

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**
6 **APPEAL TRIBUNAL**

Case No: 1753/4/12/25

7
8
9 Salisbury Square House
10 8 Salisbury Square
11 London EC4Y 8AP

12 Thursday 19th February 2026

13
14
15 Before:

16
17 The Honourable Mr Justice Saini
18 Gregory Olsen
19 Professor Ioannis Kokkorris

20
21 (Sitting as a Tribunal in England and Wales)

22
23
24 BETWEEN:

25
26 **SPREADEX LIMITED**

Applicant

27
28 v

29
30 **COMPETITION AND MARKETS AUTHORITY**

Respondent

31
32
33 **A P P E A R A N C E S**

34
35 Tristan Jones KC and Alison Berridge (Instructed by Herbert Smith Freehills Kramer LLP)
36 on behalf of Spreadex Limited

37
38 Ben Lask KC and Daisy Mackersie on behalf of Competition and Markets Authority

39
40 **Note:** Excisions in this transcript (marked “[”]) relate to commercially confidential
41 information: Schedule 4, paragraph 1 to the Enterprise Act 2002.
42

43
44 Digital Transcription by Epiq Europe Ltd
45 Lower Ground, 46 Chancery Lane, London, WC2A 1JE

46 Tel No: 020 7404 1400

47 Email:

48 ukclient@epiqglobal.co.uk
49

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

(10.30 am)

MR JUSTICE SAINI: Yes, Mr Jones.

Submissions on behalf of SPREADEX

MR JONES: My Lord and members of the tribunal, good morning. Can I introduce the teams? On my left is Ms Berridge and myself for Spreadex, and for the CMA Mr Lask and Ms Mackersie.

My Lord, you should have seen a timetable that's been agreed which --

MR JUSTICE SAINI: That is very helpful. Thank you.

MR JONES: Can I make a quick point about confidentiality? Most of the issues regarding confidentiality was resolved between the parties. There is not much confidential information in these proceedings, that which there is has been highlighted. It remains important. I should just say there is a bit of inconsistency in the sense that the CMA went back through chapter 5, which is where our focus is. They did not go back through the other chapters in the decision. So, for example, if you were to look in chapter 6 and chapter 7, there are things highlighted as confidential, which are not necessarily confidential. Nonetheless, as I say, for the most part it is clear and they are not confidential issues and where they are highlighted, they do need to be treated confidentially.

The structure of my submissions is as follows. We are going to address the issues in three broad parts. I am going to start with some introductory remarks. Those will be quite extensive. I want to cover some legal issues and show you some of the important factual material. Ms Berridge will then address you on ground 1 and in doing that, she will take you through the decision.

I am then going to address you on ground 2, which will involve me going back over the decision for certain purposes. We are going to try very, very hard not to repeat

1 each other. We will not completely succeed in that, but we are going to minimise that
2 as far as we possibly can.

3 That having been said, can I turn to what I have called my introductory remarks?
4 I want to start by just looking at the Enterprise Act to make a point about the legal
5 framework.

6 MR JUSTICE SAINI: Yes.

7 MR JONES: It is in the authorities bundle number 1. You have electronic
8 bundles I see.

9 MR JUSTICE SAINI: We have an electronic bundle.

10 MR JONES: It is page 8 of the authorities bundle. Of course you will be familiar with
11 this. There is just a point I want to highlight. We are in section 35:

12 "... the CMA shall, on a reference under section 22, decide the following questions-

13 (a) whether a relevant merger situation has been created; and

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

17 We are concerned in this appeal with (b):

18 "Whether the creation of that situation has resulted, or may be expected to result ...",
19 etc.

20 "Has resulted" is clear enough as an expression. The reason I have taken you to this
21 is because I just want to highlight it is, as I understand it, common ground that the
22 words "may be expected to result" mean "with a 50% probability or more will result".

23 I make that point because the words on their face "may be expected to result" could,
24 of course, be read in a much looser way as something which might happen, but that
25 is not how they have been understood or how they are present in this case.

26 Now there is Court of Appeal authority on this and, as luck would have it, it is one of

1 the few merger cases that is not in our bundles. It is referred to in some of those
2 cases. I will just give you the reference. It is OFT v IVA Health Limited [2004] EWCA
3 Civ 142 at paragraphs 46 and 81.

4 That's the broad framework. Ms Berridge is going to take you to the relevant guidance.
5 She is going to explain in a bit more detail the role that the counterfactual plays in the
6 analysis, but in broad terms in order to decide whether there is or may be a significant
7 lessening of competition it is necessary, of course, for the authority to identify
8 a counterfactual, what would have happened absent the merger.

9 Now I say at once I am not meaning to suggest that the counterfactual has to be
10 decided on the balance of probabilities, on the 50% threshold. That's a different point.

11 The counterfactual is a tool in the assessment. I fully accept that, but they have to
12 identify a counterfactual, and the broad lines between the parties in this case, as you
13 know, is that Spreadex says the business would have closed, absent Spreadex's bid
14 whereas the CMA concludes that it would have been sold to 10star, which would have
15 operated it in competition with Spreadex. That is their conclusion on the
16 counterfactual.

17 I will just show you that quickly. It is in the decision at page 102 at paragraph 5.218:

18 "Conclusion on the counterfactual.

19 Based on our assessment above, we conclude that the appropriate counterfactual is
20 where the B2C business, under the ownership of 10star, would continue to compete
21 in the supply of licensed online sports spread betting services, broadly in line with the
22 pre-merger conditions of competition."

23 Now, as you will have seen from the documents, there is a question as to whether they
24 also rely on the possibility of sale to Star Sports. It is, to put the point briefly, in my
25 submission a bit of a distraction. We are going to focus in our submissions on that
26 counterfactual finding, sale to 10star. I am going to come back at the end to the issues

1 around Star Sports and whether that forms part of the CMA's reasoning and, if it does,
2 what we say about it. So I am not avoiding the issue, but we are going to focus firstly
3 on the sale to 10star.

4 If you still have the authorities open, at page 11 the right to appeal is in section 120,
5 sub-paragraph (1). I have called it an appeal. It is a right to review. So the right to
6 come to this tribunal to seek a review is there. Over the page you have on page 12
7 subsection (4):

8 "In determining such an application the Competition Appeal Tribunal shall apply the
9 same principles as would be applied by a court on an application for judicial review."

10 That was all I wanted to say about the statute at the outset.

11 Next, some summary comments about the case. To state the obvious, for there to
12 have been a sale to 10star there would have needed to be some sort of common
13 ground whereby they could have done a deal.

14 Now that in this case gives rise to several problems and that is at the heart of the case:
15 could they have done that deal? From FDJ's perspective, the vendor, or Sporting
16 Group -- they are in the same group. Sometimes FDJ is referred to and sometimes
17 Sporting Group is referred to, but they are essentially the vendor together. From FDJ's
18 perspective, they wanted to get out of this market and they were looking for the best
19 way of doing so. The business that they were trying to sell had some assets, so it had
20 a baseline of value in its assets.

21 Apart from Spreadex, the only other bidders which came forwards had various
22 downsides, including in particular that they would have needed a TSA, a Transitional
23 Services Agreement, essentially to hold their hand while they got the business up and
24 running and while the various operations involved in the business were transferred to
25 them.

26 FDJ saw that as a burden that they would prefer not to have to deal with. That is why

1 they emphasised repeatedly to the CMA that if Spreadex had not bid, they would have
2 had to think carefully about whether to accept 10star's bid or close the company down.
3 That is what they said to the CMA.

4 From the perspective of 10star they also faced challenges. They were considering
5 buying a company which was in a niche and declining market. They knew that they
6 needed a TSA, but they balked at the price that was suggested of £4 million as
7 an annual price tag.

8 One also needs to ask would they have spent £3 million on this business in a declining
9 market if they had known that it was losing nearly £3 million a year. I put it like that,
10 because when you look at the CMA's reasoning -- and obviously we are going to look
11 at this in detail -- but I referred to the need earlier on to find some sort of common
12 ground. The common ground that the CMA identifies is they say FDJ would have
13 accepted the £3 million bid from 10star. It would have been paid £4 million per year.
14 10star would have pressed ahead with that deal and FDJ would have pressed ahead
15 with that deal and they don't go further. They deliberately do not say, for example,
16 FDJ might have accepted a lower amount or might have lowered the TSA price. They
17 pinned their case very clearly, and I will show you when we come to ground 2, on that
18 particular price point. They say -- they don't put it like this -- what they are effectively
19 saying is that they have identified the sweet spot where a deal would have been done.

20 Now we have two grounds. Ground 1, which Ms Berridge will address you on, is about
21 what it means to say that the most likely outcome, the counterfactual, is that there
22 would have been a sale to 10star. For that deal to have materialised a whole chain of
23 things would have needed to happen. There would have been many hurdles to jump
24 is one way that we put the point. Each of those is subject to uncertainty.

25 So when you or the CMA asks itself what is the most likely counterfactual, sale to
26 10star or closure, or maybe something else, it is necessary to ask not only would each

1 of these links in the chain have happened, would each of the hurdles have been
2 jumped, but would all of them cumulatively have happened?

3 That is important, because the same is not true of Spreadex's case. So Spreadex's
4 case is one of these hurdles would have failed. The likely thing is that one of them
5 would -- we don't need to say which one -- it is more likely that one of them would have
6 failed than that they all would have come true, and if that is right, then the
7 counterfactual doesn't hold and instead you're looking at what Spreadex says would
8 have happened, which is closure. So that's the essence of ground 1.

9 Ground 2 is a rationality challenge, but on be a slightly wider canvass. It builds on
10 ground 1 in the sense that we say for ground 2 again it is necessary to look at this
11 cumulative list of hurdles that had to be jumped, but what we say is if we are wrong on
12 ground 1, if the CMA did turn its mind to those hurdles and did conclude that they all
13 would have been jumped as the most likely outcome, that was an irrational conclusion.
14 The evidence does not rationally support the conclusion that they have reached.

15 Now I will say at once that ground 2 picks up a lot of points and you will have seen this
16 from the grounds and from the skeleton arguments. That is because there are a lot of
17 uncertainties and our case relies on all of those in support of the submission that the
18 overall conclusion is not one which is reasonably open to the CMA.

19 However, there are two critical points which I will mention now, because it is going to
20 be a while until I come back to them in my submissions under ground 2.

21 The first critical point is this. When the CMA group addresses the question of whether
22 FDJ would have sold to 10star, it places very considerable emphasis on the notion
23 that all FDJ wanted as a baseline was to recover its closure costs. Now they are called
24 closure costs. What that's referring to is the fact that a sale to 10star would have
25 involved some sort of costs, some sort of divorce costs. It would have involved
26 redundancy costs and so on for FDJ.

1 If that is right, if it is right that all they wanted as a baseline was to recover those
2 closure costs, then it obviously makes it much easier to see why they would have
3 accepted the deal that was on the table, notwithstanding all the downsides, not
4 withstanding the TSA, notwithstanding the other uncertainties.

5 What we say is that that rests on a straight misreading of something which FDJ said
6 in the course of the CMA's investigation. The CMA has taken a comment made by
7 FDJ completely out of context and it is wrong to say that all they wanted to do was to
8 recover closure costs plus whatever else they could achieve. That's my first big point.
9 My second big point is this. When the CMA then comes on to address the question of
10 whether 10star would have paid £3 million plus 4 million for the TSA, we say that they
11 fundamentally misunderstood the evidence. For one thing it was clear that 10star had
12 very serious doubts about whether they would pay £4 million for the TSA, and that is
13 just clear on the face of the documents. They didn't agree to that. They had serious
14 doubts about it. For another thing and, if anything, more importantly, 10star thought
15 the company was breaking even. They did not think it was losing £3 million per year.
16 The CMA, when it addresses that, rejects the point I have just made to you. They read
17 the evidence in a different way. They say that 10star did realise that the company was
18 losing large amounts of money. I think they would say they realised it was losing
19 £2 million a year, not 3 million, but 2 million a year is what it comes to on their sums,
20 but the CM's conclusion leading to that is, I say, irrational. So even if I had to identify
21 particular pieces of the reasoning which on their own terms are irrational, I say those
22 two are each just in isolation irrational, that the evidence does not support those
23 conclusions.

24 Now the approach which you ought to take to this sort of rationality challenge was
25 recently explained by the Court of Appeal in the C er lia case. It is not I think a change
26 in the law. It is not surprising. It is, however, a useful summary. It is in tab 12, which

1 is page 889 of the authorities bundle. It starts on 876, but 889 is where I want to go
2 to. I just want to take you through this because it answers some of the points made
3 against me by my learned friend.

4 So picking it up at paragraph 37 -- actually let me go back. 36. This is the judgment
5 of the court:

6 "... it is helpful to summarise some basic propositions about the role of the CAT when
7 conducting a judicial review of a decision of the CMA.

8 First, Parliament created the CAT as a tribunal comprising specialist lawyers,
9 economists and others with specific relevant expertise, to oversee the decisions of
10 regulators. In addition to a review of a regulatory decision on questions of vires and
11 law, Parliament entrusted the CAT with responsibility for reviewing findings of fact and
12 the evaluation of those facts by regulators."

13 The next paragraph:

14 "In a given case therefore it may be the task of the CAT to determine whether there is
15 'adequate material' before the CMA to support its conclusion, an exercise the CAT is
16 singularly well equipped to perform. It can be expected to examine closely the
17 complaints made about a decision and", underlined, "its evidential underpinning. Such
18 a deep dive into the evidence equips the CAT with the information necessary, then, to
19 make an informed judgment as to whether the decision under challenge was properly
20 justified by the evidence. The extent to which the forensic sleeves must be rolled up
21 the judicial arm is not to be confused with the margin of appreciation to be accorded
22 to the decision maker. It is at the point that the CAT is seized of a detailed
23 understanding of the evidence that it can then decide whether the CMA was acting
24 within legitimate bounds in its determination and evaluation of the facts."

