNs are the subject not merely of a power in the CMA, but they are the subject of a duty on the CMA in section 130A, as you will recall. That duty is conditioned by whether or not I think your exercise or you are about to exercise your section 5 functions. Do you see 130A at D8, (1):

"Where the CMA is proposing to carry out its functions under section 5 in relation to a matter for the purposes mentioned in subsection (2), the CMA must publish a notice [must therefore] ..."

And the section 5 functions are not all of its functions, are not any action, which again, that whole idea of identifying specific functions stands in contrast to any action, yes? That's a separate point.

But looking at what triggers the duty under 130A(1), go back to section 5 on D1 and you will see that it's all about the function of obtaining information. Obtaining, compiling and keeping under review information about matters relating to carrying out of its function.

So the point is that if you are in my learned friend's world where 131 simpliciter or MSN is the choice, that is on his conception of what happens in the six months if you have material change of circumstance, then one needs to be well alive to the fact that the duty to go down the MSN route, with all of the additional things that that would involve, all the additional complications and impingement on the efficiency of decision making, may have to be gone through if only you are considering getting further information. Because it's a like trigger duty under 130A and that itself gives more force to the idea that you have got so far as Parliament made you go down that route subject only to

that like trigger in circumstances in which you had a bunch of information and you felt otherwise able to make 131 decisions. But of course they do exist as alternatives, but you just need to be aware of the likeness of that MSN trigger for the purpose of considering that argument.

Of course, to put the flipside of that, it is, of course, entirely possible that the CMA could consider that it had all the information that it needed at that point in the hypothesis we are considering, namely material change of circumstances in the second six-month period, it had all the information to hand and it simply concluded well, I'm going to go and make a 131(1) decision. I don't need to get further information, I don't need to go down the MSN process, that's that. At which point you have a slightly different objection which is that it seems a slightly strange formulistic thing to have to do particularly if you may have to consider things like the duty to consult. That's a slightly strange and formulistic thing to do when the process can perfectly happily be built in to cover material change of circumstance. So that was the sixth point, of six, you will be delighted to hear.

Just very briefly on the facts, if I may.

THE PRESIDENT: Yes.

SIR JAMES EADIE: A couple of thoughts on the facts. A couple of submissions on the facts.

We know that the MSN was issued on 15 June 2021, it was inviting representations by 26 July 2021. Section 131B(1), as I've submitted, did not apply because 131A did not apply. Just to put the flesh on the bones, I am probably repeating what I have already said, but bringing them back to the facts, that is because neither of the preconditions were in play.

131B(2) and (3) were in play because the CMA had published an MSN, and no representations had been made. But the Secretary of State then decided, on

14 December 2021, not to make a reference, and I deliberately put no adjective in front or beside it for reasons I have explained and don't go back to. The CMA complied, therefore, with the time limit in 131B(3) within six months of the MSN and published no decision not to make a reference in that way. It did so, I think, the day before the six months was due to expire.

What was called the interim decision to introduce the adjective, what was called the interim decision explained the nature of the decision made at that point and we have summarised the relevant and key facts in 32 to 37 of the defence and I am not going back through them. You know the thing that they were waiting on, it was particularly the proposed legislative change that was in prospect.

I think my Lord asked the question as to whether or not it would be an error of law for a decision-maker to consider the possibility that legislation might create a more suitable vehicle for the exercise of powers --

THE PRESIDENT: Yes.

SIR JAMES EADIE: -- and considering that set of issues, my respectful answer to that is that that is plainly not an error of law. I was thinking over the short adjournment about whether I could shout about any authority in relation to that proposition. The closest I came to it -- and again it is not in the bundle -- but I did a case some years back in which there was a bust up about the Secretary of State's proposal to re-alter, to make more unitary local government in England and Wales.

THE PRESIDENT: Yes.

