1 This Transcript has not been proof read or corrected. It is a working tool for the Tribunal for use in preparing its judgment. It will be
2 placed on the Tribunal Website for readers to see how matters were conducted at the public hearing of these proceedings and is not to
3 be relied on or cited in the context of any other proceedings. The Tribunal's judgment in this matter will be the final and definitive
4 record.
5 **IN THE COMPETITION** Case No: 1586/4/12/23
6 **APPEAL**
7 **TRIBUNAL**
8
9 Salisbury Square House
10 8 Salisbury Square
11 London EC4Y 8AP
12 Monday 26th June – Tuesday 27th June 2023
13
14
15 Before:
16 Hodge Malek KC
17 Dr William Bishop
18 Paul Lomas
19 (Sitting as a Tribunal in England and Wales)
20
21 BETWEEN:
22 **Applicants**
23
24 **Dye & Durham Limited and Dye & Durham (UK) Limited**
25 **v**
26 **Respondent**
27
28 **Competition and Markets Authority**
29
30 **&**
31 **Intervener**
32 **TM Group (UK) Limited**
33 ___________
34
35 **A P P E A R AN C E S**
36
37 Kieron Beal KC & Ben Lewy (Instructed by Dentons UK and Middle East LLP) on behalf of Dye
38 & Durham Limited and Dye & Durham (UK) Limited
39 Ben Lask KC & Thomas Sebastian (Instructed by the CMA) on behalf of the
40 Competition and Markets Authority
41 Robert O'Donoghue KC (Instructed by Fieldfisher LLP) on behalf of the TM Group (UK)
42 Limited
43
44 Digital Transcription by Epiq Europe Ltd
45 Lower Ground 20 Furnival Street London EC4A 1JS
46 Tel No: 020 7404 1400 Fax No: 020 7404 1424
47 Email: ukclient@epiqglobal.co.uk
48

49

1
2 **Tuesday, 27 June 2023**
3 **(10.00 am)**
4 **THE CHAIRMAN:** Some will be joining us on the livestream on our website, so I must
5 start therefore with the customary warning.
6 An official recording is being made and an authorised transcript will be produced, but
7 it is strictly prohibited for anyone else to make an unauthorised recording, whether
8 audio or visual, of the proceedings and breach of that provision is punishable as
9 a contempt of court.
10 Yes, Mr Lask.
11
12 **Opening submissions by MR LASK**
13 **MR LASK:** Good morning. I propose to address the grounds of challenge in the same
14 order that we have addressed them in our skeleton argument, namely Ground 1 and
15 Ground 3 and then Ground 2.
16 Starting with Ground 1, the need for a variation of the final undertakings. The core
17 issue under this ground --
18 **THE CHAIRMAN:** Is this one point, we were thinking about this in advance and I think
19 it is going to help the Tribunal if both advocates, that is probably you in opening and
20 Mr Beal in closing, could be crystal clear about the canons on approach to
21 interpretation, the final undertakings and whether the scheme of reorganisation did or
22 did not qualify as a sale for the purpose of undertakings and why. I think if we have
23 that, it would be helpful.
24 **MR LOMAS:** Yes.
25 **THE CHAIRMAN:** The second aspects – two more aspects – is that you have
26 clause 1.1 of the undertaking, which says it is to be construed in accordance with the

1 Report and what observations do you have and what parts of the Report do you rely
2 on. The third point is that in construing whether or not a variation is required for this
3 type of purchaser, do we bear in mind that there is no real need for, let's say,
4 a restrictive approach because at the end of the day there are two control
5 mechanisms, aren't there?
6 The first control mechanism is: does it fall within the undertakings at all?
7 Secondly, at the end of the day, they still need the consent of the CMA. So if
8 something is unsuitable or poses unacceptable risk, then the CMA can, in effect, block
9 it as per Ground 2 today.
10 Those are the three factors to look into on Ground 1, some time today. You don't need
11 to do it now, but by the end of the day I would like to hear what the parties have to say
12 about each of those three points.
13 **MR LASK:** Thank you for that.
14 **THE CHAIRMAN:** Thank you.
15 **MR LASK:** The core issue under Ground 1 is whether the CMA erred in a public law
16 sense in concluding that a variation to the undertakings would be required in order to
17 accommodate the AIM proposal. We submit that the answer is no, for four main
18 reasons.
19 First, the CMA correctly construed the undertakings as requiring the sale of the entirety
20 of TMG's shares to a single buyer by means of a private sale process. That
21 construction was correct, for the reasons given by the CMA in the decision and D&D
22 has not proposed an alternative construction.
23 Second, the AIM proposal as originally described provided unambiguously for the
24 transfer of TMG's shares directly to D&D's shareholders, of which there were at least
25 17, followed by the listing of those shares on AIM. Since this would not constitute the
26 disposal of TMG to a single buyer, it would require a variation to the final undertakings.

1 Third, D&D does not seriously contend that the proposal as originally described to the
2 CMA was compatible with unvaried undertakings, nor does it dispute that the
3 lawfulness of the decision must be assessed based on the information before the CMA
4 at the time of the decision. Instead, it contends that its response to the provisional
5 decision – which I will call the PD response, for shorthand – contained a decisive
6 modification to the proposal which removed the need for a variation. According to
7 D&D, this–odification involved the insertion of a new company, Spinco, to which TMG
8 would be transferred prior to AIM admission and which would serve as an approved
9 purchaser for the purposes of the undertakings.
10 Our short answer to that is that the PD response read in context shows that argument
11 to be unsustainable.
12 Fourth, in any event, even on the most generous interpretation of the PD response,
13 the substance of the AIM proposal as described in that document remained the same,
14 namely no single purchaser, but the transfer of TMG to multiple D&D shareholders
15 followed by its listing. Indeed D&D's case on Spinco is, we submit, a classic case of
16 form over substance and risks subverting the processes and requirements established
17 by the CMA to govern the variation of undertakings.
18 To make these points good, I propose to take you through the key documents relevant
19 to this ground and make my submissions on them as I go.
20 **THE CHAIRMAN:** Just another point. If you have two individuals – let's say two
21 entities, it doesn't matter whether they are companies or not, who decide to form a joint
22 venture and they say: we will purchase these shares off you and will take 50 per cent
23 each. Are you saying that that won't fall – does that fall in it, or does it fall outside?
24 **MR LASK:** In those circumstances, am I right in thinking that the joint venture would
25 be the purchaser capable of approval?
26 **THE CHAIRMAN:** No, I'm not saying that. I am saying they form a joint venture

1 amongst themselves and part of that joint venture is that they say: okay, we are each
2 going to take a 50 per cent share in whatever companies we invest in and so they
3 come up to you and say – they come up to Dye & Durham and they say look we are
4 going to buy 50 per cent each and so there will be a three-party agreement. On one
5 side there will be the vendor and then the other side there will be – the other two sides
6 will be 50 per cent for one guy and 50 per cent for the other guy. Will that fall in it or
7 not?
8 **MR LASK:** We wouldn't say that that could never be an appropriate way of
9 implementing the divestiture remedy, but insofar as the sale would be to two separate
10 entities, it wouldn't fall within the final –
11 **THE CHAIRMAN:** You are saying they would need a variation in those
12 circumstances, so you are saying it is an absolute position that unless it is to a single
13 purchaser and not more than one purchaser you need a variation? On one view what
14 has happened here is that Spinco has been put in, in order to somehow satisfy that
15 requirement, because they realise that if it is the individual shareholders who become
16 the new shareholders of TMG, that does not fall within it and there would have to be
17 a variation. I'm not saying that – going to decide that, so that is one possibility as to
18 why it has become very important. Because when you get the original twin-track
19 proposal, it is not in there unless you look at that schedule carefully and you can see
20 that is one of the possibilities.
21 I know there are a lot of things for you to think about, the other thing is really the point
22 I put to Mr Beal yesterday: in my experience, you know, I haven't really come across
23 a situation like this where they say we want you to approve a purchaser and
24 transaction, in circumstances where we are not saying this is something we are going
25 to do, we are not going to bind ourselves to do that in any way, but we want to use
26 that effectively, possibly, as a carrot in front of other people to say: well, we don't need

1 to sell to you, we don't need to accept your price, because we have this here.
2 I just want to know what the experience of the CMA is in relation to this type of
3 scenario. Because they have had more experience than I have had in this type of
4 scenario, but I haven't come across it before.
5 **MR LASK:** We have asked that question overnight and those instructing me are not
6 aware of any previous occasion on which a twin-track proposal in the broadest sense
7 has been put to the CMA.
8 **THE CHAIRMAN:** Yes. It also feeds into this whole concept of timing, because if it is
9 merely a carrot – I don't mean that in a derogatory sense. If it is a carrot as opposed
10 to the line they are ultimately going- to go for, when do they actually go down that
11 process and say yes, we are going to press the button and enter into a binding
12 commitment to do this, when they are still trying to sell it possibly to single purchasers?
13 **MR LASK:** I think the CMA asked that very question during the process. I don't have
14 my hands on the answer, but we can dig it out.
15 **THE CHAIRMAN:** Show me the question and the answer and then we will look at
16 that. Okay. Thank you very much.
17 **MR LASK:** Coming back –
18 **THE CHAIRMAN:** Sorry to pull you away –
19 **MR LASK:** Not at all.
20 **THE CHAIRMAN:** -- but these are things that we have been thinking about overnight
21 that we want answers to. It is better I tell you all the things we have at the beginning
22 so you can deal with it and obviously the other parties can deal with it when they do
23 their submissions. Yes. Thank you.
24 **MR LASK:** I was going to turn firstly, if I may, to the decisions of the CMA which
25 Mr Beal didn't take you to yesterday. No doubt because the Tribunal had indicated it
26 had read the decision and I'm conscious of that and won't dwell on it unduly. But it is

important, given the JR context, to take the decision as the starting point and for the Tribunal to ask itself whether there are any public law errors in the decision.

The decision is at bundle C1, tab 1. If we could start on this page.

We see at paragraphs 1 to 2 a summary of the decision and you will see in paragraph 1 the CMA defines what it goes on to call the AIM admission as being the proposed demerger and admission of TMG's ordinary shares to trading on AIM. When it refers in the decision to the AIM admission, it is referring to the whole process.

Paragraph 2, the summary of conclusions:

"The AIM admission would require a variation and that variation has not been justified. Even if a variation were not required, the AIM admission would not be an acceptable means of D&D complying with this obligation ...(reading to the words)... the undertakings as the Remedy Group could not be satisfied that TMG would be divested to a suitable purchaser."

Those are the Ground 2 issues.

Turning the page, paragraphs 3 and 4 set the context.

The Tribunal will note that the original deadline for divestiture was the middle of April 2023, namely six months after the undertakings were accepted in October 2022 and that was subsequently extended to 5 May 2023. We see in paragraph 4 that good progress appeared to be being made with the sale process, D&D telling the CMA there was a clear demand for the business.

Paragraph 5 explains that the CMA became aware that D&D was pursuing an alternative mechanism in late January 2023 and D&D eventually provided its proposal paper in late February 2023, that is two and a half months before the extended deadline for divestiture.

Paragraph 7 on page 3 summarises the proposal before the CMA. It says:

"In summary, the process requires capital reorganisation of TMG pursuant to

1 a court-approved plan or arrangement, which would result in the entire issued share
2 capital of TMG being transferred to the ultimate shareholders of D&D, TMG would then
3 apply for admission of its shares to trading on AIM."
4 It is quite clear from that, in my submission, that the CMA is treating the proposal as
5 a proposal to transfer the shares directly to D&D's ultimate shareholders, followed by
6 AIM admission.
7 Paragraphs 8 to 10 complete the chronology, I won't dwell on those for now.
8 Then if we turn forward to page 7 we have the heading "Variation of the final
9 undertakings". This is where the decision addresses both the need for a variation and
10 whether a variation is justified.
11 Over the page to page 8, one sees from paragraph 27 that D&D had asked the CMA
12 to treat the PD response as a request for a variation.
13 28:
14 "The response does not explain how the undertaking should be varied in order to
15 accommodate the AIM admission, nor the relevant change of circumstances that
16 would justify such a variation."
17 At paragraphs 29 to 30, key for these present purposes, could I invite the Tribunal to
18 read those, please?
19 **THE CHAIRMAN:** Yes.
20 **MR LASK:** Thank you.
21 We see there the CMA's construction in the middle of paragraph 29:
22 "The specific terms of the final undertakings clearly make provision for the disposal of
23 TMG to a single purchaser via a private sale process."
24 I accept that the construction of the final undertakings is ultimately a matter for the
25 Tribunal, but the starting point is the CMA's construction. As I have said, Mr Beal's
26 submission yesterday was that, properly construed, the undertakings allow for the AIM

1 proposal. But D&D have never advanced an alternative construction to the CMA's.
2 They have never disputed that the undertakings require a private sale to a single
3 buyer.
4 That does mean, in my submission, that this construction is effectively unchallenged.
5 Indeed, as you will have appreciated from the submissions made yesterday, D&D's
6 case under Ground 1 is premised on the CMA's construction being correct, because
7 D&D says that the transfer of shares to Spinco is a private sale to a single purchaser.
8 Where that takes us, in my submission, is that the key question under Ground 1 is in
9 fact whether the CMA misconstrued the proposal that was put before it, not whether it
10 misconstrued the undertakings.
11 **THE CHAIRMAN:** Yes. But we will have to see what Mr Beal says about that,
12 because I'm not sure that is how he puts his case. But we will see it when we have
13 his reply. I wouldn't assume that everything you have said is common ground.
14 **MR LASK:** I certainly don't assume that everything is common ground, but –
15 **THE CHAIRMAN:** Just on that one point.
16 **MR LASK:** We have made the point repeatedly in writing in the defence, in the
17 skeleton argument, that no alternative construction has been advanced by D&D and
18 that is still the case.
19 The other point that we do say is common ground is that the lawfulness of the decision
20 must be assessed based on the material that was before the CMA at the time of the
21 decision.
22 Again, Mr Beal's submissions were premised on this. The key documents he relied
23 on were the proposal paper and the PD response. So there does not appear to be
24 any dispute as to that principle. For completeness, we have cited relevant authority
25 at paragraph 30 of the defence. I won't take you to it, but for your note it is bundle A,
26 tab 2, page 58.

1 **THE CHAIRMAN:** When you look at the way that they put it in the twin-track proposal,
2 at that stage it was envisaged that the – or certainly my reading of it when I first looked
3 at it – shares in TMG would simply be issued to the shareholders of D&D, which
4 obviously, if you want to call them purchasers or just talk about a reorganisation. But
5 it ends up with multiple people and it was their case that they didn't need a variation.
6 So I'm not sure whether they accept that it has to be a single purchaser to fall within
7 the undertaking. But I know what your case is, your case is very clear and has been
8 clear from day one that a variation is required, for whatever they want to do. Certainly
9 the original twin-track proposal on your case requires a variation for the reasons that
10 you have given.
11 **MR LASK:** Indeed, sir.
12 As I will come on to show you, our case is that the PD response does not modify the
13 proposal, or at least not in the manner it needed to modify the proposal in order to
14 apply for the CMA to consider a different proposal.
15 **THE CHAIRMAN:** Yes.
16 **MR LASK:** May I take you next, please, to the notice of application in bundle A, tab 1.
17 As I say, we make the point in the defence that no alternative construction has been
18 put forward and in its skeleton, D&D says that its proposed interpretation of the
19 undertakings in the notice of application, paragraphs 57 to 59 and 62.
20 **THE CHAIRMAN:** Notice of application, paragraph 59, yes?
21 **MR LASK:** 57 to 59 and 62, which I am going to take you to now. It begins on
22 page 26.
23 One sees at paragraph 57:
24 "D&D submits that this conclusion [namely the one that we have just seen at
25 paragraph 29 of the decision] misconstrues and misapplies the final undertakings."
26 Then we see the obligation under clause 3.1 set out and at paragraph 58, a number

1 of key clauses from the undertakings are quoted. Then at 59, I will perhaps let the
2 Tribunal read 59 to itself, but my key point is that what 59 is doing is articulating D&D's
3 case as to why the proposal satisfies the undertakings. It is not putting forward
4 a different interpretation of them.
5 **THE CHAIRMAN:** No. They are saying Spinco is the purchaser?
6 **MR LASK:** Yes, that is my point. The case that is now put is premised on the CMA's
7 construction being correct.
8 **MR LOMAS:** Tacitly Spinco was introduced into the structure, not necessarily solely
9 for, but with the benefit of shoring up an argument that it met the requirements of the
10 final undertakings.
11 **MR LASK:** Yes ...
12 **MR LOMAS:** It wasn't just spin, it had a role. Yes.
13 **MR LASK:** Just pausing on paragraph 59, these factual elements of the proposal set
14 out here are key to D&D's case that it satisfies the undertakings without the need for
15 a variation. These are the key factual elements it relies on. It says:
16 "Spinco will operate in a functionally independent way from D&D, it will have its own
17 board of directors and independent business pursuits and it will provide consideration
18 for the transfer of TMG's shares by issuing shares in itself to D&D's shareholders."
19 It says in substance Spinco is the purchaser of TMG. This is important, because since
20 these factual elements are key to the proposition that the proposal falls within the
21 undertaking, they ought in my submission to have been set out in the materials that
22 D&D provided to the CMA.
23 If they are not reflected in those materials, it is difficult for D&D to sustain the argument
24 that a proposal capable of satisfying the undertakings was put before the CMA. I am
25 going to show you that none of those factual elements were properly put before the
26 CMA.

1 **THE CHAIRMAN:** Do you mean even on the submission that you received on
2 13 March, the response?
3 **MR LASK:** Yes, indeed. I am going to take you to that. We say it doesn't go far
4 enough. Nowhere near.
5 **THE CHAIRMAN:** It is quite a mystery, really. Because if the idea was always to have
6 a Spinco, why didn't they spell it out clearly in their first twin-track proposal?
7 **MR LASK:** Well, indeed. Mr Beal submitted yesterday that the team putting together
8 the proposal was focused on the end result –
9 **THE CHAIRMAN:** Yes.
10 **MR LASK:** -- it was seeking to cut to the chase.
11 We say that is quite important, because one does need to look at the proposal as
12 a whole and the end result is admission on AIM. To that extent, we do say that even
13 if the Spinco element was properly before the CMA, which it wasn't, but even if it was
14 it is artificial and it does call into question the possibility that an undertaking in D&D's
15 position can simply insert a newly formed company into the process at a late stage in
16 order, effectively, to circumvent the need for variation in the final undertakings. We do
17 say that is problematic.
18 The final paragraph that D&D rely on as setting out their construction is paragraph 62
19 of the NOA, which is on page 28. As you will see, that is simply a submission as to
20 why the proposal satisfied the undertakings. Again, there is no alternative construction
21 in any of this. In reality, D&D's case is that the CMA misconstrued the proposal, not
22 the undertakings.
23 It may be helpful if I turn up the undertakings, given the questions put at the outset of
24 the hearing. I will just show you some of the provisions that the CMA relied on for its
25 construction.
26 This is at bundle C2, tab 19.

1 **THE CHAIRMAN:** Just give me the reference again, which bundle?
2 **MR LASK:** C2, tab 19. I'm going to start on page 640. I am sorry, in my bundle,
3 tab 19 has slipped over. Apologies.
4 I am not going to go through this clause by clause, but just show you the key ones that
5 the CMA referred to. Starting with the definitions on 640, clause 1.9, we see:
6 "Divestiture [towards the bottom of this page] means the sale of TMG by D&D."
7 Over the page on to 641, we see towards the top:
8 "Final disposal means the completion of the divestiture of the TMG business in
9 accordance with the final undertakings to an approved purchaser."
10 On the facing page, 642:
11 "Transaction agreements means the sale agreement and all other agreements to be
12 concluded between D&D and the approved purchaser which are necessary in order to
13 effect the final disposal."
14 Then on page 643, we see the substantive obligations. 3.1D requires D&D to seek
15 formal approval for each potential purchaser –
16 **THE CHAIRMAN:** When we look at 1.6, you need to address that as well, don't you?
17 **MR LASK:** Yes. The –
18 **THE CHAIRMAN:** Yes. Yes. So you have to rely on the context, haven't you?
19 **MR LASK:** Yes.
20 **THE CHAIRMAN:** I want you to address 1.1 and the relevant parts of the final report
21 at some stage.
22 **MR LASK:** Yes, we will do that.
23 **THE CHAIRMAN:** Yes. Okay.
24 **MR LASK:** 3.1D requires D&D to seek formal approval for each potential purchaser
25 and provide the CMA with sufficient information on each potential purchaser so that
26 the CMA can assess it against the purchaser approval criteria.

1 We say that is obviously indicative of a private sales process, since without such
2 a process it is hard to see how the required purchaser approval process could be
3 conducted. Purchaser approval is integral to the final undertakings and certainly D&D
4 have never suggested that an AIM listing would allow prior purchaser approval to take
5 place.
6 **MR LOMAS:** Just pausing there, for a moment. I mean technically you could give
7 purchaser approval criteria, if met, to a company like Spinco. It has a business plan,
8 it has shareholders, it has standing, knows what it is going to do. You may choose
9 not to, but theoretically you could?
10 **MR LASK:** In theory I agree, I was making a slightly more general point. So there
11 were two parts to the CMA construction. There is the sale to a single buyer and there
12 is the private sale process. The point I have just made relates to the private sale
13 process which, as I say, remains important, even on the most generous interpretation
14 of the materials put before the CMA, because even on that most generous
15 interpretation the story does not end with Spinco. Ultimately, it is all about getting the
16 shares on to AIM.
17 3.8:
18 "D&D undertakes to seek CMA approval of the final terms of the divestiture ...(Reading
19 to the words)... in final form of all transaction agreements."
20 We have seen from the definition that these mean agreements between D&D and the
21 approved purchaser. But, again, prior approval by the CMA is at the heart of the
22 undertakings, strongly suggestive of a private sale process.
23 3.10:
24 "On completion date, D&D shall transfer the entirety of the shares ...(Reading to the
25 words)... to an approved purchaser."
26 Again, it envisages a single purchaser. Indeed, a sale to multiple purchasers would

1 raise a number of issues. For example, what portion of the firm would each purchaser
2 own? How would the CMA ensure that the owners' plans were sufficiently aligned to
3 maintain the firm's competitive capability? We don't say those sorts of matters could
4 never be dealt with, but they would need to be provided for in the final undertakings.
5 The undertakings would need to make provisions for those sorts of issues to be
6 considered by the CMA.
7 For example, we would want to understand what the relationship would be between
8 the multiple purchasers. It might include reviewing shareholder agreements, but there
9 is not provision for any of that in these undertakings. That is perhaps unsurprising, in
10 circumstances where this proposal was not proposed when the undertakings were
11 being negotiated.
12 5.1 on page 645 imposes reporting obligations on D&D, including obligations to report
13 on details of bids received and the status of discussions with potential purchasers.
14 Again, strongly suggestive of a private sale.
15 Then turning to the purchaser approval criteria on page 661, you see at the top, above
16 the sub-heading of "Independence", it refers to "D&D's selected purchaser" in the
17 singular, which we say is a further indicator that the undertakings envisage a sale to
18 a single buyer.
19 As I say, the rationale for requiring a private sale is not hard to discern at all because,
20 as I say, the purchaser approval process is integral to the undertakings. It is very
21 difficult to see how that would take place with a listing on a stock exchange. But also
22 on a practical level, on the undertakings as currently structured it is difficult to see how
23 multiple purchasers could come into the consideration. I have made the point about
24 the sorts of issues the CMA would need to consider, the relationship between
25 (inaudible), how they could be monitored in order to ensure that competitive capability
26 was maintained. Also purely on a practical level, it is difficult to see how on the

1 timetable set out in these final undertakings you could accommodate the approval of
2 multiple purchasers.
3 **MR LOMAS:** This is not really a multiple-purchaser case, is it? It is a single acquiring
4 entity, certainly on the D&D case, albeit with 17 institutional shareholders each with
5 a low shareholding. That is not normally what you think about as a multiple-purchaser
6 situation.
7 **MR LASK:** That is D&D's case.
8 **THE CHAIRMAN:** Yes.
9 **MR LASK:** Our case is quite different. Our case is that the proposal before the CMA
10 was not the proposal that is now before the Tribunal.
11 **THE CHAIRMAN:** You are talking on a, sort of, non-Spinco version, the distribution
12 is shares in specie to the shareholders. I see, I am with you. I understand, that was
13 my mistake. Thank you.
14 **MR LASK:** I have an alternative submission, which is that even on a Spinco version
15 it is highly problematic, but the primary submission is that the proposal that was put by
16 the CMA was a proposal –
17 **THE CHAIRMAN:** I understand. This is a pre-Spinco analysis, in a sense.
18 **MR LASK:** Yes, I'm sorry if that was not clear.
19 We can put away the final undertakings for now. Actually, it is the claim file we need
20 to keep open for the next document.
21 The first document is at 24. We are now into the process by which D&D put the
22 proposal to the CMA.
23 **THE CHAIRMAN:** You want bundle 2?
24 **MR LASK:** I am so sorry. My bundle 2 has tab 19 as the first tab. Apologies. I will
25 try and remember that as I go forward.
26 **THE CHAIRMAN:** Which bundle –

1 **MR LASK:** You are now in C2, please.
2 **THE CHAIRMAN:** C2.
3 **MR LASK:** At tab 24.
4 Do you have that, tab 24? It is an email dated 10 February from the CMS to the CMA.
5 This was a response to the CMA's email of 8 February, which I think you saw
6 yesterday.
7 On page 739 under the heading "IPO", we see:
8 "There appears to be a fundamental misunderstanding. To be clear, D&D is not
9 seeking to propose an IPO. D&D and TMG's senior management have expressed
10 interest in exploring a direct admission of TMG to AIM, this would be done by way of
11 a share-for-share exchange so that TMG's shares held by Dye & Durham Corporation
12 would be transferred out to all of Dye & Durham Corporation's public shareholders by
13 way of a court-sanctioned plan of admission. TMG would then be held by a diverse
14 group of public shareholders and become publicly traded, D&D and TMG believe a
15 direct admission of TMG to AIM would be a path that provided absolute transaction
16 certainty."
17 The short point, it is clear at this stage that under the proposal TMG's shares would
18 be transferred to D&D's shareholders and then admitted to AIM. Entirely consistent
19 with the proposal that follows at tab 25. This is the proposal.
20 I am conscious that Mr Beal took you to this yesterday, but there are certain passages
21 that he didn't read and that I would like to emphasise.
22 Bearing in mind, again, that the context for this is that the deadline for divestiture by
23 this point is two and a half months away and this, we say, is the key document setting
24 out the AIM proposal.
25 Beginning at paragraph 2.1 on page 741:
26 "This proposal paper sets out the proposed twin-track approach to the fulfilment of the

1 divestment undertakings. The twin-track approach is a process for the proposed
2 admission of TMG's ordinary shares to trading on AIM, in parallel to the current private
3 company sale process which is already well underway."
4 D&D wants to establish a process, it has a proposed admission of TMG's shares to
5 the AIM stock market to be run in parallel. So it is TMG's shares, not Spinco's, that
6 would be admitted to AIM. It is the admission to AIM, not some interim step, that is
7 the essential purpose of the proposal.
8 3.2 to 3.3 are very important. Perhaps I could invite the Tribunal to read those
9 paragraphs.
10 **THE CHAIRMAN:** What were they again?
11 **MR LASK:** 3.2 and 3.3, please.
12 **THE CHAIRMAN:** Thank you. **(Pause)**
13 Yes. Thank you.
14 **MR LASK:** Those paragraphs are important. In my submission, they explain in the
15 clearest terms what was proposed. That TMG's entire issued share capital would be
16 transferred directly to D&D's shareholders, exactly as described in paragraph 7 of the
17 decision. Unambiguous.
18 3.4 explains the blind trust element of the proposal, which is that shares held by
19 members of D&D's management and connected persons would be held in
20 an independently managed blind trust to ensure that TMG is fully independent.
21 I am going to return to this later, but we do say that it is at least an implicit
22 acknowledgment that there would otherwise be the potential for D&D's management
23 shareholders to influence TMG in a way that undermined its independence.
24 Paragraph 3.5 and following explain the admission to AIM and they, again, make clear
25 that it would be TMG's shares that would be admitted to trading and that AIM
26 admission is the endgame. We see that at paragraph 3.5 and 3.6.

There is nothing in any of this about Spinco. There is no suggestion that there would be a single purchaser capable of approval under the undertakings. On the contrary, the proposal paper goes on to explain that it would be the shareholders that would need to be considered for approval under the purchaser approval criteria. We see this from 4.2 under the heading "Effectiveness", final sentence:

"The AIM admission would achieve this objective [namely restoring an effective competitor] and result in a shareholder base which meets each of the criteria set out in annex 3 to the undertakings."