25 "Secondly, the degree of deference to be accorded by the CAT to the CMA is fact and
26 context specific, as IBA makes clear. If, for example, the dispute concerns the

1 interpretation of a contract or letter, then the view of the CAT on a question of
2 interpretation might be as equally valid as that of the CMA. If the issue concerns
3 inferences to be drawn from statistical data, then the conclusions drawn by the CAT
4 might again be as valid as those drawn by the CMA. The CAT is also well placed to
5 measure the adequacy of the decision maker's fact finding."

6 I jump forwards to 40:

7 "It also follows that in a given case the breadth of the deference to be accorded to the
8 decision maker may vary as between different grounds of challenge. It is, however,
9 important to recognise that, because of its expertise, it is quite possible that the CAT
10 will be critical of relatively complex evaluations by the decision maker, even where a
11 non-specialist court might not be. That is a necessary corollary of the CAT having
12 been instituted as a specialist body tasked to conduct precisely that sort of exercise."

13 "It is, though, important not to let semantics obscure the nature of the exercise. If,
14 following a detailed review, the CAT concludes that the decision maker erred because,
15 for example, it misconstrued the evidence or data, or failed properly to enquire into the
16 evidence, then it is a matter of words only to say that the decision is in error because
17 it was not supported by the evidence, or alternatively, that the decision was 'irrational'.
18 Finally, none of this involves the CAT substituting its own view for that of the decision
19 maker. It is simply holding the CMA to a proper standard."

20 Now my learned friends in their skeleton argument say that this review, this application
21 before you, is a thinly veiled attempt to re-argue the merits. Actually they say that
22 twice. I am going to answer that very slightly tongue in cheek. It is not thinly veiled.
23 We are entitled to ask you to look at the merits and we are entitled to ask you to look
24 at the evidence and at the CMA's reasoning. Of course, I ultimately need to persuade
25 you not simply that Spreadex's view of the world is the better one, but that the CMA's
26 view is irrational in the sense of not being open to it on the evidence or not logically

1 reasoned. That is the threshold that I have to meet and that's the threshold that we
2 have always identified. There is no smoke and mirrors about my case. There is no
3 veil over our position. That is our target. We do look at the merits and we do it applying
4 the correct judicial review standard, as explained by the Court of Appeal.

5 I want to turn next to some background facts. I want to do this under five broad
6 propositions. The first one is online sports spread betting is a niche and declining
7 market. You can see the size of this market in the report at paragraph 2.13, which is
8 on page 20. Now these have been redacted, but I am not confident that this needs to
9 be confidential but I will not read it out anyway. As I said, the re-review was only done
10 of chapter 5, but you will see there in paragraph 2.13 there are estimates of the size
11 of the market. In 2.14 you will see:

12 "We note that based on these estimates in real terms over the past four years the size
13 of the UK licensed online sports spread betting sector has decreased by a certain
14 amount excluding binary bets."

15 They go on to say it has decreased by a slightly lower amount if you include binary
16 bets. Binary bets are bets which are essentially fixed odds bets which are presented
17 as spreads. What the CMA goes on to say in a paragraph we don't need to look at,
18 but it is 6.56 is that they think binary bets are excluded from the market. So of those
19 two numbers in that paragraph 2.14, it is the larger one which is actually relevant to
20 understand the market decline.

21 I made the point that it is a niche market. That is especially if one sees it alongside
22 the much larger fixed odds sector. You will see an estimate for that in 2.12, 2.4 billion.
23 Now the relevance of this, of it being a small and declining market, to the potential sale
24 was emphasised by various participants in the CMA's investigation. Can I show you
25 firstly the former managing director of Star Sports? There is an interview with him. If
26 we pick it up at page 571, please. I should say this is 25th September 2024. It is

1 CMA's hearing with Russ Candler, who was the managing director of Star Sports at
2 the time of the sale process. You will see at line 11 CMA says:
3 "So I just wanted to ask a general question on what [are] your views on the
4 effectiveness of a divestiture remedy ..."
5 So this is in the context of talking about the remedy, but this is his answer:
6 "Do you know what, Kapil, it is an interesting question. Do I think there is a necessity
7 for a secondary sports spreading brand within the UK? The more I kind of thought
8 about it, the more I do not necessarily buy into that. I think it is such a niche, unique
9 product that over the past ten years has slightly died a slow death."
10 "I think if you look [at] the kind of financials of Sporting Index which I was obviously
11 privy to in the process of trying to buy that business, it is kind of diminishing returns.
12 It is nowhere near the type of business and industry it was say 15, 20 years ago. I see
13 it from Star Spreads, which is obviously an Irish business and Irish regulated sports
14 spread betting brand. Over the past 12 to 18 months the business to me feels as
15 though it has stagnated a little bit."
16 "I think the pool of customers that we are considering here now is incomparable to the
17 fixed odds betting landscape that currently exists within the UK. You are comparing
18 chalk and cheese, apples and oranges. So do I personally believe it should be
19 divested, carved up and a secondary brand created out of it? I do not think it is
20 a necessity. You are talking about servicing a very unique, selected group of clients."
21 Sporting Group made similar comments. If we just look at that. So this is the vendors
22 themselves. Page 770. Again this was in the context of a remedies hearing,
23 13th August, 2024. On page 770 you will see there is a similar question from the CMA
24 about whether a divestiture remedy would be an appropriate remedy in this particular
25 case. Mr Maggs, who was the Chief Operating Officer, says:
26 "I think it's a very challenging thing to do both from a technology and operational point

1 of view, and also from a responsible gambling point of view. So any divestiture to
2 a third party I would expect the CMA would ensure that they are FCA and Gambling
3 Commission, UK Gambling Commission licensed. Yeah, that is going to add an extra
4 complication.

5 Mr Park: Okay. Okay. So we'll go into those in detail throughout this call."

6 Then Mr Wright. He is the CEO. He says:

7 "Just take a little bit of a step back and look at it 10,000 feet. The customer base or
8 addressable market within the UK that bet on spread betting specifically has
9 contracted constantly over the last 10 years, and that has only accelerated with
10 responsible gambling, risk and compliance obligations, proof of wealth for customers.
11 So it is a very small customer base that Spreadex is now covering. So it's worth
12 thinking about that also."

13 Of course, the context of this discussion is divestment. So the CMA understandably
14 tries to bring that back to "What does that mean for our divestment package?"

15 "Mr Park: ... would your comment go to the size of the divestment business that should
16 be sold?"

17 Mr Wright then says:

18 "Not specifically. What I am saying is that finding a place for this divestment, a
19 competition, another operator, if you like, is going to find it difficult to compete. I think
20 many of the customers will have, you know, dual accounts, but it is very difficult for the
21 business to wash its face I think."

22 Down at the bottom of the page the CMA again tries to bring it back to divestiture and
23 they are talking about, "We are just trying to restore the pre-merger structure. We are
24 not trying to create something which is as big as Spreadex, for example. So just focus,
25 please, on whether we can restore that structure".

26 Then over the page, 772, they dig in again. Mr Maggs again:

1 "But as per Andy's comment, the market is shrinking and ever declining in time. You
2 know, it is an aging profile. So unfortunately people either die or retire or move away
3 from having income to support spread betting behaviour and there is not a fresh influx
4 of new participants that can be recruited. So it's an ever decreasing pond in terms of
5 audience, and that was a feature of Sporting Index's declining. So you say 10, 11
6 million. In previous years it was always higher. So every year it's ever declining...

7 Mr Wright: Yeah, exactly right. I mean, restoring competition to the pre-transaction
8 environment, it was not competing. They were constantly losing customers to
9 Spreadex anyway, or those customers dying off, or those customers dropping out. So,
10 yeah, very much in decline."

11 My second factual proposition is that Sporting Index was a heavily loss-making
12 company. You can see this if you turn to page 38 of the bundle. So we are in the
13 decision, paragraph 5.32. There is a reference there to the annual accounts for FY21
14 and 22. They describe there the operating loss in each of those years. However,
15 there's a complication here, because although Sporting Index, the company, was
16 broadly speaking meant to be the B2C entity, there was another group company which
17 was the B2B entity and the costs were not neatly divided between the two of them, so
18 you can't just rely on the accounts.

19 That is why the CMA undertook its own exercise to try to disentangle the accounts.
20 They looked at the 2022 year. I just want to show you the conclusion that they
21 reached. It is at page 91 and paragraph 5.189. I am going to come back to it a few
22 times, but it useful at the top there, because it summarises the outcome of the CMA's
23 own attempt to work out the cost base and the revenue and they say it had:

24 "... an underlying cost base of around £12.5 million ... [and] revenues of £9.8 million
25 ..."

26 So the annual losses of the business that was being sold as opposed to the company,

1 but the B2C business, was something close to £3 million. That indeed was one of the
2 reasons FDJ itself wanted to exit this business. You see that on page 9 at
3 paragraph 23.

4 My third factual proposition is the other potential buyers committed nothing and
5 prepared very little in the way of business plans.

6 If you could look, please, at page 32, you will see a summary of the timeframe. So
7 from paragraph 5.14 FDJ from early 2022 started preparing for the sale, but then over
8 on the next page, end of that paragraph, the process itself commenced in early
9 January 2023.

10 Then in 5.15 you have the description of the preliminary bids:

11 "Star Sports' [bid] on 1st February 2023" -- that was the £2 million bid -- "subject to
12 Sporting Group's supply of operational support for the first year";

13 "10star's [bid] on 22nd February 2023, with a bid value of 3 million (... later confirmed
14 on 24th March 2023)" subject to the TSA; and

15 "Spreadex on 23rd February 2023, with a bid value between 5 million and 7 million
16 (later increased to 7.5 million on 22nd March 2023) ..."

17 So the bids were put forward over a very short period of time. If you look over the
18 page at 5.18, you will see that:

19 "At the end of March '23 recommendations were made to select Spreadex as the
20 preferred purchaser of the B2C business."

21 Now just looking back at 5.15, 10star's bid -- second bid on 24th March was essentially
22 the end of the road for 10star. The reason I am emphasising that is when I come on
23 later on under ground 2 to talk about what 10star knew about the losses that were
24 being made, that is the moment we need to look at. Did they know when they made
25 that second bid that it was losing £3 million per year?

26 We are not when we look at these alternative bidders talking about the situation in

1 | which well informed bidders had time to do due diligence -- they had not done due
2 | diligence -- or to develop serious business plans for a seriously loss-making company.

3 | I will, of course, talk more later on about the ways in which they were planning, they
4 | said, to turn the business around but they did not have much time to do anything.

5 | My fourth factual proposition is this. FDJ itself thought that the only alternative bidders,
6 | that is 10star and Star Sports, had serious question marks over them. Now one
7 | obvious question mark concerned the headline price on offer and I am going to spend
8 | a lot of time on that later on.

9 | What I want to show you now is what was said about some of the other difficulties and
10 | just take you to some of the underlying evidence where FDJ and Sporting Group
11 | explained their concerns.

12 | If we start, please, with page 444, this is very early in the process. It is actually at the
13 | phase 1 stage. You will see it is an e-mail from Andy Wright, Chief Executive of
14 | Sporting Group. He is responding to questions which have been put. At question 3
15 | his answer is this:

16 | "10star and Star [Sports'] bids were lower; both of them would have required [TSA]
17 | from Sporting Group during a long period of time, as they had not all the necessary
18 | resources and expertise to run standalone such a business. Only Spreadex had all
19 | the prerequisites to operate 'overnight' without external support. In our view
20 | maintaining these TSAs even with same bid value would have questioned us on the
21 | overall economics of the sale versus closing the business. Therefore an in-depth
22 | analysis would have been asked prior to making any decision to pursue."

23 | So that was what they said right at the outset. I want to turn next then to tab 9, which
24 | starts from page 466, and we are looking here at 6th June 2024, CMA's hearing.

25 | MR JUSTICE SAINI: Which page is that?

26 | MR JONES: Page 466 is where it starts, just the front page of it. So it is a hearing

1 between the CMA and various names which will by now be familiar for Sporting Group.
2 I want to pick this up -- I am going to spend a bit of time on this, because there is a lot
3 in it, but I want to pick it up, please, at page 497. At line 20 the CMA asks this:
4 "So can you tell us -- we are now in the bidding stage of the B2C sale process. [So]
5 could you just tell us your overall views in relation to the bids from each of 10star and
6 Star Sports? Just give us your overall views."
7 Mr Maggs says this:
8 "Well, first and foremost, both are not UK regulated. So in terms of that regulation and
9 compliance tick-box they were not UK licensed. They were licensed out of country.
10 So there would be --
11 Mr Wright: And 10star did not have a license.
12 Mr Maggs: And 10star did not even have a license, no."
13 He is asked:
14 "And Star Sports would have been Gambling Commission regulated. No?"
15 and he says:
16 "Yeah, but their spread betting is not licensed by the FCA."
17 At line 10:
18 "10star had no functions to support distance at all. They were looking to buy the
19 business in its entirety, but they did not have a licence. They were also owned by
20 Magnus Hedman, who was the individual that sold the business to FDJ in the first
21 instance. So he was not a preferable acquirer ..."
22 Further on they emphasise again, line 21 -- this is Mr Wright again:
23 "... regulation was always going to be problematic."
24 Mr Maggs says this:
25 "I think from the exploratory conversations we had with both it became very apparent
26 that they were becoming more dependent on us, FDJ as a business supporting them

1 | more and more with the process. It would be a very clean process. Every topic would
2 | be either financially or operationally they would require more and more support.