SIR JAMES EADIE: And the Secretary of State, I'm doing him or her a great disservice, I am sure, in summarising it in this way, but didn't much like the look of the current and existing statutory regime because it imposed a whole bunch of not very attractive, from his perspective, conditions to doing that. But there was new primary legislation in prospect. So what the Secretary of State did was to direct local

authorities, under general powers of direction, to take a whole bunch of precursor steps in anticipation of future legislation that was going to be at that point or was thought to be going to be in a particular form. The local authorities were aggrieved by this, or some of them, and could see the writing on wall and that they were going to be made unitary and so disappear. They decided they were going to challenge that on the basis it was unlawful to be exercising the power for that purpose. They failed in that endeavour. It was a case called Shrewsbury and Atcham BC, I think.

My submission is that as a matter of general principle anyway, Secretaries of State and ministers up and down the lines spend their whole life casting their eyes forward to what Parliament might or might not do and it's a perfectly legitimate thing for them to consider in making decisions, but there might be shortly around the corner a legislative regime that would greater and more likely and better suit their policy purpose. There is no unlawfulness in it.

THE PRESIDENT: The reason I raised it is it does seem to me that there is an entitlement in the part of the persons who are going to be affected by a reference to have the question of whether there should or should not be a reference decided by the law, as it applies, at that point in time.

SIR JAMES EADIE: Yes.

THE PRESIDENT: And not to look forward to the hope that something will change.

SIR JAMES EADIE: My Lord, yes, but what you couldn't do, I think, is to say I'm obliged to make a decision by a particular date and I'm not going to do that because -- I mean, that would be more problematic, but if you have a statutory scheme that allows you the six to 12-month period as well -- I mean, it goes -- I am not sure it doesn't really inform the question, the dilemma between both sides, because you either can use six to 12 months for material new considerations and further representations or you can't.

If my learned friend is right, of course we are out anyway, as it were. I'm not sure that thinking about error of law, interesting though it may be, on casting your eye forward to future legislation touches the resolution of that issue is perhaps the more neutral way of putting it.

THE PRESIDENT: You see, because what we have, in incorporating what was said in the interim decision into what I call the earlier decision, the December decision, we have a finding by the CMA that there are reasonable grounds for suspecting that there are features in the markets restricting or distorting competition and that the section 131(1) test is met. So that is the position in the CMA's mind as at 14 December 2021. Yet they say in the same breath well, the test is satisfied, we are not going to make a reference, we are not going to do so because making a reference would be not efficient or useful, we are simply not going to do it because we think that there's going to be reference -- there's going to be legislation coming in the future which might alter our position (overspeaking) --

SIR JAMES EADIE: (over speaking) taken and so on. My submission is that that's --

THE PRESIDENT: Perfectly proper.

SIR JAMES EADIE: Yes, that's a lawful thing for them to do. They can conclude prima facie that the statutory test would be met, but they would still have a discretionary -- it's a “may”. It's a “may” in 131, “may”.

THE PRESIDENT: A follow-up question on that. If the CMA had simply done nothing, not made a decision in December at all, or ever, of course there would be criticism of the CMA in not sticking to the 131A and 131B regime, but it wouldn't make any difference at all. You would still just make the decision of what action, if any, was required and if appropriate make the reference.

SIR JAMES EADIE: At the 12-month.

THE PRESIDENT: At the 12-month point.

SIR JAMES EADIE: You could, but you have to work through the statutory scheme. I said earlier that the 131B(2) and (3) regime was in play and it's in play because the CMA published the MSN and no representation had been made, and the CMA therefore had the obligations in that group of sections triggered. So they had to make a decision at that point.

THE PRESIDENT: In order to trigger the 12-month stage?

SIR JAMES EADIE: Well, they had to make a decision, yes, at that point, under (2) and (3) of 131B.

THE PRESIDENT: I see. So the utility of it is it doesn't really matter what it says, but it does matter that it is made?

SIR JAMES EADIE: They have to decide about the reference. They have do what (2) and (3) told them to do at that point.