Annex 3 is where one sees the purchaser approval criteria.

Page 745, paragraph 4.9, under the heading "Absence of competitive concern". Second sentence:

"In effect, the largely institutional shareholders of D&D would together be the approved purchaser of TMG, holding all the shares of TMG currently held by D&D, save for the blind trust shares."

On the same page, paragraph 4.11, three sentences in:

"The major shareholders can be identified and considered by the CMA now in the same way as any single purchaser under the sale process."

Paragraph 4.13 on page 746. Again, the proposal would involve listing the entire issued ordinary share capital of TMG on AIM, that is TMG not Spinco. 4.13 also acknowledges the novelty of the proposal. Mr Beal made some submissions on novelty yesterday, which I will return to, but it says here:

"D&D is not aware of the CMA previously accepting ...(Reading to the words)... AIM admission to rectify an SLC".

It goes on to say, that provides no justification for dismissing the proposal.

Paragraph 4.15 acknowledges that this proposal was not formally proposed during the negotiations of the final undertakings between August and October 2022.

1 4.16 contemplates the possibility that a variation may be required, although submits
2 as a primary case at least that it isn't required.
3 For completeness, can we turn to the big version of the spreadsheet that was handed
4 up yesterday. The little version is already there.
5 I think what Mr Beal relied on – albeit tentatively, in fairness to him – is the final section
6 on the left-hand column. There is a reference in the middle of that section to new
7 Holdco, "Reregister new Holdco PLC, distribution in specie to new Holdco PLC.
8 My simple submission is that the spreadsheet does not change anything that was
9 contained in the body of the proposal paper. These unexplained and hidden away
10 references to "new Holdco" do not suffice to alter the clear description that we have
11 just seen.
12 **THE CHAIRMAN:** Yes. But what it could indicate – I think that the twin-track proposal
13 is clear to me and the points you are making, at least at the moment, seem to be good
14 about there is no reference to Spinco there. What Mr Beal has done is by referring to
15 this, it shows that this was at least in contemplation at the time and so this whole idea
16 that when it comes up a bit more expressly, but you say not clearly enough, on
17 13 March, it is not a reaction to the problems they have on single purchase. That has
18 always been the idea as to how they were going to do it, but –
19 **MR LASK:** If that is the case, it is very difficult to see why the proposal paper was –
20 **THE CHAIRMAN:** I know. It is a mystery –
21 **MR LASK:** In the way it was. Indeed, if that was the case, it is even more baffling –
22 **THE CHAIRMAN:** These concepts aren't very complicated and it would be very easy
23 in this paper to explain what the Spinco proposal was and it is just not there. The
24 argument, they are saying is: well, we have done it to simplify things. It does not really
25 simplify things at all.
26 **MR LASK:** It does not simplify these proceedings, certainly.

1 **THE CHAIRMAN:** No.

2 **MR LASK:** It has added a layer of complication to the issue that was before the CMA

3 and is now before the Tribunal.

4 **MR LOMAS:** Well, I assume you would say, in any event, it is inconsistent with the

5 case they currently make, which is that Spinco was the purchaser and the content of

6 this document is not that Spinco is the purchaser.

7 **MR LASK:** Yes.

8 **MR LOMAS:** Yes.

9 **MR LASK:** Bearing in mind the fundamental point, which is it is the CMA's decision

10 that is under challenge and that the lawfulness of that decision has to be considered

11 by reference to what was fairly put by the CMA.

12 Having seen the proposal paper, the question in my submission becomes: did the

13 further material submitted to the CMA for the decision modify the proposal in such

14 a way as to bring it within the undertakings? I do submit that any such modification

15 would need to be explicit and it would need to be unambiguous. I say that for three

16 reasons.

17 1, as we have seen, the proposal paper was very clear as to the core elements of the

18 proposal. No suggestion that it was still evolving, no suggestion it was subject to

19 change.

20 2, as D&D was well aware, the deadline for divestiture had already been extended and

21 was now only two and a half months away and the need to minimise asset risk and

22 give rapid effect to the chosen remedy is clear from the CMA guidance. For your note,

23 that is the merger remedies guidance, 5.1, which is at authorities bundle 1, tab 24,

24 page 761. So there was no time for an iterative process as regards the design of the

25 proposal and no suggestion by the CMA or D&D that there would be one. That is the

26 second point.

1 3, this was, as D&D acknowledged, a novel proposal in the UK merger context. That
2 absent any precedent in CMA guidance or decisions it is essential for D&D to make
3 absolutely clear if it was seeking to modify the proposal.
4 Sorry. Just for completeness, we don't need to turn it up, but annexed to the proposal
5 paper – no, I'm sorry. The draft TMG letter was annexed to the proposal paper, but
6 you have now been shown the final TMG letter, which is at F7. You don't need to turn
7 it up, just to note that it refers to the direct listing of TMG's shares on AIM, so it is
8 consistent with the proposal paper.
9 **THE CHAIRMAN:** So F7, the letter?
10 **MR LASK:** F7 is the letter. Yes.
11 **THE CHAIRMAN:** What date is the letter again, in F7?
12 **MR LASK:** The final version is 27 February, so it is four days after the proposal paper.
13 The next document, same bundle, tab 27. This is D&D's response to a request for
14 clarification from the CMA. 2 March, so it is a week and a bit after the proposal paper.
15 The short point is that there is no suggestion in this letter of any change to the
16 proposal. On the contrary, you will see on page 759, between the two hole punches,
17 that the letter confirms that it would be TMG's shares that would be listed to AIM. It
18 says in the second sentence of the middle paragraph:
19 "As explained in the proposal paper, an AIM listing would give TMG's shareholders
20 liquidity to sell the TMG shares if they choose to do so."
21 A slightly separate point, because this is a Ground 2 issue, but "if they choose to do
22 so", there would be no obligation on TMG's shareholders to sell their shares once
23 listed on AIM. That feeds into one of the CMA's core concerns under Ground 2, which
24 is that it would be completely unknown for how long the overlap in shareholdings would
25 persist. For present purposes, this letter confirms the proposal paper.
26 One sees on this page the question that we were discussing a bit earlier, that the CMA

1 asked at which point D&D would have to choose which track it was pursuing. So that
2 is question 2 in bold and then you will see D&D's answer underneath.
3 One sees that if TMG wants to ride both horses for as long as possible, consistent with
4 the purpose of the twin-track process, which is to drive up the price if possible.
5 **THE CHAIRMAN:** Not surprisingly.
6 **MR LASK:** Indeed.
7 That takes us to D&D's supplementary submission, dated 6 March, which is at tab 28.
8 We can take this briefly.
9 This is two weeks after the proposal paper, so we now have just under two months to
10 go until the deadline for divestiture. There is still no suggestion of any change to the
11 proposal. The submission continues to press for the twin-track approach and that was
12 defined, as we saw in the proposal paper, as involving the admission of TMG's shares.
13 There is nothing in this document to suggest any modification to the proposal.
14 Then that takes us to the provisional decision, it's the next event, and that is at file D,
15 tab 3. This is issued on 8 March and one sees the overriding concern in paragraph 1,
16 which is then elaborated on below. I would like to draw your attention to paragraph 2,
17 at the end of paragraph 2, the CMA says:
18 "In this case there was a risk that shareholders holding stakes in both companies might
19 have both the ability and an economic incentive to favour D&D over TMG or to reduce
20 competition between the companies."
21 That is the competition concern:
22 "It would be very difficult for the CMA to assess the ability and incentive of the
23 institutional shareholders to be confident that they would meet the criterion of
24 independence, together with all the other aspects of purchaser approval criteria, in the
25 time available."
26 That reflects a practical concern. The CMA is saying: how can we possibly assess

1 some 17 shareholders against the purchaser approval criteria before the deadline of
2 divestiture? It is important because it makes clear that the CMA is proceeding on the
3 basis set out in D&D's submissions to date, namely that since TMG's shares would be
4 transferred to D&D's shareholders, it is those shareholders that would have to be
5 assessed under the purchaser approval criteria.
6 **THE CHAIRMAN:** Is it relevant, Mr Lask, that this seems to be a substantive
7 assessment of the merits of the alternative proposal. I don't read the CMA as taking
8 the point in here that the alternative proposal does not meet the definition of
9 "purchaser" in the final undertakings.
10 **MR LASK:** A very fair observation, if I may say so. The CMA does not discuss the
11 need for a variation in this document. But it is then asked –
12 **THE CHAIRMAN:** I understand. Yes, I understand.
13 **MR LASK:** -- to consider (inaudible).
14 **THE CHAIRMAN:** At this stage it sidesteps that point and looks at substance?
15 **MR LASK:** It is raising a practical concern –
16 **THE CHAIRMAN:** Yes, I understand.
17 **MR LASK:** -- how can we do this with 17 shareholders?
18 If the CMA got the wrong end of the stick or if D&D proposed to modify the proposal
19 to meet this concern, then it could and should in my submission have made this
20 absolutely clear when responding to this document. But, as we will see, what it actually
21 does is it doubles down on its existing position.
22 Just by way of further response to your point, sir, D&D's own case, as one sees from
23 its reply – I won't take you to it now, but the reference is at paragraphs 9 and 18, which
24 is bundle A, tab 3, page 88. D&D's own case is that it introduced Spinco into the
25 process in order to forestall the concern that listing TMG's shares directly on AIM
26 would not be a transfer to a single buyer.

1 **THE CHAIRMAN:** Let me just look at that now. Give me the reference.
2 **MR LASK:** It is bundle A, tab 3 –
3 **THE CHAIRMAN:** Yes.
4 **MR LASK:** -- page 88.
5 **THE CHAIRMAN:** Yes.
6 **MR LASK:** You will see, paragraph 9:
7 "The principal modification [this is the second sentence] was to incorporate an explicit
8 step in which a new UK PLC would be formed, Spinco, and the relevant D&D
9 shareholding in TMG would be transferred to Spinco before the AIM admission. The
10 purpose behind this modification was to address the CMA's apparent concern about
11 the absence of a suitable purchaser."
12 D&D seems to appreciate that there Is a problem here and it says that is why it
13 introduces Spinco.
14 **THE CHAIRMAN:** Then they say the provisional decision of the CMA did not
15 expressly take issue with the alleged absence of a purchaser, but did express concern
16 the CMA would not be able to ensure that the shares in TMG ended up being held by
17 a suitable purchaser.
18 **MR LASK:** Yes. That is the part of the provisional decision that I just showed you.
19 **THE CHAIRMAN:** Yes. Exactly. Yes. Okay.
20 **MR LASK:** It appears to have interpreted the provisional decision as indicating
21 a concern or, in any event, it acknowledges there is a potential concern, a potential
22 objection, about the lack of a single purchaser.
23 The same point appears at paragraph 18 of this document on page 90. At the bottom
24 of page 90:
25 "It is accepted that the provisional decision expressed a concern about the ability of
26 the CMA to assess the suitability of a purchaser of the TMG shares. That problem

1 was resolved by D&D proposing in its PD response the introduction of Spinco or a new
2 TMG parent company to whom the shares in TMG would be transferred, thus enabling
3 an assessment of the suitability of a specific purchaser to be carried out."
4 **THE CHAIRMAN:** But in paragraph 18, it does seem to also say that your construction
5 is wrong, doesn't it? But you are saying that they don't come up with an alternative
6 construction?
7 **MR LASK:** Indeed.
8 **THE CHAIRMAN:** Because otherwise they would not have said "a misplaced
9 concern"?
10 **MR LASK:** That's true. Also, we saw in the notice of application they say in terms
11 CMA misconstrues the final undertaking.
12 **THE CHAIRMAN:** Exactly.
13 Your point is, it is one thing to say you have misconstrued it, it is another to tell you
14 what is the actual construction you have?
15 **MR LASK:** Yes.
16 **THE CHAIRMAN:** They say we don't really need to go into that anymore, because
17 what our proposal is is not a direct transfer into the names of the D&D shareholders,
18 but what needs to be considered by this Tribunal and by you at the time was a single
19 purchaser in the form of Spinco. Then we are going to have to look at their response,
20 their reply, to your provisional decision to see to what extent that is really clear as to
21 what they were doing. We debated this to a certain extent at the CMC you would have
22 seen, no doubt, from the transcript of that. Okay.
23 **MR LASK:** Yes.
24 It is the PD response that I wish to take you to next.
25 **THE CHAIRMAN:** Yes.
26 **MR LASK:** Which is back in file C2, tab 29.

1 **THE CHAIRMAN:** I will just make a note and then I might come back to that in
2 a second, thank you.
3 **MR LASK:** Sorry?
4 **THE CHAIRMAN:** I'm just going to make some notes.
5 **MR LASK:** I will pause. **(Pause)**
6 **THE CHAIRMAN:** Right. What is the next thing you wanted to show me?
7 **MR LASK:** The PD response, which is file C2, tab 29.
8 **THE CHAIRMAN:** Yes.
9 **MR LASK:** This is the key document from D&D's perspective. This is the principal
10 document they rely on, together with the proposal paper.
11 Just to recap on the scene, by the time we get to the PD response on 13 March, it is
12 clear that the proposal involves the transfer of TMG's shares directly to D&D's
13 shareholders, it is clear that this is how the CMA understands the proposal and D&D
14 knows that this may run up against the objection that it does not fit within the final
15 undertakings. It is against that background that we say any modification to the
16 proposal would need to be explicit and unambiguous. It would, moreover, need to
17 contain the key factual elements of the proposal that are said by D&D to bring it within
18 the undertakings. We saw those elements in the notice of application. The
19 independent board of directors, the consideration for the sale and so on.
20 Starting on page 772, paragraphs 1.1 and 1.2 outline D&D's position. What is
21 submitted there is that the provisional decision is unlawful, not that D&D is modifying
22 the proposal in response.
23 Then, picking it up at 1.6, 1.6 contains a series of points.
24 Firstly, (a) D&D says:
25 "The CMA needs to consider whether to vary the final undertakings."
26 Which is exactly what the final decision did. The CMA first satisfied itself that

1 a variation was required.

2 (b):

3 "The CMA has failed to take into account the fact that the proposed approach would
4 be a better means of achieving the divestment of TMG, since it would either result in
5 the creation oI.(Reading to the wordsI)... newly formed PLC, which would own TMG
6 and whose shares would be listed on AIM, thereby securing a disposal of TMG of
7 an independent entity or otherwise assist D&D in maximising the value."

8 I fully accept that there is a reference there to a newly formed PLC, which would own
9 TMG. But there is no elaboration on what is meant by that, how it fits into the process
10 and there is no suggestion that it represents the modification of the process.

11 (c) --

12 **THE CHAIRMAN:** Would you say that that is a reference to Spinco?

13 **MR LASK:** It is a reference to Spinco, although not by name, but I accept it is
14 a reference to Spinco.

15 **THE CHAIRMAN:** You accept that, yes.

16 **MR LASK:** There are a number of such references in this document, which I will take
17 you through. But we say they just don't do the job.

18 (c) challenges the CMA's supposed conclusion that an AIM-listed owner of TMG and
19 its shareholders would not be in a position to compete with D&D, but that wasn't the
20 CMA's conclusion in the provisional decision, because there had not been any
21 previous reference to an AIM-listed owner of TMG.

22 (d) Mr Beal referred to yesterday, and he referred to the provisions of schedule 8.
23 Whilst the subparagraph cites some provisions of schedule 8, it doesn't say that the
24 formation of a new company is what is proposed here.

25 (e) poses the question: why could TMG not operate as an effective competitor once it
26 or its parent is listed on AIM? Again, another reference to a parent, but at the same

1 time an indication that D&D hasn't abandoned its original proposal, because it says
2 "TMG or its parent". In my submission, the reference to a parent is cryptic and
3 unexplained.
4 (f) is important:
5 "The Remedy Group fails to explain why it would be 'very difficult' for the CMA to
6 assess institutional shareholders to be confident they would meet the criteria and have
7 independence when the CMA has received a list of those shareholders, several of
8 them are well-known institutions and the CMA appears to believe that it could assess
9 a private-equity-backed purchaser, whose investors were similar entities to or part of
10 the same groups as D&D's institutional shareholders."
11 You will recall we saw in the provisional decision the concern that it would be difficult
12 to assess multiple institutional shareholders as potential purchasers under the criteria.
13 D&D does not respond by saying, "That is not what we have in mind".
14 It does not respond by saying, "Well, fair enough, we will amend the proposal".
15 Instead what it does is it doubles down and it says, "Well, you have a list of the
16 shareholders so there is no problem in assessing them".
17 In my submission, that is a clear indication that the proposal is unchanged.
18 (g) is to similar effect and, again, it – is important - it is quite a long paragraph, but if
19 you turn to page 774 and look at the passage beginning five lines down:
20 "The situation is wholly different where there is no single purchaser but a listing of the
21 shares of the relevant part of the merged entity, or its newly formed holding company,
22 on a freely tradeable securities market."
23 It is stating in terms there would be no single purchaser, and that is precisely the
24 concern expressed in the provisional decision. It is precisely why the CMA ultimately
25 decides that a variation would be required.
26 Again, I accept there are further references to a newly formed holding company and

1 its parent, but again these are cryptic, they are presented in parentheses, almost as
2 an afterthought. The primary case is still that TMG itself would be listed on AIM and
3 clearly that has not been abandoned.
4 – this context -- to perhaps anticipate an argument that might – put in reply -- where
5 you had a clear original proposal, several explicit indications that it is still being
6 pursued and a looming deadline, it was not for the CMA to conduct further enquiries
7 into the nature of D&D's proposal. It was not for the CMA to investigate with D&D
8 whether it wanted to modify its proposal. There's a rationality standard that applies.
9 In my submission, the onus was on D&D to say if it was amending its proposal. Indeed,
10 it would be unrealistic and detrimental to the CMA's ability to carry out its role
11 effectively if the dropping of hints -- which is all we see here -- was sufficient to trigger
12 a duty to conduct further enquiries.
13 Paragraph 2.2 asks the CMA to treat this response as a request for a variation. This
14 would be an obvious place to state that the proposal had been modified such that no
15 variation was required, but there is nothing to that effect.
16 Moving on to page 776, paragraph 3.2(e) I would characterise as the high-water mark
17 of D&D's case. This is as close as this document gets. It refers to the formation of
18 a new company to hold shares in TMG, in the last part of that subparagraph.
19 But there is no suggestion that this would be instead of TMG's shares being transferred
20 to D&D's shareholders. There is no suggestion that this new company would be put
21 forward as a potential purchaser for the purposes of the purchaser approval criteria.
22 **THE CHAIRMAN:** Sorry, is that quite right, Mr Lask? Because it says:
23 "The aim of admission would involve the formation of a new company to hold shares
24 ..."
25 You say, some shares, these shares? The implication is --
26 **MR LASK:** It doesn't tell us.

1 **THE CHAIRMAN:** In TMG.

2 **MR LASK:** It doesn't tell us when it would hold those shares.

3 It does not say, "This is instead of what we propose", there is no abandonment of any
4 part of the existing proposal. That is reinforced, again, at paragraph 3.4, page 777.
5 The Remedy Group appears to be concerned that it would be very difficult for the CMA
6 to assess the institutional shareholders, this is the passage we have seen in the
7 provisional decision:

8 "No explanation is given for this alleged difficulty, despite the CMA having been
9 provided with a list of those shareholders."

10 It is the same point we saw earlier in this document.

11 **THE CHAIRMAN:** Sorry. Aren't you eliding two points here?

12 I think I understand your point that a distribution in specie to 17 shareholders runs a
13 problem with the multiple purchaser issue, but I anticipate that what D&D would say
14 is: whether we do that version or we do a Spinco, you have to apply the purchaser
15 assessment criteria, the purchaser approval criteria, and all we are doing is pointing
16 out that you are capable of doing that on whatever model. We have to meet the
17 requirements of annex 3, we accept that, but you can do it because the identity of the
18 shareholders is clear and they are reputable institutions.

19 **MR LASK:** That is what is said, but what is implicit in that is that it is still the
20 shareholders who would act as the purchaser/purchasers capable of approval, which
21 is entirely consistent with the proposal as described in the proposal paper. It is not
22 consistent with what is now said, which is, "No, it is only Spinco you have to worry
23 about, you just have to look at Spinco, single buyer".

24 **THE CHAIRMAN:** But within the same paragraph, 3.2, you have (b) as we–, which
25 seems to --

26 **MR LASK:** Sorry, which paragraph, sir?

1 **THE CHAIRMAN:** 3.2, you took us to 3.2(e) as the high point, but if you look at 3.2(b),
2 it seems to be on the basis that it is the D&D shareholders who would be directly
3 holding the shares.
4 **MR LASK:** It is. Yes. Yes. I should have shown you that.
5 **THE CHAIRMAN:** I mean, I don't want to make D&D's case for them. But I can
6 imagine that they would say Spinco is a company with no history and its only asset is
7 going to be TMG. So what can you assess in terms of suitability for your annex 3? It
8 can only be the 17 institutions that would be the shareholders in it. We understand
9 that you would want to do that, because it would be meaningless on a newly formed
10 company. But you can do that, because their identity is known.
11 **MR LASK:** I am not sure that is how they put their case before the Tribunal.
12 **THE CHAIRMAN:** Right. Okay.
13 **MR LASK:** The case under Ground 1, as we understand it, is that the CMA erred ...
14 there is a single purchaser available, Spinco, and that is who you would assess under
15 the purchaser approval criteria.
16 **THE CHAIRMAN:** But it certainly would be their case under Ground 2?
17 **MR LASK:** It may be their case under Ground 2.
18 Again, I'm not sure it has been put that way under Ground 2. Ground 2 is focused
19 more on the substance rather than the process --
20 **THE CHAIRMAN:** Let's not get distracted.
21 **MR LOMAS:** As I understand their case on Ground 1, it is forget the original proposal,
22 which is a direct transfer into the names of the D&D shareholders. What you should
23 have assessed is the Spinco proposal and that the Spinco proposal satisfies the
24 requirement of the single purchaser. It seems as though on that basis, you are
25 saying: well, they are not running that first horse and they haven't actually come up
26 with a construction as to why this multiple purchaser proposal would even fulfil the

1 criteria in the first place and that they would have needed a variation, which you are
2 not giving them.
3 **MR LASK:** Yes.
4 **MR LOMAS:** The problem about the lack of clarity is you say what they should have
5 done is to say: look, forget what we sent you before, let's be abundantly clear, we are
6 not asking you to approve a transaction where the shares go to the shareholders in
7 D&D. We are asking you to approve a transaction where it goes to Spinco.
8 On that basis, we don't need any sort of variation, just go straight to considering
9 whether or not you are happy that they satisfy your approval criteria.
10 **MR LASK:** Yes.
11 **MR LOMAS:** Yes. All right.
12 **MR LASK:** For completeness, there are further references in this document to TMG
13 (or its parent) being listed on AIM but, again with "parent" in parenthesis, so I repeat
14 my earlier submission which is that the primary case remains that TMG itself would be
15 listed on AIM. That clearly had not been abandoned at this stage.
16 **THE CHAIRMAN:** You get that in, for example, 3.5. As you say, it's in a number of
17 other places. What about the argument that given that you have two ways of doing it,
18 or two possible ways of doing it, as indicated by this document, you should consider
19 both alternatives. You should have said: well, look, the multiple purchaser route
20 doesn't fall within the undertaking, so you need a variation for that, which we are not
21 going to give you anyway. But the single purchaser one, you could say it does or
22 doesn't fall within it and then you come to a decision on that.
23 Faced with a document like this with these alternatives being put in there, why
24 shouldn't you come back and say, "Well, look, you have these alternatives, what are
25 you asking us to do? Are you asking us to approve one or the other or both?"
26 **MR LASK:** Yes. So I did answer part of that question when I made the point that this

1 cannot be enough, this sort of document, to trigger a duty to make further enquiries
2 with D&D. Given the context, given the clarity of the original proposal and given the
3 fact that in this document there are several explicit indications that the original proposal
4 is still maintained.
5 One might well say, certainly in the light of the way D&D now puts its case, that D&D
6 in this document is trying to ride two horses. Or three, actually, because you already
7 have two with the twin-track proposal. We say that isn't good enough. D&D is
8 a sophisticated company with expert legal representation, it was asking the CMA to
9 approve a novel mechanism for divestiture that it only raised for the first time halfway
10 through the process and it was, moreover, explicitly inviting the CMA to consider
11 varying the undertakings. The CMA's task was to decide whether a variation was
12 necessary and, if not, whether it be confident that the proposal would produce a
13 suitable purchaser, having regard to its statutory duties.
14 **MR LOMAS:** Just seeing where this is going and anticipating Mr Beal's point. Do you
15 accept that the question of construction of the final undertakings is a matter of law not
16 a margin of appreciation?
17 **MR LASK:** I do. I say it does not arise for the reasons I have given. One has to
18 endeavour to properly characterise the challenge under Ground 1. The way I put it is
19 to say that what is effectively being said by D&D is that the CMA misconstrued the
20 proposal, not the undertakings, the proposal that was put before it. Although they don't
21 quite put it in these terms, that sounds like an error of fact. An error of fact for the
22 purposes of the JR jurisdiction and they do cite the key authority on error of fact in
23 their skeleton, it might be helpful if we look at it now. I don't think it made its way into
24 the authorities bundle but it is cited by D&D. It is the case of E v Home Secretary.
25 This is the --
26 **THE CHAIRMAN:** We will look at this after the break and then you can tell us where

1 we are going to file this away.

2 **MR LASK:** Thank you, sir.

3 **THE CHAIRMAN:** Yes.

4 **(11.30 am)**

5 **(A short adjournment)**

6 **(11.42 am)**

7 **THE CHAIRMAN:** Right. So we are going to look at this case, yes?

8 **MR LASK:** Yes. We were discussing the appropriate legal characterisation of the
9 challenge under Ground 1. I was making the point that although it is not put in these
10 terms, in substance it seems possible to characterise it as an allegation of an error of
11 fact. The case I have handed up, the case of E, which I suggest goes in authorities
12 bundle I --

13 **THE CHAIRMAN:** Yes.

14 **MR LASK:** -- tab 11. This is the leading authority on mistakes of fact in a JR context.
15 The context for this case is actually a statutory appeal on a point of law, but the case
16 is relied upon in a JR context as establishing the parameters of a mistake of fact. If
17 I could turn you to paragraph 66 on page 1071 of the report.
18 This is the Court of Appeal:
19 "In our view, the time has now come to accept that a mistake of fact giving rise to
20 unfairness is a separate head of challenge in an appeal on a point of law. At least in
21 those statutory contexts where the parties share an interest in cooperating to achieve
22 the correct result, such as asylum law. Without seeking to lay down a precise code,
23 the ordinary requirements for a finding of unfairness are apparent from the above
24 analysis of the Criminal Injuries Compensation Board case. First, there must have
25 been a mistake as to an existing fact, including a mistake as to the availability of
26 evidence on a particular matter. Secondly, the factual evidence must have been

1 established uncontentious and objectively verifiable. Thirdly, the appellant or his
2 advisers must not have been responsible for the mistake. Fourthly, the mistake must
3 have played a material not necessarily a decisive part in the Tribunal's reasoning."
4 What this shows us, in my submission, is that in order for a mistake of fact to be
5 a ground of challenge in a case such as this, it must be shown that the appellant was
6 not responsible for the alleged mistake.
7 If what is being said is that the CMA committed an error of fact in misconstruing the
8 proposal that was before it, then our answer to that is that D&D was responsible for it,
9 because of the way the materials were expressed. It's a very clear proposal in the
10 proposal paper and then the crumbs, if I can call them that, in the PD response, hints
11 were dropped that there might be something else going on, but it was no more than
12 that.
13 **THE CHAIRMAN:** One reading of the reply is that there is, sort of, two variations of
14 a proposal.
15 Variation 1, which is that you have the D&D shareholders becoming shareholders of
16 TMG and then having an AIM listing.
17 Then the other is that you have a Spinco structure.
18 And that they are two things you need to come back on. They will say: well you should
19 have at least asked us to clarify, and we offered to meet and explain our proposal, and
20 if you had taken up that offer it would have been abundantly clear that we were running
21 three horses rather than two.
22 **MR LASK:** If that is the way it is put, then it is a rationality challenge because of
23 an alleged failure to conduct further enquiries, subject to the rationality standard.
24 **THE CHAIRMAN:** Yes.
25 **MR LASK:** The question is: was it irrational in the circumstances for the CMA not to
26 go back to D&D and ask further questions about the nature of its proposal? To which

1 my submission is firmly no.