3 | Mr Wright: Yeah, we had concerns, primary concerns over the regulation on both
4 | parties, and the deliverability would have been very problematic for 10star."

5 | He is then asked about what he said about sale to 10star and why does that matter
6 | that 10star used to own the business and Mr Wright says at line 15:

7 | "Yeah, I mean, they sold the business back in 2019, but they no longer had a licence
8 | both with the FCA or the Gambling Commission and for them having sold the business
9 | to FDJ for £110 million I think it was back in 2019, how serious they were about buying
10 | the business back at a heavily discounted price, it was not viewed as a preferable or
11 | serious bid."

12 | He is asked about support and Mr Maggs then says over on the next page:

13 | "It would be very hard to find someone that would not need support, and I think we
14 | explored conversations with financial spread betting companies who used to have
15 | sports betting odds. They were [not] interested ... and in terms of Star Sports, they
16 | have both fixed odds and spread betting operation, but not of the scale of Sporting
17 | Index ... So they could have taken on the operation, but it would have taken a
18 | transition period of at least two years whereas the initial scoping of a TSA document
19 | for 10star was very much a minimum of two years and some in terms of reliance on
20 | certain functions within our business, and we costed that out, and I think you asked
21 | a question earlier about cost. It cost a lot of money to run a spread betting business,
22 | and, yes, so as per normal TSA, the idea is there is a small margin applied and keeping
23 | things centred is for the new acquirer to take on that business in its entirety ..."

24 | Now over the page the CMA comes back to what had been said in phase 1, which
25 | was, as I showed you, that they would have looked at the overall economics. That
26 | question which is put is in lines 8 and 9. It culminates in this:

1 "How would you have calculated the overall economics of the sale to either Star Sports
2 or 10star and what would you have taken into account?"

3 The CEO's answer is this:

4 "I think when we are looking at the TSAs, how well that TSA plays for, obviously TSA
5 in place for the likes of a 10star would have been a long time. Them having known
6 zero trading function or risk management or supported functions the TSA would have
7 been in place for an indefinite period, to be negotiated."

8 He contrasts that to 10star.

9 Again the CMA comes back on page 502, line 18:

10 "...can you sort of explain why you would have questioned the overall economics of a
11 sale versus closing down the business? I mean, you would not have made the loss
12 on the TSA services."

13 The answer is this:

14 "There is management aspect, so Andy described at the start there is the cooperation
15 of the two businesses that run differently. So there is management oversight from
16 leadership teams, from GNA" -- I think that must mean general and
17 administrative -- "functions, HR, finance, etc. It is pretty hard to cost all the out into it,
18 buildings, etc. Generally Andy stated in our mission statement, I think it was two
19 months after joining, that the business would be focused, and this was apparent to
20 every staff member as well. We were focusing on the B2B arm of the business and
21 not the B2C, so it would not enjoy the same level of resources going forward."

22 They are asked again about the TSA. Skip forward, please, to page 504. He has
23 been asked:

24 "How much was the TSA looked into? Who looked into it in detail?"

25 At line 6:

26 "... I think, as I have said before, sort of was not fully delved into deeply because the

1 initial indicative view showed it was quite an extensive piece of work to do so, and
2 would be heavy lifting, to use the word "lift" again, and did it warrant that? I think
3 during conversations it quickly became apparent that there was only one bidder that
4 would work in this exercise."

5 Again from 20 the CMA says:

6 "Yes. Okay. So for the purpose of the counterfactual which Richard outlined earlier
7 at the outset of the call under a hypothetical scenario where Spreadex's bid did not
8 exist would you have progressed hypothetically both Star Sports and 10stars to go
9 into a limited data room and explore those TSA options and discuss a transaction
10 further with them?"

11 The answer is this:

12 "I think we would probably explore 10star against the other strategic options of closing
13 the business or some kind of restructure of the business."

14 So that was the tenor of their answers at that meeting. I want to look at another
15 meeting. This one starts at page 528. So this is described as a teleconference with
16 FDJ as opposed to Sporting Group, but many of the same people appear, plus some
17 different people. So this is FDJ. It's on 17th September 2024.

18 If we go forward, please, to page 546, it is a similar set of questions and I will say at
19 the outset it is a similar set of answers. I will also make the point that there were many,
20 many meetings and these questions were asked more than the four or five times that
21 I am showing you. You could look at other meetings in which they were asked similar
22 questions and they gave similar answers. I am sure if there were important things in
23 those, my learned friend would put them before you. I am taking you through them
24 because I don't want it to be said "Mr Jones has cherry picked pieces of evidence".

25 All of the evidence is of this tenor. So I am going to show you this and then move on.

26 At 546 they are asked again at 15:

1 "Okay. Looking back at the pros and cons of pursuing a TSA with 10star or Star
2 Sports, what factors would you have taken into consideration if you were to have
3 conducted an evaluation of a potential TSA?

4 "Male speaker: What factors in what meaning?"

5 "Mr Park: The economic evaluation. I mean, what are the factors that FDJ would have
6 taken into consideration in conducting this economic evaluation?"

7 The answer is:

8 "Define what would be the TSA and the cost of it. That is your point. In fact, the TSA
9 would have needed to sustain the system for the spread betting which is dedicated.
10 We named it I think in the document Atlas and SMM. We would have assessed the
11 cost of maintaining and operating this system solely for the purpose of the TSA. This
12 is the core, and that is why it was problematic and we finally preferred I guess the
13 buyer who can avoid us -- sorry -- to provide that system.

14 Plus the trading, and perhaps, Andy, you can help, but the traders would have still to
15 continue trading in both lines. Trading spread is a speciality that you add on trading
16 fixed odds. Again the TSA would have maintained that as we were providing one and
17 only B2B spread betting feed for one and only client, which is a client of a TSA that
18 would end up eventually, so not with a I would say business case behind, and the cost
19 of it could be exceeding the other problem we had in terms of profitability on the B2B
20 side overall."

21 This is Mr Wright, the CEO again:

22 "Yeah. I think for me the considerations from an economic standpoint would be the
23 team that would need to set up to be able to supply this service, the term, how long
24 we would be offering this service before the eventual buyer could insource that
25 capability themselves, the offering also."

26 Then under Mr Wright the male speaker comes back:

1 "Yeah, and what is clear when you go a little bit further on, what Andy is saying, that it
2 would have been difficult for any of the other buyers to afford this TSA because of the
3 costs that it would have required on our side, or for us it would have been a loss if we
4 accept the price and sell the TSA at a lower price than it cost to us. Globally the
5 economic picture was far better on the Spreadex offer."
6 Then the CMA says:
7 "What would have been the benefits ...? Those would be some of the costs. What
8 would have been the benefits that you would have taken into account?"
9 "Male speaker: Benefits of ...sorry, the benefits?"
10 "Mr Park: Yeah. So you have highlighted the costs of providing the TSAs. So would
11 the benefit be the TSA fee income ... or would there be other benefits?"
12 The answer is:
13 "The benefit would be to ease the sale."
14 "But at the end we were here to get rid of that business."
15 Then a male speaker says:
16 "Yeah. Basically the only positive thing was if it was helping to finally dispose from the
17 B2C activity."
18 I would ask you to read those bits which have been highlighted as confidential. Then
19 he says:
20 "So, yes, the only motivation that we would have had was to ease this ultimately as
21 the sale of the B2C activity."
22 It goes on in this vein over the page. So page 549, the male speaker again from line 4
23 says -- line 7 -- I will pick it up there:
24 "What is the cost and the management time to do that, and what are the costs of just
25 stopping this activity? I think it would have been the trade-off we would have had to
26 do."

1 At line 16:

2 "We were ready to compare the economic options versus closing, because it was not
3 affordable. We would have closed."

4 From line 21:

5 "And if I may add you understand that finding a bidder who is interested into sports
6 spread betting is quite complicated if you add what we have just explained about the
7 TSAs. It makes the thing harder, so we were looking, if I may say, to find the right
8 bidder, but closing would have been an option."

9 Then another male speaker:

10 "Yeah, it would have been an option because we were losing money on this activity
11 and we were losing more and more money as the economics were worse and worse
12 at the time being because of the new constraints on regulation, because we were -- as
13 I said, we were not the best owners possible because we were not ready to do what
14 is needed to make it work at end price regarding our ESG profile, etc.

15 "When you have an activity that is losing money, at some point just stopping it and
16 closing it is better than to continue it and if we would have found a solution, a good
17 solution, we would have closed it. I think that is the right way to put it."

18 That was my fourth point. FDJ themselves thought they had serious question marks
19 over them.

20 My fifth point is that Spreadex was in a materially different position to the other
21 potential buyers. It, of course, was already regulated, but, more importantly, it was
22 able to and did onboard customers to its own system. It didn't need a TSA. It didn't
23 need to inherit the costs.

24 Let me pause there, because I saw you furrowing your brow. They did have a very
25 short period -- quite right. There was a very short TSA. That is correct. I apologise.

26 So they had a very short TSA, but they were able essentially to use their own

1 infrastructure and not to inherit the loss-making operation that they purchased.

2 Now I want to under this hearing, Spreadex's position, deal with a point that my learned
3 friends make about Spreadex's position. Can I ask you, please, to turn to their
4 skeletons in bundle, page 22? At paragraph 4 they summarise Spreadex's case on
5 rationality. Then at paragraph 5 they say this:

6 "This argument is difficult to square with Spreadex's view at the time of the merger that
7 if it did not buy Sporting Index, then somebody else might. Contemporaneous
8 documents show that Spreadex believed that a new owner could run the business
9 more effectively than FDJ, making Sporting Index more competitive and winning back
10 market share. Spreadex paid £7.5 million for the Sporting Index business in part to
11 remove that risk. One might reasonably ask why it did so if, as it now contends, the
12 Sporting Index business was in such a bad financial state that no other bidder would
13 have wanted it anyway."

14 Now what they are referring to there is two documents which are summarised in the
15 report. Can I show you that? It is on page 91. They are referred to a couple of times
16 in the report, but I will show you the main place where they are relied on first. So
17 page 91. Now we have been to this paragraph before, 5.189, but if you read the rest
18 of that paragraph, you will see they say:

19 "... we consider that in order for the alternative bidders to have been committed to
20 a transaction, they would have needed to consider that they could improve the
21 performance of the business by reducing its cost base and/or increasing its revenues."

22 So that is what this paragraph is about. Would an alternative buyer have thought that
23 it would be able to improve the business? That's the question for this paragraph. Then
24 there is a series of subparagraphs.

25 Over the page on (e) is this point about Spreadex's internal documents. It says:

26 "Spreadex's internal documents show that part of the rationale for the merger was to

1 diminish the competitive threat of an acquirer improving the Sporting Index business,
2 which suggest that Spreadex thought some improvement in performance was
3 feasible."

4 Then there are some examples:

5 "In Spreadex's proposed initial bid document from February 2023 a sports trading
6 manager stated that after acquiring Sporting Index Spreadex 'would not have the [X]".

7
8
9 In February 2023 an email was circulated:

10 "... discussing the benefits and costs ... One of the stated benefits was [X]."

11
12
13
14 Now you can see and I accept that those comments from Spreadex are relevant in the
15 way that the CMA relies on them here, because the question that the CMA is
16 addressing in 5.189 is would the alternative bidders have thought there was scope to
17 improve the business? They have various pieces of evidence and Spreadex's own
18 views that there may have been scope to improve the business is one of the things
19 relied on. Clearly it is not a killer point, but it is a point which goes in the mix.

20 I fully, fully accept that, but Spreadex's opinion about that is not, however, relevant to
21 the other steps in the CMA's reasoning in this report or to the points which I am
22 pursuing before you today. Most obviously were the alternative bidders who actually
23 came forwards, 10star and Star Sports, willing to pay enough for the deal to be done?
24 Were they willing to pay for the TSA? Would FDJ have accepted the offers that were
25 being made and so on?

26 Spreadex's view that there was a risk that another purchaser might come forwards is

1 not relevant to those issues because Spreadex had no idea who the other bidders
2 were. They had no idea what the bid values were. They had no idea what FDJ, in
3 fact -- what its attitude was towards those.

4 So the CMA has been careful to rely on these points for quite a targeted purpose. In
5 contrast my learned friends in their skeleton argument try to turn it into something
6 much more serious. They say that my stance before you today is hard to square with
7 what Spreadex said previously, in other words, that there is some sort of inconsistency
8 between Spreadex at the time thinking a competitor might purchase it versus me
9 saying today that the CMA's conclusion on the facts that 10star would have purchased
10 it is irrational.

11 There is no inconsistency between those two things. It is simply the difference
12 between a company operating in conditions of uncertainty back in February '23 and
13 perhaps later -- I say perhaps -- and indeed later in the process, because, of course,
14 they went ahead and bought it, so operating in conditions of uncertainty versus us
15 here now being able to analyse the actual evidence of who was, in fact, interested and
16 what attitudes did they and FDJ, in fact, have.

17 Now we can all understand why from a rhetorical point of view it is tempting for
18 an advocate to place emphasis on this and to pull it up into a more significant point
19 than the CMA itself has relied on it, but, as I have said, when you drill down into it and
20 look at it from an evidential point of view and ask what it actually tells you about the
21 evidence, you see in my submission there is absolutely no inconsistency between the
22 position that was taken then and the position that is taken now that we see the
23 evidence.

24 That concludes my introductory remarks and I am going to hand over -- we should
25 have liaised on this before I hand over to you.

26 MR JUSTICE SAINI: I am sorry to interrupt. Can I suggest that whenever you think it

1 is appropriate in the course of your submissions let us know when we should have
2 a break. We will take a break at some point this morning. I don't want to interrupt your
3 flow, so you can choose the break time.

4 MS BERRIDGE: Thank you. I appreciate that. As Mr Jones promised I am going to
5 start with the CMA's guidance on how it approaches the counterfactual assessment.