THE PRESIDENT: Sure. Of course. If they tossed a coin and said do we make a reference or do we not, let's flip a coin, that would be very naughty, I accept.

SIR JAMES EADIE: No, that would be unlawful.

THE PRESIDENT: Sure, but what's the consequence of it?

SIR JAMES EADIE: Well, you come to the court and seek a declaration --

THE PRESIDENT: Sure, but what is the consequence of it? I mean, you can still make the decision to make the reference under 131B(4)(b) because when you write your report there is an action which includes, you say, a reference under 131(1).

SIR JAMES EADIE: You can still do that. All that means is that -- all -- I mean, you put it in contentious terms (overspeaking) -- for reasons I understand, but what Parliament has required is that they lawfully, and therefore conscientiously without flipping a coin, consider that question at that six-month point to see whether they can bring the thing to a close sooner, and the ultimate deadline on our conception of 12 months. That's what they have to do. And if they decide not to make the reference

at that point, well, that's what they decide. But they have to act lawfully in considering and making that decision. That may not be as strong a control as my learned friend would like, but it is a control and it's a control that Parliament is perfectly entitled to put in place. That's how we put it.

THE PRESIDENT: Yes, I see.

SIR JAMES EADIE: I'm not going to go back over the features we have been debating the thing for the purpose of teasing out how the interpretation works and so for that purpose obviously extreme propositions either way worked -- would enable one to see and test, but the facts here are there were further representations, there was further analysis conscientiously done. Assuming that, taking into account the legislation is a relevant consideration, which I submit it is, they are entitled, in the sense that they are rationally entitled to take it into account, there had been significant changes in relation to that. The thing had been pushed out. So we are not actually on the facts in the sort of extreme circumstances that we've been debating for the purpose of testing the limits of the interpretation.

So those are the twin conceptions of the regime, and we respectfully submit that there is very good force in the idea that this is a step thing, this is a sequence thing, that takes you to any action at the end of the 12-month period that does not require you to ignore all of those things.

My Lord, I'm very conscious that you asked some questions at the beginning.

THE PRESIDENT: Yes.

SIR JAMES EADIE: Just to do the best I can in relation to those, I think the critical thing that we would say in relation to those questions -- and I quite understand that they came from the --

THE PRESIDENT: Just to be clear, you are saying quite firmly that --

SIR JAMES EADIE: They don't arise.

THE PRESIDENT: -- the questions are wide of the mark in the nicest possible way, they make an assumption which you say is incorrect?

SIR JAMES EADIE: Yes. I think I would say that. I mean, they are premised on the idea, in effect, that the six-month thing has to be a final decision. In other words, they are premised on the idea that my learned friend's case is right.

Now, if that is so, then, as I said at the outset, there may be not much between us, I suspect.

THE PRESIDENT: Indeed. I think, as with all of these sort of applications, the tribunal is faced with two extreme propositions. So at one extreme we have Apple saying that the decision at six months is, if not quite final, then really very decisive in terms of the ability to make the reference and at the other end we have the CMA saying that yes, it's a decision, it's part of the process, but at the end of the day, if we decide that a reference is the action that we need to take on the publication of a study on rational grounds, then that is it and not to put too fine a point on it, what the decision says is something we'll look at, but is not quite a thing writ in water but getting quite close to that.

SIR JAMES EADIE: Yes, and of course one needs to be a bit careful because issues of interpretation have a right and a wrong answer, if one is allowed to put it in that way, and there is real seduction in searching for middle ground where middle ground is perhaps not the right answer.

I can see that there may be middle ground in the sense that is at least hinted at by your earlier questions and thinking, which essentially tests the idea of when something would be material. Are there ways in which one can escape from the more extreme position that you have just put to me about our case, which is you can just change your mind, it can be nothing more than that. My respectful submission is that is the right answer.

The middle ground here that you need to bear in mind is middle ground that is dictated, in effect, or may be dictated by public law because the middle ground may be what type of material change of circumstance is a change of circumstance material? Is it lawful to take it into account? Lots of the questions and lots of the discussion we have been having have surrounded that. Is it all right to take into account legislation or would that be an error of law? Then you will go back to your four questions at the beginning.