2 **THE CHAIRMAN:** One of the other things you have to bear in life is that we all have

3 101 things to do and the problem with cases is it tends to, sort of, microscope. It is as

4 if the only thing on your table is their thing, whereas the people at the CMA, we all

5 know how hard they work, they have a lot of things to deal with. This isn't the only

6 thing you have got. This is halfway through the divestiture period and you have what

7 looks like a clear proposal coming in, you have some cloud coming in at the end and

8 is it really incumbent upon you to, sort of, be proactive and start looking for things

9 when you have other things? But litigation tends to make everything just focus on one

10 thing.

11 So, for example, the submissions on Ground 2, there is a lot of focus on one footnote,

12 as if the whole of your decision is based on the reference to DuPont. Whereas you

13 are saying: no, that is not really a fair way of looking at what we are doing, that is just

14 one footnote. Just look at everything else we said, don't just focus on one thing. It's

15 a four-legged table as opposed to a three-legged table. I understand the problem

16 you– have and it is not -- something has to be fairly clear for you to be under

17 an obligation to go back and start saying, "Well, look, just explain this in more detail,

18 what is going on? Are you amending your proposal?"

19 Because ordinarily, you would expect somebody to be really clear and say, "This is

20 what we have asked for, actually we are not asking for that anymore, we are asking

21 for something else".

22 **MR LASK:** Sir, I respectfully agree. Those are important points when considering

23 whether it was irrational of the CMA not to go back. You do have a very clear proposal

24 in the original document. It is a novel one. It is halfway through the divestiture

25 process. In the PD response, there is no suggestion -- sorry no explicit statement that

26 it has been modified or abandoned in any way. You have some crumbs, you have

1 some hints, but this wasn't a guessing game. Those crumbs and those hints are not
2 enough to impose an obligation of rationality on the CMA to go back to D&D.
3 **THE CHAIRMAN:** The fact is that it certainly wouldn't have been unreasonable for
4 someone within the CMA to have looked at it and come back and said, "Look we are
5 not happy with this, you need to clarify, we need a meeting and all that. You would
6 not be criticised for doing that. The real issue is: is the rationality test fulfilled in
7 circumstances where that has not happened? Because different people react to
8 different things at different times and some people may pick it up, other people won't
9 pick it up. The question is: does it fall within the, sort of, scope here that no one
10 actually picked up the pen or whatever and wrote back and said what is going on?
11 **MR LASK:** It is obviously a trite proposition that irrationality is a high threshold.
12 **THE CHAIRMAN:** Yes. Okay.
13 **MR LASK:** I think we can leave the PD response there. There is a finnCap letter at
14 tab 29 of bundle C2. Yes. Sorry. It was appended to the PD response. It is at 785,
15 page 785.
16 Mr Beal relied on the first bullet point at the bottom of page 785, which says:
17 "Shortly prior to AIM admission the company will become owned by a holding
18 company."
19 My submission is one I have already given you, which is, that is at best a crumb and
20 it does not suggest that the proposal has been modified.
21 **THE CHAIRMAN:** Well, those other bits seem to be more in line with the original
22 proposal.
23 **MR LASK:** Yes.
24 That takes me to the final document that was referred to or that was relied on yesterday
25 as having been before the CMA at the time of the decision. That was the draft
26 admission document and you will recall that the email chain between the CMA and

1 D&D's advisers was handed up yesterday and put into the bundle at, I think, tab 33.

2 **THE CHAIRMAN:** Yes.

3 **MR LASK:** We have actually brought with us the full email chain, not out of any desire

4 to bombard you with paper but because this one missed out the CMA's request.

5 **THE CHAIRMAN:** I had asked to see the CMA's request.

6 **MR LASK:** Quite right. If I may just hand that round. We have not filleted it, we have

7 just printed out the whole email chain, so apologies for its length.

8 **THE CHAIRMAN:** Did I put this at the front of 882 or something? Where did I --

9 **MR LASK:** Yes. 882.

10 **MR LOMAS:** Yes, that is where I put it.

11 **THE CHAIRMAN:** Yes. Can you just quickly take us through this, yes?

12 **MR LASK:** I'm just going to take you to one point, which is on the third page.

13 **THE CHAIRMAN:** Yes.

14 **MR LASK:** This is the request from the CMA, Emily Robinson, on 27 March at 4.15.

15 You will see:

16 "Dear Graham and Frank, we understand that you intend ..."

17 **THE CHAIRMAN:** I'm still trying to find which page you are on.

18 **MR LASK:** I am sorry. The pages aren't numbered, but it is the third.

19 **THE CHAIRMAN:** 3. Yes.

20 **MR LASK:** You see the orange band.

21 **THE CHAIRMAN:** "Dear Graham and Frank", that one?

22 **MR LASK:** That's the one:

23 "We understand that you intend that the AIM document will be supplied to the D&D

24 board for its approval. We remind you of D&D's obligations under the final

25 undertakings, in particular the requirement at paragraph 6.2(m) that no confidential

26 information shall pass from TMG to D&D except where strictly necessary in the

1 ordinary course of business, except with the prior written consent of the CMA. Please
2 could you send us a copy of the latest draft of the AIM admission document. ".
3 I am showing you that because that is the purpose for which the CMA was requesting
4 this document, to satisfy itself that confidential information was not going to be passed
5 between the parties. This was not the CMA making further enquiries into the nature
6 of the proposal.
7 Then one sees the email that comes back the following day, on 28 March --
8 **MR LOMAS:** Sorry. The implication is the reference to latest draft is not that they had
9 seen earlier drafts, but this is the first draft they had seen and they were just looking
10 for the current version? As far as we know, at least.
11 **MR LASK:** I don't think there is any suggestion of an earlier draft.
12 **MR LOMAS:** Yes.
13 **MR LASK:** Then you see the reply on 28 March, which is the day before the decision.
14 This is on the second page of the clip that I have handed up and the reply is halfway
15 down the second page. Email sent 28 March, 15.10. The draft AIM admission
16 document is attached and then there is some discussion of confidential information.
17 The short point I make is that there is absolutely no suggestion in the covering email
18 that the draft AIM admission document reflects a modified proposal. Mr Beal took you
19 to the document yesterday, I don't propose to go through it, save to say that one sees
20 it is quite a complicated document.
21 **THE CHAIRMAN:** One other point is that in the email of 20 March, they are pressing
22 for a final decision quickly.
23 **MR LASK:** Yes.
24 **THE CHAIRMAN:** On one level they are saying you should have done a lot more
25 further enquiries and research and stuff being reaching a final decision. That does not
26 fit very well with this where they are saying we want a decision quickly and one of the

1 invitations is that we remit this back to you for you to do all the sort of empirical
2 research into common shareholdings, which is not really viable in the sort of divestiture
3 period. It would take quite a long time to get to the bottom of that debate. That is
4 what --
5 **MR LASK:** Of course, when we come to Ground 2 I will be submitting that the nature,
6 the context of the CMA's decision, to understanding the limitations on what it was
7 required to do. But you are quite right to point out that here you have D&D pushing
8 for a quick decision, which sits uneasily not only with the arguments under Ground 2
9 but with any suggestion under Ground 1 that further enquiries should have been made
10 as to the nature of the proposal.
11 **THE CHAIRMAN:** Yes.
12 Yes. Thank you.
13 **MR LASK:** Just to finish on the draft AIM admission document, the short point is that
14 it is a complicated document and that the CMA can't reasonably have been required
15 to infer from it, with no indication in the covering email, that the proposal clearly
16 explained previously had been modified.
17 **THE CHAIRMAN:** I am sorry. I am just looking -- this is the one however, whereas
18 as I understand the D&D's submission, the sale event is specifically defined and
19 clarified, isn't it?
20 **MR LASK:** Mr Beal took you to page 900 at paragraph 3.3. Which is in square
21 brackets, it reflects the fact that it is a draft. It says:
22 "Following the conclusion of the CMA's enquiry, Dye & Durham sold the group
23 ...(reading to the words)... Canada."
24 Then one has to go back to page 895 to see a definition of the group. The group is
25 defined as:
26 "TML and each of its consolidated subsidiaries prior to the ...(reading to the words)...

1 the company and its consolidated subsidiaries."

2 TML means TMG, that is at page 897.

3 **THE CHAIRMAN:** Yes. I am sorry. I think I am misleading you. I think the document

4 to which Mr Beal was referring was the preceding one, the arrangement agreement

5 and the plan of arrangement at paragraph 2.3(b). That is probably a red herring.

6 **MR LASK:** That is one of the documents that was not before the CMA.

7 **THE CHAIRMAN:** Yes.

8 **MR LASK:** Just to complete the point, the company in this document is defined as

9 "Blank PLC", a company incorporated in England and Wales, with registered number

10 14746757. So as I say, my short submission is the CMA cannot reasonably have been

11 expected to look at this document and infer that actually what is happening is the

12 proposal was being modified. It is a dense document, it requires explanation if that is

13 said to be the effect of it, but no such explanation was provided.

14 **THE CHAIRMAN:** The fact is when you look at this carefully and with hindsight what

15 they are now saying is you can see that it does contemplate a Spinco. But the real

16 issue is was it unreasonable or irrational for you not to pick up on that and then in your

17 final decision not address that as a third possible horse?

18 **MR LASK:** Yes. I would agree with that characterisation.

19 **MR LOMAS:** Yes. It may be the point you are making, because TML is separately

20 defined from the company.

21 **MR LASK:** Yes (inaudible) TMG.

22 Tribunal, I am coming towards the end of Ground 1 now. The Tribunal will recall that

23 there were four main arguments and I have addressed you on the first three.

24 I can take the fourth one briefly. These four submissions are in our skeleton at

25 paragraphs 19 to 27.

26 My fourth submission is that even if contrary to what I have been submitting the effect

1 of the PD response was to modify the AIM proposal by inserting Spinco, the CMA's
2 conclusion of the various (inaudible) remains unimpeachable. There were two
3 elements to this submission. The first is that, as I have already submitted, whatever
4 else was going on, the core thrust of the proposal remained admission to AIM. Mr Beal
5 submitted yesterday that that is actually why the earlier documents did not refer to
6 Spinco, because they were focusing on the end result. They were cutting to the chase,
7 as he put it.
8 In those circumstances, the insertion of Spinco is somewhat artificial and if one is
9 considering whether this proposal falls within unvaried undertakings, one has to look
10 at the proposal as a whole. AIM admission, potential sale to multiple shareholders, is
11 not in my submission within the undertakings. It is not a private sale and it is not a sale
12 to a single purchaser. That is the first point.
13 The second point is as we saw from paragraphs 9 and 18 of the reply, D&D's own
14 case is that Spinco was formed in order to serve as a single purchaser capable of
15 assessment under the purchaser approval criteria. It appears, therefore, that Spinco
16 was inserted in order to get round the need for a variation.
17 **THE CHAIRMAN:** You say that. What, as I said before, is confusing about that is:
18 effectively, that is what is said in the reply where they say at paragraphs 9 and 18 that
19 it was in response to the provisional decision. I have that. But then the submission
20 yesterday relying on the schedule to the twin-track proposal with those little bits at the
21 bottom, which seem to indicate that actually they were going to have a new company.
22 **MR LASK:** Well --
23 **THE CHAIRMAN:** It can be a mystery, because it seems as though on their case they
24 had this in contemplation all along. Then that raises the issue if that is right, then why
25 is that not in the body of twin-track proposal?
26 **MR LASK:** Indeed. The point I am making now is premised on what is said in the

1 reply.

2 **THE CHAIRMAN:** I know. Yes.

3 **MR LASK:** Being accurate. I don't doubt it is, but it requires it to be. If it is right that

4 Spinco was inserted in order to forestall the CMA's concern, then it seems that the

5 purpose of Spinco is to circumvent the need for a variation. But the --

6 **MR LOMAS:** Or more positively, perhaps, to ensure that the application conforms

7 with the requirements of the final undertakings, more neutrally put. Yes.

8 I think it is common ground that the insertion of Spinco as an entity does not affect the

9 substantive competition analysis. I think that is common ground.

10 **THE CHAIRMAN:** That is common ground. That was clear at the CMC.

11 **MR LASK:** The only point I wish to make is that the -- I'm going to come on to

12 Ground 3. The requirements in the variation guidance that governed when a variation

13 may be granted, they serve an important role and they serve to ensure that

14 undertakings are only varied with good reason. In particular, only varied where there

15 is a change of circumstances which means they are no longer appropriate for dealing

16 with the SLC. So by restricting the circumstances in which variations are granted, the

17 CMA seeks to ensure the smooth and effective implementation of its remedies. But if

18 a company such as D&D can circumvent those requirements simply by inserting

19 a brand new holding company as an interim step, that would in my submission subvert

20 the processes and principles established by the CMA to govern variations. That is

21 why we would say it would be a triumph of form over substance.

22 **THE CHAIRMAN:** Yes.

23 **MR LASK:** That is Ground 1.

24 I will turn next to Ground 3, which I can take briefly because D&D does not in fairness

25 place great emphasis on Ground 3 and the scope of the issues in Ground 3 are

26 relatively narrow.

1 Ground 3 only arises if Ground 1 fails. We do say that if Ground 1 fails, as we say it
2 should, Ground 3 is sufficient to dispose of the application, because if a variation was
3 required and no variation was justified, it was not necessary for the CMA to go on and
4 consider the substance of the competition concerns.
5 **THE CHAIRMAN:** You say that now, but I presume you want us to give a ruling on all
6 three grounds?
7 **MR LASK:** I would have to check with those behind me. Perhaps we could do that
8 over the short adjournment.
9 **THE CHAIRMAN:** Do that over lunch.
10 **MR LASK:** Ground 3, could I ask you to turn up the decision, please, which is file C1,
11 tab 1, page 9.
12 We were looking earlier at page 8 and the conclusion that variation was required.
13 Then, on page 9, the CMA turns to whether a variation should be granted. Dealing
14 first with the legal test and guidance. I would like to pick it up, please, at paragraph 34,
15 where the CMA cites the variation guidance. This is CMA 11. You will see halfway
16 through this paragraph, this is a quote from the variation guidance, and it says:
17 "The precise nature of the CMA's consideration of any change of circumstances will
18 depend entirely on the individual circumstances affecting the ...(reading to the
19 words)... if it is not to lead to either variation or termination."
20 In my submission, that is unsurprising that the CMA should be explaining its policy, its
21 approach to variations, in those terms, because the starting point at least is that
22 certainly the design of the remedy is dealt with in the final Report. Then the specific
23 obligations for giving effect to that remedy are thrashed out when the undertakings
24 have been negotiated.
25 **THE CHAIRMAN:** Just give me the reference to where is CMA 11 in the bundle?
26 **MR LASK:** That is at D1, I believe. Yes. D1. That is the variation guidance.

1 **THE CHAIRMAN:** That's fine.

2 **MR LASK:** Then if one turns over the page to page 10. At 36, again this is
3 reproducing paragraph 3.3 of the variation guidance. We have seen what a change
4 of circumstances actually needs to be, what sort of change there needs to be. Then
5 paragraph 36:

6 "Any request by the parties for a variation should set out clearly and with supporting
7 evidence what the change of circumstances is, how and why it makes it appropriate
8 to vary or terminate the undertakings, the possible consequences for consumers and
9 businesses impacted by the remedy, why a review of the undertakings meets the
10 CMA's published prioritisation principles and whether the request is being raised in
11 order to avoid a breach of the undertakings."

12 Then at paragraphs 37 to 40, the CMA sets out its reasons for deciding that a variation
13 isn't justified. You see firstly at paragraph 37:

14 "Although D&D requests that the response be treated as an explicit request for
15 variation, it hasn't explained or provided evidence as to what constitutes the relevant
16 change of circumstances since the final undertakings came into force and why this
17 means it is appropriate to vary the final undertakings."

18 I emphasise relevant, because that is a reference back to paragraph 2.5 of the
19 variation guidance:

20 "A change of circumstances that means the undertakings are no longer appropriate in
21 dealing with the competition problem."

22 That is the first reason.

23 The second reason, also in paragraph 37:

24 "Nor does it detail specifically how and why the undertakings should be varied or met
25 any of the other requirements listed in paragraph 3.3."

26 Which is set out immediately above.

1 Those reasons are elaborated on in paragraph 39 --

2 **THE CHAIRMAN:** But surely what D&D was saying is, well, look, we set out in the

3 proposal paper the matters set out in paragraph 38. Surely that is what they say is the

4 change of circumstances. You may not agree with it, but isn't that their case? It is not

5 that they haven't told you what constitutes a relevant change of circumstances.

6 I understand what their case is, you may not agree with it.

7 **MR LASK:** What they haven't done, there are a number of points there. What they

8 haven't done, they do say that they set out the change of circumstances in the proposal

9 paper.

10 **THE CHAIRMAN:** Yes.

11 **MR LASK:** What we say is that you didn't explain why that was a relevant change of

12 circumstances. You didn't explain why that meant the undertakings were no longer

13 appropriate for dealing with the competition. You will recall the rationale for the

14 proposal is because D&D wants to drive up the price in the private sale process. That

15 does not mean that the undertakings are no longer appropriate in dealing with the

16 SLC. It means they have a commercial incentive to obtain a higher price,

17 understandably, but those are two different things. That is the first point.

18 The second point is that even if they had set out and evidenced a relevant change of

19 circumstances, they did not address any of the other requirements in the variation

20 guidance. They have no answer to that. They don't suggest that they did. You will

21 see, just elaborating on that first point, paragraph 39 says:

22 "The Remedy Group does not consider that D&D's ...(Reading to the words)...

23 purchasers being shortlisted for round two."

24 Which is consistent with what D&D told the CMA, namely that there was a clear

25 demand for the business. So there is the CMA setting out the view that there does

26 not need to be any change of circumstances that renders the final undertakings as no

1 longer appropriate.

2 Then the third reason given by the CMA is at paragraph 40, where the CMA explains
3 that this is a novel proposal and it would be important to consult on any variation. To
4 be clear, the CMA does not there say it is under a statutory obligation to consult, but
5 it does say it would be important in the circumstances to consult. Then it says:

6 "But this would require a further extension, thus prolonging the period of uncertainty
7 for TMG and undermining the need to complete remedies quickly."

8 Those are the three reasons, and we say D&D has failed to identify any public law
9 error in those reasons. We have dealt with this fully in our defence and skeleton.

10 I will give you a reference to the relevant paragraphs. It is paragraphs 29 to 40 of the
11 skeleton, which is in bundle I at tab 2, page 40. I was not proposing to take you to
12 those.

13 **THE CHAIRMAN:** You don't need to.

14 **MR LASK:** Mr Beal made a somewhat different case yesterday on Ground 3. As far
15 as we are aware, this was a point made for the first time yesterday, which is that the
16 CMA should have departed from the variation guidance to allow a modest or minor
17 variation, I think he described it as.

18 That argument does not assist either, because, firstly, D&D did not ask the CMA to
19 depart from its guidance. It is very difficult in those circumstances for it to argue that
20 the CMA acted unreasonably in applying its guidance.

21 Second, the CMA has a basic public law duty to follow its guidance unless there are
22 good reasons not to. Published guidance ensures transparency, fairness and
23 predictability. More particularly, as I've already submitted, the variation guidance
24 ensures that undertakings are not varied without some good reason connected to the
25 competition problem they seek to remedy.

26 Mr Beal said that the reason to depart from the guidance is that there is a very

1 substantial risk of the value that is ascribed to the business being significantly less
2 than the value that would be obtained on an AIM listing. We have pointed out in our
3 skeleton that D&D has never established that an AIM admission would enable its
4 shareholders to obtain a better price. It has submitted it, but there was no evidence
5 to that effect before the CMA.
6 In any event, it is not a good reason for departing from guidance. The concern that it
7 reflects is about the private commercial interests of D&D and its shareholders, but that
8 has nothing to do with protecting competition. The CMA's statutory duty is to achieve
9 a comprehensive solution to the SLC, not to support the commercial interests of the
10 various companies it regulates. It cannot, in my submission, be required to reopen
11 final undertakings simply because a company perceives that a different divestment
12 option might result in higher prices.
13 **THE CHAIRMAN:** The higher price, I think, there are two ways that you can look at
14 that. One is that you can get a higher price by the carrot method, ie you get a private
15 purchaser to offer more because there is the possibility that if that offer is rejected you
16 still have this other option to pursue, so he is going to offer you more money.
17 Then the second way is if you go down the AIM listing route, you will get more money
18 for the shares on the open market, depending on which way the market goes, so there
19 are two ways that --
20 **MR LASK:** Yes. We say that neither is relevant for the purposes of variation. Neither
21 constitutes a relevant change of circumstances and neither justifies a departure from
22 the guidance. There is always going to be an issue when a company is required to
23 divest following a merger investigation. There is always going to be a tension between
24 the price the company wants to achieve and the fact that the market knows it is
25 required to sell. That cannot justify varying the undertakings.
26 **THE CHAIRMAN:** I think the point I am making is that on the second option, there is

1 no evidence that it would get a higher price --

2 **MR LASK:** Yes.

3 **THE CHAIRMAN:** -- and I agree with you on that.

4 On the first option, I can't remember, but doesn't the finnCap letter indicate that it will

5 help get a higher price on the sale if they have a private buyer? I can't remember, but

6 I thought when I looked at this originally there was a bit more evidence of the first one

7 but no evidence of the second, unless I have missed something.

8 **MR LASK:** If I may, can I come back to you on that?

9 **THE CHAIRMAN:** Yes. It is just my memory. I can't remember if I am right or not.

10 **MR LASK:** Yes. I am grateful, Mr O'Donoghue reminds me that actually the

11 decision -- I am going to come on to this as part of Ground 2, the decision finds in

12 paragraph 65 that the market price of TMG shares may be depressed by the

13 expectation that the D&D shareholders would be seeking to sell their TMG shares.

14 That goes to the --

15 **THE CHAIRMAN:** No. The second bit -- I can see the second bit.

16 **MR LASK:** The second possibility.

17 **THE CHAIRMAN:** I am really talking about the first bit, not the second bit.

18 **MR LASK:** I understand.

19 **MR LOMAS:** I mean, the commercial benefit of the alternative proposal is D&D

20 ceases to be a forced seller. It doesn't need to sell. It can give the shares to its

21 shareholders, unless it gets an attractive price from a third party purchaser. So it takes

22 them out of that forced sale position, whatever happens thereafter on AIM.

23 **MR LASK:** You can see why any company in D&D's position would like that.

24 **MR LOMAS:** Yes. On every forced divestiture it would be an attractive option for the

25 seller.

26 **MR LASK:** If that is good enough to justify a variation to ... undertakings, it would

1 drive a coach and horses through the (inaudible) further evidence.
2 That was all I was proposing to say on Ground 3. I wanted to turn next to Ground 2.
3 Ground 2 only arises, in my submission, if D&D succeeds on either Ground 1 or
4 Ground 3. We obviously say it fails on both, so we address Ground 2 in the alternative.
5 There are two factual points that I wish to emphasise at the outset.
6 The first factual point is that it is common ground that the AIM proposal would create
7 a situation where TMG and D&D would have identical shareholders with identical
8 shareholdings at the point of AIM admission. That puts this case at the extreme end
9 of the common ownership spectrum, because we are talking about a complete
10 overlap, at least at the outset.
11 The second factual point is that when and to what extent this position might change
12 would be unknown. Whilst the shares would be freely tradeable once admitted to AIM,
13 divergence would depend on the market and, as I have submitted, the D&D
14 shareholders would be under no obligation to sell their shares once listed, save
15 perhaps for the holders of the blind trust shares, who we understand would be obliged
16 to sell.
17 What this means is that it is impossible to know how long the complete or substantial
18 overlap would last.
19 Against that factual background, I will address you on three main issues.
20 Firstly, the nature of the CMA's task.
21 Secondly, the CMA's concerns about independence.
22 Thirdly, its concerns about capability and commitment.
23 First the CMA's task. Ground 2 concerns the second part of the decision. In that part
24 the CMA addressed, without prejudice to its conclusions on variation, whether the AIM
25 proposal would satisfy the conditions in the undertakings and more generally have
26 a level of risk that the CMA could accept.

1 As you can see in the decision, it primarily involved assessing whether the proposal
2 would enable divestiture to a purchaser (inaudible) approval criteria. This was
3 quintessentially a question of judgment for the CMA, requiring it to make educated
4 predictions about the level of risk involved in the proposal, drawing on its expertise
5 and experience in the design and implementation of merger remedies.
6 As one sees from the authorities with which the Tribunal is familiar, the Tribunal
7 exercised particular restraint in respect of such decisions.
8 I would like to start, please, by going back to the purchaser approval criteria and I need
9 to get this right.
10 **THE CHAIRMAN:** Are you going to say any more on the law?
11 **MR LASK:** Yes.
12 **THE CHAIRMAN:** Because the only glitch I probably need a bit of help on is to what
13 extent do you accept paragraph 10 of Mr Beal's skeleton as (a) a correct statement of
14 principle and (b) as applicable in the present case. But you can come to that later. All
15 I am saying is I would like to know what your position is on that.
16 **MR LASK:** Yes. Well, I can address you on what we say about the law. The short
17 answer is we say proportionality doesn't come into this.
18 **THE CHAIRMAN:** I know. That is what I want you to expand upon when we get to it.
19 **MR LASK:** Yes. I mean, proportionality, as we understand it, is invoked by D&D
20 primarily under Ground 3, where it says we were putting forward a less intrusive
21 remedy and a more proportionate remedy. That ought to have justified a variation.
22 We have dealt with that in our skeleton under Ground 3 and I will give you the
23 reference.
24 **THE CHAIRMAN:** Yes.
25 **MR LASK:** It is paragraph 37.
26 In a nutshell, yes, we say the proportionality of the remedy imposed in this case is not

1 in issue, because the final decision decided that divestiture was a proportionate
2 remedy and that decision was not challenged. Even now Mr Beal does not go so far
3 as to say that the divestiture process envisaged in the undertakings is
4 disproportionate. I think the way he puts it is to say, well, our proposal was more
5 proportionate. What we will see, I think, from the Ecolab case is that you only look at
6 relative proportionality when you have two equally effective remedies.
7 **THE CHAIRMAN:** We have dealt with that in a number of authorities.
8 **MR LASK:** Yes. So -- yes.
9 **THE CHAIRMAN:** I will just make a note. **(Pause)**
10 **MR LASK:** So I wanted to --
11 **THE CHAIRMAN:** Yes. I am making a note. **(Pause).**
12 Yes. I have that. Thank you.
13 **MR LASK:** I wanted to take you, please, to the purchaser approval criteria, which are
14 (inaudible) undertakings. I think you have this in file C1 at tab 19.
15 **THE CHAIRMAN:** Yes.
16 **MR LASK:** Yes, it is tab 19, page 661. I am going to take you to the decision shortly.
17 What you will see from the decision is that the CMA in looking at the criteria have
18 focused on the first three, independence, capability and commitment. The
19 independence criterion says:
20 "An approved purchaser should not have any connection, for example financial,
21 management, shared directorships, equity interests or reciprocal commercial
22 arrangements, to D&D and/or TMG that could reasonably be expected to compromise
23 the approved purchaser's ability or incentive to compete with D&D after the final
24 disposal."
25 Two points of importance.
26 First, the approved purchaser should not have a connection, any connection, that

1 could reasonably be expected to compromise its ability or incentive to compete. This
2 reflects a risk averse approach to remedy implementation. It does not require the CMA
3 to ask itself whether any connection would, on the balance of probabilities, eliminate
4 or even significantly diminish the ability or incentive to compete. Simply whether it
5 could reasonably be expected to compromise the ability or incentive. I emphasise it
6 because it is a modest threshold and it helps explain why D&D's challenge under
7 Ground 2 is unsustainable.
8 In my submission, the CMA was not required to produce evidence of common
9 shareholders having intervened to suppress competition and it was not required to
10 adduce empirical evidence of price rises in industries with high levels of common
11 ownership. All that was required was some probative material on the basis of which
12 the CMA could rationally conclude that there was a material degree of risk in the
13 proposal. That is a reference to the BAA case, paragraph 20.
14 The second point of importance on the independence criterion is that it specifically
15 identifies equity interests as an example of the kind of connecting factor that may give
16 rise to concerns. Mr Beal said yesterday that Spinco would not have an equity interest
17 in D&D, but respectfully that misses the point. The point is that the common
18 shareholders would have interests, equity interests, in both D&D and TMG.
19 As we saw yesterday, the independence criteria --
20 **MR LOMAS:** Sorry. Their interpretation. You would say that the equity interest on
21 this includes the equity interests of the approved purchaser shareholders, rather than
22 being limited, as you might read it, to the approved purchaser?
23 **MR LASK:** I'm saying it has to, we have made the point that it is common ground on
24 both sides, as I understand it, that the insertion of Spinco does not make any difference
25 to the substantive assessment.
26 **MR LOMAS:** I don't think that's a Spinco point. I think it is a question of whether in