6 If I can ask you to turn to bundle D, tab 15, page 1284, you can see there the heading
7 "The exiting firm scenario". There are various scenarios that the guidelines cover, we
8 are here in the exiting firm scenario. In paragraph 3.21 there describes a two limb
9 structure that the CMA follows in these cases. So (a) and (b).

10 "(a) the firm is likely to have exited through failure or otherwise and, if so, (b), there
11 would not have been an alternative less anti-competitive purchaser for the firm or its
12 assets to the acquirer in question."

13 It goes on to elaborate how it approaches those two limbs. If I can ask you to turn
14 over the page to 1285, you will see the heading there "Limb 1 - likelihood of exit".
15 There is some elaboration there. I will not go into that now. Then on the next page,
16 "Limb 2 - alternative purchases". There is some elaboration there.

17 I am going to read to you paragraph 3.30, which just hits the main factual questions
18 that the CMA looks at in these cases:

19 "When considering whether there were alternative purchasers the CMA will seek to
20 identify who the alternative purchaser(s) might have been and take this into account
21 when determining the counterfactual. The CMA may consider the marketing process
22 for the target firm as well as offers received for it. The CMA will not restrict its analysis
23 to alternative purchasers who are willing to pay the same or a similar price. That was
24 agreed in the merger under investigation but rather if there was an alternative
25 purchaser willing to acquire the firm at any price above liquidation value. Importantly,
26 the CMA will consider alternative purchasers that would have operated the business

1 as a competitor."

2 So that's how the CMA will approach an exiting firm scenario. Now the guidance is
3 also useful, because it discusses the CMA's approach when there are several possible
4 counterfactuals in play.

5 If I can ask you to turn back to page 1281 and look at paragraph 3.13, that deals with
6 this question and it deals with it separately at phase 1 and phase 2. We are at phase
7 2 here:

8 "At phase 2 the CMA has to make an overall judgment as to whether or not an SLC
9 has occurred or is likely to occur. To help make this assessment the CMA will select
10 the most likely conditions of competition as its counterfactual against which to assess
11 the merger."

12 I would like to pause there. That says that what we are looking for when we assess
13 the counterfactual is the most likely counterfactual. The reason I am pausing is I want
14 to just show you that both parties now put their case on that basis. So that's not
15 a debate within the case. So if I can ask you to change --

16 MR JUSTICE SAINI: The test is what is most likely?

17 MS BERRIDGE: Yes. If I can ask you to take bundle B, which is the pleadings bundle,
18 tab 2, which is the CMA's defence, page 59, paragraph 78:

19 "Given its conclusion the exiting firm test was not met, the CMA went on to conclude
20 on the most likely conditions of competition in the counterfactual."

21 Now the reason that I raise this is that was not how Spreadex had originally understood
22 the decision, so it went on to amend its pleadings to make clear that this is not
23 a debate. If I can ask you to turn to the reply, which is tab 3 in that bundle.

24 MR JUSTICE SAINI: Which page, please?

25 MS BERRIDGE: 87. If you can look at paragraph 11 at the bottom of that page, you
26 will see that we amended our pleadings just to meet that case. If I can ask you to read

1 the amended paragraph 6 that is included within that paragraph. (Pause.)

2 That most likely formulation is not a debate in this case. We say that the CMA took

3 the wrong path regardless of whether it used a most likely or a more likely than not

4 framework.

5 So having looked at the guidance and dealt with that, I want to turn to the decision.

6 So that's in bundle C. I am just going to show you that two limb structure as it is

7 reflected in the counterfactual chapter. So if I can ask you to turn to page 35, you will

8 see there that the CMA starts with limb one and the conclusion on that is at page 41,

9 paragraph 5.40. The CMA concludes that absent a sale, Sporting Index would have

10 exited the market.

11 So (i) is satisfied and that part of the decision is not challenged. (ii) then begins

12 there -- you can see the heading -- and takes up essentially the rest of the chapter.

13 The conclusion on (ii) is at page 101, paragraph 5.216. We will come back to this, but

14 for now I just want to show you the structure of the chapter. You will see here that the

15 CMA decided that (ii) was not satisfied.

16 It concluded that the most likely counterfactual was a sale to 10star which would have

17 operated it in competition with Spreadex.

18 It is that part of the decision that we challenge today.

19 So before delving further into that analysis of (ii) I will just remind the tribunal of the

20 essence of our ground 1. So the essence of ground 1 is that in order to reach that

21 conclusion that we have just seen on (ii) the CMA needed to satisfy itself that a number

22 of individual things would happen, and it wasn't sufficient to say that each of these was

23 likely to happen. The CMA needed to conclude that the most likely outcome was that

24 all of them would happen. That involved some assessment of the cumulative

25 probability of those individual things and we say that the CMA did not do that.

26 That is important because whenever you try to predict a series of events, each of which

1 is subject to some uncertainty, you need to think about how those individual
2 uncertainties interact and add up. The coin analogy is not a perfect one in this case,
3 I recognise that, but it does make this basic point very neatly. If you toss a coin once,
4 the chances of getting heads is 50%, but if you toss it three times the chances of
5 getting three heads is 12.5. So there's a difference between individual likelihood and
6 accumulative likelihood.

7 Now, of course, we don't say that the CMA needed to set its decision out in
8 a mathematical way. That's not necessary or appropriate, but we do say the CMA
9 needed to address its mind to this question, the cumulative likelihood question, and
10 we say that it didn't do that.

11 So I have said to you that there were a series of individual propositions in the decision
12 and that all of them needed to happen for the counterfactual to come about. What
13 I want to do now is to go back into (ii) and show you those within the decision. That is
14 some material that Mr Jones has gone to. Where that's the case, I will just show it to
15 you in the decision quite quickly.

16 We have boiled it down to six propositions. I will show you them within the decision,
17 but I will also mention that within our skeleton we have summarised them in a list, so
18 if going through those six you want to have a note or aide-memoire, I can give you the
19 reference in our skeleton. That is bundle A, tab 1, page 16, paragraph 59. There is
20 a certain amount of dotting about within the decision that we will need to do now.

21 So within the decision the first question that the CMA asked was whether 10star's bid
22 price would have been acceptable to the seller, FDJ. It did this in two parts. I am
23 going to take you straight to the conclusions on those parts.

24 The first conclusion is at page 46, paragraph 5.65. If we go to the bottom of that it
25 says:

26 "...we conclude that the alternative bidders bid values would not have rendered their

1 bids to be unviable to FDJ on these grounds."
2 That is in the context of a comparison against closure costs. Mr Jones explained this
3 before. The first basis of this part of the analysis is to compare the bid prices against
4 the costs associated with that particular sale. That is, as you will see, quite a confident
5 conclusion. The CMA measured the closure costs, compare them against the bid price
6 and concludes that it is higher.
7 Then if we go to the second part of that analysis, that concludes on page 65,
8 paragraph 5.120. This is the alternate way of analysing the bid price. There the CMA
9 compares the bid price against its estimate of the liquidation value of the business.
10 Here the conclusion is a bit more tentative you will see:
11 "On the basis of these estimates and recognising the inherent margin for error in our
12 estimates, our view is that 10star's bid would likely have been above the liquidation
13 value of the B2C business."
14 As you will see that was a more tentative decision. The CMA then turned to whether
15 the FDJ would have been prepared and happy to provide the transitional services that
16 10star would have needed and the conclusion there is on page 74, paragraph 5.147.
17 This is another quite tentative conclusion:
18 "On the basis of our assessment above our view is that the operational cost to FDJ of
19 entering into a TSA with an alternative bidder would likely have been manageable."
20 Again quite tentative. I wanted to show you just by way of example some of the
21 question marks over that that would likely have gone into that tentative expression.
22 So if you would turn to page 70 and look at paragraphs 5.135 and 6, I will just ask the
23 tribunal to read those. They explain a conflict of evidence there on the extent of the
24 support that 10star would have needed. Thank you.
25 Obviously there is a lot of material here. I am not taking you to all of it. I am just trying
26 to illustrate that some of those tentative conclusions, it is not just words. There was

1 | some real doubt expressed in the reasoning leading up to them.

2 | So the CMA then drew these points together and asked whether the overall economic

3 | balance of the transaction would have been attractive to the seller, taking into account

4 | both the operational cost of the TSA and the bid price. So the things I have just

5 | mentioned it drew together. That is paragraph 5.154, which is on page 76.

6 | "On the basis of our assessment above, our view is that the operational cost ..."

7 | Oh, sorry. I am reading the wrong one. 5.154:

8 | "...our view is that a transaction with 10star would likely have presented challenges

9 | from ..."

10 | MR JUSTICE SAINI: I am not sure where you are reading that.

11 | MS BERRIDGE: Sorry. I got lost. 5.154, the third line.

12 | MR JUSTICE SAINI: Yes.

13 | MS BERRIDGE: "...our view is that a transaction with 10star would likely have

14 | presented challenges from FDJ's perspective. However, taking the evidence in the

15 | round, our view is that FDJ would most likely have been willing to enter into a TSA

16 | with 10star in order to complete the sale of the B2C business."

17 | That takes into account the bid price and the TSA together. So to summarise where

18 | we have got to so far, we have done one step. For this counterfactual to happen the

19 | first step is that the economic balance must have been attractive to FDJ. That broke

20 | down into essentially two steps and the CMA said that taking the evidence in the round,

21 | it most likely would have been attractive.

22 | Next the CMA turned to the seller's non-financial considerations. Mr Jones showed

23 | you some of the underlying evidence on this so I am just going to show you where it

24 | comes in this chapter.

25 | So if you can turn to page 77 and look at paragraphs 5.159 and 5.160, you will see

26 | that the first sentences of those paragraphs describe the evidence from FDJ that it

1 had concerns about selling the business back to the individual that they had bought it
2 from and that they had concerns that 10star was not FCA regulated. Then the
3 conclusions on those are at 5.167 and 8 on page 81. They are just in the opposite
4 order. So 5.167 right at the bottom, the last sentence:
5 "In view of the above our view is that FDJ is not likely to have had any sufficiently
6 serious regulatory concerns to cause it to reject the alternative bidders' bids."
7 Then 5.168:
8 "On balance our view is that this", and that is the selling back problem, "would not
9 have been a sufficient reason to cause FDJ to reject the 10star bid."
10 So now we have three steps. First, the economic balance was most likely attractive
11 to FDJ; second, the sale-back issue on balance would have been insufficient to
12 dissuade FDJ from a sale; and, third, the regulatory issue was not likely to dissuade
13 FDJ from a sale.
14 So we are halfway through. Next the CMA turned to the perspective of the buyer,
15 10star. We have heard again about some of this, so I can show you relatively quickly.
16 If you could turn to page 85, paragraph 5.177, that records that:
17 "...neither alternative bidder had submitted a binding bid [or completed due diligence]."
18 Then 5.180, further down the page, noting that there weren't already self-standing
19 accounts for the sale business. It was a carve-out situation, so the CMA had to put
20 together some sort of financial assessment based on the underlying evidence.
21 Then page 91, paragraph 5.189. Mr Jones already showed you this. The conclusion
22 of that assessment was that the cost base was considerably higher than the revenues,
23 so it was a loss-making business. Therefore 10star would have had to believe that it
24 could improve the performance of the business before it would have committed itself.
25 Then we see some plans for turning around the business. Those are on page 97.
26 Then 5.204, sub-paragraph (b):

1 "10star told us that it had submitted a bid to purchase Sporting Index as it believed
2 that it could combine its current B2B expertise with Sporting Index's strong brand to
3 develop a product to compete in the UK B2C sports spread betting segment."

4 It goes on a little in that vein. Then over the page, 5.205, there are some views
5 expressed by 10star to the effect that under the pre-existing ownership that there had
6 been a lack of investment and some caution about the regulatory approach and that
7 those might have held the business back and gave it some sense that he could
8 improve the business under 10star ownership.

9 Then concluding on that, going back to 5.200 which is on page 96:

10 "Based on our assessment above and noting in particular our views ... we conclude
11 that the alternative bidders would likely have been committed to completing a
12 purchase of the B2C business."

13 So that was our fourth step. Next, as we have heard, 10star would have required FCA
14 approval. If you look at page 101, paragraph 5.213, the last line of that paragraph:

15 "... our view is that the alternative bidders would likely have proceeded to obtain FCA
16 approval."

17 So there is another "likely" there.

18 Finally, 10star would have needed to turn that loss-making business around and
19 operate it as an effective competitor to Spreadex. The conclusion on that is at
20 page 101, paragraph 5.215. At the bottom of the paragraph:

21 "... we conclude that an alternative bidder acquiring the business would likely" -- again
22 "likely" -- "have operated the B2C business broadly in line with the pre-merger
23 conditions of competition."

24 Some of the uncertainties that go into that statement are just captured in that
25 paragraph. So if you just look about halfway through:

26 "... an alternative bidder would have faced challenges ... [but] the performance of the

1 B2C business had the potential to improve ..."

2 So we have six steps and I will quickly run through them and then perhaps we should
3 have a break.

4 MR JUSTICE SAINI: Okay.

5 MS BERRIDGE: Number one. The economic balance was most likely to be attractive
6 to FDJ.

7 Number two. The sell back issue would on balance not have dissuaded FDJ.

8 Number three. The regulatory issue would not likely have dissuaded FDJ.

9 Number four. 10star was likely to have been committed to completing a purchase.

10 Number five. 10star was likely to have obtained FCA approval.

11 Number six. 10star was likely to have operated the business in competition with
12 Spreadex.

13 All of those had to happen for the counterfactual that the CMA identified to come about
14 and, as I have shown you, the tentativeness of those conclusions reflects some real
15 question marks in the analysis leading up to them.