Is there difference or is there distinction in terms of the principle of approach to be applied between a situation where it is just a change of mind, where someone has lied and then they are discovered to have lied. Where there is a material change of circumstances stricto sensu. But all of those things, to go back to a point I made right at the outset, are matters for the rational judgment of the public authority making the decision.

So if we are in middle ground, then that is for us, as it were. That is territory that we are entitled to occupy. My learned friend has to put his case and does unashamedly put his case as an ultra vires case and the reason that he does is that he has to win at that level of extremity, whereas we do not because there could be no challenge to the idea that it could be treated as material.

THE PRESIDENT: We will obviously examine the points that are live before us and those that are not when we write our judgment. At the moment, on basis that the only stupid question is the one you don't ask, I am really trying to gauge what heft the six-month decision had.

Now, you say it doesn't affect the rationality judgment that lies in the CMA in deciding what between month six and month 12 it should do at month 12 or before if it's done before, and therefore you say well the decision actually is no more than a factor to bear in mind.

Now, if one takes a view that the decision means something more than that, in other words if it has a certain degree of heft or weight to it, then that, of course, will close down that rationality window or range that you have, and that is what, I think, defines the middle ground.

SIR JAMES EADIE: If you were to reach that and that was really my follow-up point about the middle ground because at that stage one is asking the question what sort of thing would do by way of change. My point, you know, is that that's a matter ultimately of rational judgment. You are not confronted with any challenge to rational judgment here. But you can see the sort of -- the three key things that are said to have changed between six and 12.

THE PRESIDENT: Yes.

SIR JAMES EADIE: Can I just check there is nothing else?

THE PRESIDENT: Of course.

SIR JAMES EADIE: Right.

MR CUTTING: Sorry, I don't think this is the same hobby horse, but it probably looks like it, sounds like it and runs like it.

If we go to 131B(4) and we get to your -- the action, if any, so we've had the interim on your case, the interim provisional decision not to refer, and we get the report six months later, which contains -- which sets out the action and the action is going to be a reference. So that then is a reference that follows the market study report.

SIR JAMES EADIE: In the sense of the market study report has been issued?

MR CUTTING: Correct. Which then attracts section 131A.

SIR JAMES EADIE: It doesn't attract 131A unless the other condition --

MR CUTTING: It does. 131A(1):

"This section applies to a case where the CMA has published the market study notice..."

Tick.

“and to the CMA proposing to make a reference…”

Tick.

So you have then created the doom loop that your purported reference that you say you are entitled to make at month 12 --

SIR JAMES EADIE: I see the point. It's not a doom loop though because you go down -- under this statutory scheme, you go down the paths that are dictated from particular points of time. So your 131A path is dictated at the time the MSN is published.

MR CUTTING: That's not what it says though. It says this.

"This section applies to a case where the CMA has published the market study notice and

"(a) the CMA is proposing to make a reference ..."

SIR JAMES EADIE: It is proposing to make a reference, i.e., at the time at which it publishes the CMA Market Study Notice.

MR CUTTING: It doesn't say that. It doesn't make a reference or express an opinion when it publishes the notice, only when it publishes the six-month decision or the report, so the notice is day 1 --

SIR JAMES EADIE: Yes.

MR CUTTING: -- not six-month or 12 months, so it has --

SIR JAMES EADIE: Sorry to interrupt, I'm not sure where that comes from. 131A(1) --

MR CUTTING: Yes, applies where the CMA has published a Market Study Notice. That is the thing that kicks it off.

SIR JAMES EADIE: And?

MR CUTTING: And is proposing to make a reference.

SIR JAMES EADIE: Is?

MR CUTTING: Yes.

SIR JAMES EADIE: At that date.

MR CUTTING: And that date happens to be, on your hypothesis, month 12.