1 paragraph 1.1 the reference to equity interest is equity interests of -- actually the
2 Spinco -- yes, the Spinco might make a difference in that sense. Yes. I can see that.
3 Okay. Let's move on.
4 **MR LASK:** Obviously the case the CMA was dealing with was the D&D shareholders
5 as the approved purchaser.
6 **MR LOMAS:** Yes, that is true, at that point.
7 **MR LASK:** That body of approved purchasers had --
8 **MR LOMAS:** I think we all agree, the incentives would be the same, if there are
9 incentives it is the same whether or not you have an intermediate company.
10 **MR LASK:** The independence criteria here, as we saw yesterday, reflects the merged
11 remedies guidance: paragraph 5.21(b). The reference for that is authorities bundle 1,
12 tab 24, page 756. I will just read out to remind you what --
13 **THE CHAIRMAN:** Just read it out.
14 **MR LASK:** -- the paragraph says:
15 "The purchaser should have no significant connection with merger parties that may
16 compromise the purchaser's incentives to compete with the merged entity. Eg
17 an equity interest, common significant shareholders, shared directors, reciprocal
18 trading relationships or continuing financial assistance."
19 Although D&D's proposal was novel, the concerns to which it gave rise were not,
20 because the CMA has made very clear that common shareholdings may prevent the
21 independence criteria being satisfied. It has made that clear both in published
22 guidance and in the very purchaser approval criteria to which D&D agreed.
23 This concern about common shareholdings and, indeed, the merger remedies
24 guidance and the purchaser approval criteria more generally, this concern is based on
25 the CMA's expertise and experience. They don't come out of the blue.
26 Then we also see the capability and commitment criterion. Capability, an approved

1 purchaser, I'm paraphrasing, should have to enable TMG to continue to develop as
2 a competitor and commitment, an approved purchaser should demonstrate that it is
3 committed to and has credible plans for TMG competing in the supply of PSRBs.
4 These criteria are cumulative, not alternative. A purchaser that was independent but
5 lacked the relevant financial resources to maintain TMG as an effective competitor
6 plainly would not be a suitable one. I emphasise that, because much of D&D's focus
7 under Ground 2 has been on the CMA's findings as regards independence. It is the
8 point you made, sir, about zeroing in on one particular part of the decision, such as
9 the Dow/DuPont footnote, at the expense of a wider appreciation. We say a failure to
10 meet the capability and commitment criteria would suffice to justify the refusal of the
11 AIM proposal, whatever one says about independence. That is important, because
12 important findings that the CMA made on the capability and commitment criteria are
13 unchallenged. I am going to come on to that, in due course.
14 If I could turn now, please, to the Ecolab, case which is in authorities bundle 3, tab 9.
15 This is a helpful case, in my submission, because it concerned a challenge to the
16 CMA's decision to reject an alternative remedy proposal. Albeit at the final report
17 stage, but there is a parallel. It is also helpful because it addresses a number of the
18 issues that are raised by D&D's challenge. So if we could pick it up, please, at
19 paragraph 58 on page 485.
20 This is dealing with rationality and it is quoting from the well-known BAA case. The
21 quote from BAA is relevant, because D&D's case under Ground 2 is put in various
22 ways, so failure to take into account company law constraints, insufficient basis for its
23 concerns around independence, failure to carry out further analysis of the economic
24 literature, but the case law shows that those challenges all fall to be decided on the
25 basis of a rationality test and that the CMA has a wide margin of appreciation when
26 making evaluative judgments as regards remedies. We have given some authorities

1 for that in paragraphs 28 and 29 of the defence at A257.
2 **THE CHAIRMAN:** What paragraphs for the defence?
3 **MR LASK:** 28 to 29 of the defence.
4 **THE CHAIRMAN:** Okay.
5 **MR LASK:** One sees in the quote from BAA, paragraph 20, subparagraph 4 of BAA:
6 "Similarly, it is a rationality test which is properly to be applied in judging ...(Reading
7 to the words)... there must be evidence available to the CC of some probative value
8 on the basis of which it could rationally reach the conclusions it did."
9 That is the standard that we say applies when considering whether there was
10 a sufficient basis for the CMA's concerns.
11 Over the page, there are some further quotes from BAA and coming back to your
12 question, sir, on proportionality and paragraph 10 of Mr Beal's skeleton, at least some
13 of the authorities he took you to on proportionality yesterday were concerned with the
14 EU concept of proportionality. What BAA is dealing with here is the concept of
15 proportionality as it arises under Article 1, Protocol 1 of the ECHR. I don't think D&D
16 specified in their written case which concept of proportionality they are relying on, but
17 I would assume it is A1, P1, rather than EU law.
18 **THE CHAIRMAN:** I assume that.
19 **MR LASK:** In those circumstances, the test is manifestly without reasonable
20 foundation. One sees that from paragraph 20, subparagraph 5 of BAA. That is the
21 test that is applied here in Ecolab.
22 Then, at paragraph 60, you see paragraph 26 of BAA:
23 "The Tribunal like any court exercising judicial function should show particular restraint
24 in second guessing the educated predictions for the future that have been made by
25 an expert and experienced decision maker, such as the CC."
26 It is exactly the arena we are in.

1 Paragraph 61 reiterates the well-known point that on a rationality challenge, the
2 applicant has to overcome a high hurdle.
3 Then if we could turn on, please, to page 490 of Ecolab. This was Ground 2 of the
4 challenge:
5 "Rejection of the ADP was irrational, disproportionate and based on an error of law."
6 The ADP was the alternative divestiture proposal in this case, it was the alternative
7 remedy proposed by the applicant that the CMA rejected. You can see the challenge
8 is put in similar terms to D&D's terms, irrational, disproportionate, error of law.
9 I wish to draw your attention to paragraphs 74 to 75:
10 "The duty on the CMA was to find as comprehensive a solution as ...(Reading to the
11 words)... or mitigating the SLC. This is a high duty, as Lord Justice Patten explained
12 in the Ryanair case."
13 Then we see the quote:
14 "What the CMA has to decide on the ordinary civil standard of proof is whether an SLC
15 has or may be expected to have resulted. Once it has reached that conclusion, then
16 the action which it has to take must be such as to remedy or prevent the SLC
17 concerned. It is not at that stage in the exercise concerned with weighing up
18 probabilities against possibilities, but rather with deciding what will ensure that no SLC
19 either continues or occurs. Section 35.4 confirms this."
20 Then the Tribunal goes on to observe:
21 "It is this duty which is in our view correctly encapsulated in the concept of an effective
22 remedy in the CMA's guidance."
23 These authorities are dealing with the issue of remedy as it arises at the final report
24 stage. In my submission, the principles applied equally where issues of remedy arise
25 thereafter, as in this case.
26 This is important because D&D's submissions proceed at times as if the CMA's task

was to decide on the balance of probabilities whether the risks were likely to materialise. I appreciate that is not how Mr Beal puts it, but when making submissions on things such as the empirical evidence and the CMA should have conducted further research into the economic literature, we say that is wrong, not least because of the nature of the CMA's task. It is not deciding whether the risks will materialise on the balance of probabilities, it is assessing whether the proposal carries an acceptable level of risk having regard to its duty to ensure that no SLC continues.

Just further on that point, page 493, paragraph 83:

"Moreover, as Mr Williams pointed out, the divestiture remedy adopted by the CMA constitutes a one-off intervention, if the risk involved in that remedy materialised there would be nothing that the CMA could do about it and the SLC would then persist. That, of course, is one reason why the CMA, in our view entirely reasonably, does not favour a remedy which it cannot give a high degree of confidence of success for."

THE CHAIRMAN: What paragraph is that?

MR LASK: Sorry, that is 83.

That is why the CMA is entitled to take a risk-averse approach as reflected in the purchaser approval criteria, which is what it applied in this case.

The final passage in Ecolab that I wish to show you is on page 496 at paragraph 93. In that case, the applicant sought to rely on a previous CMA decision on remedy to challenge the present decision on remedy, it tried to rely on the Rentokil case. What the Tribunal says in 93 is:

"Merger decisions of the CMA do not constitute precedence and it is axiomatic that each case turns on its own facts and that the characteristics of one market may be very different to those of another. Consistency is achieved by the CMA applying its statutory guidance."

The Tribunal did not find the comparison with the previous CMA case helpful. This is

1 relevant to D&D's reliance on foreign decisions, which you were shown yesterday,
2 because if previous CMA decisions on different facts and in different contexts are of
3 little assistance, then decisions taken in other jurisdictions on different facts and under
4 different regimes are of even less assistance, in my submission.
5 **THE CHAIRMAN:** It depends what you are looking at.
6 If you are looking at whether or not decision establishes or was consistent with
7 a principle being correct, I have no problem in looking at other jurisdictions. On the
8 other hand, if it is for the second purpose which you have indicated, it does not really
9 assist me.
10 **MR LASK:** Sorry, the second purpose being?
11 **THE CHAIRMAN:** When you are trying to use it and saying there is a precedent here,
12 looking at how they applied the facts in that case you should be applying the facts in
13 the same way. Sometimes when you look at some of the foreign decisions they set
14 out principles and arguments and you look at it and say that is actually quite convincing
15 as a proposition and it is useful to look at that. But apart from that, I don't get a huge
16 amount of assistance.
17 **MR LASK:** The foreign decisions that Mr Beal showed you yesterday I'm just going
18 to come on to. I think he relied on those for two purposes.
19 One to say this was not novel.
20 A second purpose was to say, well, because those courts and regulators were not
21 concerned with a spinoff, the spinoff arrangement, then it was irrational for the CMA
22 to be concerned about spinoff.
23 **THE CHAIRMAN:** Well, it is all very fact specific.
24 **MR LASK:** Exactly. That is my submission. They don't assist. I will come on to it in
25 a little more detail.
26 What I would like to take you to now is the decision and what the CMA said about the

1 first basis for its -- I said I would was going to address you under three headings,
2 I have dealt with the nature of the decision, I am now turning to the second heading,
3 which is the independence (inaudible).
4 The decision is back in C1, tab 1. If we could start, please, on page 14, paragraph 53.
5 The proposal paper explains that at the time of the AIM admission D&D and TMG
6 would have identical shareholders with identical shareholdings. That is common
7 ground.
8 Paragraph 54:
9 "While the Remedy Group accepts that ownership of the respective companies could
10 and is in practice liable to diverge over time, there is no certainty around when this
11 would occur and it has concerns about the independence of such shareholders for as
12 long as they are common shareholders in both D&D and TMG."
13 This concern is repeated a bit further down.
14 Paragraph 55 sets out the basis for the concerns around independence:
15 "The Remedy Group considers that the common ownership creates unilateral
16 incentives to maximise value by reducing competition between commonly held firms
17 so as to increase shareholder returns overall."
18 There you see the footnote referring to Dow/DuPont and quoting the decision of the
19 Commission, paragraph 2348:
20 "The economic literature on cross shareholding which extends to common
21 shareholding tends to show that common shareholding with competitors reduces
22 incentives to compete, as the benefits of competing aggressively to one firm come at
23 the expense of firms that belong to the same investor's portfolio. See also annex 5."
24 You will note here that the CMA is not relying, at least expressly, on the specific
25 literature concerning empirical analysis. It certainly is not focusing on it. In my
26 submission it didn't need to, I have already made that submission. It didn't need to

1 because the nature of its task was different, it was a much more modest threshold that
2 it was addressing.
3 You also see in paragraph 55:
4 "In a response D&D submitted that the institutional shareholders would have no ability
5 to favour D&D over TMG, as they are each minority shareholders who do not have
6 influence over D&D. For the reasons explained in paragraph 57 ...(reading to the
7 words)... considers common shareholders in TMG may have both incentive and ability
8 to reduce competition, whether by favouring TMG or by other means."
9 So the CMA is specifically addressing one of the key arguments relied on by D&D,
10 under its company law heading, which is: well they are minority shareholders, they
11 don't have the ability to influence the company.
12 Paragraph 56:
13 "D&D accepts that TMG shares being held by members of D&D management and their
14 connected persons would cause concerns from an independence perspective and
15 propose that these shares would be placed in a blind trust."
16 I am going to return to this, because this is a problem for D&D's case under Ground 2.
17 57 is key. Could I ask you, please, to read 57?
18 **THE CHAIRMAN:** (Pause)
19 I have read that. Yes.
20 **MR LASK:** I would emphasise these points on 57. The CMA acknowledges in
21 paragraph 57 that directors have duties to the company, but explains why it is
22 nevertheless concerned.
23 The second point is that the concern that shareholders would exercise influence over
24 TMG is that they would do so either by formal or informal means, so as to compromise
25 its ability, or incentive to compete with D&D. "Compromise", you will recall, is the term
26 used in the purchaser approval criteria.

1 The third point, the CMA said this is a material risk in circumstances where there is
2 a complete overlap on AIM admission and every chance that a substantial overlap
3 could persist for an unknown, potentially significant, period of time.
4 Fourth point, the CMA's concerns, as it makes clear, do not rest on coordination
5 between shareholders, because what the CMA is talking about is the situation where
6 they each have a common unilateral interest in reducing competition.
7 The fifth point is this particular risk, in the CMA's view, that shareholders might not
8 support TMG in raising additional funds, but the CMA also says the risk could arise in
9 respect of other decisions that may need shareholder approval.
10 **THE CHAIRMAN:** There is more than one side to this. One side is what the
11 institutional shareholders may do or may not do, but what about the point I put to
12 Mr Beal yesterday, about A, B, C and D, where the directors may feel that what they
13 should do is, insofar as they can, they should be trying to take market share away from
14 C and D rather than B. Does that fall at all in any of the concerns that the CMA have
15 and, if so, where?
16 Because I can understand that that sort of concern may have factored into the original
17 wording of the merger guidance at paragraph 5.21. But is it factored in at all in this
18 decision?
19 **MR LASK:** It --
20 **THE CHAIRMAN:** You can come back to me on this at 2 o'clock, but I do want at
21 some stage for you to respond to some of the points I have raised.
22 **MR LASK:** Yes.
23 **THE CHAIRMAN:** Both yesterday and today.
24 Looking at timing, I think we should put a stop time of 5.30, because both you and
25 Mr Beal have been slowed down by us rather than -- I know what it is like as
26 an advocate. You are probably going to need more time than we thought yesterday,

1 because we slowed you down. But I think as long as we finish by 5.30, it is fine.
2 Probably we will see where we are when you finish your submissions. But don't feel
3 under any obligation to rush through.
4 **MR LASK:** I am very grateful for that indication.
5 **THE CHAIRMAN:** Yes.
6 **MR LASK:** In case it helps, I was about to finish, which would I think be a natural
7 place to break, but I just wanted to show you very quickly --
8 **THE CHAIRMAN:** Yes. Finish the point you have, as long as it takes no more than
9 five minutes.
10 **MR LASK:** No more than a couple of minutes.
11 **THE CHAIRMAN:** Yes.
12 **MR LASK:** I have made my points on paragraph 57.
13 Paragraph 58 is also important:
14 "This uncertainty as to TMG's ability to compete is much less likely to arise in
15 ...(Reading to the words)... be less than in a listed company and this would need to be
16 taken into account."
17 The reason I emphasise this is because, of course, the CMA was not considering
18 D&D's proposal in a vacuum, but it was doing so against an existing sale process that
19 appeared to be progressing well. The CMA explains that the uncertainty that it is
20 concerned about is much less likely to arise under a private sale.
21 Then at 59, we see the timing concern again. Final sentence:
22 "Whilst the shares would be freely tradeable once admitted to AIM, it is unclear how
23 long this period of complete or very substantial common shareholdings would last."
24 Just to wrap this up, it is quite clear that the CMA isn't simply referring to the
25 Dow/DuPont principles and then saying, "Well, there you go, it is a problem, we have
26 to reject the proposal". It is starting with those principles and then applying them to

1 the facts. It is looking at the facts such as the complete overlap, the uncertainty over
2 how long that overlap will last, TMG's vulnerability to being deprived of the additional
3 funds it needs to compete and also, of course, addressing the arguments that were
4 being put to it in the PD response.
5 There can be no question, in my submission, that the CMA simply took Dow/DuPont
6 and said, "There you go, we reject it". They conscientiously applied the principles
7 recognised in Dow/DuPont and recognised in the merger remedies guidance and the
8 purchaser approved criteria and applied them to the facts.
9 Just finally, Mr Beal said yesterday that the decision did not express a concern that
10 common shareholders would vote as a block. It is certainly not saying that they would
11 explicitly coordinate to vote as a block, but it does point out in paragraph 57 that
12 because they have common incentives they may vote the same way.
13 **THE CHAIRMAN:** They don't need coordination.
14 **MR LASK:** They don't.
15 If that is a convenient moment?
16 **THE CHAIRMAN:** For future reference, I should have said at the CMC that when we
17 have an electronic bundle of authorities it does help me if we have the authorities
18 hyperlinked to the skeleton arguments. But I think that ship may have passed.
19 **MR LASK:** I was not aware we had an electronic bundle.
20 **THE CHAIRMAN:** Do we not have an electronic bundle of authorities? I thought we
21 have.
22 **MR LASK:** Unless those behind me say otherwise, I don't see why we could not
23 provide a version of the skeleton that had hyperlinks. Can I come back to you?
24 **THE CHAIRMAN:** Yes. Come back on the practicalities. I should have done it at the
25 CMC, it is my fault, really.
26 **(1.07 pm)**

1 **(The short adjournment)**

2 **(2.00 pm)**

3 **(Proceedings delayed)**

4 **(2.05 pm)**

5 **MR LASK:** So, I have some answers to the Tribunal's questions. What I was
6 proposing to do was deal with them at the end of my submissions --

7 **THE CHAIRMAN:** That's fine. Yes, that's a good time.

8 **MR LASK:** -- if that suits the Tribunal.

9 I am dealing with the second of my main headings under Ground 2, which is
10 independence. I have made my submissions on the decision and what I want to do
11 now is turn to D&D's criticisms.

12 D&D advances four main criticisms, as one sees from its skeleton argument and as
13 became apparent during Mr Beal's submissions yesterday. I will address those
14 submissions in the following order.

15 The first is whether there was an adequate basis for the CMA's conclusions.

16 The second is the economic literature, insofar as that is not already covered under the
17 first.

18 Third concerns the constraints of company law.

19 The fourth concerns the foreign decisions.

20 Firstly, the argument that there was an insufficient basis for the risks identified by the
21 CMA. This is dealt with in our skeleton at paragraphs 62 to 70. D&D's essential
22 complaint under this heading is that the risks identified by the CMA were
23 unsubstantiated. The question for the Tribunal, therefore, is whether there was
24 material available to the CMA of some probative value on the basis of which it could
25 rationally reach the conclusion it did. We have seen that from the BAA case cited in
26 Ecolab.

1 We say the answer to that question is quite obviously yes. First, as already explained,
2 the risks of common ownership are identified in the CMA's merger remedies guidance
3 and, indeed, the purchaser approval criteria, which reflect the CMA's expertise and
4 experience in the design and implementation of merger remedies.
5 Second, the risks are underpinned by an established body of economic literature, as
6 acknowledged by both the European Commission and the CMA itself. That literature
7 may not reflect a perfect consensus among economists on all matters, but that does
8 not render the CMA's assessment irrational.
9 In assessing the level of risk involved in the proposal, the CMA was entitled to rely on
10 the fact that according to economic literature common ownership tends to reduce
11 incentives to compete -- that is the footnote that we saw in the decision referring to
12 Dow/DuPont -- but the CMA was not required to resolve academic debate or identify
13 empirical evidence in support of its concerns.
14 Much of the economic literature which the Tribunal has been shown is concerned with
15 how to deal with these issues of common ownership on a market-wide basis, whether
16 ex ante regulation is required, whether existing US laws are sufficient. The CMA was
17 not deciding whether to propose market-wide ex ante regulation of common
18 ownership. It was assessing the risk involved in a novel remedy proposed halfway
19 through the divestiture timetable, when there was already a perfectly good divestiture
20 remedy in place.
21 Third, as I have already submitted, the CMA applied the principles reflected in the
22 economic literature, in the merger remedies guidance, in the purchaser approval
23 criteria. It applied those principles to the facts. It noted the complete overlap on
24 admission to AIM, it was concerned about the unknown period of time for which that
25 would persist, it was concerned about TMG's vulnerability to a lack of investment and
26 the risk that common shareholders could withhold support and it noted that TMG's

1 ability to compete was much less likely to be a problem under a private sale. That is
2 the third point.
3 The fourth point is that D&D itself accepts that common shareholdings can in principle
4 give rise to competition concerns. It accepts this in terms -- perhaps I will show you
5 this, it is in its reply at paragraph 31, which is bundle A, tab 3, page 96.
6 **(Pause)**
7 We see paragraph 31.1:
8 "The CMA states that D&D accepts that overlapping shareholdings by D&D
9 management gives rise to concerns about independence."
10 That is overlapping shareholdings by management:
11 "This is correct, D&D accepts that were D&D's management to hold voting shares in
12 TMG this would potentially affect TMG's independence and be a relevant
13 consideration when the CMA applies the independence criteria. D&D's management
14 have therefore offered to place their TMG shares into a blind trust so as to neutralise
15 this concern. It is denied, if it is alleged, that the same concern affects cross
16 shareholdings by institutional shareholders who play no role in D&D's management,
17 management are not to be equated with independent institutional investors."
18 Similarly at 31.3:
19 "The CMA suggested it has previously identified the existence of common institutional
20 shareholders as giving rise to concern. That misses the point. D&D accepts that
21 common shareholdings by interested parties can give rise to competition concerns.
22 The CMA has however never previously considered that common shareholdings by
23 independent institutional investors give rise to competition concerns."
24 D&D's case accepts that in principle there can be competition concerns arising from
25 common shareholdings, but asserts that those concerns cannot arise -- remember this
26 is a rationality standard we are concerned with, they cannot plausibly arise when the

1 common shareholders in question are independent institutional investors. That is what
2 D&D's case boils down to and it is incumbent on D&D, in my submission, to
3 substantiate the submission that the position is completely different for institutional
4 investors.
5 I am going to show you, as I go through the documents, why it fails to do that.
6 I would like to turn next, please, to the Dow/DuPont decision, which is authorities
7 bundle 1, tab 29, volume 2.
8 As we have seen, this was cited in the decision in support of the proposition that
9 common ownership can reduce competition.
10 **THE CHAIRMAN:** Sorry, which bundle are we in?
11 **MR LASK:** I am sorry. This is authorities bundle volume 1, but it is volume 2 of
12 volume 1.
13 **THE CHAIRMAN:** Yes. Which tab?
14 **MR LASK:** It is tab B29.
15 **THE CHAIRMAN:** Thank you.
16 **MR LASK:** I would like to pick it up, please, on page 1305.
17 One sees the heading at 8.6.4.3 "The presence of significant level of common
18 shareholding tends to lower rivalry". Then recital 2348:
19 "The economic literature on cross-shareholding, which extends to common
20 shareholding, tends to show that common shareholding of competitors reduces
21 incentives to compete as the benefits of competing aggressively to one firm come at
22 the expense of firms that belong to the same investors' portfolio.
23 "Moreover, some recent empirical studies provide indications that the presence of
24 significant common shareholding in an industry is likely to have material
25 consequences on the behaviour of the firms in such industries, in particular that prices
26 are likely to be higher, 1713, and that common shareholders tend to shape the

1 monetary incentives of firms' executives in order to align them with industry
2 performance, and not only their firm's specific performance."
3 One sees there that the Commission is dealing with two separate points. The intuition
4 behind this concern, the theoretical aspect of the concern which is at 2348, and then
5 the empirical studies at 2349.
6 One also sees -- this will become apparent as we go through the decision -- that in the
7 footnotes to 2349 the Commission cites the Azar study, which Mr Beal says has been
8 debunked. But not only the Azar study, it also cites the Anton study at footnote 1714.
9 Just for completeness, recital 2350:
10 "While the economic literature has, to the best of the Commission's knowledge,
11 focused on the effects of cross shareholding and common shareholding on price
12 competition, the economic rationale of such effects applies to innovation competition."
13 There is an elaboration of that at 2351.
14 So turning next to annex 5, which begins on page 1753. It begins in earnest on 1755.
15 Recitals 2 to 4 explain why the Commission is interested in this, in the context of this
16 merger. In short, it is interested because the impact of common shareholding on
17 competition means that traditional measures of concentration, such as the HHI, are
18 likely to underestimate the level of concentration in the market. That is why it is
19 interested in this.
20 One sees in recital 2 a reference to the horizontal merger guidelines, those are the
21 Commission's guidelines, which state:
22 "The Commission is unlikely to identify horizontal competition concerns in a merger,
23 with a post-merger HHI between 1,000 and 2,000 and the delta below 250, or a merger
24 with a post HHI ...(Reading to the words)... such as for instance one of the following
25 factors are present."
26 At C:

1 "There are significant cross shareholdings amongst the market participants."
2 I appreciate that is referring to cross shareholdings, rather than common
3 shareholdings. As we will see, the Commission goes on to explain that the same
4 rationale applies.
5 Recital 11 on page 1757. There is a redacted table that we can't see, but then
6 recital 11 says:
7 "The most important shareholders listed in Table 2, [then it has their names redacted].
8 These shareholders are often large 'passive' mutual funds holdings, in the sense that
9 these shareholders tend to construct well-diversified portfolios of individual stocks,
10 most often based on index funds, with long investment horizons and infrequent selling,
11 and tend not to buy and sale shares for the purpose of influencing managerial
12 decisions."
13 As we understand D&D's case, when it refers to its independent institutional investors
14 it is referring to these types of investor. The types of investor described by the
15 Commission in recital 11.
16 If we could turn forward, please, to page 1759. This is section 3 of annex 5. This
17 deals in more detail with so-called passive shareholders and it is important, in my
18 submission because, as I have said, D&D's case boils down to the argument that
19 whilst common shareholdings can cause competition concerns, it is irrational to
20 suppose that large institutional shareholders would have the incentive or ability to exert
21 influence over TMG.
22 Section 3 helps demonstrate that that proposition is unsustainable. The heading to
23 section 3 is, "Large minority shareholders, in particular so-called passive
24 shareholders, have more influence than their formal minority equity share".
25 Recital 19, final sentence:
26 "Nevertheless, passive investors are not passive owners but they engage in active

1 discussions with companies' board and management, with a view to influence
2 ['influencing' I think it should say] the companies' long-term strategy."
3 Paragraph 21 sets out a submission made by the parties, and says in recital 21:
4 "... it remains that large shareholders have a privileged access to the companies'
5 management and can, therefore, share their views and have the opportunity to shape
6 the companies' management's incentives accordingly."
7 Section 3.2 is interesting, because it contains qualitative evidence from the so-called
8 passive shareholders themselves. You will see the heading, "Passive investors
9 acknowledge that they exert influence on individual firms with an industry-wide
10 perspective".
11 In recital 23 you have some evidence from Vanguard, I focus on this because
12 Vanguard is one of D&D's shareholders. It is precisely the sort of investor that we are
13 talking about in this case:
14 "In a letter sent to board members of Vanguard funds' largest portfolio holdings,
15 Vanguard's chairman and chief executive F. William McNabb III stated that Vanguard,
16 one of the largest mutual funds holdings that manages approximately $3.6 trillion in
17 assets, will seek active interactions with firms they invest in ..."
18 Here is the quote:
19 "'[i]n the past, some have mistakenly assumed that our predominantly passive
20 management style suggests a passive attitude with respect to corporate governance.
21 Nothing could be further from the truth.' Glenn H. Booraem, controller of the Vanguard
22 Group's funds and a Vanguard principal, complemented that view: '[w]e believe that
23 engagement is where the action is. We have found through hundreds of direct
24 discussions every year that we are frequently able to accomplish as much - or
25 more - through dialogue as we are through voting. Importantly, through engagement,
26 we are able to put issues on the table for discussion that aren't on the proxy ballot.

1 We believe that our active engagement on all manner of issues demonstrates that
2 passive investors don't need to be passive owners. [...] The bottom line is that we
3 believe that the vast majority of boards and management ... are appropriately focused
4 on the same long-term value objectives as we are'."
5 Then the following recital, 24, is evidence from Blackrock's chairman and Blackrock
6 are another of D&D's large institutional shareholders:
7 "A similar message emerges from other large shareholders. Blackrock's chairman and
8 chief executive Larry Flink confirmed that '[w]e are an active voice, we work with
9 companies, but we need to work for the long-term interest' and Blackrock's head of
10 Asia Pacific corporate governance and responsible investment Pru Bennett further
11 declared that '[w]e actively engage, we vote all our proxies. We're not just voting but
12 have a lot of engagement with companies'."
13 Recitals 25 to 27 are more of the same, albeit from different investors. Two points to
14 note here.
15 One, the Tribunal will recall from the CMA's decision that it was concerned both with
16 the possibility of formal influence, such as the voting, and informal influence. This
17 evidence here deals with both formal and informal.
18 The second point to emphasise is that this shows that the Commission's analysis in
19 this annex 5 isn't just concerned with the empirical analysis that Mr Beal made
20 submissions on yesterday. It is taking into account a range of evidence, including
21 qualitative evidence directly from the sorts of investors that we are concerned with.
22 Section 3.3 begins on page 1761. This section cites empirical evidence to support the
23 qualitative evidence referred to in the previous section, so recital 28:
24 "Several academic work[s] have provided empirical evidence that 'passive' investors
25 are, in fact, active owners, in the sense that they act to influence the behaviour of the
26 firms in which they have shares."