16 Is that a good moment?

17 MR JUSTICE SAINI: Yes. We will have a fifteen-minute break. So we will reconvene
18 at 12.05. Thank you.

19 (Short break)

20 MS BERRIDGE: Thank you. So before the break we saw our six individual
21 propositions and the way they were expressed in the decision. We can now go back
22 to that conclusion on (ii) where those are drawn together, and that is on page 101,
23 paragraph 5.216. I know I have taken you to this before, but I am going to ask you to
24 read that paragraph one more time. (Pause.)

25 MR JUSTICE SAINI: Yes.

26 MS BERRIDGE: We say this conclusion is flawed. All the CMA does there is recite

1 that it has taken account of all the evidence in the round. What it does not say there
2 or, in fact, anywhere else in the decision is how it has gone from those individual
3 propositions that we looked at to the overall conclusion, how it has decided that the
4 most likely outcome was that all of those things would happen.

5 Indeed, even at this point, which is the drawing together point and the only point where
6 the issues are drawn together, it is striking that the CMA still lists out three separate
7 propositions and refers to them as likely.

8 Now listing three does not do full justice to how many separate parts of the analysis
9 there were, but the more important point is that that reasoning just tells us that each
10 of those was considered to be likely, and just because some separate things are each
11 likely doesn't make them likely together. You need something more. It bears
12 emphasising that if any of these things did not come true, the CMA's counterfactual
13 would not hold and its SLC would not hold.

14 It is also important to read this paragraph in the context of what's come before which,
15 as we have seen was some real question marks over those individual propositions. It
16 is clear just from what we have read on the face of the decision that there were difficult
17 judgment calls at each stage. So against that background it is very difficult to
18 understand how the CMA can have concluded that each of the individual steps was
19 so likely to have come true that the most likely outcome was that all of them would
20 come true. We say it failed to turn its mind to that essential question and the decision
21 is therefore flawed.

22 Now in its response the CMA says that the obvious and fatal problem for this ground
23 1 is that the CMA did, in fact, ask itself what was the most likely outcome, basing its
24 judgment on all of the considerations and evidence in the round, but it is not enough
25 just to say that you have done that. The CMA is required to set out its reasons and
26 5.216 simply does not do that.

1 I would like to take you to a couple of authorities on that. I know it is a familiar
2 proposition, so I will be brief. If we can turn to the authorities bundle, bundle D, tab 16,
3 page 1343, this is the Enterprise Act, section 38. This is the duty to publish a report.
4 That is subsection (1). Then subsection (2):
5 "The report shall in particular contain:
6 ... (b) its reasons for its decisions...
7 (c) such information as the CMA considers appropriate for facilitating a proper
8 understanding of those questions and its reasons for its decisions."
9 But no proper understanding is possible based on paragraph 5.216. It simply leaves
10 the question open.
11 If I can ask you to turn back in the authorities bundle to tab 11, page 769, and this is
12 Meta. Page 849, paragraph 148(2). This is another mergers case before this tribunal
13 and the tribunal emphasises there.
14 MR JUSTICE SAINI: Sorry. Which page of the bundle is that?
15 MS BERRIDGE: Sorry. 849.
16 MR JUSTICE SAINI: Sorry. I am just being a bit slow.
17 MS BERRIDGE: The paragraph is 148(2), the first line:
18 "The addressees of a decision," and this is a mergers decision, "and any other persons
19 affected by the decision, are entitled to understand exactly", and that is underlined,
20 "the basis on which the decision is made."
21 Spreadex has no way of understanding how the CMA stood back and weighed the
22 various probabilities. It is simply told to take this on trust. That is inconsistent with the
23 CMA's duty to give reasons. I want to show you an example of a failure of analysis
24 which is similar to this and was criticised by the tribunal in another merger case. So if
25 I could take you to tab 7 in the bundle, page 332 and that is Ryanair. Within Ryanair
26 if you could go to page 369. This is paragraph 85 of the judgment. What the tribunal

1 is doing here is quoting the part of the Competition Commission report that was
2 challenged in that case.

3 If you could look within the quotation to paragraph 8.9, so that's of the CC report, this
4 is the bit I would like us to focus on. Second sentence:

5 "We believe that we must carry out a balancing exercise, taking into account all the
6 circumstances of the case in assessing ..."

7 Then that is the question they were looking at:

8 "We considered the following factors in reaching our decision."

9 Then you will see all the little subparagraphs there with letters which go all the way
10 down the next page and indeed on to the one after that.

11 Now if I can ask you to move on within that judgment to page 380, paragraph 105.

12 This is where the tribunal gives its view on that part of the Commission's analysis. So
13 105(3):

14 "Paragraph 8.9 of the [report] is unsatisfactory in that whilst it identifies a list of factors,
15 it did not go on to state what weight it placed on each of these factors individually."

16 So it is not exactly the same case, but it is analogous. The CMA is not entitled to list
17 things out and expect us to leap from there to the overall conclusion. It needs to set
18 something out to show how the individual propositions lead to the whole.

19 To be clear, it is not just a failure on the CMA's part to write something down. This is
20 an extensive and carefully considered report and it was prepared over a long period.

21 So when an analysis is not set out, the clear implication is that it did not happen.

22 So, finally, the final section of my submissions I want to deal with some of the CMA's
23 other arguments that they have made in their pleadings on ground 1.

24 So, first, if I can ask you to look at the CMA's skeleton, which is in bundle A, tab 2 and
25 find paragraph 46. This is on page 32:

26 The CMA acknowledges that there is no express statement in the decision that

1 a number of things would have to happen in combination for a sale to have been
2 completed, but it argues, however, that this is such an obvious proposition that it does
3 not need to be stated.

4 Even if you agree with that there is no answer to say that the problem is obvious.
5 Obvious or not it needed to be addressed and we say that it was not addressed. If
6 I can then ask you to look at paragraph 47 which is over the page:

7 "The CMA emphasises that it was not required to quantify the probability of any part
8 of its reasoning."

9 We say that is clear, but it is not Spreadex's case that the CMA had to conduct
10 a mathematical exercise. I know I have said this before, but I want to be absolutely
11 clear. Spreadex says only that the CMA needed to recognise that predicting the
12 likelihood of a series of events involved some assessment of how those likelihoods of
13 those individual events interact and add up. There is no maths required.

14 Finally also within that paragraph 47 the CMA points out that the propositions on which
15 it relies are not independent. So that contrasts with the coin tossing example that each
16 time you toss a coin it's a fresh toss. It is 50% every time and it doesn't matter what
17 has gone before. These things are to some extent tangled up and we absolutely agree
18 that it is much more complicated than just looking at a simple coin tossing example
19 and that there are relationships between the individual propositions that I showed you.

20 We say that in the exercise of drawing those propositions together that is part of it,
21 understanding the relationships, pulling them out, talking about what they are.

22 So, for example, you will remember that the question of FCA approval comes up in
23 two places in the proposition, as I showed you, and also -- Mr Jones has spoken about
24 this -- the suggestion that FDJ was only looking to recover its closure costs comes up
25 in three separate propositions. So we say that part of the analysis would be looking
26 at those pieces of evidence and how they sit within the individual propositions. If they

1 are weak, they undermine more than one. If they are strong, they build the case more
2 strongly. This is just hypothetical. We don't see anything of that sort in the decision.
3 We just are given 5.216. We have considered the evidence in the round and that is
4 the end of the matter.

5 If I may take you to one final authority to complete my submissions. It is the very last
6 one in the bundle. It is tab 17, page 1346. It is R (on the application of Wells) v Parole
7 Board. If you can turn to page 1356 within the case and look at paragraph 33, this is
8 a restatement or an explanation of the irrationality on Wednesbury unreasonableness
9 ground. I will just read the very final half sentence:

10 "...does the conclusion follow from the evidence or is there an unexplained evidential
11 gap or leap in reasoning which fails to justify the conclusion?"

12 Here we say there was exactly such a leap. The CMA leapt from a series of things it
13 considered likely to happen on balance to a conclusion that all of them happening was
14 the most likely outcome. That is a proper ground for judicial review and on its own
15 sufficient reason to quash the final decision.

16 Sir, unless I can assist the tribunal further, I will hand back to Mr Jones.

17 MR JUSTICE SAINI: Could I just ask a question about how grounds one and two
18 relate to one another? As I understand ground 1 -- I am putting this much less
19 elegantly than you have -- you have a collection of six events which have been found
20 to be likely, some by a close margin and I think your argument is that if you put those
21 together -- they have to be put together and then you have to justify your conclusion
22 that the overall counterfactual was likely. I think your point is -- well, there are two
23 points. One is that although the CMA says, using the wording in the round, that they
24 have done that, you are saying they have not done it. Then separately from that there
25 are reasons, and I am trying to understand how the reasons fit into this argument. So
26 I understand your argument that when they say in the round, although they say that,

1 they have not actually done that, and I think that the CMA's position is they have done
2 that and it was kind of obvious that they had done that. How do the reasons -- what
3 was the reasons argument here?

4 MS BERRIDGE: Yes. So I see them as linked.

5 MR JUSTICE SAINI: Yes.

6 MS BERRIDGE: You remember that I said that where an analysis is not set out it is
7 a reasonable inference that it didn't happen especially when you have such a long and
8 well considered report. I think the duty to give reasons and that quotation from Meta
9 just really reinforced that, that we shouldn't -- the CMA is not able to just rely on saying
10 something is obvious when there is actually a job of analysis to be done and there is
11 a high standard of setting that out, drawing the points together. So reasons is perhaps
12 a sort of sub segment of our argument.

13 MR JUSTICE SAINI: Is it if they had done that they should have given reasons as to
14 how they did it, the so-called in the round exercise?

15 MS BERRIDGE: Exactly.

16 MR JUSTICE SAINI: Going back to the point I started this off with, what's the
17 relationship between the two grounds, so ground 1 in a sense is an argument about
18 logically what should have been done and you are saying it wasn't done. Ground 2,
19 although it has different limbs, is an argument; okay, let's assume that they did what
20 they said they had done, in other words, they looked at each of the individual items in
21 forming their conclusion about what in the round was likely, the outcome is a perverse
22 outcome, because when you look at all of those collections of six "likely"s, any rational
23 decision maker putting them into the balance would not have concluded that the
24 counterfactual outcome, which is AB1 or 10star buying, is the likely outcome.
25 A rational decision maker, had they done the exercise properly, could only have
26 concluded that the likely outcome was closure.

1 MS BERRIDGE: Exactly. I don't want to trespass on Mr Jones' submissions but I think
2 that exactly captures it. You could put it almost in the reverse to say the same thing,
3 which is that ground 1 is capable of proceeding on the basis of all of the conclusions
4 as found in the report. So we don't need to show you that any of those are irrational
5 or wrong. It is even if everything the CMA says is right, they fail to do one bit. As you
6 say, ground 2 looks into parts of the CMA's reasoning and says that those are irrational
7 and therefore the conclusion was irrational.

8 MR JUSTICE SAINI: Forgive me if it sounds like a stupid and obvious question, which
9 is the word "closure" is used a lot. We also see the word "liquidation" used. I actually
10 find it much more helpful to think of this case as there being two potential
11 counterfactuals. One is the counterfactual which the CMA adopted, which is
12 purchased by 10star or AB1. Is closure used as a shorthand for liquidation scenario?

13 MS BERRIDGE: It is a bit confusing. I will try to set out how I understand it from the
14 report. So closure is used in relation to closure costs.

15 MR JUSTICE SAINI: Right.

16 MS BERRIDGE: It would have perhaps been better to call it sale costs or costs
17 associated with the sale. When they are talking about the adequacy of the bid price,
18 they say their primary case is that FDJ wanted only -- was only concerned to recover
19 enough from the sale to cover the costs of closing. So, for example, if 10star I think
20 said "Well, we will not need two of your employees" so there would have been a cost
21 of making them redundant and there are some other costs. So closure costs just refers
22 to closing down the bit that wasn't sold.

23 So the question of comparing the bid price against closure costs you could think of
24 that as emerging with money in your pocket. So it doesn't cost you more to close it
25 down than you got. Then obviously liquidation is a more familiar term. That is what
26 we say was the most likely scenario, and that is if FDJ had said "None of these sale

1 options are working for us. We are just going to close it down, we are going to sell off
2 the assets. There will be costs of that, redundancy costs, and there will be some
3 money coming in when we sell off the individual assets."

4 MR JUSTICE SAINI: Let's try to put it more simply than that. So we have two options
5 for a counterfactual. One is CMA's favourite counterfactual, which is sale to 10star.
6 The other is what exactly, because is it closure or liquidation or are they the same
7 thing, and it has a figure on it and I am just trying to think of -- just thinking ahead, FDJ
8 as a rational economic actor you think is going to go for the option which leaves it with
9 the most money in its pocket exiting the business. They are leaving the business.
10 Either they can sell it to 10star, (inaudible) million in its pocket, or they can
11 close/liquidate it -- I am using those as the same thing -- with (inaudible) in its pocket.
12 It is going to take whichever of those figures is the greatest ultimately.

13 What I am still trying to get to the bottom of is what the second -- I have used the word
14 closing or liquidating because, in fact, looking at the CMA's decision at 5.43, page 41
15 of chapter 5, they use -- they say that they are considering:

16 "... the economic impact on the seller of a sale to an alternative purchaser relative to
17 the economic impact of closing or liquidating the business."

18 So they use "closing" or "liquidating", but just going back to the facts of this case,
19 option A is sale to 10star. We are all clear about that, together with the TSA. That
20 has a figure that has been identified. What exactly is option B?