SIR JAMES EADIE: No, it isn't because we've --

MR CUTTING: Yes, it is because at month 6 it said we are not going to make a reference.

SIR JAMES EADIE: Well you say it is, but my submission is that it isn't. That isn't the right way of looking at it. You go down the paths. On day 1 you head down this 131A(1) path. If at that stage you are proposing to make a market reference, all of the alternative in 1(b) applies, and that is what dictates the path. You don't steer off the path or come back on it.

THE PRESIDENT: I think what you are saying, Sir James, is that one has to read into 131A(1) a certain point in time at which either propose to make a reference or not making a reference is articulated, and once you have decided to go down either path 131A or B, it's linear and you never go back.

SIR JAMES EADIE: So you avoid the doom loop in that way. I'm not sure I do accept that I would need to reword because the present tense does it for me.

THE PRESIDENT: Just so that we have it absolutely clear, what is the date that the "is" is referring to?

SIR JAMES EADIE: The date on which the market study is published.

MR CUTTING: But the CMA won't express an opinion on whether it is going to make a reference on the day it issues the notice.

SIR JAMES EADIE: Well, it could do. It could do. It could have satisfied itself perfectly properly.

MR CUTTING: But then it wouldn't need to do the notice, it could just do the reference.

THE PRESIDENT: Right, just so that we have -- it's very important we understand

where you coming from. When one is working out when the delta in 131A(1) arises, that delta arises on the date the market study is published.

SIR JAMES EADIE: The point being made to me it can be done on day 1, it can be done a week after.

THE PRESIDENT: Right.

SIR JAMES EADIE: But you still don't end up in the doom loop.

THE PRESIDENT: Well, one --

SIR JAMES EADIE: You can't, you have the six-month period and then 12-month period, then cut-off.

THE PRESIDENT: I mean, this is not -- this is simply an effort at understanding exactly what it is that is being put.

Mr Cutting is making the point that if in 131B(4)(b) the action the CMA is proposing to take is a market reference, then unless there is some temporal limit to 131(a)(1)(a), you are proposing to make a reference to which 131A and 131B apply. So you go into great loop.

Now, very happy to avoid the loop because loops are, generally speaking, a very bad idea. I'm a great fan of the linear approach, but do you need to put in a stop date --

SIR JAMES EADIE: You do.

THE PRESIDENT: -- that exists prior to the 12-month point or when the report is made. Of course, it could be the date the market study is published, but that doesn't seem a very rational date.

SIR JAMES EADIE: It looks like the stop date is in 131B(1).

THE PRESIDENT: 131B(1). So the six-month period.

SIR JAMES EADIE: Yes. But you could do it from day 1. There may be a rare case, I'm sure Mr Cutting has far more experience than I have, as to whether that is likely to be a common occurrence, but as a matter of statutory interpretation it covers both.

Parliament is highly unlikely to have intended a situation, I fully accept, where you end up in what you described as the doom loop.

MR CUTTING: Well, a possible inference is that this suggests that -- the action under (4) doesn't include a change of mind into a reference because that would attract 131A and by definition there won't be enough time to comply with all the requirements that the operation of 131A(1) may trigger --

SIR JAMES EADIE: Only if you are stuck in the doom loop and only if you ignore the fact that the consequence of that would be, as I indicated earlier, that you have to -- you are then ignoring, as it were, the tracks that Parliament has put you down, you are treating it all as having to be done by six months. I am not going to go back over those --

MR CUTTING: No, I understand.

THE PRESIDENT: Mr Cutting very fairly is --

SIR JAMES EADIE: Very good. I have no criticism, I fully understand the point being put and a doom loop would be a thoroughly bad idea.

THE PRESIDENT: Indeed. The reason it is being raised now is because one way of avoiding the doom loop, no doubt others, but one way is that it points in Apple's direction.