1 The first study that is referred to is the Appel study:
2 "Appel, Gomley and Keym investigate empirically whether passive investors affect
3 firms' governance and performance. Their finding suggests that passive mutual funds
4 influence firms' governance choices, and that they exert their influence through their
5 large voting blocs. In particular, they find that 'passive mutual funds have a significant
6 impact on each of the three aspects of [firms'] governance. First, an increase in
7 ownership by passive funds is associated with an increase in board independence.
8 [...] Second, passive ownership is associated with the removal of takeover defences.
9 [...] These findings are economically large [compared to the average situation.] Finally,
10 an increase in passive ownership is associated with firms being less likely to have
11 unequal voting rights, as captured by having a dual class share structure'. [I
12 emphasise this] They also note that '[o]ur evidence suggests that a key mechanism
13 by which passive investors exert their influence is through the power of their large
14 voting blocs'."
15 Of course, if you have complete overlap, then even if individual investors are minority
16 shareholders, the CMA is concerned that they have a common incentive to reduce
17 competition and, therefore, are likely to vote in the same way.
18 D&D says that the Appel paper is "flatly inconsistent with the CMA's decision because
19 it makes no finding about the impact of common ownership on competition". But that
20 misses the point for which this paper was cited by the Commission. The point is that
21 supposedly passive ownership, which is precisely what D&D is relying on, actually
22 involves active influence, including through voting.
23 Recital 30 refers to the Azar paper, where they reviewed the available evidence on the
24 activity of passive investors, in particular their public declarations, along the lines seen
25 in section 3.2:
26 "... their fiduciary duties, the coordination of voting opinions across funds belonging to

1 the same mutual fund, and the variety of tools used to engage with companies. They
2 note that '[t]he combined effect [of their fiduciary duty to vote and their activism, in
3 particular in determining executive compensations, retention, and the election of the
4 directors,] can be consistent with incentivising the CEO to not only maximize the own
5 firm's performance, but also take industry performance or specific competitors' profits
6 into account.' They also note that 'although communication is not necessary to
7 implement unilateral anti-competitive incentives that arise from publicly known
8 common ownership links, the above evidence suggests that frequent and active
9 communication, explicitly also about product market strategy, does take place
10 between the largest investors and their portfolio firms. We also find it implausible that
11 the worlds' largest and most powerful investors are unaware of or unable to maximize
12 their economic incentives - the evidence above certainly suggests a significant degree
13 of sophistication'."
14 Mr Beal will correct me if I am wrong, but I am not aware that that part of the Azar
15 analysis is subject to criticism. I think the criticism relates to the empirical analysis,
16 whereas what Azar was dealing with there is a sort of ...
17 (Audio interference).
18 "... and use their shareholder power to replace management where they are
19 dissatisfied."
20 This notion of voting in the same way is consistent with the CMA's concerns.
21 Then recital 33, we can't see much of the factual information. But the conclusion at
22 recital 33:
23 "Overall the control exerted by large shareholders seems to be more important than
24 their ownership equity share suggests."
25 Then moving on.
26 Section 4, which we don't need to dwell on, explains that the Commission's past

1 notices and practices recognise that minority shareholders can have more control than
2 their share suggests. It is generally consistent with the preceding evidence.
3 At section 5, we have the Commission's analysis of the economic literature. The
4 heading of 5.1 is "The economic literature shows that firm's incentives to increase
5 prices increase with partial ownership of competitors".
6 Then there is a discussion of the three main economic papers analysing this
7 theoretical unilateral impact of partial competitive ownership. So it is unilateral not
8 collusive.
9 Then 41 summarises the evolution of the literature.
10 42 quotes from the O'Brien and Salop paper.
11 Then 43 is informative, because it explains the intuition behind the higher incentive to
12 raise prices. Perhaps I will just let the Tribunal read recital 43, please. **(Pause)**
13 What the Commission recognises in recital 43 is that sales will divert in part to firms
14 with no connection to the acquiring firm. But it says that partial ownership nevertheless
15 increases the incentive to raise prices. I emphasise this because one of Mr Beal's
16 arguments is that it would make no sense for D&D's shareholders to seek to dampen
17 competition between TMG and D&D because they would then lose customers to ATI
18 and Landmark.
19 The Commission recognises here that even though there is a risk of diversion to other
20 competitors as well as the connected firm, the incentive nevertheless arises.
21 Section 5.2, recital 45:
22 "The analysis of the theoretical unilateral impact of common shareholders can be
23 directly derived from the model developed by O'Brien and Salop ... As explained in
24 detail in Azar ... O'Brien and Salop ... develop a model of oligopoly in which firms
25 maximise a weighted sum of the portfolio profits accruing to their shareholders, where
26 a shareholder's weight in a firm's objective function is proportional to the fraction of the

1 control of the firm held by that shareholder. As a consequence, the theoretical
2 framework, the methodology and the conclusions of O'Brien and Salop ... apply to
3 common shareholdings."
4 Mr Beal emphasised yesterday the distinction between cross shareholdings and
5 common shareholdings and said this was the controversial bit. The Commission here
6 is saying the same theoretical framework applies. Contrary to Mr Beal's submissions,
7 we don't read this link that the Commission makes as being dependent on Azar's
8 empirical analysis. If I understood the submission correctly, it was, "Oh, well, this link
9 between cross shareholdings and common shareholdings relies on Azar's empirical
10 analysis, that has been debunked so the link is broken". I don't think that is what the
11 Commission is saying here. Rather what it is saying is it is the logic of O'Brien's model
12 as explained by Azar, so Azar deals with O'Brien's model, but it is the logic of that
13 model that allows the Commission to conclude that the concerns arising in relation to
14 cross shareholdings also apply to common shareholdings.
15 Moreover, the Commission then goes on to discuss an important case study at
16 section 5.3 that supports the proposition that common shareholdings tend to reduce
17 incentives to compete.
18 I will summarise it, if I may. What happened here in the case study discussed by the
19 Commission is that one of DuPont's shareholders, Trian, sought a place on the board
20 because it wanted to encourage DuPont to compete more aggressively, particularly
21 against Monsanto, one of the competitors. But it lost, Trian lost its effort to gain a place
22 on the board because it was opposed by three of DuPont's largest shareholders,
23 Vanguard, State Street and Blackrock.
24 One sees at recital 49 that a paper by Schmalz offered an explanation for why this
25 happened. I will let the Tribunal read recital 49, but in broad terms, it was because it
26 was not in the economic interests of Vanguard et al for DuPont to compete more

1 aggressively, so they blocked Trian's path to the board. Saying the big shareholders
2 did not want increased competition between DuPont and Monsanto, that is why they
3 voted against Trian.
4 Then recital 50 refers to another paper that points in the same direction according to
5 the Commission.
6 51 is the Commission's conclusion on the case study:
7 "... the Commission understands the proxy fight between Trian and DuPont can be
8 interpreted as an illustration of the diverging incentives between large shareholders
9 specific to a firm, which focus on the profitability of this firm, and large shareholders
10 common to several competing firms, which have lower incentives to enhance
11 competition between these firms."
12 We have the qualitative evidence from the so-called passive shareholders, you have
13 the literature, the theoretical frameworks that are set out in the literature and then you
14 have a real world case study the Commission is relying on. Then it gets to the
15 empirical evidence, but it is quite wrong to think that the empirical evidence is all there
16 is. Mr Beal referred to the empirical evidence and empirical analysis as the mainstay
17 of all this, and we would not accept that.
18 In any event, the empirical analysis is there and it is, you know, part of the picture.
19 Recital 52 refers, again, to Azar and now it is referring to Azar's empirical analysis,
20 which suggested that there were higher prices in the airline industry as a result of high
21 levels of common shareholding. D&D say this has been debunked, we explained in
22 our skeleton we don't accept that.
23 There has been debate around the methodology and we have actually cited in our
24 skeleton Azar's response to this debate. I don't think it is in the bundle, we are very
25 happy to hand it up but I'm not proposing to open it, because I don't think there is any
26 dispute between us that there is debate around the empirical evidence. What the Azar

1 response tells you is that the debate is not closed, it is continuing.
2 In any event, the fact that there has been debate over one of these papers does not
3 render it irrational for the CMA to rely on the principles reflected in the Commission's
4 analysis.
5 As I think I have already submitted, the CMA did not purport to and was not required
6 to show that an impact on competition had been proved empirically. Such proof would
7 in any event be specific to the industry that was studied. There may well be a different
8 position if the CMA was assessing the need for ex ante market-wide intervention, but
9 that is not what it was doing here. Accordingly, the evidential burden on the CMA was
10 a modest one.
11 Quite rightly, Mr Beal does not ask the Tribunal to resolve the academic debate but he
12 does say the CMA should have considered more recent research. I am going to show
13 you that the CMA was aware of the research that followed the Dow/DuPont decision,
14 because you see the 2022 CMA report and I will come back to that. But the key point
15 is that the more recent research does not indicate that the economic literature in this
16 annex 5 is outdated or that common shareholdings are no longer a concern. What it
17 illustrates is that there is ongoing debate around the empirical analysis.
18 Again, as I have said, the CMA's task was not to resolve academic debate but to
19 assess whether, in light of the thinking on this topic, there was an acceptable level of
20 risk.
21 Just to be clear, Mr Beal's core submission on the economic literature yesterday, as
22 I say, was, "Azar was the mainstay of Dow/DuPont, Azar has been discredited and
23 therefore Dow/DuPont has been discredited". That is not a fair characterisation in my
24 submission. As I say, it is right that there has been debate over the empirical analysis,
25 but the intuition that common shareholdings create incentive to reduce competition is
26 widely accepted in the literature, including the literature that Mr Beal showed you

1 yesterday. It is entirely rational for the CMA to rely on that intuition and apply it to the
2 facts as it did.
3 It is helpful at this stage, I am just going to divert away from annex 5 momentarily, to
4 show you by analogy the Law Society case, which I think we looked at at the CMC. It
5 is in authorities bundle 5, tab 7.
6 Yes. Tab 7. I expect the Tribunal will be familiar with this case. It is primarily
7 concerned with the admissibility of expert evidence in these sorts of proceedings, in
8 JR proceedings. If we pick it up, please, at page 169, paragraph 37.
9 You have the well-known Powis principles on when new evidence can be admitted in
10 JR proceedings.
11 Then 38 explains that there is a Lynch extension.
12 At 39, the Court of Appeal extends this principle to situations where there is a serious
13 technical error and then there is a quote from the Gibraltar Betting and Gaming
14 Association case, which essentially says an error, which is far from obvious, may
15 nevertheless prove to be fundamental and expert evidence may help in establishing
16 that.
17 At 40, the court says:
18 "The same point in principle applies, in our view, to a challenge based on irrationality.
19 A decision may be irrational because the reasoning which led to it is vitiated by
20 a technical error of a kind which is not obvious to an untutored lay person (in which
21 description we include a judge) but can be demonstrated by a person with relevant
22 technical expertise. What matters for this purpose is not whether the alleged error is
23 readily apparent but whether, once explained, it is incontrovertible."
24 It is paragraph 41 that I rely upon:
25 "The corollary of this is that, as was recognised in the Lynch case, para 18, if the
26 alleged technical error is not incontrovertible but is a matter on which there is room for

1 reasonable differences of expert opinion, an irrationality argument will not succeed.
2 This places a substantial limit on the scope for expert evidence. In practice it means
3 that, if an expert report relied on by the claimant to support an irrationality challenge
4 of this kind is contradicted by a rational opinion expressed by another qualified expert,
5 the justification for admitting any expert evidence will fall away."
6 I am not dealing here with competing independent expert reports. That is why I say
7 I rely on this case by analogy, but I do say it helps in that regard, because what it tells
8 us is the mere fact that you may have debate between economists on the impact of
9 common shareholdings, and in particular on the empirical analysis, that does not tell
10 you that it was irrational for the CMA to rely on a view that is expressed in the economic
11 literature and much of the economic literature and it is reflected in the Commission's
12 decision.
13 So it tells you there is disagreement, it tells you there is debate, but it doesn't establish
14 that one side of the debate is irrational.
15 That is all I wanted to say on the Law Society, then back to annex 5.
16 **THE CHAIRMAN:** I suppose you would say that the CMA has to make a decision one
17 way or the other. It does not have a choice. If the evidence is not clear, that does not
18 absolve it of the responsibility of having to make a decision, that's just a fact that it has
19 to bear in mind when taking that decision.
20 **MR LASK:** Quite. Of course, it is managing risk. As I have submitted, it is quite rightly
21 taking a risk averse approach and asking itself whether it can have a high degree of
22 confidence in the success of the remedy that is being proposed.
23 Do you still have annex 5 open? We are on page 1767. Recital 53 refers to the Anton
24 paper, which takes:
25 "... a complementary angle to the economic papers already quoted."
26 The Commission concludes:

1 "These findings suggest ..."

2 Sorry. Let me read the quote from the Anton paper:

3 "They show, in their working paper, that executives are incentivised to reflect
4 industry-wide focus. More precisely, they show empirically that 'executives [of firms
5 in industries with common ownership] are paid less for their own firm's performance
6 and more for their rival's performance [… and that] [h]igher common ownership also
7 leads to higher unconditional total pay.' These findings suggest that in industries, such
8 as the agrochemical industry, in which common ownership is prevalent, the common
9 shareholders shape the monetary incentives of firms' executives in order to align them
10 with industry performance, and not only their firm's specific performance."

11 (2.53 pm)

12 (Connection lost)

13 (2.57 pm)

14 "... the Commission considers that, in general, market shares used by the Commission
15 for the purpose of the assessment of the Transaction tend to underestimate the
16 concentration of the market ... and, thus, the market power of the Parties, and that
17 common shareholding in the agrochemical industry is to be taken as an element of
18 context in the appreciation of any significant impediment to effective competition that
19 is raised in the Decision."

20 To sum up, there is a body of economic literature supporting the proposition that
21 common shareholdings of competitors reduces incentives to compete.

22 There are also empirical studies finding that common shareholding in an industry can
23 lead to higher prices. This literature has been endorsed (inaudible) and by the
24 Commission in the merger control context."

25 Now, to suggest that in those circumstances the CMA's decision was unsubstantiated
26 is, with respect, lacking in reality. And so too, for the reasons I have already given

1 you, is the assertion that the CMA simply applied the headline conclusions from
2 Dow/DuPont without any assessment of whether they applied in this case.
3 Again, in considering the intensity of the enquiry; considering whether the intensity of
4 the CMA's inquiry was rational, the context is important. The CMA was addressing
5 a narrow question of whether a complete overlap in shareholding involved
6 an acceptable level of risk. It was doing so as the expert regulator, with considerable
7 experience in this area and having recently considered these issues in the report on
8 UK competition. Which I will turn to now, if I may.
9 This is in bundle H, tab 6. This paper is a response to a request by Government to
10 carry out an assessment of the state of competition in the UK. It follows an earlier
11 paper in November 2020. One sees on page 16 of the bundle, paragraph 2 of the
12 report, explains that the aim is to provide information and analysis for public debate
13 and policy.
14 Much like the Commission in Dow/DuPont, this paper addresses common ownership
15 in the context of considering levels of market concentration. In particular, again as
16 one sees from paragraph 2, it provides improved estimates for concentration that
17 adjusts for the effects of common ownership.
18 This paper was not cited in the decision but it was cited by D&D in their written case.
19 What we say this paper does, firstly, it illustrates that it is not right to say -- which is
20 what D&D say -- that the literature in Dow/DuPont is now obsolete. This is an updated
21 analysis and shows this is not the case. What this report does is it illustrates the
22 expertise that the CMA was bringing to bear when assessing the level of risk involved
23 in the AIM proposal. So it cited Dow/DuPont in the footnote, that wasn't the whole
24 story. CMA has this expertise, it must and does bring it to bear when considering
25 issues such as the AIM proposal.
26 Turning, please, to page 21, paragraph 11:

1 "When companies in the same market are controlled (or part-controlled) by the same
2 owners, the commercial incentives for them to compete will be weaker or even absent.
3 For the first time, this report presents preliminary data on the effects of this common
4 ownership by combining 2 extremely large datasets of UK businesses. Our
5 assessment, which considers common ownership at 25 per cent and 50 per cent
6 thresholds, shows that:
7 "The effect of common ownership on the overall number of independent businesses
8 is modest ..."
9 But it is more prevalent among larger businesses.
10 Just to be clear, what the CMA is looking at in its analysis here is not the impact of
11 common ownership on competition, but the extent of common ownership.
12 Then, at page 30, paragraph 35, "Common ownership":
13 "The economic literature on common ownership is still developing [we will see in a
14 moment what the CMA means by that]. Our analysis of common ownership in adjusted
15 concentration is still preliminary and there are various ways in which it could be
16 extended and improved upon. For instance, our results are sensitive to the control
17 thresholds used. Further sensitivities could be built in to explore how our results are
18 driven by our definition of common ownership groups ..."
19 So when the CMA says that its analysis is still preliminary and needs to be extended
20 and improved upon, again, it is talking about the analysis of the extent of common
21 ownership, not the intuition about the impact that common ownership can have on
22 incentives.
23 Then section 3 begins on page 71. There is some duplication in paragraph numbering
24 here. I would like to look at the paragraphs under the second main heading, the
25 heading being "Common ownership, competition, and concentration".
26 Paragraph 3.1:

1 "Common ownership is usually defined as the 'simultaneous ownership of shares in
2 many firms active in the same market.' Traditional economic thinking assumes that
3 firms will act independently and compete with each other in order to maximise their
4 own profits. Common ownership, however, challenges this assumption."
5 3.2:
6 "Some studies propose instead that firms maximise the profits of their shareholders'
7 portfolio."
8 Then you have a footnote reference to Backus and (Inaudible), the Backus is a 2019
9 paper, so it is post Dow/DuPont. The CMA continues:
10 "In the presence of common owners, this means firms account for the implications of
11 their actions on their rivals' profits. Therefore, under this scenario competition is
12 dampened. Consider a simple example ..."
13 Perhaps the Tribunal could read the example, please, at A and B. **(Pause)**
14 The CMA is referring by way of example to the possibility that one firm might avoid or
15 abandon a proposed price reduction because of the impact it would have on a
16 connected firm.
17 In my submission, abandoning a price reduction wouldn't necessarily be contrary to
18 directors' fiduciary duties, which is one of the points that D&D relies on under its
19 company law heading.
20 That is important, because it explains why the fiduciary duties aren't a safeguard
21 against the sorts of issues that the CMA was concerned about. Because if directors
22 of a company decided not to reduce their prices, D&D have other submissions about
23 the likelihood of that, but not reducing your prices is not on its own a breach of fiduciary
24 duties. It may well protect short-term profits.
25 **THE CHAIRMAN:** It may or may not be, depending on your assessment of the
26 competitive environment, elasticities and all sorts of things ... there is a complex set

1 of --

2 **MR LASK:** My submission is it wouldn't necessarily be a breach, so the fiduciary

3 duties are not an answer to this sort of concern.

4 3.7 onwards, the CMA says:

5 "We summarise some of the main studies on the common ownership on competition."

6 Then the footnote:

7 "The review in this report and in the related Appendix is highly inspired by the ongoing

8 work of [an academic at the University of East Anglia]."

9 3.8 refers to a JCR report on the extent of common ownership in the EU, showing that

10 it has become more prevalent.

11 3.9 explains:

12 "... common ownership has been studied [for some time]. The focus of these early

13 studies was on how [it] might be able to facilitate explicit or implicit coordination among

14 competitors. Over time, the literature has moved toward the potential anticompetitive

15 effects of common ownership on firms' unilateral incentives."

16 You will recall that that is what the CMA was concerned with, unilateral incentives.

17 3.10:

18 "Several studies provide theoretical models and examples that show that common

19 ownership leads to anti-competitive incentives and outcomes. Studies in this area

20 have usually built on standard economic models to account for (direct and/or indirect)

21 common ownership links."

22 Then 3.11:

23 "More recent empirical work has provided some evidence to support the proposition

24 that common ownership can be anticompetitive. However, these results have been

25 contested and a clear consensus has yet to arise in the empirical literature."

26 Then you see the examples at 3.12A and B.

1 So the CMA acknowledges that a clear consensus has yet to arise from the empirical
2 literature, but some of the studies do show an increase in price arising from common
3 ownership. What you don't have here is anything like a clean bill of health for common
4 ownership. So here we are, six years after the Dow/DuPont, the CMA is updating its
5 research and it is not giving common ownership a clean bill of health.
6 We see on the contrary that having looked at the same sort of material as the
7 Commission, and some updated material, it has reached a similar conclusion. Namely
8 that there is reason to think that common ownership leads to anticompetitive
9 outcomes.
10 Again, I emphasise the CMA was not required to decide in this case whether the
11 proposal would lead to anticompetitive outcomes, simply asking itself whether there
12 was an acceptable level of risk that the incentive or ability to compete would be
13 compromised. The material I have shown you, the merger remedies guidance,
14 purchaser approval criteria, Dow/DuPont and now this provided an ample basis for the
15 CMA's conclusions.
16 There are two further arguments advanced by D&D that I want to address under this
17 heading.
18 The first argument is that it would not be economically rational for common
19 shareholders to impair TMG's performance when customers might divert to third party
20 competitors rather than D&D. There is no merit in that point for these reasons.
21 Firstly, the Commission addressed that point in Dow/DuPont, as I have shown you,
22 and explained that common ownership increased the incentive to raise prices,
23 notwithstanding the risk that some of the resulting diversion would be to third parties.
24 That was recital 43 of annex 5.
25 The second is that the CMA found, perhaps unsurprisingly given that we are dealing
26 with an unchallenged SLC, that D&D and TMG were close competitors and that there

1 was material switching between the two, notwithstanding the presence of two other
2 effective competitors.
3 If we could turn up the final Report, please. It is at C1, tab 18.
4 If we could turn firstly, please, to page 524. You will recall yesterday Mr Beal showed
5 you the paragraphs immediately preceding 7.83 and the analysis suggesting high
6 levels of switching to ATI and Landmark. But it is important to read on. At 7.83, it
7 says:
8 "We have considered whether the rate of switching between D&D and TMG in recent
9 years is an indicator of their closeness of competition. In this context, the fact that ATI
10 has accounted for a substantial share of switching away from D&D and TMG reflects
11 ATI's recent market growth, at the expense of the other incumbents, and may have
12 led to a higher than usual overall rate of switching away from each of the Parties. In
13 our view, this makes it difficult to interpret the switching rates between D&D and TMG
14 ... as necessarily indicating their closeness of competition in future periods."
15 Then 7.84, just at the end of that paragraph:
16 "In any event, we consider that the Parties' data suggests that switching between TMG
17 and D&D would still be material in the absence of the Merger under a wide range of
18 assumptions about ATI's future performance."
19 Then moving on towards the end of this section, at page 537, "Our current view on
20 closeness of competition". 7.118:
21 "Our guidelines make clear that the merger firms need not be each other's closest
22 competitors for unilateral effects to arise."
23 7.119:
24 "Having taken into account the evidence set out above in the round, we consider that
25 the Parties are close competitors. In particular, we note that ... (b) The available
26 evidence on customer switching between the Parties, which we interpret with caution,

1 supports the view that the Parties are close competitors. Each of the Parties appears
2 to have won a material proportion of the revenues (and customers) lost by the other."
3 The CMA finds in the final report that there was material switching between D&D and
4 TMG, notwithstanding the presence of ATI and Landmark. Obviously no challenge to
5 those findings and, as such, in my submission, it is obviously rational to suppose that
6 at least some of the benefits of a softening of competition by TMG would pass to D&D.
7 In other words, at least some of the diversion would be to D&D.
8 That is sufficient to create a greater incentive to limit competition than would exist
9 under divestment to an independent third party.
10 That is D&D's first argument I wanted to deal with.
11 D&D's second argument, I took you to D&D's reply where it acknowledged that
12 common shareholdings can in principle give rise to competition concerns and that is
13 why you have the blind trust. I submitted that its case thus boils down to the argument
14 that institutional shareholders are different. Essentially it says that whilst common
15 shareholders can voice competition concerns, it is irrational to think institutional
16 shareholders would have the incentive to exert influence over TMG, because they are
17 unlikely to be interested in affecting competition between the parties.
18 Two problems with that. First, the Dow/DuPont analysis shows that large institutional
19 investors do play an active role in the businesses in which they hold shares.
20 Second, is that D&D has never adduced any evidence as to the degree of influence
21 exerted by its own institutional shareholders, ie the very shareholders who would own
22 both D&D and TMG under the proposal. If, as a matter of fact, those investors had
23 not devoted sufficient attention to the conduct of D&D's business in the past, D&D
24 would have been very well placed to provide evidence of this to the CMA. Its failure
25 to do so is telling.
26 That completes the first of the four main areas of complaint raised by D&D. You will

1 be pleased to hear the second, third and fourth will be quicker.
2 The second is economic literature, much of which I have already covered. This is dealt
3 with in our skeleton at paragraphs 75 to 86. In D&D's skeleton, it relies, for
4 completeness, on a collection of new academic articles which it says shows vigorous
5 academic debate on the issue of common institutional shareholders. But, in my
6 submission, the suggestion that there is academic debate does not indicate
7 irrationality. I have already made that submission. On the contrary, it tends to confirm
8 that the competition risks are a matter of genuine concern and the literature need not
9 speak with a single voice in order for the CMA's decision to be rational.
10 Indeed, if the CMA was required to show a perfect consensus in the economic
11 literature, it would impose an unrealistic and frankly dangerous standard, because it
12 could result in the approval of remedies that posed a material risk of failing to resolve
13 the competition problem they were designed to address. It comes back to Mr Lomas's
14 point, which is that the CMA has to decide. It has to make a risk assessment on the
15 basis of the material it has and on the basis of its experience and expertise. In my
16 submission, it was clearly entitled to take a precautionary approach.
17 As explained, the debate in the economic literature is, in any event, around the
18 empirical analysis. The intuition that common shareholdings create incentives to
19 reduce competition is actually widely searched, including in the articles Mr Beal took
20 you to. It probably suffices for me to give you the references rather than take you back
21 through those articles. There are just three I would like to give you the references to.
22 The first is Backus, which is file E1, tab 7, pages 403 and 427.
23 The second is Denis, which is file E2, tab 13, pages 617 and 618.
24 The third is Patel, file E1, tab 10, page 575.
25 Those are all articles that postdate Dow/DuPont and they all, in my submission,
26 recognise the theory behind the CMA's concerns, even if there is debate over the

1 empirical analysis.

2 **MR LOMAS:** It would be an interesting question, I suppose, if there was a

3 well-documented theory but absolutely no empirical evidence for it whatsoever, but I

4 suspect we don't need to go there.

5 **MR LASK:** In my submission, the CMA would be perfectly entitled to reach the same

6 conclusion it did, because it would be entitled to take the intuition behind the theory

7 and apply it to the facts. The facts of this case. Empirical analysis may or may not

8 assist, let's suppose Azar had never been criticised and we could say, "Well, there we

9 go, you have empirical analysis that proves the CMA's case".

10 The response I would face would be: well, that is concerned with the US airline

11 industry, it has nothing to do with the market we are concerned with. So the empirical

12 analysis only takes you so far.

13 The third area of complaint concerns the constraints imposed by company law. We

14 deal with this at paragraphs 56 to 61 of our skeleton. D&D's argument is that the CMA

15 did not take into account company law constraints, which operate on directors or the

16 limited managerial role for shareholders under the Companies Act 2006.

17 One sees from the decision that the CMA did have in mind D&D's points concerning

18 the rights of minority shareholders and director duties, paragraphs 55 and 57 of the

19 decision. The question for the Tribunal is whether it was irrational for the CMA to reach

20 the findings it did, notwithstanding those points.