21 MS BERRIDGE: Yes. We say liquidation.

22 MR JUSTICE SAINI: Okay. So we can see the shorthand liquidation which has been
23 valued subject to the comment about customer lists. That has a figure on it. I think it
24 is your case -- this is more of an argument, putting aside the more detailed arguments
25 ground 2 about misunderstandings, etc, that a rational CMA could only have decided
26 that option B, liquidating the business, is the correct counterfactual.

1 MS BERRIDGE: Yes. So Mr Jones will be taking you through that, but that is what
2 we say, yes.

3 MR JUSTICE SAINI: I know that there are more subtle arguments underlying that, but
4 I am just trying to put it crudely so I can understand it. Okay. Thank you very much.

5 MS BERRIDGE: Thank you.

6 MR JONES: Ground 2. Ground 1, just to recap, CMA didn't address their minds to
7 cumulative culpability. Ground 2, if they did, their conclusion was irrational.

8 MR JUSTICE SAINI: Yes.

9 MR JONES: Can I just, my Lord, add a couple of footnotes to the discussion that you
10 have just had with Ms Berridge? You were asking what is Spreadex's preferred
11 counterfactual, as it were. Liquidation, yes, but, of course, all Spreadex really is saying
12 and needs to say is they would have completely shut the business down. Logically
13 and rationally that would seem to us to mean liquidation, which is why I am happy to
14 answer --

15 MR JUSTICE SAINI: They want to get as much money as they can.

16 MR JONES: They want to get as much money as they can. What they, in fact, would
17 have chosen to do and whether they would have sold the assets, it would seem odd
18 not to, but that is actually part of the background debate between Spreadex and the
19 CMA about how a rational business would behave. So I don't want to be boxing myself
20 too much into liquidation. Yes, that seems the obvious and rational thing to do if you
21 are closing it down. So yes, liquidation, but the headline is just shutting the business
22 down.

23 The second point is this, my Lord. When you put your questions to Ms Berridge you
24 said that Spreadex's case is that the only rational conclusion is liquidation. I do take
25 issue with that a little bit, if I may, because our challenges to the CMA's reasoning
26 resulting in their own decision about what the counterfactual is. I say that is irrational.

1 So I don't need to go so far as to say the only rational conclusion is the one which
2 Spreadex endorsed.

3 MR JUSTICE SAINI: You have to say, though, the reasoning itself would undermine
4 the conclusion.

5 MR JONES: Yes, I do need to show that, but I don't need to, as it were, anticipate
6 alternative reasoning that could get to the same conclusion. I need to show that the
7 reasoning in the decision is flawed. That is my point.

8 Obviously we are here for the second time and I will come back to this point, but the
9 reasoning is now quite different to the first round. So I am just targeting the reason
10 that we are actually facing in the decision and that is what we say is irrational.

11 Can I reiterate a point I made at the outset, which is because ground 2 is a challenge
12 to the rationality to the overall conclusion, assuming for these purposes that they did
13 turn their minds to cumulative probabilities and that they did say in the decision the
14 most likely outcome, having regard to cumulative probabilities, is sale to 10star,
15 because we are challenging that overall conclusion, we are relying on, as in ground 1,
16 but we are relying on all of the various uncertainties that go into that as part of our
17 case for saying it is an irrational conclusion.

18 I am just emphasising that because we rely on that even where the CMA has not
19 misunderstood the evidence. So even in those parts of the decision where the CMA
20 recites the evidence and I say "No, that is wrong", I am still able to point to the
21 uncertainty associated with the evidence as factoring into our overall challenge. I,
22 however, as I said at the outset, am going to focus in my submissions on two broad
23 areas.

24 Can we go to page 43 of the decision. I warned you that there is going to be a bit of
25 repetition. I just want to follow the same structure of the decision as Ms Berridge did
26 whilst trying not to repeat the actual points that she made.

1 You know at 5.49 there is the three different headings that the CMA addresses this
2 general topic of (ii) under and the first heading on page 43: would FDJ have been
3 willing to complete a sale to alternative bidders. 5.50 they look at that in four different
4 stages. (a) is the recovery of closure costs. This is the first point that I want to focus
5 on.

6 If we look at 5.51, please:

7 "As explained above, FDJ submitted during the remittal inquiry that its objective in a
8 sales process would have been to recover the redundancy and other closure costs of
9 the business, and that it would have recovered the consolidated net asset value of the
10 business to the extent possible. We understand this to mean that FDJ would have
11 assessed the viability of the alternative bidders' bids against the closure costs
12 associated with a sale to the alternative bidders, and at least some of the net asset
13 value of the B2C business."

14 5.52:

15 "We also understand this to mean that FDJ was not seeking or necessarily expecting
16 to recover the full net asset value of the business."

17 Now the closure costs are explained. If one looks forward, please, to 5.59, you will
18 see there were different closure costs associated with both of the two bids and it is
19 redundancy and other similar costs. 10star's bid would have been £0.95 million
20 closure costs. Star Sports' bid would have been approximately 1.25 million of closure
21 costs.

22 At 5.60 you see:

23 "By netting these estimated closure costs against 10star's bid ... and Star Sports' bid
24 ..."

25 they come to a net value for those two bids and they are above both the closure costs.

26 That, as you have already seen, would not have been sufficient to give Sporting Group

1 or FDJ any compensation, or sufficient compensation I should say, to cover the
2 business's net assets, which, if you look forwards to 5.62, were £3 million.

3 If we just jump ahead, please, to page 60, there is there a calculation of net assets in
4 which they are looking here at liquidation, but you can work out the net value during
5 a liquidation.

6 MR JUSTICE SAINI: Which paragraph, Mr Jones?

7 MR JONES: Page 60, paragraph 5.102, they talk about the recovery rate of the
8 balance sheet assets. You will see at (b):

9 "... a recovery rate of 100% on the basis" -- this is for debtors -- "of FDJ's submission
10 ..."

11 That is 2.8 million.

12 "... 100% recovery rate for cash ...

13 "... 100% payment rate to creditors ..."

14 So that nets it off.

15 "On the basis of the above, we estimate a value of approximately £2.6 million...for the
16 net assets on the balance sheet ..."

17 As I say, that is in the context of liquidation, but just pausing there, on the face of it,
18 going back to what they say about just wanting to recover closure costs, we say it's a
19 pretty odd suggestion that FDJ would have only been focused on trying to get closure
20 costs plus anything else if possible, because on this approach what the CMA is saying
21 is that FDJ were prepared to sell assets worth net £2.6 million for something over
22 around £1 million. It is just on the face of it a very odd conclusion. The evidence for
23 it -- if you go back to 5.51, which I showed you a moment ago, you will see that starts:
24 "As explained above, FDJ submitted ...", etc.

25 Now that "as explained above" is a reference to paragraph 5.47, where you see the
26 same formulation in that first sentence and then the evidence for it is there in that

1 footnote 139:

2 "FDJ response dated 27th May 2025 ..."

3 That is in the bundle. It is at tab 18, page 628. Actually could we just look forward
4 first to the answer that is focused on? It is on page 629.

5 MR JUSTICE SAINI: 229?

6 MR JONES: Sorry. 629. Do you have it, my Lord?

7 MR JUSTICE SAINI: I have it now.

8 MR JONES: It is FDJ's answers. It is 27th May 2025. You will see the response,
9 questions 2 and 3. This is what is we say:

10 "The group's objective would have been to preserve and recover as much value as
11 possible from a sale transaction with a view to at least covering the associated
12 redundancy and closure costs and to the extent possible recovering the consolidated
13 net asset value."

14 Those are the words that are latched on to:

15 "Whether the group would have ultimately completed a sale to 10star would have
16 depended on the overall economic balance of the transaction, in particular, whether
17 the negotiation of the TSA terms rendered the offer financially viable in light of the
18 anticipated burden and transitional risks as explained during the remittal phase.
19 Considering the progress of negotiations with 10star throughout the process, both
20 offers could reasonably have been viewed as aligned with the group's expectations."

21 So it's those words in that first sentence which are latched on to, but one has to look
22 at what they were actually asked, and for that we go back to page 628. They have
23 had explained to them various calculations that the CMA has done during the remittal
24 process coming up with their estimate of liquidation value, and question 2 at the bottom
25 of the page is:

26 "In light of the information above please explain whether FDJ would likely have

1 completed a sale to 10star on the basis of an effective bid of £2.5 million and
2 a liquidation value estimate of around £1.6 million".

3 ie the lower of the (inaudible) range, and 3:

4 "FDJ would likely have completed a sale to 10star on the basis of an effective bid of
5 £2.5 million and a liquidation value estimate of around £1.7 million."

6 So the question that was put to them was all premised on the bid being above
7 liquidation value. That was the context in which they answer in the way that they did.

8 Now in their answer you have seen at the end of that they refer to:

9 "Both offers could reasonably have been viewed as aligned with the group's
10 expectations."

11 The meaning of that was clarified. If you go forward to --

12 MR JUSTICE SAINI: I have seen what they clarified what they mean by that.

13 MR JONES: The clarification tied that to the liquidation value.

14 MR JUSTICE SAINI: I think there are two different liquidation values that have been
15 brought forward. That is what they mean by both offers.

16 MR JONES: There is a note there. Someone has inserted it. The reason I am
17 emphasising it is they had the liquidation values in mind is my point. They were not
18 just answering this question with no regard to the liquidation values that were put to
19 them. It was answered with those in mind. That is what they made clear when they
20 answered the question.

21 So you can't in my submission reasonably take from this that what they were saying
22 was that they would only have wanted to cover closure costs plus whatever else they
23 could get and that they wouldn't have worried about the liquidation value. It is not the
24 context of the question. It is not the hypothetical that they were turning their minds to.
25 It is not consistent with their clarification of the answer.

26 So we do say that the reasoning in the part of the report that I just showed you takes

1 that sentence out of context and relies on it in a way that is irrational.

2 Now I am going to come back in a moment to the relevance of this, because, as you

3 know, they go on to look at liquidation value and I need to deal with that, but this

4 remains important to their analysis in a way that I am going to show you.

5 Let's have a quick look at liquidation value. Paragraph 5.68, which is page 47, they

6 explain why they are looking at liquidation value. So they have already nailed their

7 colours to the mast saying it is only closure costs. They only wanted to recover closure

8 costs plus whatever else they could get. Then they say, nonetheless, given the

9 language in our guidance, you should look at liquidation costs, Spreadex's

10 submissions, which were that any rational company would have taken account of

11 liquidation costs, and to test whether any conclusions should be made would change

12 if the reference point were to be taken as the liquidation value rather than closure

13 costs, we have calculated a liquidation value for the B2C business.

14 The conclusion of this on page 65 you have already seen. 5.120. Their conclusion is:

15 "10star's bid would likely have been above the liquidation value. Star Sport's bid would

16 likely have been below the liquidation value."

17 So there's a degree of tentativeness around that, but that is the result of the liquidation

18 analysis. During the administrative phase Spreadex took issue with a lot of the

19 liquidation calculations. I am not going to do that today. We do take issue in our

20 grounds with one part of it but I am not going to pursue that. I am happy to stick with

21 what they say at 5.120. There is a degree of uncertainty, but broadly speaking 10star's

22 bid would likely have been above the liquidation value; Star Sports' below.

23 MR JUSTICE SAINI: Can I make sure I understand that? You are asking to proceed

24 on the basis that you are accepting the -- just in terms of the quantification of the

25 liquidation values, we were just looking at that letter -- the question that was asked of

26 FDJ. I think the range was 1.6 to 1.7, if I remember it.

1 MR JONES: Yes.

2 MR JUSTICE SAINI: For the purposes of this hearing you are willing to accept that
3 that's right?

4 MR JONES: Yes.

5 MR JUSTICE SAINI: Because I think your customer lists argument was that, in fact,
6 the liquidation value would have been (inaudible) but you are not pursuing that, are
7 you?

8 MR JONES: We are not pursuing it.

9 MR JUSTICE SAINI: That is helpful.

10 MR JONES: We then go on to the TSA, as you know. That's page 65. Just to be
11 clear, the TSA that is being discussed in this section for 10star is at a cost of £4 million
12 per year. I will just show you 5.137 on page 71, where what is said is that the extent
13 of TSA would, it says, have lasted for 12 months but it might then on a smaller basis
14 have had to carry on for another one or two years.

15 Now I want to look at what the CMA draws from this. If you go forward to page 74,
16 please -- we are in the section on the TSA, but obviously they look at the TSA in the
17 context of closure costs, bid values, liquidation values and so on. These various points
18 come together from page 74.

19 At 5.147, as you have seen, they say their view is that:

20 "... operational cost to FDJ of entering into a TSA with an alternative bidder would
21 likely have been manageable on the basis that (a) FDJ initiated the 2023 B2C sale
22 process with the expectation that a TSA would be required, and (b) a TSA with the
23 alternative bidders would likely have been in line with its expectations ..."

24 Now just pausing there, when they say FDJ initiated the process with the expectation
25 that a TSA would be required, that's right, but I have shown you the evidence of what
26 they said about that. They were very much hoping they wouldn't have to have a long

1 | TSA and that evidence --

2 | MR JUSTICE SAINI: They were not enthusiastic about it but they accepted they might
3 | need to have one.

4 | MR JONES: They accepted they might need to have it. They were not at all
5 | enthusiastic about it and they were repeatedly emphasising that if the only offer on the
6 | table was one which included a TSA then would have to think very hard about the
7 | alternative, which is closure.

8 | MR JUSTICE SAINI: Yes.

9 | MR JONES: So in terms of what is said -- now that evidence is summarised in the
10 | decision. So the evidence that I took you through is summarised in the bits that I have
11 | just sort of jumped over at page 74, but the point I am making is, saying that they
12 | initiated the process knowing that a TSA would be required doesn't answer the
13 | question of whether in the end they would have gone ahead with the deal. It is just
14 | making point that they knew that they might need a TSA and you are just thrown back
15 | on the question of what economic judgment would they have made in the round,
16 | looking at the TSA that was before them?