SIR JAMES EADIE: Yes, but you revisit exclusive scheme. But the point -- all the points I made earlier turns it the other way. It is that Parliament has deliberately set these various tracks down which you go and has deliberately set out sometimes where it does apply and sometimes where it doesn't, and you have all of the oddities of what happens in six months to the 12-month period and ignoring material considerations having to go under a slightly different looking doom loop.

THE PRESIDENT: Fair enough. But however one tries to break the doom loop, whether one reads a narrowing of action, which I accept goes against Mr Bailey's

construction of action as in the statutory definition we saw earlier, does violence to the word, but your route of breaking it loads quite a lot onto the "is" in 131A(1)(a).

SIR JAMES EADIE: It does, that is the --

THE PRESIDENT: So we are going to have to sort that out one way or the other because either which way one gets to a sort of spiral where you constantly proposing and never disposing.

SIR JAMES EADIE: Obviously, you've not had that -- no one's -- no one is going to suggest that on this side of the court that you end up in that position, but my submission is that you are confronted with two relatively stark and different conceptions of what this regime is designed to do and whether or not it does create the sort of mandatory shutdown, shutters come down limit that Apple propose, or whether it's a gentler and marginally longer process.

THE PRESIDENT: Thank you very much, Sir James. I'm much obliged.

SIR JAMES EADIE: I'm reminded there is the point about breach not invalidating and all of that. We've set that out very, very fully in our defence --

THE PRESIDENT: You have.

SIR JAMES EADIE: -- document at paragraph 73 and following and I'm not sure I have got a great deal to add orally to that other than summarising the points that are there.

THE PRESIDENT: No, Sir James, I suspect, we will obviously look at it, but the way the argument has fallen I don't think you are contending if -- and it's a big if that you want underlined -- Mr Otty is right, then the futility point doesn't really arise because the shutters have come down and that's it, and if on the other hand you are right, the futility point also doesn't arise because you have made a decision that you are perfectly entitled to make. So clearly if the middle ground makes that point more important, then we will look at it.

SIR JAMES EADIE: I don't for the moment, at least, accept the idea that because you are dealing with a time provision, on both of our conceptions, it necessarily follows that the remedial discretion that one would ordinarily find in relation to a public authority decision of this kind is shrunk to nothing because the logic of the point that my Lord put to my learned friend, which I entirely understand, which says it's a different category of case to the ordinary run of the mill administrative decision where futility is bang in play and for obvious reasons. You are dealing with a slightly different set of affairs if you are dealing with time because one can always make the suggestion, whenever you breach time or haven't complied with time, you could always make the suggestion, well that means that the thing has to be quashed because. But that, I respectfully submit, is too severe a view of the remedial discretion that sits in the hands of the court and would sit in the hands of the Administrative Court.

Even in relation to provisions where time is breached, there remains a discretion and the sorts of factors that you see described at section -- paragraph 73 and following of our defence would apply as relevant factors to be taken into account in the exercise of your remedial discretion and we do pray them this aid.

I quite understand why that point was raised and I do entirely accept that this is a slightly different category of public law error, if that is where you get to, because it involves time. I do not accept the basic proposition, if this is the one that is advanced -- and I'm not sure Mr Otty went the whole way in advancing it -- I do not accept the proposition that effectively the discretion shrinks to nothing because you are dealing with time. That is perhaps the only additional point to make.

THE PRESIDENT: I mean, of course it might arise, but there's no enthusiasm on either side for this course that will want to quash the December decision, the earlier one, one would then have to ask what would be the outcome if the decision were re-made and the answer there is pretty clear because --

SIR JAMES EADIE: It has already been done.

THE PRESIDENT: It has already been done.

SIR JAMES EADIE: Exactly. But that's perhaps a different ball game.

THE PRESIDENT: That's a route that either party is advocating and Mr Otty, for understandable reasons, didn't show much enthusiasm for that.

SIR JAMES EADIE: That goes, of course, goes to whether there is significant prejudice if you get into that stage. You don't quite get into section 131(2)(a) territory, it would have been likely to have been the same, you get through a slightly (overspeaking) prejudice.