21 I make three submissions on that.

22 First, as I submitted a couple of times but I am going to develop the submission in

23 a different way now, D&D itself accepts that common ownership can in principle give

24 rise to competition concerns. I have addressed you on D&D's argument that

25 institutional shareholders are different in terms of their incentives. The key point for

26 present purposes is this: D&D has not identified any relevant distinction in company

1 law as between institutional shareholders and management shareholders. So it has
2 not suggested that company law imposes relevant restraints on institutional
3 shareholders that don't apply to the management shareholders.
4 So if, as D&D accepts, company law would not be sufficient to prevent the
5 management shareholders from exercising influence over TMG, then there is no
6 reason to think it would be sufficient to prevent institutional shareholders from doing
7 the same.
8 The same point applies to directors. D&D relies on their fiduciary duties to act in the
9 best interest of TMG, it apparently accepts that those duties would not be able to
10 forestall the risk of influence by D&D's management shareholders, that's why they
11 propose a blind trust. It gives no reason why those duties would operate any differently
12 in respect of influence by D&D's institutional shareholders. That is the first point.
13 The second point is that in reality the company law provisions relied on by D&D would
14 not preclude D&D's common shareholders from exerting influence over TMG
15 management so as to compromise competition and nor would it render such inference
16 implausible. For example, it is common ground that shareholders have voting rights
17 on matters such as election, reappointment and the removal of directors. That is
18 a notice of application, 81.1 and 81.2, file A, tab 1, pages 35 to 36.
19 The decision, as we have seen, identified voting in line with a common interest in
20 reducing competition as one way in which the shareholders could influence TMG. It
21 is a means by which shareholders could express preferences or dissatisfaction with
22 how the business is run.
23 The decision also highlighted the risk that D&D's shareholders could withhold their
24 support for the raising of funds. Again, shareholders have the right to approve or
25 refuse the issuing of shares to raise additional capital, see the notice of application,
26 paragraph 81.5. That is file A, tab 1, page 37.

1 Making it more difficult. So Mr Beal's submission, I should say, was focused on the
2 raising of debt. It is up to the management what to do about raising debt. The CMA
3 has highlighted the concern that the common shareholders could make it more difficult
4 to raise equity findings. Making it more difficult or less attractive for TMG to raise funds
5 poses risk to competition, because the CMA explained -- both in the final report and
6 the decision -- that access to funds would be particularly important for TMG to continue
7 as an effective competitor, paragraphs 63 and 65 of the decision.
8 Finally, shareholders can also exert influence informally. We saw that from annex 5
9 of Dow/DuPont. For example, from expressing their views in discussion with
10 management. D&D has not identified any provision of company law that would
11 preclude this.
12 The third point is this. D&D's reliance on fiduciary duties does not assist, because
13 acting in a way that avoids competition, as I have already submitted, does not
14 necessarily go against the company's best interests. One sees in Dow/DuPont at
15 2351 that common shareholding can dampen innovation competition. If, for example,
16 directors held off on the development of new products or expanding into new areas,
17 they may avoid commercial risks and maximise short-term profits. It would not
18 necessarily breach their fiduciary duties, but it would risk softening competition.
19 In addition, the fiduciary duties would not shield TMG from decisions by shareholders
20 which made the raising of funds less attractive or more difficult.
21 Finally, directors may not always comply with their duties. Breaches may not be
22 detected. That is not the CMA's concern here, the CMA's concern is to ensure that no
23 SLC (inaudible), it is entitled to take a precautionary approach.
24 To sum up, the provisions of company law invoked by D&D do not render the CMA's
25 decision irrational.
26 Can I pick up here on one of the Tribunal's questions which Mr Beal addressed you

1 on yesterday. It is the question concerning the Tribunal's hypothetical example, the
2 four-firm example. I think you asked me, sir, before the lunch adjournment whether
3 the CMA had in mind that sort of example. I think the crux of the example is the
4 directors could ease off on competition merely by knowing that their shareholders were
5 common shareholders and that is operating on the directors' behaviour. That is not
6 explicitly raised as a possibility in the decision, not in terms. But paragraph 57,
7 perhaps we should turn up the decision. File C1, tab 1, page 15.
8 The first sentence of paragraph 57:
9 "Directors ...(Reading to the words)... will be most likely to promote the success of the
10 company for the benefit of its shareholders."
11 The only point I make is that that is a mechanism by which the hypothetical example
12 could take effect.
13 **THE CHAIRMAN:** Yes. Exactly.
14 **MR LASK:** Then just to deal briefly with Mr Beal's submissions on this point. There
15 was a discussion between Mr Beal and the Tribunal about the viability of TMG
16 reducing competitive pressure only on D&D and Mr Beal suggested, well, it could not
17 be done. They can't differentiate. I just wanted to show you a couple of passages
18 from the final report on this. So we are still in C1, tab 18.
19 **THE CHAIRMAN:** What I had in mind was, with this sector, that you could have
20 a sales team or whatever and you would go out to particular customers, big customer,
21 and say, "Look, here is our presentation, we can offer a discount, we can offer this,
22 this as an accessory, an add on", in order to pull them into A or B.
23 **MR LASK:** That is not very far off what I am going to show you.
24 **THE CHAIRMAN:** All right.
25 **MR LASK:** Page 471. You see the heading "Discounts and negotiations".
26 **THE CHAIRMAN:** Yes.

1 **MR LASK:** Perhaps I could ask the Tribunal just to read 6.51 and 6.52, please.

2 **THE CHAIRMAN:** Yes. That is what I was referring to. Yes. **(Pause)**

3 **MR LASK:** To similar effect, on page 496, paragraph 6.134.

4 **THE CHAIRMAN:** Sorry, which paragraph?

5 **MR LASK:** 6.134.

6 **THE CHAIRMAN:** Okay.

7 **MR LASK:** It is the same/similar point:

8 "Suppliers also compete on price, often by offering discounts off the list price as part

9 of negotiations to win new customers or to retain existing customers."

10 This shows that according to the findings in the final report it is possible in practice to

11 differentiate between different customers, and it does happen. Mr Beal said

12 yesterday, "Well, it wouldn't happen because there is a risk of diversion to the other

13 players in the market", but this is showing that it does happen.

14 **THE CHAIRMAN:** Yes. Another way is offering free periods.

15 **MR LASK:** I am sorry?

16 **THE CHAIRMAN:** Is offering services for free for a certain period, saying, "We will

17 give it to you for free for three months, if you like it then ..."

18 **MR LASK:** That brings me to the fourth and final area of complaint under the

19 "Independence" heading.

20 **THE CHAIRMAN:** How long do you have?

21 **MR LASK:** That is what I was going to address.

22 **THE CHAIRMAN:** We have to think about the transcribers.

23 **MR LASK:** I am making good progress. I will certainly be finished by 4.00.

24 **THE CHAIRMAN:** Shall we take our break now?

25 **MR LASK:** That should be fine. Yes.

26 **(3.30 pm)**

1 (A short adjournment)

2 **(3.45 pm)**

3 **MR LASK:** I am turning now to the fourth and final head of complaint, under the
4 "Independence" heading. That is relating to foreign decisions, which we address at
5 paragraphs 71 to 74 of our skeleton.

6 The primary purpose for which Mr Beal relied on some foreign decisions yesterday
7 was to dispute the CMA's observation on novelty. But then, having shown you the
8 four decisions, he also said that they show common institutional shareholders are
9 unlikely to be a problem, otherwise the arrangements in those cases in other
10 jurisdictions wouldn't have been approved. I will address each of those submissions
11 in turn.

12 Novelty is actually a Ground 3 point. As we have seen, the CMA said because the
13 proposal was novel it would need to consult before varying and this would extend the
14 uncertainty to TMG and the need to address the SLC quickly.

15 As the chairman observed in his ruling on evidence, the CMA was manifestly referring
16 to novelty in a UK merger context. That novelty isn't in dispute, it was acknowledged
17 by D&D in the original proposal and in that regard, foreign decisions are irrelevant.
18 The fact there have been spinoffs in other jurisdictions does not alter the fact that this
19 was a novel proposal in this context, in this jurisdiction.

20 The second point, which is the more substantive one, reflects D&D's skeleton
21 argument where they say: since spinoffs have been approved in other jurisdictions,
22 the CMA was irrational to consider that common institutional shareholders posed a risk
23 to the independence of TMG. As we have submitted in our skeleton, that argument is
24 a non sequitur. For the reasons I have already given you, which is the CMA operates
25 in a different merger regime, merger cases turn on their facts, as the Tribunal observed
26 in Ecolab, and in any event a risk assessment such as that contained in the decision

1 is by its nature an evaluative judgment and the CMA is quite entitled to take a different
2 view from foreign regulators and courts, both on the likelihood of risk and the level of
3 risk that it is prepared to tolerate.
4 There is a further reason why the foreign decisions relied on by D&D are of no
5 assistance and it is this. As far as we can tell, none of the decisions to which Mr Beal
6 took you to yesterday contain any actual analysis of whether common ownership
7 across the divesting entity and the spinoff might weaken competition between --
8 **THE CHAIRMAN:** That was the area that I was looking for, I think I said it at the CMC.
9 If there are foreign decisions which contain analysis which I could understand and
10 appreciate, that is one thing.
11 **MR LASK:** Yes.
12 **THE CHAIRMAN:** That is what I was looking for when I said that the parties are free
13 to put in any foreign decision they want. Because I would be interested to see that
14 type of analysis. But you are right, unless I have missed something, I haven't seen
15 the analysis that could assist me on that.
16 **MR LASK:** Well, we haven't either and we didn't put in any foreign decisions because
17 we are not aware of any that assist in that respect. As far as the ones Mr Beal took
18 you to yesterday, we don't see any of that kind of analysis in those. So they don't
19 contain any reasoning that could call into question the CMA's reasoning.
20 Effectively what D&D says is, it is implicit that the relevant foreign court or foreign
21 regulator was not troubled by the risks that troubled the CMA in this case, but --
22 **THE CHAIRMAN:** What we do have though is that the exception to that is the DuPont
23 decision, the one that you rely on, which does contain analysis and reasoning.
24 **MR LASK:** Yes.
25 **THE CHAIRMAN:** Which I didn't see on the authorities that were shown to me. So
26 I can understand that, you know, you can have a divestiture using a spinco and that

1 could be fine. But it may not be fine, it is very, sort of, fact specific. But I don't see the
2 sort of analysis that you see in DuPont in these other cases going the other way.
3 **MR LASK:** Indeed. Of course, whether a spinoff is or is not acceptable may depend,
4 in part, on the extent of the overlap.
5 **THE CHAIRMAN:** Yes, of course it could. Yes.
6 **MR LASK:** As I have emphasised a number of times.
7 **THE CHAIRMAN:** Or the industry and the market. Yes.
8 **MR LASK:** The Iacopi case that Mr Beal took you to, for example, actually indicates
9 that what the FCC required in that case is that all shareholders owning more than
10 1 per cent were required to dispose as part of the arrangement. The FCC was not
11 willing to wait for things to take their course on the market.
12 Just for your reference, that is authorities bundle 2, tab B1, page 31. But the ultimate
13 point I make is that absent any analysis in these decisions dealing with the same
14 issues as the CMA was dealing with, mere implication -- even if it is the right
15 implication -- cannot show irrationality on the part of the CMA.
16 I want to move now to the second basis for the CMA's decision, which is capability and
17 commitment. I can take this briefly.
18 As I explained when I was showing you the purchaser approval criteria, the criteria are
19 cumulative, so a decision finding that one of them was not satisfied would have been
20 enough to justify the refusal of that proposal.
21 If we could turn, please, to the decision, C1, tab 1, page 18. We see, and just for
22 context, on the previous page you will see the heading "Capability and commitment",
23 that is what the CMA is dealing with in this part of the decision. The CMA identifies
24 two concerns under these criteria and the two concerns concern TMG's ability to raise
25 additional funds.
26 It says in the first part of paragraph 65 that in order to compete actively in a fast-moving

technology market, TMG would need or wish to raise additional funds in the future. There is a footnote there, it is paragraph 63, and footnote 66 above.

The first concern is, (a):

"As part of a larger corporate investment group TMG would have access to additional resources, as an independently ...(Reading to the words)... in the final undertakings."

Just pausing there, that is the core finding under this first concern. The concern is a greater degree of uncertainty over the ability to raise funds.

As far as we can tell, that basic finding has not been challenged by D&D. I am sure Mr Beal will correct me if we have that wrong, but we can't find the challenge to that in the written case. What is challenged is the additional reasoning that follows, where the CMA says:

"This concern would be further exacerbated by the fact that for the reasons set out above, whilst there is a significant common shareholder ownership, the willingness of such shareholders to approve an increase in share capital or otherwise provide further financial support to TMG may be influenced by the potential adverse impact on D&D.

That is an echo of the concern we have been dealing with under the "independence" heading and the CMA relies on that, it is to exacerbate the uncertainty.

D&D challenges that exacerbation and we rely on all the reasons given previously to say the challenge is unfounded, but there is no challenge to the basic finding on financial uncertainty.

D&D's argument that the common shareholders cannot veto a board decision to raise funds is misconceived, for the reasons we have given in our skeleton at paragraph 88A. In any event, it is concerned with the exacerbating factor, not the basic finding.

We do say that absent a challenge to that basic finding, Ground 2 cannot succeed because even if D&D's case on independence were to prevail, the CMA's conclusion

1 on capability and commitment would remain intact.
2 The CMA's second concern here at paragraph 65(b) was that the market price of
3 TMG's shares could be depressed by the expectation that D&D's shareholders would
4 be seeking to sell their shares. This in turn could harm TMG's ability to raise additional
5 equity finance on attractive terms. For the reasons given in our skeleton at
6 paragraph 88, we say that D&D has no proper answer to this. We also refer to TMG's
7 submissions on this point at paragraph 33 of their skeleton.
8 That is all I wanted to say on capability and commitment. I was going to then sweep
9 up on the remaining questions the Tribunal has put to us.
10 Firstly, what is the correct approach to the construction of the final undertakings? As
11 I have already indicated, we agree that construction is ultimately a matter of law for
12 the Tribunal. We see from the undertakings themselves, paragraph 1.1, that they
13 need to be construed in accordance with the final Report.
14 We would submit they also need to be construed in accordance with the CMA's
15 statutory duties, because the final undertakings are accepted by the CMA under
16 section 82 of the Enterprise Act. When the CMA is accepting undertakings, as when
17 it is making a final order, it is seeking to give effect to its statutory duties. But we don't
18 think anything turns on that in this case.
19 **THE CHAIRMAN:** Yes. My question on that was on the first limb, was which
20 paragraphs of the final Rreport do you rely on that you say fall within paragraph 1.1,
21 which assists us on construction. That is all I was asking on that.
22 **MR LASK:** I understand. The CMA did not expressly rely on any provisions of the
23 final Report.
24 **THE CHAIRMAN:** They don't need to. If it is a question of construction that we have
25 to exercise --
26 **MR LASK:** Yes.

1 **THE CHAIRMAN:** -- then all I need from you is just to give me the paragraph numbers
2 that I need to look at when we get round to drafting something.
3 **MR LASK:** Yes. May I refer you to paragraphs 48 -- this is the final report.
4 **THE CHAIRMAN:** Yes.
5 **MR LASK:** -- 10.137 and 10.138.
6 **THE CHAIRMAN:** What, 10.137 and 138?
7 **MR LASK:** Yes.
8 **THE CHAIRMAN:** Yes.
9 **MR LASK:** Essentially one sees references in those paragraphs to the purchaser,
10 a purchaser. We say that that supports the proposition that what is envisaged is sale
11 to a single purchaser.
12 **THE CHAIRMAN:** Yes, okay.
13 **MR LASK:** I am only addressing those questions that I have not already addressed.
14 **THE CHAIRMAN:** Yes.
15 **MR LASK:** Would the CMA want the Tribunal to decide Ground 2 in any event, if it is
16 with us on Grounds 1 to 3? Yes, please.
17 Was there any evidence that D&D's shareholders would obtain a higher price in
18 a private sale because of the prospect of AIM admission?. We don't think there was.
19 There was a reference, I think, to the finnCap letter.
20 **THE CHAIRMAN:** Yes.
21 **MR LASK:** We don't think that contains any such evidence. Indeed, finnCap were
22 writing that letter on behalf of TMG, which is who they were instructed by, which may
23 explain why they did not feel able to --
24 **THE CHAIRMAN:** Wait. Wait. Wait. Two levels.
25 The second level is getting a higher price if they go down the twin-track proposal, they
26 don't have a private sale, goes ahead, gets listed and you say there is no evidence

1 that the price would be -- they would get a better price that way. I understand that.
2 That is fine.
3 The first way of doing it is to say the carrot is held out in front and that they do get
4 a higher price because that prospect has encouraged people to offer more money.
5 You are saying that although there may be assertions to that effect, you are saying
6 there is no actual evidence to that effect. Is that what you are really saying?
7 **MR LASK:** That is our position.
8 **THE CHAIRMAN:** Let me just note that down.
9 Yes.
10 **MR LASK:** Just for completeness, the assertions are certainly there in the --
11 **THE CHAIRMAN:** I have seen the assertions. What I couldn't remember was whether
12 or not the finnCap letter had covered it as well. You are saying it doesn't?
13 **MR LASK:** Not to our understanding.
14 **THE CHAIRMAN:** Yes.
15 **MR LASK:** I think that covers all the questions.
16 Of course, if there are any others I am ready to assist. Subject to that, those are my
17 submissions.
18 **THE CHAIRMAN:** Thank you very much.
19 Mr O'Donoghue, I know you have waited a long time, but don't feel under any time
20 pressure.
21 If you take 45 minutes, it is absolutely fine.
22
23 **Opening submissions by MR O'DONOGHUE**
24 **MR O'DONOGHUE:** In view of the CMA's comprehensive submissions, I think quite
25 apart from the time observation I can be brief.
26 I have nothing to say on Ground 1. I suspect at this stage even Dr Bishop will be

1 relieved to hear I have nothing to say on the economics of cross or common
2 shareholdings and I have virtually nothing else to say on independence or indeed on
3 Ground 3.
4 What I want to do is focus on three points.
5 First of all, to say something more about the capability and commitment criterion,
6 because of course it is TMG's capability which is at issue and there is evidence and
7 parts of the decision that you have not been shown that I would like to take you to.
8 Of course, Mr Beal spent a small bit of time yesterday on that part of Ground 2 and
9 there hasn't been as yet a direct response to at least some of his points. I want to pick
10 up on those.
11 **THE CHAIRMAN:** Can I ask you a question then. Looking at the witness statement
12 which was subject to the second ruling, one of the bits that I left in at paragraph 35
13 related to the not insignificant cost to TMG of this whole process and possible
14 continuing costs as we go along. The question is: is that a matter that we should take
15 into account? To what extent is it covered in any event in the decision? Those are
16 two bits that flow from that.
17 **MR O'DONOGHUE:** That fits with my third point.
18 **THE CHAIRMAN:** You are going to cover that? That is absolutely fine.
19 **MR O'DONOGHUE:** First capability and commitment, to unpack some of the
20 evidence.
21 The second point, there was a separate concern in the decision that in my submission
22 has been slightly swept under the rug, which is that the question of delay and
23 uncertainty was itself in view of the lateness of the AIM admission proposal a separate
24 part of the assessment. I will develop that point.
25 The final point is to do with TMG's particular concerns, of course in relation to the
26 evidence which has been admitted. I just want to --

1 **THE CHAIRMAN:** What I would like to know is where does it fit in the decision?
2 **MR O'DONOGHUE:** Yes.
3 **THE CHAIRMAN:** And to the extent that it does not fit into the decision, how can we
4 take it into account?
5 I am sure you will cover all of that.
6 **MR O'DONOGHUE:** I will.
7 **THE CHAIRMAN:** Thank you.
8 **MR O'DONOGHUE:** Before we get into the weeds, of course, TMG was strongly
9 opposed to the CMA's (inaudible) I certainly do not come here as an apologist or patsy
10 for the CMA, but the final Report remains unchallenged, it is final and binding. At this
11 stage the only question for the CMA and for TMG is that the remedy should be
12 implemented as quickly and as fully as possible. You have to take your medicine when
13 it comes to the SLC in the absence of an appeal. The question at this stage is simply
14 a remedial one.
15 Lamenting the past is really of no interest to anyone at this stage, particularly of course
16 TMG.
17 TMG's priority is to achieve full commercial independence from D&D under new
18 ownership as soon as possible. The stasis and uncertainty created by the AIM
19 admission proposal and this appeal itself risks potentially harming TMG. I will
20 obviously come back to some of the specifics here, but my basic submission is that
21 the AIM admission proposal was late, entirely novel and manifestly raised issues of
22 uncertainty, delay and compliance with the purchaser approval criteria that the CMA
23 was rationally entitled to object to.
24 The commercial reality of this case is that D&D considers rightly or wrongly that it
25 bought high and now may have to sell at a lower price. That, of course, is unfortunate
26 if it happens for the shareholders, but it was always part of the commercial risk they

1 assumed in purchasing TMG prior to CMA approval. Of course the sales price could
2 just have as easily gone up and if they were selling into a rising market no one would
3 suggest that the increase should somehow be disgorged in terms of the gain and the
4 divestiture process.
5 So there is certainly nothing wrong with D&D being forced to take the yin with the yang
6 here. The CMA is not some form of insurance against the possibility that you might
7 have to contemplate selling for less than which you purchased at.
8 That is by way of introduction, sir.
9 Turning to the first of my three points, the question of capability and commitment. As
10 Mr Lask said to you, I think more than once, the purchaser approval criteria are
11 cumulative and therefore it is sufficient for the CMA's purposes if D&D's AIM admission
12 proposal fails on one of them. So these excursions into cross and common
13 shareholdings, interesting though they are, they may be completely irrelevant at the
14 end of the day in terms of the dispositive part of this appeal.
15 The Tribunal has already seen this, but let me go back to the decision in C1, please,
16 just to show you the totality of the findings on capability and commitment, because
17 some of them were glossed over.
18 **THE CHAIRMAN:** Yes.
19 **MR O'DONOGHUE:** If we can go to paragraph 64, it is page 17 of C1.
20 You will see the sentence in addition, it is the second sentence. Then it starts:
21 "finnCap acknowledges the risk that the share price will drop ..."
22 So it is common ground that one potential consequence of the AIM admission proposal
23 is the risk of a share price drop. That is finnCap agreeing to that. So no dispute about
24 that.
25 Then over the page, sir, an important point at 65:
26 "This is a fast-moving technology market, TMG may need or wish to raise additional

1 funds in the future."

2 A particular feature of this market is that access to funding in a fast-moving context is

3 potentially important.

4 Mr Lask has shown you, of course, the examples in 65(a) and (b) . (b) concerns the

5 separate issue of the impact on the ability of TMG to raise additional equity finance,

6 as opposed to debt, on attractive terms. So the basic point, as I understand it, is that

7 in circumstances where the AIM admission, as is common ground, could lead to share

8 price depression, then trying to get equity financing on the back of that may be quite

9 challenging. So that is the basic concern set out in the decision.

10 As I understand it, Mr Beal's only response to that is to say, well what about debt

11 financing? That is 67 of his skeleton, but that with respect is not a response to the

12 separate point which is common ground in relation to concerns about equity financing,

13 which remain wholly uncontradicted.

14 In my submission, it is hardly a controversial proposition to say that a firm which faces

15 potential financing issues, particularly in a fast-moving technology market, will all else

16 equal be a less effective competitor than one which does not.

17 But there is a further specific point -- this is really the crux of my submission on the

18 first point -- in this particular case. That funding and acquisitions, or funding for

19 acquisitions, they are an important feature of this market in particular in terms of the

20 ways in which the firms react to the fast-moving pace of technology in this market.

21 Just to anchor this in the decision, sir, to come back to a recurrent question. If we go

22 back to footnote 64 on page 17. You can see a cross-reference to the final report,

23 10.136. If we can then go to the Report, because it is not just 10.136. We are now

24 back in C1 or -- sorry, we are in tab 18 of the same bundle. Forgive me. It is page 611.

25 So 10.136:

26 "... the market has changed substantially over the last two years. There are now three

1 large groups, with vertical integration ... The room for a fourth player in that market is
2 limited by a lack of independent suppliers of such reports, and this will create a
3 competitive challenge for a party with access to those reports at prices likely to be
4 higher than that of any search company in the same group. TMG said it is important
5 that any alternative investor understands the challenge that creates and has
6 a coherent long-term investment strategy to manage the associated risk."
7 Then 10.137(a), second sentence:
8 "As such we will be paying particular attention to the assessment of the longer-term
9 investment plans of potential acquirers as part of our purchaser suitability
10 assessment."
11 Then a couple more points on acquisition, in the same report. If you go back to
12 page 426, 2.13 of the decision, the final Report.
13 **THE CHAIRMAN:** You will have to give me that reference again, sorry.
14 **MR O'DONOGHUE:** It is page 42 of the final Rreport, it is table 2.1. It is a table of
15 D&D's acquisitions, recent acquisitions in the UK. It has been a highly acquisitive
16 company. Then at 213, a couple of pages on, you will have seen since 2017 D&D has
17 acquired over 20 businesses, including in the UK.
18 In this fast-moving technology market, one of the ways companies plug gaps in
19 technology is through acquisitions. This is a market in which acquisitions are
20 a particular feature. That is an important further point in the context of understanding
21 capability: it has to be capable, in my submission, to obtain funding if necessary for
22 growth and acquisition.
23 Now, Mr Pepper addresses this in his evidence. It is in my F bundle as part of -- the
24 annex to the intervention.
25 **THE CHAIRMAN:** Sorry, which bundle volume number is it?
26 **MR O'DONOGHUE:** It is my -- it is called IB in some of the references I have seen.

1 It is either F or F-IB bundle.

2 **THE CHAIRMAN:** F?

3 **MR O'DONOGHUE:** This is tab A. So it is paragraph 13 on page 3. If I could invite

4 the Tribunal to read that and in particular the last sentence. **(Pause).**

5 **DR BISHOP:** I am sorry, I am lost here.

6 **MR O'DONOGHUE:** Dr Bishop, it is bundle F, tab A, page 3.

7 **DR BISHOP:** Yes, I read that.

8 **THE CHAIRMAN:** Where do we start? Paragraph 13?

9 **MR O'DONOGHUE:** 13.

10 **DR BISHOP:** Yes, I have that now.

11 **MR O'DONOGHUE:** Particularly the last sentence, substantially bigger, access to

12 substantially greater funds for growth and acquisition, so the acquisition point again.

13 While we are in this folder, in tab 11 you will see that earlier this year D&D made

14 a further UK acquisition in this space. So we say across the decision, final report and

15 the admissible evidence, the issue of acquisitions and funding for acquisitions is of

16 fundamental importance. That is why the difficulties in relation to equity (inaudible),

17 which again are unchallenged, are not immaterial.

18 Just to wrap up on this point, sir. If we can go to my skeleton for the hearing. I want

19 to deal with Mr Beal's points. Paragraph 33. We say at 33, it is common ground that

20 the equity financing point is not challenged and instead Mr Beal makes four points,

21 which we say are peripheral and don't assist.

22 First he says, well, the CMA found that TMG on a day-to-day basis could compete.

23 We say that ignores the CMA's further finding in the very same sentence, that it would

24 impact on the ability of TMG to raise additional equity finance. That is not an answer.

25 Then you see B:

26 "CMA's fear about a ...(reading to the words)... but D&D would not commit to a final

1 time frame in which it would do so."

2 Then C, over the page. The blind trust, there was a time commitment there, although

3 we note it was, (a), open ended and (b) in terms of 18 months, actually quite long. In

4 any event, that is no answer to the position in relation to the majority of the shares, for

5 which there is no time commitment under which full independence would be secured.

6 Then D is the point about equity finance versus debt finance, which I have already

7 dealt with. That is Mr Beal's skeleton.

8 Then just to pick up -- I can do this very quickly -- on what Mr Beal said yesterday.

9 Does the Tribunal have the transcript from yesterday?

10 **THE CHAIRMAN:** Yes.

11 **MR O'DONOGHUE:** Yes.

12 It is remarkably brief. It is one page out of, I think, something like 180. It starts at 113.

13 **MR BEAL:** I am sorry to rise, we don't have a copy of the transcript but I can

14 remember roughly what I said yesterday.

15 **THE CHAIRMAN:** I hope so. It should reflect what you said.

16 **MR O'DONOGHUE:** It starts at line 16.

17 **THE CHAIRMAN:** It is only fair that you read it out.

18 **MR O'DONOGHUE:** "Please can I move on to the capability and commitment criteria."

19 Mr Beal's first point, 21:

20 "Once it is an independent entity, it will be able to access the equity and debt markets

21 to be able to finance any additional investment ..."

22 With respect, that is not correct. The finding in relation to the challenges of accessing

23 equity finance are unchallenged.

24 **MR BEAL:** The point is that they can access them, but only with shareholder support.