17 | 5.148 makes essentially the point I have just made about the wider context. So they
18 | say:

19 | "We note that FDJ's willingness to incur this operational cost of entering into a TSA
20 | would have been considered in the wider context of the alternative bidders' bids."

21 | Then towards the bottom of that page they refer again to Sporting Group's submission
22 | about them questioning the overall economics of the deal.

23 | At 5.149 is where the point about recovering closure costs comes back in. So they
24 | say:

25 | "We asked FDJ whether it would have completed a sale to 10star on the basis of
26 | an effective £2.05 million bid ..."

1 Just pausing there, that is, in other words, the 3 million bid minus closure costs. So
2 that's what they are talking about:

3 "... in the context of 1.3 million and 1.76 million liquidation value estimates (at the same
4 time setting out our estimates for each liquidation value component). FDJ was aware
5 that a TSA would have been required in connection with a sale to 10star. As set out
6 in paragraph 5.47 above, FDJ submitted in response to our query that its objective
7 with the sale of the B2C business would have been to preserve and recover as much
8 value as possible from a sale transaction, with a view to at least covering the
9 associated redundancy ..."

10 MR JUSTICE SAINI: It is going back to that answer.

11 MR JONES: It is going back. So they build it back in at this stage. If you look forward
12 to 5.154 on page 76, which -- you have already seen I think part of this, but this is the
13 conclusion which Ms Berridge showed you on would FDJ have accepted the bid? After
14 the sentence which Ms Berridge showed you, do you see there is an (a)? There is
15 a list of points and the first one is:

16 "FDJ's objective in the sale process was to recover closure costs associated with a
17 sale ..."

18 and this would have been above the closure costs.

19 So it comes back into the assessment of whether or not the deal would have been
20 accepted. Now it is right to say that they go on in (b) to refer to the liquidation value:

21 "10star's bid would in any case have likely been above the liquidation value ..."

22 But my point is whilst on ground 1 we criticise them for not looking at things in the
23 round in the correct way when you put all those different steps together, the six steps
24 together, you can't make that point about 5.154. They are looking at things in the
25 round here, and when they ask the question "Would this deal have been done?", they
26 are not treating price, as it were, a binary issue. They were not just ticking a box and

1 saying "Yes, the price would have been enough" or "No, it wouldn't have been
2 enough". They are looking at it in combination with the other factors.

3 So in that context if one takes the view, as the CMA does, that on the financial side,
4 FDJ were only looking to recover their closure costs, then all of a sudden a bid like
5 10star's bid, which is a couple of million above closure costs, might be thought to
6 outweigh the disadvantages associated with a TSA, whereas if you strike out (a) from
7 paragraph 5.154 and you strike out their reliance on closure costs, and all you have is
8 liquidation value, so you are left with the CMA saying "Well, 10star's bid we think was
9 probably a bit above liquidation value", that would make their reasoning much harder,
10 because they would have to say even though it is a little bit more than liquidation value,
11 nonetheless we think they would have gone for it, notwithstanding the downsides of
12 the TSA, notwithstanding their doubts about regulation, notwithstanding the time it
13 would have taken and they were losing money and all of those other things."

14 So that is why I have emphasised the closure costs and it is why I say although they
15 did look at liquidation costs, it still infects their overall decision in this part of the case.

16 Now I should say a little bit more about the liquidation. If we just go back to 5.150,
17 please, page 75, the paragraph begins by referring again to the need to look at the
18 overall economic balance of the transaction and it goes on towards the end:

19 "FDJ added that considering the progress of negotiations with 10star throughout the
20 process, a potential sale to 10star in the context of both the 1.3 million and 1.76 million
21 liquidation value estimates could have reasonably been viewed as being aligned with
22 FDJ's expectations."

23 Now I just wanted to look back very quickly please at the question that was asked.

24 Page 628:

25 "...please explain whether...FDJ would likely have completed a transaction on this
26 basis."

1 That is the question. They avoid answering that question. Go over the page. 629. I
2 say "they avoid". That's not a criticism. What I mean is they don't say "yes"; they don't
3 say "no". They say very fairly both offers:
4 "... could have reasonably been viewed as aligned with the group's expectation."
5 So they are shrugging. They were saying "could have done". It is the stance that they
6 have adopted throughout, which is we would have had to look at all of this in the round.
7 That is what they say further up in this very same answer. "We have would have
8 looked at it all in the round". So it is not a straightforward answer. It is not a "Yes, we
9 would have gone along with that deal." It is saying it could have been reasonably
10 viewed as a line of expectation.
11 Now this point is addressed in the decision. If you go back to page 75:
12 "Spreadex submitted ... FDJ's response was ambivalent and we agree that there is
13 still a degree of uncertainty ... FDJ have acknowledged that the negotiation ... may
14 have rendered its bid unviable ..."
15 Then they say:
16 "However, we infer from FDJ's response that based on the early discussions and
17 negotiations it had with 10star, including on the TSA (and in particular the £4 million
18 TSA quote that had been provided to 10star prior to 10star confirming its preliminary
19 bid), 10star's bid could have reasonably been viewed as being aligned with FDJ's
20 expectations."
21 Pausing there, that is not really an inference. That's what they said in that
22 paragraph that we just looked at.
23 "As set out above, our view is that a TSA required by 10star would likely have been in
24 line with FDJ's expectations of a TSA when it had initiated the [process]."
25 That is a point I have already addressed. Yes, they did expect one. No, they didn't
26 want to do that.

1 Then they say:

2 "Therefore, on this basis our view is that negotiations over a TSA were unlikely to have
3 rendered 10star's bid to be unviable from FDJ's perspective."

4 Now at 5.152 and 5.153 the CMA deals with the question what would have happened
5 if 10star had tried to pay less than £4 million for the TSA. I am going to look at this in
6 more detail when I come to talk about the transaction from 10star's point of view but
7 essentially what's being said here is 10star would have paid £4 million and we
8 therefore don't need to ask ourselves whether or not FDJ would have accepted a deal
9 for less than that. You see that last paragraph at 5.153:

10 "In these circumstances our view is even if FDJ would not have been willing to offer
11 the TSA which 10star required at a price lower than £4 million, this would not materially
12 impact our assessment of the counterfactual."

13 It wouldn't impact it because they say it doesn't matter, because 10star would have
14 paid £4 million. That's why I said at the outset their analysis is really pinned on the
15 deal that they say effectively was on the table £3 million bid, £4 million TSA, because
16 that is what they pin it to here. 10star would have paid £4 million. We don't need to
17 consider what would have happened if they didn't pay that. I will come back to that
18 when I talk about 10star.

19 At 5.154 -- again you have seen this -- the conclusion is they most likely would have
20 entered into the TSA with 10star. They run through the various reasons, but they are
21 reasons which I have already addressed you on. They are in my submission
22 erroneous for the reasons which I have explained, and I apologise. The point I am
23 about to make I have probably made too many times already. I will try not to make it
24 again, but it is just one link in the chain. So for the counterfactual to hold you don't
25 have to look at this and say well, difficult, but on balance this is the conclusion. You
26 have to be able to look at this and say "We are so confident in this conclusion and so

1 confident in all the other conclusions, that we can say they all would have happened".
2 Whilst we are here I will just show you what they say about Star Sports. I will come
3 back to this later, but 5.155 they note that Star Sports' bid would likely have been
4 below liquidation value, although above the closure costs value.
5 Then 5.156:
6 "Nonetheless, for the reasons given above in relation to 10star, and in particular given
7 10star's higher net bid value relative to that of Star Sports, we do not consider it
8 necessary to reach a view on whether FDJ would likely have been willing to enter into
9 a TSA with Star Sports."
10 I will come back to that later, but essentially my point on it is their analysis of Star
11 Sports really runs into the ground at that point because they don't reach a view on
12 what would be a critical point were it to be said that Star Sports might have bought the
13 business.
14 MR JUSTICE SAINI: Let me ask you a question. You may be coming back to this,
15 but I think the core of this ground is that they misunderstood and then misapplied
16 based on that misunderstanding the answer to the question. What do you say was
17 the correct understanding of what was being said by FDJ in question 2 and 3, the
18 answer to question 2 and 3?
19 MR JONES: Can I turn back to the -- it is on page 629.
20 MR JUSTICE SAINI: I think first of all they ask "Do you want to say anything about
21 liquidation". They say "That is fine. Nothing about liquidation". I think we are all
22 accepting for the purposes of this hearing that range of liquidation is correct. The
23 second question is -- you are right they don't answer it directly -- would you accept the
24 10star bid with that value and that range of liquidation values, but what's the correct
25 understanding, in other words, what should the CMA have taken away from what they
26 had been informed by FDJ?

1 MR JONES: They are saying "If we had been faced with these hypothetical situations,
2 so if we had been faced with liquidation values as you have put them out to us and the
3 bid you have put to us then our objective in those circumstances would have been to
4 try -- because they say to preserve and recover as much value as possible with a view
5 to at least recovering closure costs and to the extent possible net asset value."

6 They then go on to emphasise again that they would need to look at the economic
7 balance of the transaction, but it is all said in the context of considering bids above
8 liquidation value.

9 MR JUSTICE SAINI: Which certainly the 10star bid is above liquidation value.

10 MR JONES: Yes. Well, I accept that. So they are saying in the context of a bid like
11 that we would have taken these various things into account. We would have looked
12 at the overall economic balance of the transaction and, you know, they have told the
13 CMA many, many times over that they had concerns about TSAs and it went beyond
14 just looking at the numbers. So against that background they are saying this could
15 reasonably have been viewed as aligned with our expectations, but they are not saying
16 "We definitely would have gone for this". They are reiterating what -- they had literally
17 been asked the same question by this stage -- I say literally as if I am about to give
18 a precise number -- they had been asked a lot of times the same questions about
19 "How would you have assessed these things?" and they had repeatedly said "We
20 would have had serious concerns but we would have looked at the overall balance
21 and we would have tried to reach a decision based on all of these different factors".

22 MR JUSTICE SAINI: Is your argument the way that the CMA has interpreted that is
23 as if it is an unequivocal yes, that we would have accepted the value?

24 MR JONES: (Overspeaking). The first mistake they have made is to treat the first
25 sentence as though it is saying "We would have sold for less than liquidation value.
26 We only wanted to recover closure costs regardless of the situation" --

1 MR JUSTICE SAINI: Isn't that point a bit academic now given that the liquidation value
2 is below the actual offer we are dealing withing with?

3 MR JONES: No, because that was -- the reason I took you to the way the CMA looked
4 at these things and continued to place reliance on the idea that they only wanted to
5 cover closure costs was because if that is right there is much more scope to conclude
6 then they would have accepted this deal, because all of the downsides associated with
7 the TSA and the other things, but all of those downsides would have been outweighed
8 by the fact that this offer that they had on the table was a million or 2 million -- I can't
9 remember the precise number -- a couple of million pounds above closure costs. So
10 you would say well, maybe they would have gone for that in that case, because you
11 put all of these things into the balance and there is quite a lot of room for manoeuvre.
12 If, though, they have misunderstood, as I say they have, what was being said about
13 the closure costs and that 10star -- FDJ was never saying that they would have always
14 just wanted to cover closure costs and that more rationally they would have wanted to
15 cover liquidation costs, that plank of the reasoning falls away.

16 Where you will come to, my Lord, is the point you just put to me, which is anyway isn't
17 the bid value above liquidation value? The answer is yes, in fact it is above liquidation
18 value but it is not a long way above liquidation value so you are still then in the world
19 of having to decide whether there is enough room for manoeuvre for them to have
20 done the deal. The answer isn't obvious, because they have emphasised repeatedly
21 the downsides of the TSA. It would be a difficult question to have to judge.

22 I am not required to say exactly what the CMA would have concluded if they had
23 judged that question, because that is not how they approached it. Their analysis
24 emphasised repeatedly closure costs and that I say mistaken reading of this answer
25 infects their reasoning, because as I say, they just approached it on the wrong basis
26 when they came to ask whether it had been accepted, they approached it on the wrong

1 basis.

2 MR JUSTICE SAINI: One final question, which you can answer after lunch. We can
3 all read what the question was and what the answer was. When it comes to our role,
4 is our role to decide whether the way that the CMA appear to have understood FDJ's
5 answer was rational or is it because as a matter of language there can only be one
6 right understanding of the answer, because it is one of the points I think that is taken
7 by the CMA, which is they say they have come to a reasonable interpretation of what
8 the response was.

9 MR JONES: Yes.

10 MR JUSTICE SAINI: And what's our task?

11 MR JONES: It goes back to the discussion in C r lia. It is the nature of the issue that
12 is before you. So if there are questions of economic judgment --

13 MR JUSTICE SAINI: This is just language.

14 MR JONES: This is just language. It is just evidence.

15 MR JUSTICE SAINI: There is no expertise involved in reading the language.

16 MR JONES: That is correct. So you can look at it and you can say that the CMA just
17 misunderstood this.

18 MR JUSTICE SAINI: Okay. We will reconvene at 2 o'clock. Thank you very much.

19 (1.03 pm)

20 (Lunch break)

21 (2.00 pm)

22 MR JUSTICE SAINI: Mr Jones, before you continue, I should have read out a warning
23 about live transmission, but I'll do that now.

24 Some of you are joining by live stream on our website, so I must start, therefore, with
25 the customary warning. An official recording is being made and an authorised
26 transcript will be provided, but it is strictly prohibited for anyone else to make an

1 unauthorised recording, whether audio or visual, of the proceedings, and breach of
2 that provision is punishable as a contempt of court.

3 Thank you.

4 MR JONES: I before lunch was addressing you on the topic would FDJ have been
5 willing to sell for the price that the CMA identified and with that TSA.