THE PRESIDENT: Yes. Sir James, I don't think we need to hear anything more on futility because if we get to it we will obviously read what has been said again with great --

SIR JAMES EADIE: I am sorry it's been an uphill struggle.

THE PRESIDENT: No, it's very helpful. Thank you very much.

SIR JAMES EADIE: I'm grateful.

MR OTTY: Thank you.

Sir, I don't know whether the shorthand writers want a break.

THE PRESIDENT: We have now -- yes, I think we should probably rise. We will rise for ten minutes until quarter past. Thank you very much.

(3.10 pm)

(A short break)

(3.25 pm)

Submissions in reply by MR OTTY

THE PRESIDENT: Mr Otty.

MR OTTY: Thank you, sir.

We respectfully submit that it is not correct to characterise the two positions under

consideration as involving two extremes. There is nothing extreme about Apple's submissions. Apple's submissions, we respectfully submit, on the contrary are the only ones which are consistent with a coherent approach to statutory interpretation, having regard to the full range of provisions that we have looked at. It is an interpretation which is the only one which is consistent with the underlying statutory purposes that the secondary materials identify, and it is the only one which serves the overall scheme; namely, one which allows for Market Study Notice on day 1, conferring significant additional powers on the CMA, and which reaches a decision point, on any view, a decision point at the 12 months point.

Within that, it very sensibly contemplates that there has to be the commencement of a consultation on any proposal for an MIR within six months, so that that final decision can be taken. That is why the Market Study Notice is required at the outset to set a period for the provision of representations, as it did here with the July deadline. That is why consultation on a proposal has to commence within six months. That is why it has to be consultation which is practicable to allow the 12-month deadline to be hit.

And there is no difficulty with that as a matter of substance, as I sought to urge upon the tribunal this morning, because of the extensive powers the CMA is clothed with on day 1. There is no reason whatsoever why it should be in difficulty in adhering to those different time periods.

So the question isn't so much perhaps what heft does the six-month decision have, the question is more what heft does the six-month deadline have? And the heft of the six-month deadline is that it allows that entire scheme to be respected in a way which allows for effective consultation, finality, expedition and certainty.

Against that background, to go briefly to some of Sir James' submissions. He started with a couple of points of context, the first was that the CMA exercised its powers in the public interest. We agree. We have no difficulty with this.

He sought I think at one point to suggest that Parliament expects that where the reasonable suspicion threshold is met then the CMA will make a Market Investigation Reference. But that's not, of course, what the legislation says. The CMA may make a reference if that threshold is cleared.

He emphasises the second point of context, introductory point of context, that it's inherent in the effective exercise of regulatory power, that a public body is able to react to new developments and new facts. We agree. But the problem with that submission taken at a high level of generality and then applied to this case is that you can't simply divorce the application of that principle from the statutory context and the defined limits of the powers that Parliament has chosen to provide for.

And there is nothing extreme about our submission either because of the safety valve I accepted in exchanges this morning about the availability of a second Market Study Notice contemplated in 5(f) and 43 of the defence. But I should emphasise, just so there's no confusion at all about it, but I may have misunderstood Sir James' understanding of my submissions, but I should emphasise that it is that which we say is the safety valve, a second Market Study Notice. It is not open to the CMA to simply have recourse to a freestanding section 131 power in relation to the same subject matter.

Going on then --

THE PRESIDENT: So you are not accepting the construction of action, if any, as (overspeaking) --

MR OTTY: No, I'm certainly not accepting that, sir.

I was going to come to it but just to emphasise it now: action, if any, necessarily contemplates, we say, action which the CMA is actually proposing to take, having concluded its market study. Now in this context it merits emphasis again, that the CMA did not make a market investigation reference at the 12-month point. They didn't

purport to exercise that power at that point. What they instead did was propose one and launch a fresh consultation within the natural meaning of the words.

THE PRESIDENT: Are you saying that there is in that case virtue in what we call the doom loop, in the sense that if you choose to do that you go right back to the beginning?