25 Not that it can't access them.

26 **MR O'DONOGHUE:** There are two points there, there is the point about what would

1 the shareholders make of this.
2 The second point is, in any event if the share price is depressed, is it realistic to obtain
3 funding even if the shareholders are otherwise on board. Now, of course, these are
4 not unrelated, but they are at least conceptually two distinct points.
5 Then, bottom of the page:
6 "The concerns about [undervalued] shares ... misplaced. We have an orderly
7 procedure ..."
8 The first point: the concern about undervaluing the shares is not misplaced, again that
9 is common ground. finnCap agreed with that.
10 The orderly procedure, with respect, does not assist Mr Beal; the problem with the
11 orderly procedure is that in relation to blind trust it could extend for up to 18 months,
12 for the other shares it is completely open ended. So for orderly process, we read delay
13 and the CMA was perfectly entitled to have regard to delay.
14 Then over the page, he says:
15 "... whether institutional investors buy or sell in a fully tradeable market is a matter for
16 them. We have no control over it."
17 This is put forward as a virtue, in my submission this is part of the problem. If you are
18 divesting to shareholders who have no obligation under the terms of the final
19 undertakings, even as varied, to effect divestitures within a specific period of time,
20 never mind in specific volumes, that is open ended and uncertain. To compare that
21 uncertainty and completely open ended nature with the certainty of a purchaser who
22 is subject to an agreement where the deadlines are fixed, with respect, does not bear
23 comparison.
24 Then at line 10, he says:
25 "No reason has been given to suggest the shareholders would veto that."
26 Again, it is not simply a question of veto. There is the question of the attractiveness

1 of equity financing in circumstances where the price would be depressed, as is
2 common ground.
3 Then at 18, he says:
4 "TMG will stand or fall in due course on the quality of its product and therefore the
5 performance of its management and its business more generally."
6 That is true as far as it goes, but as we saw on paragraph 64 there is a separate and
7 further concern in relation to the specific issue of funding. Again at the risk of
8 excessive repetition, that is unchallenged.
9 On my first point, there is actually no challenge to the decision's findings concerning
10 the adverse impact on the AIM admission on TMG's ability to access in particular
11 equity finance. As I showed the Tribunal, these concerns are very, very far from being
12 theoretical. Acquisitions and access to funds for acquisitions were highlighted as
13 a particular feature of this market and as a particular concern in the case of
14 a purchaser of TMG.
15 The second point is the question of delay. We can go back to the decision, there are
16 a handful of references which in my submission are important and have been glossed
17 over.
18 So it is C1. If we start at paragraph 15. If the Tribunal note on the left, the heading
19 "Assessment of the proposal", my basic submission is the question today on
20 uncertainty was firmly part of the assessment, was a separate concern or further
21 concern to the other concerns in terms of the purchaser approval criteria. 15, again,
22 as is common ground, not raised at the stage of the final undertakings. Just for your
23 reference, in the remedies papers the CMA did expressly invite D&D and TMG to come
24 forward with any and all further remedy proposals at that stage. It is C16, 346,
25 paragraph 17.
26 No good reason has been given for why the AIM admission could not have been

1 proposed at an earlier stage, as opposed to late in the divestiture period.
2 In my submission it is important to bear in mind that as at the date of the decision,
3 29 March, there were five weeks to go to the divestiture deadline. This is very, very
4 late in the process for something of this kind to arise and in substance, by the time the
5 decision arose in front of the CMA, we were at the end of the divestiture period or
6 towards the end rather than at the mid-point. That is important in terms of the
7 practicalities of what is being suggested.
8 17 in my submission is a very important paragraph:
9 "The timetable is not intended to accommodate new and complex proposals, such as
10 AIM admission not foreseen at the time of the report. To do so could require further
11 extension, thereby prolonging a period of uncertainty for TMG in which its future
12 ownership is unknown, increasing the risk of deterioration of assets and competitive
13 capability, this would undermine the objective of the final report in adopting
14 a divestiture process that could quickly and effectively address our competition
15 concerns."
16 Again for your note, the CMA did indicate to the parties, back I think in January or
17 February, that further extensions to the divestiture deadline were unlikely to be
18 granted. That is at C2, 23, 737. So the question of delay was uppermost in the CMA's
19 mind at all stages.
20 Then at paragraph 40 we have the three-week consultation point which Mr Lask has
21 dealt with at length. You will see in paragraph 40 that, first of all, there is
22 a cross-reference to paragraph 17 which we have just seen and, secondly, the third
23 from last sentence:
24 "This would likely require further extension to the divestiture period, taking it beyond
25 the date indicated."
26 Now, there was a faint suggestion that, well, the CMA should dispense with the

1 consultation period. As we noted in our skeleton, a number of third parties did
2 comment at the remedies stage before the CMA, so the suggestion in my submission
3 that in relation to an unprecedented proposal late in the day consultation could be
4 either dispensed with or merely truncated is completely and utterly unrealistic.
5 Just to round off the reference in the decision. In my submission, the CMA was not
6 simply concerned with the narrow point in paragraph 40 that it may have to consult for
7 three weeks, although that is manifestly correct or at least manifestly free from public
8 law error. If we then look at, for example, 57, two-thirds of the way down:
9 "A very substantial overlap with shareholders ...(Reading to the words)... thereafter."
10 59, over the page, last sentence:
11 "It is unclear how long ...(Reading to the words)... shareholdings would last."
12 Then 66:
13 "The same point could persist for an unknown period of time."
14 Of course, as I noted, even for the blind trust the most that D&D was willing to say was
15 that perhaps within a period of 3 to 18 months there could be an orderly divestiture of
16 that small rump of shares. But, of course, that period certainly at the upper end of the
17 range is itself a very substantial period of time. But the critical point is there was
18 absolutely no certainty in relation to any of these shares as to when the identically
19 overlapping shareholders would end and what the unravelling of that would be.
20 That is the question of delay.
21 On uncertainty, of course, delay itself creates uncertainty but there was further
22 uncertainty that was within D&D's sphere. If we go back to paragraph 48 of the
23 decision, you will see there is a reference in the last sentence to a business plan and
24 the CMA notes it is not yet available. One would have thought that a business plan
25 was a pretty important part of the overall package, but not available even at the date
26 of the decision.

1 If we then go to tab 27 in the second C bundle, please. Page 758, tab 27. So the
2 CMA asked the fairly obvious question: well, have you spoken to the shareholders
3 about all of this? The answer is, "Well, we haven't, because we can't".
4 Of course, this was not a trivial matter. Some of these shareholders are foreign
5 domiciled funds. There are restrictions on whether they can trade on AIM shares, so
6 this was not a trivial point in terms of dotting Is and crossing Ts. It raised potentially
7 quite fundamental issues.
8 Of course, as Mr Lask submitted, the bird in the hand is the private sale process in
9 that agreement which has now crystallised. The bird in the bush is the AIM admission
10 proposal. If one is looking at these two proposals side by side and one compares the
11 questions of certainty, delay and contingency, there really is no comparison. So this
12 did not arise in a vacuum, at this stage the CMA was essentially looking at what was
13 certain, what could be delivered within the divestiture timeline and many, many
14 elements of the same admission proposal were very much at large.
15 Fundamentally, the CMA had no idea when common shareholdings would end.
16 Fundamentally, we saw the multiple references to a long-term investment strategy.
17 You cannot have a long-term investment strategy where there is an open ended
18 process whereby this common shareholding is unwound. There will be no long-term
19 investment plan for that period, because the future owners of the company remain
20 unknown and uncertain as to when they will emerge.
21 **MR LOMAS:** Are you not pushing that a bit too far? There are many quoted
22 companies that have long-term investment plans but have changing shareholder
23 registers every day.
24 **MR O'DONOGHUE:** That is true. Of course, this is an unusual situation where
25 something has to be divested. There is a mechanism under the AIM admission --
26 **MR LOMAS:** You are talking about after the divestiture has taken place, under the

1 Spinco arrangement. A company in those circumstances develops an investment
2 plan, as done at any other quoted company, even though its shares are being traded.
3 I am having problems following quite that point.
4 **MR O'DONOGHUE:** There will ultimately be a new controlling entity for TMG. It is
5 a rather basic point. I mean, if the private sale process is approved, say, next month
6 that long-term investment plan can be made at that point.
7 **MR LOMAS:** Yes. Sure.
8 **MR O'DONOGHUE:** If and when there is change of control by the admission, that will
9 by definition be delayed and the plans will at that stage inevitably change. There is
10 simply a gap or a stagger in terms of when --
11 **MR LOMAS:** I see. You are talking about the gap between a concluded private sale
12 and a concluded float, so there is uncertainty for that dislocation, not after the float?
13 **MR O'DONOGHUE:** Who would commit for a long-term plan for the interim? It is
14 an oxymoron.
15 **THE CHAIRMAN:** Let's look at it. Go back one stage. If you are an institutional
16 shareholder and you get a note saying this is what we are going to do and that we are
17 going to, basically, give you these shares in TMG and we will see what happens on
18 the price and you can sell your shares and you may get a good price, you may not get
19 a good price. You may say, well, I don't want that. Then where are they?
20 **MR O'DONOGHUE:** That is why I took you to the point that the shareholders had not
21 even been consulted.
22 **THE CHAIRMAN:** There are two separate questions.
23 The question that is being asked by the CMA is that are they able to hold shares? The
24 answer probably is yes. But what if they just say, well, we don't want this?
25 **MR O'DONOGHUE:** Sir, that is what I mean by "open ended". Open ended in terms
26 of time and open ended in terms of lack of any firm commitment as to when would be

1 the guillotine or date by which there must be a divestiture. There has been no
2 commitment to that in any shape or form. It is open ended in every sense.
3 **THE CHAIRMAN:** Yes. Okay.
4 I am sure there is an answer to the point I have given, but it just crosses my mind.
5 **MR O'DONOGHUE:** As I move on to my final point. There is one useful contextual
6 point. If one goes back, we can pick this up in the index to the C bundle. So if we go
7 to the second page of the index. It starts at item 16. You will see, sir, that the CMA's
8 notice of possible remedies, 18 May, remedies hearing obviously which included
9 submissions by the parties in writing as well, final report, final undertakings. If you
10 look at those deadlines, it is a period of about five months for the consultation and
11 formulation of the final remedies proposal.
12 In my submission, that gives you a good indication of at least done properly what
13 a proper remedy review and discussion process would look like.
14 Of course, I accept in the context of a variation one needs to be practical. But it
15 underscores in my submission the point that when the CMA has to make a decision,
16 five weeks before the divestiture deadline, the complexity and uncertainty and delay
17 associated with that proposal, is itself a sufficient reason to reject that proposal. The
18 normal deadlines one sees for the formulation of remedies provides some useful
19 context, at least, in relation to that point.
20 **MR LOMAS:** The five-month period is about the substantive question about whether
21 you have to divest and whether you have to divest all of it.
22 The five-week period which may be, I understand, too short, it is about a different
23 issue, it is about the mechanism for the divestiture. So they are considering different
24 issues.
25 **MR O'DONOGHUE:** In part, sir, of course the remedies papers and remedies
26 process -- I mean had the admission proposal been made as it should have been,

1 back then, either one of these --

2 **MR LOMAS:** Of course.

3 **MR O'DONOGHUE:** The point I am making, sir, is that process and the timelines are
4 there for a reason, and that gives you an indication as to what the proper process for
5 a proposal of this kind, at least at that stage, would take.

6 I accept in the context of a variation where there is a divestiture period the CMA has
7 to do the best it can, but what I am trying to do is really draw a contrast between five
8 weeks and five months. In my submission, that tells you something useful in terms of
9 what can reasonably be expected of the CMA in such a context.

10 **MR LOMAS:** They are periods for considering different issues.

11 **MR O'DONOGHUE:** Somewhat, but again the CMA is being asked at this stage in
12 effect to approach (inaudible) proposal, had the proposal been made in the ordinary
13 way and the remedy stayed that is the timeline which would have been followed. We
14 say it is there for a reason.

15 Finally, sir, in relation to the impact on TMG, just to give you the references to our
16 evidence and how it links with the decision. We can go, sir, to Pepper 1 in the
17 F bundle -- in view of the time, I am not going to go back to our letter of
18 27 February 2023. The Tribunal has that and you can see what it says.

19 In terms of Pepper, if we can start at paragraph 16. He emphasises:

20 "... compete in the market an appropriate business plan and objectives ...(Reading to
21 the words)... there was no business plan."

22 Then 33, 34 and 35:

23 "... been increasingly concerned by the significant time cost and resource constraints
24 involved in pursuing both options simultaneously without clarity ...(Reading to the
25 words)... fulfil our day-to-day duties."

26 Then you see the reference to a substantial seven-figure sum for adviser's fees.

1 Then, 38, important there was a call with the CMA on 21 March and you will see:
2 "We were concerned that a listing would not necessarily provide the business with the
3 independence ...(reading to the words)... the purpose of growing the business."
4 Then there is a confidential bit I would invite you to read.
5 Then at 46 to 48, it is confidential but he gives a number of examples as to how the
6 significantly increased workload associated with the twin-track process, that that has
7 led to concrete implications for the business in terms of important workstreams being
8 delayed.
9 Forgive me, sir. **(Pause)**
10 We say that these actual retention terms are actually an overwhelming objection to the
11 AIM admission proposal and D&D has essentially ignored them.
12 Sir, to go back to your decision, your question in relation to, well, where do we find this
13 in the decision. I can make a number of points.
14 First, paragraph 17 of the decision. It talks about uncertainty for TMG, risk of
15 deterioration of assets and competitive capability. I accept, as Mr Lask did, that there
16 is not a granular exposition of the points in Pepper, I must accept that. But in my
17 submission, for example, the matters one sees at 46, 47 and 48, they are
18 quintessentially matters of competitive capability, because what he is saying is that
19 initiatives that would otherwise have been scheduled to go ahead have been unable
20 to go ahead because of the workload. Frankly created by the twin-track proposal.
21 Of course, I have shown the Tribunal that the particular concerns in relation to funding
22 are set out very expressly in paragraphs 64 and 65 of the decision.
23 Just to wrap up, sir. D&D has been critical that the CMA has not weighed up the pros
24 and cons of the AIM admission. But in terms of the benefit of the proposal, let's quickly
25 look at what D&D has actually said.
26 If we start at C29, 775.

1 **THE CHAIRMAN:** I am just making a note, so I will come back in a second, all right?
2 **(Pause)**
3 **DR BISHOP:** Sorry, what was the reference?
4 **MR O'DONOGHUE:** It is the second C bundle, tab 29, page 774.
5 **DR BISHOP:** So the twin-track divestiture process?
6 **MR O'DONOGHUE:** Correct.
7 **THE CHAIRMAN:** So on this paragraph 17, it doesn't, let's say, spell out the particular
8 facts that you put in Pepper 1. But you say those actually would be covered, because
9 they are just illustrative and reflective of the risks that they were concerned about. So
10 the CMA say, "Well, this is our concern" and you say, "Well, those concerns are right",
11 because of what you say in Pepper. In assessing the rationality of their concerns, it
12 may be relevant in some way that they are actually right. Even though evidence has
13 arisen after the decision, that evidence is consistent with the decision in assessing
14 whether or not that decision is rational.
15 **MR O'DONOGHUE:** Yes. It is evidence of the subsequent impact that could
16 (inaudible) but, of course, Mr Pepper does say that there was a call prior to the
17 decision on --
18 **THE CHAIRMAN:** Yes, I have seen that.
19 **MR O'DONOGHUE:** With the CMA where this was communicated. It was not done
20 by osmosis or telepathy.
21 **THE CHAIRMAN:** Yes. Okay. Right. What is your next point, sorry?
22 **MR O'DONOGHUE:** There has been a criticism the CMA did not weigh all this up.
23 I just want to look at what exactly they were meant to be weighing up. Because on
24 the TMG side of the scales, we say the objections were pretty overwhelming in terms
25 of the impact of the AIM admission.
26 Then on the D&D side -- they say for example at 2.3 in tab 29 that the twin track would

1 provide a better means of securing the divestiture. That I don't understand.
2 Then, over the page, they make the competitive stimulus point.
3 If one goes back to the decision in tab 1 of the first C bundle, it is written largely with
4 uncontested points that the divestiture process at that stage was working extremely
5 well. For example, at paragraph 4 making material progress, clear demand.
6 Paragraph 39, you see the shortlisted purchasers.
7 We then, finally, go to the second C bundle at 24. Page 738. This is 10 February, so
8 this is quite late in the process. It is cropped in my copy, bottom of the page, "...
9 continue to make good progress [over the page] with prospective bidders, we are
10 working diligently on the sale process".
11 The Tribunal, in my submission, is entitled to ask given that this is the position as of
12 10 February and the twin-track proposal went in 13 days later, what has been the
13 fundamental change in terms of the divestiture process justifying this novel proposal?
14 There is no indication, even now, as to what had changed in two weeks.
15 Of course, there was a monitoring trustee which had been appointed and one of the
16 monitoring trustee's many functions was to advise the CMA -- let me give you the
17 reference in the final undertaking, it is paragraph 10.6(iii) and paragraph 11:
18 "The monitoring trustee was bound to advise the CMA if any issues arose in
19 connection with the divestiture process."
20 Including, of course, material delay. There was not a peep from the monitoring trustee
21 that there was any problem in relation to this divestiture process.
22 In the absence of any concern expressed by the monitoring trustee and given that
23 D&D itself was saying only two weeks before submitting the twin-track proposal that
24 good progress was being made, the Tribunal is entitled to ask what is said to justify in
25 effect a volte face only two weeks later?
26 With respect, it is not for D&D to interpose itself with some sort of running commentary

1 and preliminary assessment on prospective purchasers. It is the CMA and CMA alone
2 which has the final say in relation to the approval of purchasers, and that occurs at the
3 end of the process and it is simply none of D&D's business to provide an interim and
4 unsolicited update that in their view more competition tension is needed.
5 The whole point of this process with the shortlisting is to generate in a particular
6 context a competitive process and the outcome of that process is what it is.
7 Sir, those are my submissions.
8 **THE CHAIRMAN:** Yes. You have kept within your 45 minutes. Thank you very much.
9
10 **Reply submissions by MR BEAL**
11 **MR BEAL:** I have a number of points in reply, I will try and be as brief as possible.
12 The only logical order to them is a chronological one, in the sense of when issues
13 arose. I will endeavour to respond to them one by one.
14 One of the early points, but it is a consistent point that has been raised, is the alleged
15 novelty of what we are proposing, at least in a domestic UK context. Our short
16 response to that is it is not a novel remedy for the EU Commission, notwithstanding
17 Dow/DuPont, and I took the Tribunal to that in opening. Nor is it a novel remedy for
18 the US, which has a very sophisticated antitrust regime, as the Tribunal well knows.
19 Of course, everyone has to start somewhere with something, so it has to be assessed
20 on its merits, in our respectful submission.
21 The questions that were put by the Tribunal first thing this morning were for specificity
22 about exactly how the sales process would take place. So if I can start with that.
23 Where we are at the moment is that Callisto, as Spinco, has been established, it has
24 been created. It is, as I understand it, a PLC, independent directors have been
25 appointed to it. That company, therefore, exists but it does not hold any shares in
26 TMG.

1 The consequence of putting into effect the plan of arrangement would be, as the deed
2 of arrangement and the plan of arrangement shows, that the shares in TMG would be
3 transferred to Spinco and Spinco would then hold them. Spinco would then receive
4 those shares for consideration, because it is receiving those shares in return for
5 allotting shares in itself to the existing D&D shareholders.
6 As it happens, that plan of arrangement was scheduled to go before a shareholder
7 meeting on a date shortly after the final decision was taken. It was then postponed,
8 because the final decision was taken and, therefore, regulatory approval for it had not
9 been given. There was a date in the diary and a listing statement for the plan of
10 arrangement to be given effect. It did not go ahead because of the final decision.
11 **THE CHAIRMAN:** How does that fit in then with the idea that you were saying that
12 you were going to have this as a means to, in effect, encourage higher offers from
13 potential purchasers? Because once you transfer the shares over, is that really the
14 end of the private sale process?
15 **MR BEAL:** The idea, my understanding was, to get the court's approval for the
16 planning arrangement and then not execute it or at least unwind it in the event that
17 final approval from the CMA was not forthcoming.
18 **THE CHAIRMAN:** No, I can understand that bit --
19 **MR BEAL:** But in terms of the execution date --
20 **THE CHAIRMAN:** -- what I am saying is -- but once you have got the shares issued.
21 **MR BEAL:** Yes. Transferred.
22 **THE CHAIRMAN:** Yes. Transferred. And then the shares issued back by Spinco in
23 favour of the D&D shareholders, sure that is the end of the private sale process?
24 Because the rationale that was being put forward in the twin-track proposal is we want
25 this in order to generate, let's say, a better offer or better offers from the private sale
26 process. So that stops, doesn't it?

1 **MR BEAL:** I think the short answer is if there was still an outright third party interest
2 in TMG, then they would have to deal with the independent directors of TMG and
3 acquire TMG through Spinco. So the acquisition would then be of Spinco by any
4 outright third party purchaser. But, yes, D&D's interest at that point would be gone --
5 **THE CHAIRMAN:** Yes. Exactly.
6 **MR BEAL:** -- because it would have divested itself of the shareholding.
7 In terms of canons of construction, I can go back if necessary and repeat the
8 submissions I made as to the definitions of "divestiture", "approved purchaser", "final
9 disposal", et cetera. All of those are in the C1, tab 19, page 640 and onwards in the
10 final undertakings, but I don't feel the need to do that.
11 The short point is the mechanism by which final disposal has to take place is through,
12 necessarily, the transfer of the shares in TMG. By the way, I should add that of course
13 if there is an outright purchase from a third party purchaser, ie a non-Spinco solution,
14 then that purchaser will also have to acquire TMG's shares. My understanding is that
15 an outright purchase would typically involve a special purpose vehicle, which would
16 be created for the purpose of acquiring those TMG shares and see you have a new
17 company formed anyway.
18 So the differences between the different solutions simply reflect the corporate finance
19 world and tax considerations, typically. Therefore the idea that Spinco is a new
20 company is not the radical departure that it has been perhaps portrayed as. Spinco is
21 an independent legal entity and for the purposes of the construction of the final
22 undertakings, it is appropriate to view it as such. It is as simple as that.
23 In terms of canons of construction, I have cited in our case written pleadings and
24 skeleton the Trump Supreme Court decision where I think it was Lord Hodge says,
25 "You adopt a remarkably similar approach, whether or not you are looking at planning
26 permission, contractual documents or anything else".

1 The point was raised this morning about the concept of the shareholders themselves --
2 **THE CHAIRMAN:** Could you just give me the bundle reference of the Trump
3 decision?
4 **MR BEAL:** Yes. Bundle of authorities 1, so that is tab 12 --
5 **THE CHAIRMAN:** Yes. Okay. Thank you.
6 **MR BEAL:** -- page 362.
7 The clauses that we looked at this morning included, obviously, the standard singular,
8 includes the plural. We have the cross incorporation of the Interpretation Act 1978 to
9 the same effect in clause 178.
10 It is not our case, and it has not been our case, that the concept of multiple
11 shareholders being treated as purchasers would come foursquare within the final
12 undertakings. That is why when we look at the way we put it in the initial proposal, we
13 were saying there is nothing to stop you considering in substance whether or not this
14 is a suitable purchaser because the shareholders can be viewed and you can take
15 a view as to whether or not you like the shareholders or don't like the shareholders.
16 We were obviously inviting the CMA to review the shareholder composition, because
17 we recognised that certainly it would not be appropriate to have D&D management
18 shareholders maintained in the business.
19 **THE CHAIRMAN:** So you accept that to have multiple purchasers does not fall
20 squarely within the undertaking?
21 **MR BEAL:** The multiple purchasers concept, if one had, for example, five key
22 shareholders who were in a joint venture, putting themselves forward as a purchaser,
23 then it could fall within the scope of the final undertakings, arguably, because singular
24 includes plural and so on. That is not the way we have run our case and the reason
25 why we have not run our case that way is for the simple reason that there are more
26 than 14 shareholders in D&D and whilst one can point to the key composition of the

1 shareholders being those shareholders and therefore you can take a view as to
2 whether or not there is anything inappropriate about those shareholders maintaining
3 a shareholding in D&D, TMG, but squeezing them within the confines of the concept
4 of a single disposal to a single purchaser, or even construing "single purchaser" as
5 encompassing multiple purchasers is a meaning we thought was too much of
6 a stretch.
7 **THE CHAIRMAN:** Yes. That's okay.
8 **MR BEAL:** But that does explain, with respect, how this process has taken place.
9 I think, sir, you have referred to it on a few occasions as a mystery. The reality was
10 we were very much focused on the end result and we were concerned to achieve
11 a situation in which TMG would be functioning as an independent competitor.
12 Why was that appropriate? Well, because that is exactly what the final Report
13 required. So in answer to the next question from the Tribunal this morning: which parts
14 of the final Report are you saying are relevant to the construction of the undertakings?
15 The answer to that is that bundle C1, tab 18, pages 589 to 590 where the remedy is
16 looked at. Then the rationale for divestiture is dealt with and there are specific
17 passages at page 588 to 589 and 608 to 609 where the rationale for divestiture is the
18 establishment of a valid and viable competitor in the market.
19 So the concern in the final Report is a reduction from four to three in the key players
20 in the market. We were very keen to establish a return to four. So when we are looking
21 at, in the twin-track proposal, we are suggesting that either by listing TMG directly and
22 transferring the shares over, effectively the divestiture through dividend in specie of
23 the D&D shareholding in TMG, you end up with a position where you are essentially
24 shifting the ownership of the company in TMG to a non-D&D based ownership
25 structure. That was the idea. Because of the independent institutional shareholders,
26 who invest in multiple firms around the world, it is not D&D specific and therefore there

1 is not the D&D taint with the ongoing company. That was our concern.
2 When you look at Spinco as a development from that, it was simply because there
3 was in the provisional decision that rather strange reference to, "We don't think this
4 would be a suitable purchaser". The substance, as the Tribunal pointed out to Mr Lask
5 this morning, of the provisional decision was about the core concern. The core
6 concern here has always been about the common identity of institutional shareholders
7 in D&D and TMG.
8 So when we then responded to the provisional decision, we tried to do two things.
9 I will be candid about it. We were trying to deal with the suggestion that somehow it
10 was important that there be only one purchaser, even though that wasn't really
11 deployed in the provisional decision, but we were also seeking to maintain the point of
12 substance, which was that the concern about common institutional shareholders was
13 not a valid one and we could not see any rational or sustained basis for it and that
14 formed the basis of the critique.
15 When you look throughout that response to the provisional decision, it is repeatedly
16 considering two different ways of doing things. It is either saying TMG can be listed
17 on AIM, what does that require? Well, of course, you can't be listed unless you are
18 a public company. TMG is not presently a public company and therefore you would
19 need to convert to a PLC and then have the shares in TMG listed. D&D shares in
20 TMG would then have to effectively be transferred over to TMG through species
21 dividend of some description. Or you have Spinco and Spinco is simply much easier.
22 So the response to the provisional decision was at all stages, whether it is TMG or
23 Spinco, ie a parent, and ultimately the issue for this Tribunal on Ground 1 is: does the
24 way that the proposal is presented to the CMA at the end of the process, before the
25 final decision, raise the option, foursquare, of Spinco being deployed as an answer to
26 any concerns there may be about a single purchaser requirement?

1 The answer is it does. It says so. But it does not deal expressly with anything in the
2 provisional decision that was saying it was important for there to be only one
3 purchaser, because that is not what the provisional decision said and we were
4 responding to the provisional decision.
5 The reply that we have settled, the pleading that we have settled is entirely consistent
6 with the way that we have put our case.
7 **THE CHAIRMAN:** The mystery I was putting was that you say that the Spinco came
8 as a result of the implicit concern in the provisional decision. But then when you
9 showed me the schedule to the twin-track proposal, it indicates that actually you had
10 this in mind as a possibility at the time you made the twin-track proposal.
11 **MR BEAL:** The Canadian lawyers who are involved in dealing with the plan of
12 arrangement for the Ontario court, my understanding -- I think there was some
13 evidence about this but it has been ruled inadmissible, so I can't go there -- is that
14 plans of arrangement typically involve a Spinco, for regulatory reasons. So whilst one
15 can imagine a situation in which TMG itself reregisters as a PLC and then simply
16 proceeds to list, my understanding is that for corporate finance reasons over in
17 Canada it is simply easier to ship the shares off into a new Spinco, have that Spinco
18 listed as a PLC and that Spinco then lists its shares. There we are.
19 This isn't some wild attempt to circumvent the merger guidelines. This is simply
20 corporate finance dictating how this is done. The M&A people are determining how
21 this is done. It is not some conspiracy to try and do the CMA out of proper merger
22 remedies.
23 Spinoff procedures are a proper merger remedy. The fact that they have not yet been
24 accepted by the CMA does not, in my respectful submission, mean that they should
25 not be accepted by the CMA in an appropriate case. I would be surprised if the CMA
26 were saying, "We would not accept these in abstract come what may".