MR OTTY: Yes. And again it's noticeable that there's been no reference to section 131B (5) at all. And we do respectfully embrace the question behind Mr Cutting's question about what the meaning of section 131A is. That is clearly contemplating two triggers and two triggers only for its application: is the CMA proposing a Market Investigation Reference; and has a Market Study Notice been published? And on any view both of those criteria were satisfied by the case before you.

I am just going back to emphasise what we say is the flaw in Sir James' submission about section 131A, which you have at D13. We say he is undoubtedly seeking to read in words into 131A(1)(a) because he's requiring the section to say this, "This section applies to a case where the CMA has published a Market Study Notice and the CMA is at the same time proposing to make a reference under section 131."

There are a number of problems with that submission, aside from the fact it involves reading words into the statute that aren't there. It's not what the defence contends for at paragraphs 53 and 59 where they seek to put the temporal point at the time of the Interim Report; namely the six-month point. It would be very odd if the CMA was already proposing on day 1 that the market investigation reference for it even to be going down the Market Study Notice route at all, because the threshold would already have been crossed for such a reference and for it to enjoy the section 174 powers.

It's quite difficult to reconcile with the different tenses used in 131A itself. Subparagraph (1) talks about the section applying to case "where the CMA *has*

published a Market Study Notice", looking back; and then refers to "the CMA *is* proposing", apparently at any point, is proposing.

And it's also inconsistent with subsection (b) because we know from subsection (b) that the triggers are certainly looking beyond the date of the original Market Study Notice publication because the second trigger is a representation has been made to the CMA, within the period specified in the notice, but the CMA is proposing not to make a reference. So there's nothing consistent with the wording or the scheme which supports the idea that you focus on the time of the Market Study Notice itself.

The one question that Sir James did express enthusiasm for hearing from me on was the one I perhaps rudely interrupted him on to give my views on, what on earth is the CMA to be doing in the second six months if it's decided not to make a Market Investigation Reference? Well, we don't have to look very far for an illustration as to what it's doing, and I will just give the tribunal the reference. Remember, at the time of the Interim Report the CMA are saying: we have decided not to make a Market Investigation Reference. And we are not inviting representations on that issue. But it is setting out a whole series of other possible remedial actions or interventions which it thinks might be appropriate and which it's going to explore and which it does invite representations on and that's chapter 10 of the Interim Report, B466 and following.

So not only is it easy to see that other things than revisiting a decision about a Market Investigation Reference can be done on the second six months, we have an example on the very facts of this case.

We say that on the critical question of action, are there any limits on the concept of action? Was it open to the CMA to simply decide at the end of the 12-month period, well, as an action we are going to propose that there be consultation on the Market Investigation Reference? So I submitted this morning that's inconsistent with the natural meaning of the words because the section is speaking of action, not action

which it's still considering taking and which it wishes to consult upon. More importantly, perhaps, it's inconsistent with the whole scheme of the Act, which contemplates consultation on a proposal for an MIR within six months of publication of the notice. And as I said this morning, in the context of a published Market Study Notice it is those provisions on consultation and notification which necessarily, as a matter of ordinary meaning in the whole scheme, occupy the field.

Thirdly, again it would be quite contrary to the whole purpose of expedition and certainty evident throughout the legislation and the background materials.

So to repeat and summarise it again, it is, we say, entirely consistent with the scheme that it's to be interpreted as set out in paragraph 19 of our application; that gives rise to no difficulties in practice whatever, and it is the only interpretation which respects the statutory purpose.

I think I'd be trespassing on repetition if I went any further, sir, and I don't think there is anything else I can add to what I said this morning.

THE PRESIDENT: Mr Otty, thank you very much, the tribunal has no further questions for you.

We are very grateful to both of you and your teams for the very helpful submissions. We will reserve our judgment and we will endeavour to hand something down as soon as we can. Thank you all very much.

(3.42 pm)

(The hearing concluded)