1 **THE CHAIRMAN:** I don't think they are saying that. What they are saying is that
2 when you have the undertakings in the form we have it and we are some way down
3 the divestiture process, and there are requirements possibly to have to consult and
4 get it right, it is just impracticable to raise it at this stage and whatever concerns they
5 have are not going to be allayed within a reasonable period of time.
6 **MR BEAL:** On the timing point, of course, the proposal initially went in on 23 February,
7 I think it was.
8 **THE CHAIRMAN:** That's right.
9 **MR BEAL:** We are now four months down the line. For better or worse, that is where
10 we are.
11 **THE CHAIRMAN:** That is what happens when you challenge a decision.
12 **MR BEAL:** Of course. But delay, therefore, with respect, cannot be the determining
13 factor, because imagine that there had been a willing mind willing to engage with this
14 concept of deploying in the UK context what is said to be a novel proposition. Then it
15 could have been managed by now. So the delay is not operative delay on our part.
16 Yes, of course, it wasn't part of the original proposal, but the reason it wasn't part of
17 the original proposal is because we thought we would be able to secure a successful
18 disposal of the business through a third party sale.
19 **THE CHAIRMAN:** Yes. That -- yes.
20 **MR BEAL:** It is when we could not do that and when -- for reasons I am not going to
21 elaborate on, but they are in the evidence -- that was proving excessively difficult, for
22 a number of reasons, that we then ventilated an alternative way of trying to introduce
23 a competitive dynamic into the market.
24 While I am on the subject, let me just deal with the question of evidence which
25 chronologically came up much later but it is convenient to deal with it now. The
26 evidence is in there. It is in there in the form of a series of submissions, including the

1 one that my learned friend, Mr O'Donoghue, just took you to, where we are referring
2 to the advantages of avoiding a constrained or forced sale by introducing a different
3 competitive dynamic which will avoid the need for people to say, "I am going to pay
4 you less because you have no option but to take my offer".
5 **THE CHAIRMAN:** Yes, but --
6 **MR BEAL:** That evidence was in there, but that was reinforced by Mr Proud's witness
7 evidence that was then ruled inadmissible, because it was said to duplicate material
8 that was already before the CMA. The CMA has never, ever said, and it still doesn't
9 say, that there aren't benefits that would accrue from this proposal. They have
10 recognised that the proposal has benefits, but their concern, not obviously TMG's
11 concern, which is not reflected in the final decision, CMA's concern is that there is
12 a risk.
13 **MR LASK:** Sorry to interrupt.
14 I am not sure the CMA has recognised that there are benefits. It is acknowledged in
15 the decision that submissions were being made about benefits, but it hasn't been
16 accepted by the CMA.
17 **THE CHAIRMAN:** Yes, but whether that is right or wrong, what I am concerned about
18 is what you were saying earlier. If the benefit is a carrot which will encourage people
19 to make better offers and you can have a higher private sale, I can understand what
20 that is all about. But when you say to me that actually the idea was to get this Spinco
21 idea off as soon as practicable, once you have done the share transfers, then is that
22 not the end of the carrot being dangled in front of the potential purchasers to get a high
23 price?
24 **MR LOMAS:** Once you have done the sale, the final undertakings have been
25 satisfied?
26 **MR BEAL:** That's true. We would have secured approval in principle and then we

1 would have been pursuing a twin-track strategy by going ahead as far as we could
2 with the implementation of plan of arrangement and pursuing offers in the market. But
3 I agree with you that once completed and executed the plan of arrangement brings to
4 an end that process. But that would have taken, say, three to four weeks. In the
5 meantime you could have been negotiating with offers in the market and if you
6 obtained a better offer out of the market that reflected the economic value of the
7 business, then you have the benefit of both of them operating in parallel and then you
8 go with whatever works once you hit that divestiture period.
9 The ambition was to have that done and dusted by the beginning of April, well ahead
10 of the 5 May divestiture deadline. Then, you know, you have jumped through the
11 hoops and you are done. That was the idea. But of course, the final decision came
12 out and it was negative. The provisional decision came out and we couldn't take any
13 comfort from the fact that we were likely to get approval, so we had to keep on with
14 most things not being fully executed.
15 We did then, in any event, decide to go ahead and incorporate Spinco and that bit has
16 been done. As I have said, we had to cancel the plan of arrangement meeting and
17 the court dates and the listing statements being pulled as well, as I understand it.
18 This was all, however, about the means to an end. It was about establishing a viable
19 TMG which did not have a risk to the competitive structure, which could function on its
20 own two feet. This case, therefore, comes down to,what we are suggesting as a way
21 of doing this, does it present a real as opposed to a theoretical risk that the aim behind
22 divestment, namely the removal of the SLC, won't be achieved?
23 Or, in the words of the final undertakings, can it reasonably be expected that the
24 competition concern won't be addressed? This case is all about the risk of common
25 institutional shareholders somehow softening competition in the market, which is why
26 the evidence that is in the final decision on that is so important.

1 Before I get to what is essentially Ground 2, I do need to, I think, just cover off a few
2 things on Ground 1 and Ground 3 first.
3 Firstly, Mr Lask very sensibly accepted that the provisional decision response by us
4 every time there is a reference to newco or the parent company, that is reference to
5 Spinco as a proposition. I am not going to repeat the submissions I have already
6 made. The Tribunal will simply have to read that decision.
7 As a matter of law, however, that document, it is a bit like the terms of a contract.
8 Once you know what is there, it is for this Tribunal to construe that document and work
9 out what it means. There is no dispute that that document says what it says. What it
10 isn't open, with respect, to the CMA to do is say, "We misunderstood what that
11 document said and you have to give us the benefit of the doubt and assume it doesn't
12 say now what it does in fact clearly say".
13 That is not the way that Ground 1 operates and nor is it the way it should operate as
14 a matter of law.
15 **THE CHAIRMAN:** As I understood it, they were saying yes, there is no margin of
16 appreciation, we have no flexibility in relation to the interpretation of the undertakings.
17 But we do believe there is a margin of appreciation in relation to the quality of factual
18 material put to us and the degree of understanding of that, against which we apply
19 a set contractual measure.
20 **MR BEAL:** The question ultimately is, as a matter of fact, does the proposal include
21 a reference to Spinco and the Spinco proposition? If the answer as a matter of fact to
22 that is, "Yes, the proposal does include that", then the question is: why wouldn't that
23 be a capable of being a purchaser for the purposes of the final undertakings?
24 My submission to you is that the PD response makes it abundantly clear, supported
25 by the finnCap letter of support, that what is envisaged at least in part, or as one of
26 two options, is that a new parent company is incorporated and it is that parent

1 company that has its shares listed on AIM and that is effectively being treated as
2 a proposition, were it to be necessary to identify a single purchaser for these purposes,
3 rather than treating TMG as listing its own shares in itself.
4 But I do reiterate that the provisional decision did not take the point that is now being
5 taken against us. Had it done, then it would have undoubtedly have been more
6 explicit. But it is a question of construction of a document and the construction of that
7 document is necessarily -- this is not an error of fact case. We are not saying they
8 have missed an obvious fact. It's a question of what does the proposal actually say
9 and it either says what it says or it doesn't. So we do say that is an important point.
10 It is only in the final decision that this issue about whether or not it is a single purchaser
11 or multiple purchasers has come to light. If that point had been addressed in the
12 provisional decision, it would have come to light sooner and it would have been more
13 squarely addressed, arguably. But just because it was not more squarely addressed,
14 does not mean it was not addressed full stop. It clearly was, on any view, repeatedly
15 referred to as being one of two options to have the parent company listed on the AIM.
16 So the decision that we challenge and the error of law that, therefore, arises from
17 Ground 1 is the conclusion that a variation to the undertakings is needed. Whether or
18 not that conclusion is right necessarily turns on the construction of the undertakings,
19 alongside the proposal as it has been --
20 **THE CHAIRMAN:** Yes. So you accept on the original proposal a variation would be
21 needed, but in relation to the proposal as set out in the response to the provisional
22 decision and the finnCap letter, you say that you are putting forward two options,
23 including one with a single purchaser and that would fall within the undertaking?
24 **MR BEAL:** I don't think the initial proposal engaged with the issue that was only raised
25 in the final decision.
26 **THE CHAIRMAN:** No.

1 **MR BEAL:** I think we were simply trying to get to the nub of the issue and the
2 substance of the issues, which is ultimately this is going to be an independent body in
3 a market. What market is it going to be in? Well, it is going to be in the listed AIM
4 securities exchange and, therefore, it will be functioning as a PLC in the market, but
5 with all the benefits that being a listed entity in a securities exchange brings, such as
6 fluidity, liquidity and the ability to raise additional finance if the shareholders approve
7 it.
8 **MR LOMAS:** Sorry to return to this, but if we are in the, sort of, last strokes of the last
9 strokes, so to speak.
10 Have I got it right that what you are saying is normal canons of contractual
11 interpretation apply to the final undertakings. I think that is probably common ground.
12 **MR BEAL:** Yes.
13 **MR LOMAS:** You are not saying that those canons of contractual interpretation apply
14 to the proposal, are you?
15 **MR BEAL:** Yes, I would.
16 **MR LOMAS:** You would?
17 **MR BEAL:** I would.
18 **MR LOMAS:** Even though it is a unilateral document put in to a regulator?
19 **MR BEAL:** Well, it is a unilateral document but it is the basis for -- I mean, imagine,
20 for example, you have a VAT dispute and you don't know whether it is a supply of
21 goods or a supply of services. The entity that takes that decision will be HMRC.
22 HMRC has to look at the contractual arrangements and what is being done on the
23 ground and that will involve a mixed question of fact and law.
24 Now, here we have the proposal that speaks for itself and actually construing the
25 document is something that the Tribunal does day in, day out. So in terms of what
26 does the proposal actually say, your view on that is the same as the regulator's and it

1 is capable of being supported by the objective facts of the document itself.
2 So in the VAT dispute that I have just given an example of, you would look at
3 a contract. If there is a factual dispute as to whether or not something is in fact a term
4 of the contract that might be one thing, but the classification you then give it is the legal
5 overlay. Now, here it would be a question of applying a given document a construction
6 by reference to a legal overlay that is the terms of the undertakings themselves.
7 **MR LOMAS:** Yes. I don't want to get too side tracked in that. But in your VAT
8 example, the VAT authorities would be looking at a contract between a supplier and a
9 buyer to interpret whether it was about goods or services or whatever. That would be
10 a contractual document subject to canons of contractual interpretation between those
11 two parties.
12 Here you have a rather general document put in to a regulator saying: this is our
13 alternative proposal, this is why it is a good idea, it is not drafted in contractual
14 language, it is -- understandably, it is a selling document putting a proposal, seeking
15 to persuade a regulator that this would be an attractive way to go.
16 **MR BEAL:** Yes.
17 **MR LOMAS:** I would have thought the way in which you approach the interpretation
18 of that document was a little different from the final undertakings.
19 **MR BEAL:** Well, it is certainly a less formalistic process. But nonetheless, if you are
20 getting to the heart of what is actually being put forward as a proposal for a decision,
21 then I do with respect say it requires a construction of what the document says.
22 **THE CHAIRMAN:** So you are saying it is a question of construction for us to decide
23 what the response means, rather than a question of fact has D&D changed its
24 proposal and that's a proposal that the changed proposal is something that they should
25 be responding to?
26 **MR BEAL:** In my respectful submission, the Tribunal will need to ascertain what was

1 being proposed to the CMA and that requires looking at the documentation. There is
2 then a question of does the CMA's final decision saying that requires a variation meet
3 the legal requirements set by the undertakings, because if it falls within the scope of
4 the undertakings it does not need a variation, but if it does not fall within the scope of
5 the undertakings then it does.
6 Ultimately, with the greatest of respect, if you find that the twin-track proposal was
7 a good thing and provides benefits for no discernible risk to the competitive process,
8 then Grounds 1 and 3 ought to follow, either we get in on the basis that what we have
9 proposed is within the scope of the undertakings and it makes sense and you remit it
10 to the CMA to have another think, or you take the view it is a good thing and why
11 wouldn't you give permission to vary the undertaking should it need to be done,
12 because it is a good thing and deserves proper consideration.
13 **THE CHAIRMAN:** In which case you need to determine Ground 2 before you come
14 to a view on Ground 3.
15 **MR BEAL:** Well, if I lose on Ground 2, then I have lost on everything. So in a sense,
16 that is the easy bit. Worrying about which particular route to go down in order to
17 accommodate something that you think is a good thing is a second order of priority.
18 Now, logically, Ground 1 comes first because that was the basis of the decision. But
19 if I don't have any merits with Ground 2 -- it is not a merits claim, but you understand --
20 **THE CHAIRMAN:** I do. Yes.
21 **MR BEAL:** -- if I don't have a substantive challenge on JR grounds on Ground 2, then
22 it is over for me anyway.
23 Now, in terms of, if I may keep on moving at some pace, the new document, the new
24 email that was passed up. The email with the request from the CMA for disclosure of
25 the AIM admission document. There is a reference in that email that I will invite you
26 to consider in due course, where CMS is offering in terms to speak to the CMA and

1 offer any documents they want if they don't understand anything. So that is simply
2 another piece of evidence that is before the Tribunal now as to what we were saying
3 to the CMA at the time.
4 On Ground 3, we are not asking in any way -- I hope I made it clear in opening -- to
5 divert, I think it was put, from divestment. That is not our aim. Our aim is simply to
6 get a very modest amendment to the undertakings to allow the listing process to take
7 place, side by side with the possibility of sale for the reasons we have been through.
8 We are not in any way seeking to undermine the competitive position. What we are
9 concentrating on is the mechanism by which divestment is achieved.
10 It was, with respect, wrong for Mr Lask to suggest that we are driving a coach and
11 horses through merger enforcement. You could only respectfully form that view if you
12 thought that in abstract spinoffs were never going to work. If it has to be
13 acknowledged, and it must, that spinoffs might work in appropriate circumstances,
14 then it necessarily follows that spinoffs can be an acceptable means of divestment,
15 just not in this case or in this case, depending on the conclusions the Tribunal reaches.
16 Ground 2. One of the issues that has been raised is whether or not we have evidenced
17 the competitive tension benefit from the proposal. It was, as I have indicated, it was
18 dealt with in the various submissions that were made. Therefore, it was before the
19 CMA. It was initially vouchsafed in some evidence, but that evidence has been
20 excluded: both Mr Franklin Adams and Mr Proud.
21 **THE CHAIRMAN:** I think the point being made is it is a distinction between
22 submissions which they would like to call assertion and evidence.
23 **MR BEAL:** Well, it was --
24 **THE CHAIRMAN:** You know. So if you get, let's say, an expert saying, "I have looked
25 at this, this is a good thing, for various reasons" you can say that is evidence. If you
26 just merely assert, "Okay, by doing this we are going to get a better price or whatever."

1 But then, on the other hand, you may say, "Well, what sort of concrete evidence can
2 you really expect me to have to produce? I'm just relying on a logical point which is,
3 well, if someone has got a choice of whether or not he sells to you, then you are going
4 to get a better price."
5 Because, you know, if you are in the market and there is a row of orange sellers, you
6 can go to one guy and he says, "I want £1 an orange" you can say, "Well, you know,
7 I can go to the guy next door and he will give it to me for 90p." If you have a number
8 of buyers, the buyer says, "Look, I will offer you £1" you can say, "Well, look, I have
9 this other option, I don't need to go to you, I have this other option."
10 So I'm not sure whether it is the sort of thing that you would need, what I would say,
11 concrete evidence as opposed to making it a submission and saying, "Well, that is
12 a logical thing."
13 **MR BEAL:** The relevant parts of Mr Proud's evidence were excluded on the basis
14 that it duplicated material.
15 **THE CHAIRMAN:** No, because I'm saying I am not sure whether or not -- when you
16 are saying you need evidence of something, whether you need, on something like
17 this --
18 **MR BEAL:** Common sense/logic.
19 **THE CHAIRMAN:** -- anything other than a rational argument as to why in the normal
20 course of human events, if you have an option and you don't have to sell, then you are
21 going to get -- or potentially you are going to get -- a better price than if you have no
22 other options, where people think: well, these guys have got no choice, they have
23 a divestiture period, it is going to be sold within a certain period of time, I can get
24 a good price off these guys because there is no other game in town.
25 **MR BEAL:** It may be I am (inaudible) against the wind, my Lord, at 5.25.
26 **THE CHAIRMAN:** No. Don't worry. All I care about is getting the right answer: you

1 know that. Yes.
2 **MR BEAL:** So cutting to the chase, really, on risk. There is a certain tension in the
3 CMA submissions. They say this is all novel but then they seek to invite the panel to
4 defer to their expertise in this area. So there is an unspoken tension there.
5 It was also suggested that the capability and commitment findings were not
6 challenged. They very much are. So at paragraphs 62 to 68 of our skeleton, we also
7 cite various parts of our notice of application, in particular paragraphs 81.5 and
8 paragraphs 85 to 86.
9 Now, the way that the challenge is put is to the findings at paragraph 65 in toto. It is
10 not as suggested that somehow we have accepted bits of it and not accepted other
11 bits. I am afraid I will simply have to leave the Tribunal to look at our pleaded case to
12 confirm that.
13 **THE CHAIRMAN:** Yes. So what is the reference? I looked at it --
14 **MR BEAL:** 62 to 68 of our skeleton. In terms of the notice of application specifically,
15 it is paragraphs 81.5 and 85 to 86.
16 **THE CHAIRMAN:** Yes. I can look at that. Yes.
17 **MR BEAL:** There was a question about proportionality in relation to Ground 2 and --
18 **THE CHAIRMAN:** Yes, I want to know where that fits in. Yes.
19 **MR BEAL:** Mr Lask was asked whether or not he agreed with paragraph 10.
20 **THE CHAIRMAN:** Yes.
21 **MR BEAL:** Now, the way this comes about is in BAA, for your note, page 153 at tab 6,
22 bundle 1 of the bundle of authorities, Mr Justice Sales refers in paragraph 20(2) and
23 in 20(5) to concepts of proportionality that are derived from EU law. In particular, to
24 the Fidessa case and Upjohn. That case law was then explained in Lumsdon as being
25 relevant case law and, therefore, a relevant test in circumstances where an EU
26 institution is challenged and there is a different test when it is a domestic decision

1 challenged on the basis of EU law.

2 What BAA incorporates is an approach to EU proportionality. It is dealing with A1P1,
3 but the learned judge is relying on the cross-fertilised view of proportionality from EU
4 law and, of course, the merger regime is very much based on EU law principles and
5 has always been based on EU law principles, or substantially impacted by them.

6 We do say that Lumsdon, because of Mr Justice Sales' reliance on Fidessa, Lumsdon
7 necessarily qualifies Mr Justice Sales' analysis. Even though it was an A1P1 case,
8 the test of proportionality, therefore, necessarily needs to take into account Lumsdon
9 and, in any event, if one looks at cases such as Daly, which are Convention cases, it
10 is clear from our paragraph 10 which cites both Convention case law and CJEU case
11 law that the approach to proportionality does not require the sort of very light touch
12 that my learned friend would have this Tribunal apply.

13 In relation to Dow/DuPont, the issue really is where do the CMA identify the risk of
14 a particular institutional investor substantially influencing or giving rise to a reasonable
15 expectation that they would behave in a way that would compromise the ability of TMG
16 to compete. Dow/DuPont, as you know, was on its very specific facts where there was
17 common institutional ownership across the entire board, across the entire market.
18 I have already taken you through why the underlying economic literature has moved
19 on and I reiterate the CMA review itself identifies two schools of thought: page 74,
20 bundle H, paragraph 3.12.

21 It identifies in terms of the two schools of thought and that review is not
22 cross-referenced in the final decision and nor is the other school of thought referenced
23 in the final decision. So you have a final decision in circumstances where one can
24 assume institutionally the CMA knows that there are two schools of thought, where
25 there is a reference simply to one.

26 It is no good, with respect for my learned friend, to say, "Oh, well, we are supported

1 by the CMA review" because it forms no part of the final decision. Nor is he supported
2 by further economic literature which seemingly may go the same way, which had not
3 been referred to in Dow/DuPont, because that is all post-decision analysis that is not
4 in the final decision itself.
5 Our complaint is, as I indicated, not that there is one right answer which this Tribunal
6 must find. Our complaint is that the CMA chose solely to focus on one strand of
7 thinking, one type of analysis, without recognising that there was a whole
8 countervailing strand of analysis and a whole countervailing empirical evidence which
9 rendered that concern about risk null and void. You have one school of thought that
10 says, "We think this is a risk as a matter of principle: here is some empirical research
11 that supports it." You have another school of thought that says, "That is simply not
12 right, it doesn't make any sense, there is no rational reason why an institutional
13 investor would choose to do that and, by the way, there is no mechanism by which the
14 institutional investor could do that."
15 All of that countervailing evidence is simply not featured in the final decision at all and
16 our complaint is that it should have done, because it had been recognised by the CMA
17 internally in 2022 that it existed and they can't seek to rely on only part of the proper
18 picture in order to justify their conclusions.
19 Essentially, Mr Lask's submissions repeatedly relied upon the cross-shareholding
20 point and not the common shareholding point. This isn't a case where there is some
21 Citizen Kane character holding multiple shareholdings in companies with some sort of
22 corporate agenda for a group as a whole. This isn't that case. This is a case where
23 there are shareholders such as Vanguard, as my learned friend referred to, who invest
24 in most FTSE 100 companies and most US S&P 500 companies and whose
25 institutional shareholding is huge.
26 In circumstances where the incentive for them to worry themselves as to whether or

1 not Dye & Durham is going to be prejudiced by TMG's new independent status is,
2 frankly, not a realistic concern. Not a realistic prospect.
3 Dow/DuPont also obviously has to be read in light of the fact that the EU Commission
4 has sanctioned spinoffs, including in a horizontal case, in Alcan and Veolia.
5 Active owners was dealt with in Appel, which is bundle E, tab 1, page 7. My learned
6 friend repeatedly referred to recital 43 in Dow/DuPont and, indeed, relied upon it for
7 a rationality purpose to deal with my suggestion that it did not make any economic
8 sense for an institutional investor to seek to influence the competitive structure of the
9 market. Recital 43 was a cross-shareholding, so it is the Citizen Kane example, not
10 anything else.
11 Recital 45, as I indicated, is the problem because they seek to extrapolate from
12 cross-shareholding cases to common shareholding cases and there is significant
13 economic literature to the effect that that theoretical framework is simply implausible
14 in the context of institutional shareholders. I'm going to give you two references, if
15 I may: E11, page 585, which is the US Court of Appeal judge's literature, and then
16 E15; 727.
17 Now, it is true that we are seeking to raise reasons why there is no substantiated case
18 of real risk as opposed to reliance on a theoretical risk, but that does not mean that
19 we are somehow tasked with the burden of dealing with risk because, of course, this
20 was a CMA decision where they identified the risk and it is for them to substantiate it.
21 If, in fact, the only evidence they have relied on in the final decision is economic
22 literature which only gives half the story, then it does, we respectfully suggest, mean
23 that they have failed to take into account a relevant consideration which is the
24 countervailing piece.
25 What we didn't see from Mr Lask's submission was a detailed response to all of the
26 other material that goes the other way. I can understand why he has not done that,

1 because it is not in the final decision and, therefore, he cannot stand it by the final
2 decision.
3 The CMA report itself on cross-shareholding, page 69, says in terms that it is not
4 intended to capture any data on common institutional shareholders.
5 Company law. He said, well, company law should apply equally to D&D's
6 management shareholdings. Yes, it would. D&D's management with a 16 per cent
7 threshold are not going to be able to block a special resolution either. But we have
8 simply recognised as a matter of principle it is much more objectionable to have a rival
9 maintaining a beneficial shareholding interest in a rival than it is having institutional
10 shareholders. So we have simply cut that off at the pass by saying we are not going
11 to try and defend that as a point of principle, we will put them in a blind trust, and there
12 has not been any challenge to the blind trust.
13 He also said that we had accepted that shareholders can stop an equity issue
14 if -- please, always read the detail of what our submission says, because it says: at
15 an AGM, with a majority resolution. Somebody holding a 5 per cent institutional
16 shareholding share is not going to be able to block it.
17 There is then the question. I need to deal with a couple of points that were raised in
18 intervention before dealing, if I may, with one slightly delicate point. The
19 intervention -- to the extent it added anything of value -- it dealt with delay and delay
20 in the disposal of the blind trust.
21 The reason why there is that delay is precisely to avoid the other criticism that
22 somehow we are disposing of the shares too quickly and that that depresses the
23 market. So we can't win; that may be the answer. But, I mean, the short point is it is
24 unfair to take that point against us when we are studiously trying to avoid any knock-on
25 impact on the share price.
26 Business plan. With the greatest of respect, I can't imagine that TMG would want it to

1 be said that they don't have a business plan. When they become an independent
2 fully-functioning competitor, competing vigorously with my clients, I have no doubt they
3 will have a very detailed business plan and a marketing strategy and everything else.
4 The reality is that we haven't seen it and we don't have details of it, because there are
5 clean team arrangements and it is not appropriate for my clients to see it.
6 There is then the issue of TMG's so-called detailed concerns and the extent to which
7 they are in the final decision. The answer is they are not. Yes, there is a reference to
8 a concern about the impact of uncertainty on TMG, but there is no evidence that what
9 is in Pepper 1 was ever before the CMA in terms. There is no evidence that Mr Pepper
10 put those particular points to the CMA and there is no evidence that the CMA took
11 them into account.
12 Now, purely on the matter of factual matters, obviously Mr McCready -- bundle G, tab
13 A -- responds to some of the factual matters in Mr Pepper's witness statement.
14 So, in essence, anything that isn't on the face of the decision is going to be ex post
15 facto support for the CMA's decision, rather than anything that was properly before it.
16 The slightly delicate matter is this. So what I have -- perhaps not -- I don't mean it in
17 a disparaging way. What I have described as the rearview mirror hypothesis, which
18 is that somehow directors of TMG without any prompting from institutional
19 shareholders will be consciously looking in the rearview mirror that they are sitting
20 behind them and they will want to try and play to their interests, rather than raise their
21 potential opposition.
22 Now, that is obviously not the structure that represents an informal means by which
23 the institutional shareholder will try and actively manage the management of TMG,
24 because that is going the other way. So in terms of direction of travel, what is being
25 put to me as a hypothetical -- and has been on several occasions -- is that somehow
26 there will be a non-solicited effect of common institutional shareholding.

1 The short answer to that point is it does not feature in the final decision and has formed
2 no part of the CMA's reasoning. With the greatest of respect, a public body that is
3 thrown a lifeline by a Tribunal should not accept it if in truth it does not feature in its
4 decision. With the greatest of respect, it is, therefore, not for the Tribunal to
5 supplement the reasons given by the CMA in its decision with a further point that may
6 or may not hold good, but which has in no way been evidenced in the final decision
7 itself.
8 I say that with the greatest of respect, simply as a matter of constitutional propriety,
9 given the concern that this Tribunal always has not to try and go behind, supplement
10 or in any way do anything other than deal with the rationality of the decision that was,
11 in fact, made. It is very important that we look at what the reasons were motivating
12 the decision in question.
13 Would you give me a moment? **(Pause)**
14 Thank you. Thank you very much for giving me that moment and thank you very much
15 for allowing me the extra time.
16
17 **Further submissions by MR LASK**
18 **MR LASK:** Sir, before we finish, may I offer one point of clarification arising from
19 an exchange Mr Lomas had with Mr Beal, where it was suggested that it may be
20 common ground that contractual canons of construction apply to the construction of
21 the final undertakings. That is not a concession the CMA has --
22 **THE CHAIRMAN:** They have not made that concession. But everyone loves to say
23 that someone else -- it is common ground. I understand when it is and when it isn't.
24 Because, at the end of the day, I will go through all the transcripts again and the
25 skeletons to decide whether or not things are common ground. But I'm not assuming
26 much in this case is common ground: you don't need to worry about that.

1 **MR LASK:** Thank you.
2 **THE CHAIRMAN:** We are obviously going to have to reserve. We will try and get
3 a decision out, as soon as possible. My practice is to try and get merger decisions out
4 no later than four weeks after the hearing but, ideally, it should be two weeks after the
5 hearing. But it just depends on what else comes on the plate, let's be honest. If we
6 have time, we will do it within two weeks. If we haven't, it is going to take a bit longer.
7 Thank you very much, everyone. The submissions of counsel were of a very high
8 standard. But also, it is not just that, the bundles were put together beautifully and
9 everything really smoothly done by the solicitors at the back. Their role is very much
10 appreciated; thank you very much.
11 **(5.43 pm)**
12 **(The hearing adjourned)**
13
14
15
16
17
18
19
20
21
22
23
24