6 I am going to move on to the next broad heading in the decision, which is whether
7 10star would have been committed to completing a purchase of the B2C business.

8 Can I show you the description of 10star at page 84 of the decision, please? You will
9 see at 5.176(b):

10 "10star, registered in Malta, is a global sports betting operator and a B2B business,
11 offering bespoke pricing, trading and risk management services to licensed sportsbook
12 operators with annual revenues of around £7 million in 2023. 10star told us that it
13 operated a similar business to Sporting Solutions. 10star was set up by Magnus
14 Hedman, who had previously acquired Sporting Index ... before selling [it] to FDJ ..."

15 So we are talking about the prospect of a large acquisition for this particular company,
16 talking about it buying a business with much larger annual revenues than it had. The
17 question which we are asking is whether it would have bought the company had it
18 known it was losing nearly £3 million per year.

19 Can I ask you to look at paragraph 5.177 while we are on this page?

20 MR JUSTICE SAINI: Yes.

21 MR JONES: You have seen this, but just to remind you the reason why the CMA went
22 on to calculate the losses was because they wanted to see whether the alternative
23 bidders would likely have remained committed to completing a transaction had they
24 been able to complete their due diligence on Sporting Index's financial position.

25 So they are recreating in a way what the due diligence would have shown had they
26 got to that stage. That's the springboard for the discussion which then follows

1 culminating in paragraph 5.189 which shows you the conclusion which you've seen
2 a few times.

3 Now I want to unpick one aspect of how this is worked just so we have the context
4 clearly in mind. You know that the costs of the B2C business and B2B business were
5 tangled up in some way. That was why the CMA had to go through this exercise of
6 trying to isolate the B2C costs.

7 If you turn, please, to 5.182 which is on page 86, you will see:

8 "During the remittal inquiry AlixPartners submitted that the TSA, combined with the
9 carve-out business, was designed to deliver an 'up and running business' from
10 completion of the sale, and so the combined TSA and carve-out business costs figures
11 from the Project Silver Report set out AlixPartners' assessment of the minimum viable
12 cost base for the proposed carve-out business. AlixPartners also submitted that while
13 different purchasers might require more or less support under the TSA, any resource
14 reductions under the TSA would be expected to be offset for the most part by additional
15 resource costs within the acquirer's business such that the impact on the overall cost
16 figure would be broadly neutral (subject to any efficiencies ...)"

17 So essentially what the CMA did to try to work out the underlying costs for 2022 was
18 to look at the carve-out costs, so the costs of the business that was being carved out,
19 and to add on to those the costs of the proposed TSA.

20 I just emphasise that because I personally found it a bit difficult to follow when I first
21 looked at this. There was obviously not a TSA in 2022. They are just using those as
22 a way to work out what the costs would have been in 2022 as a way of disentangling
23 them.

24 You will see in 5.183 that the CMA went on to make various adjustments to the figures
25 that had been provided by AlixPartners. Now these are not particularly significant for
26 my purposes but I just want to highlight a couple of points.

1 | If you go forward to (g) on page 88, there was a discussion about what the price for
2 | the TSA --

3 | MR JUSTICE SAINI: It is the 4 million figure.

4 | MR JONES: Yes. So they take the 4 million figure as the appropriate starting point
5 | and then at (h) there is just a clarification:

6 | "We note that the £4 million TSA quote given to 10star included a £1 million one-off
7 | cost for 'Readiness to transition to acquirer end-state', which we infer relates to a
8 | one-off migration cost to transfer the B2C business to a purchaser, while the other
9 | 3 million ... were ... 'annual run-rate' costs."

10 | Then at (i) they therefore used the 3 million TSA as a sort of annual run rate to work
11 | out the costs for FY22.

12 | Ms Berridge pointed out to me over the adjournment that I said to you the TSA cost
13 | was £4 million annually and that was wrong. I misspoke. It was £4 million for the first
14 | year but had it continued, it would have been the 3 million rolling figure. It was the
15 | 3 million figure that was used to work out the costs for FY22. You are very familiar
16 | with this part of the decision. You get to 5.189 where they are looking at whether or
17 | not the alternative bidders would have been confident they could improve the
18 | performance of the business, but the question which remains unanswered up to this
19 | point is what did 10star think the costs were, because if it thought it was paying
20 | £3 million for a company which was breaking even and there was scope to improve
21 | performance, that is one thing, but obviously that's very different from buying
22 | a company which is losing £3 million per year, even if you think there is scope to
23 | improve performance. That is a very different proposition.

24 | Now to unpick what 10star knew when it made its bid, I need to take you through the
25 | correspondence that we have in the file from that time. I need to do it carefully and as
26 | far as I can chronologically to piece the different points together.

1 So if we start, please, at page 708 in the bundle, you will see at the bottom of that
2 page there is a list from someone at Powell Consulting, who was working on behalf of
3 10star. So there is an e-mail from someone on behalf of 10star to essentially the
4 consultants working for FDJ setting out a list of questions. That is 7th February.
5 On the same page Oakvale Capital above that on 15th February replies and they reply
6 with an attachment and that attachment is in the next tab, so from page 711. It has
7 the name Powell at the top there but it is Powell's questions. Those are the questions
8 in black and the answers are then given in green on behalf of FDJ. The one I want to
9 look at is 9, so on page 712 where they had been asked to give a detailed breakdown
10 on the cost base of the business being sold. There's a list of costs in that. Actually it
11 includes a TSA. That adds up to £8.5 million, that list of costs that you see there. So
12 that was 15th February.

13 Now on page 716, if you could look at that, this is the first bid that was made on behalf
14 of 10star and this was 22nd February. It is a bid, as you will see at the bottom of that
15 page, for £3 million.

16 If we then go forwards to 23rd March, page 723.

17 MR JUSTICE SAINI: Just remind me what was the date of that?

18 MR JONES: 22nd February '23.

19 MR JUSTICE SAINI: Yes.

20 MR JONES: So if we then go forward to page 723 -- this is a month later and this is
21 just before the second bid so this is when the important communications happen. Now
22 we are looking here at 23rd March, 17.59. This is an internal e-mail within 10star and
23 the consultants working with them. You will see at the bottom of that page:

24 "They told us last year's revs were supposed to be [around] 10 million and the B2C
25 business for sale were supposed to have approximately been break even. The cost
26 breakdown they provided initially only itemises 8.5 million of costs so we have asked

1 for the bridge to 10 million of costs. Waiting for response."
2 That is why I showed you those questions about the cost breakdown adding up to
3 8.5 million, because we can see what they are talking about. He has been told there
4 were 10 million of costs. He's been told they were breakeven. Can't understand it
5 because when they have asked for the breakdown, they have only been given
6 8.5 million.
7 Now he says there "Waiting for response". He had indeed sent the e-mail that that is
8 referring to half an hour before he sent this e-mail. So this is 23rd March at 17.59 and
9 the e-mail that he had sent is at page 434, please. You will see the e-mail from Powell
10 Consulting at the bottom where again he is contacting Oakvale on behalf of FDJ:
11 "Guys,
12 In a previous conversation you thought 2022 revenue was £10 million (please confirm)
13 and that the B2C business being sold approx broke even last year.
14 From the attached Q&A -- see Q9 -- I can only find £8.5 million of costs. Can you give
15 us some detail to bridge from 8.5 to 10 or has anything changed?"
16 The answer that he gets is just above that. It is the next morning, 9.41:
17 "Hi, Bobby.
18 Responses below.
19 Current run rate is 12 million plus.
20 Q9 costs were broad brush and focused on spreads. Doesn't really factor in fixed
21 odds fully and also the TSA is mixed in here, so this is very far from clear."
22 Now I am going to refer to this e-mail a few times and I am going to call it the "run rate
23 e-mail".
24 MR JUSTICE SAINI: What's run rate? Costs?
25 MR JONES: Yes. What we're running at at the moment.
26 MR JUSTICE SAINI: Okay.

1 MR JONES: You will see it is very unclear what's being said in that e-mail. You can
2 read it in all sorts of ways but on the face of it it is a really unclear e-mail. The question
3 he was asked was about 2022 and the answer was about run rate. This is my
4 understanding, that run rate means now. It is the current run rate is 12 million plus. It
5 is not --

6 MR JUSTICE SAINI: Just to understand it, Mr Powell is saying it was 8.5. It seems
7 to have become 10. What has changed? The response to that is that particular
8 question was all very broad brush and the current run rate, I assume it is not 8.5 or
9 10. It is actually 12.

10 MR JONES: Yes. Just to be clear the questions that Mr Powell was asking was all
11 about '22.

12 MR JUSTICE SAINI: Right.

13 MR JONES: He was saying "My understanding was you broke even in 2022 and you
14 had 10 million of revenue, but when I asked you for the costs breakdown, you can only
15 show you 8.5 million". That's what they are trying to bridge. They are trying to
16 understand what the financial state of the business is. "You said it is breaking even.
17 We can only see 8.5 million of costs". He is asking what is the bridge between that.
18 He doesn't even answer the question. He says the current run rate is 12 million plus
19 and then Q9 costs, which is a reference to the question 9 that he had been asked
20 earlier, "It is broad brush. Doesn't factor things in, etc". It is extremely unclear. You
21 don't need to take my word for that.

22 Firstly, you can see for yourself. Secondly, the more important point was that
23 Mr Powell thought it was unclear, because if you look at the response that he gives at
24 the top:

25 "Just to confirm ... current run rate on costs is 12 million plus, ie approx 10 million from
26 '22 plus the TSA added on?"

1 That is what he is asking and he is trying to work it out. "How do you get to this?"
2 "Please call me to talk through when you have a moment."
3 So that was at 11.15 and on the same day, if we then go back to page 721, a couple
4 of hours later, looking at the e-mail from Mr Powell, who was the consultant, so even
5 what he knows is not necessarily what 10star knows, but he is e-mailing Magnus
6 Hedman. What he was e-mailing him is a draft of an e-mail which is going to go out
7 with the reiterated preliminary bit. We will see the final note they sent in a moment,
8 but that is what this is about. He's e-mailing round a draft of an e-mail. He says:
9 "Propose to send this ... I am still waiting on the longer form TSA as FDJ hasn't sent it
10 yet. Also waiting on updated detail on costs to bridge 8.5 - 10 million (as described in
11 my email last night to you both)."
12 So he clearly -- Mr Powell clearly at this point still is planning to bridge the 8.5 million
13 to 10 million. He is very far from realising that actually it was closing money in '22. He
14 is still trying to understand why does it look on the numbers you have given me as
15 though it would have been making money because the numbers he's been given, he
16 told us, was 10 million revenue he told us and 8.5 million in costs and he is trying to
17 bridge that gap.
18 So he clearly did not understand the run rate e-mail as somehow communicating to
19 him "No, no, actually this is a business that is losing lots of money".
20 You have another internal e-mail -- I'll just show you that -- that's on page 720 -- at
21 15.29 on the same day, in which Bobby Powell says:
22 "Spoke to them about the TSA not being clear enough to opine on without further
23 discussion with the business. They said it was ok to send something a little more
24 vague. See below. I have made [some more] amendments ..."
25 So the TSA is vague. It is all still preliminary anyway, but there we are. That's the
26 discussion we have had. Then a couple of hours after that you get the e-mail with the

1 reiterated bit. That's at page 438. If we could turn to that, please. So this is on 24th
2 March 2023 at 17.22:

3 "I have attached the LOI again, updated only for today's date and exclusivity period
4 moved from 30 days to 40 days as there is much we still need to ascertain in relation
5 to people, TSA, starting P&L and exactly what technology will move, etc."

6 Then there's a list of bullet points and at the bottom there is the bullet point about the
7 "Service agreement mark-up/assumptions":

8 "Thank you for the detail provided. We will need a substantial portion of the TSA, but
9 given that we only received the document a couple of hours ago, and given that the
10 price has increased (from the original detail provided) from 2.5 million to 4 million plus
11 plus, and the way the detail is provided, we will need to explore this further with you to
12 understand more clearly how these modules fit and how we can onboard with our own
13 resources, etc. A price of 4 million plus plus would be what we would expect SSLN to
14 charge a Tier 1 client who generates huge profits ..."

15 MR JUSTICE SAINI: What's SSLN?

16 MR JONES: It is some acronym for Sporting Solutions. I would need to take
17 instructions. It is the vendor.

18 MR JUSTICE SAINI: I can take it as being the selling entity.

19 MR JONES: The selling entity.

20 "... [it is] what we would expect [them] to charge a Tier 1 client who generates huge
21 profits ..."

22 MR JUSTICE SAINI: What's a Tier 1 client?

23 MR JONES: I don't have any greater insight, my Lord, than to say a top tier, top class,
24 high value client.

25 MR JUSTICE SAINI: High value buyer.

26 MR JONES: Yes.

1 MR JUSTICE SAINI: Right. I think I know what "SPIN B2C" would be.

2 MR JONES: "... who generates huge profits. SPIN B2C, however, will be a very small
3 business which you tell us only broke even last year."

4 So, in other words, the price that you are charging, that you are now proposing for the
5 TSA of 4 million plus plus, would be what we would expect you to be charging to
6 a client of yours, in other words, someone buying a TSA from you, on very high value
7 business, but this, however, will be a small business, which only broke even last year,
8 which you tell us only broke even last year. So he's complaining about the £4 million
9 TSA price and, of course, there's -- I have shown you the evidence which had we have
10 on this but clearly it looks from this as though there has been a further development in
11 the two hours between these two e-mails that I'm showing you, which is, as he says
12 here, he's just a couple of hours ago received the TSA and this new TSA which he
13 has received has gone from £2.5 million to £4 million. He is pushing back on that
14 saying "I could understand that if you were charging a high value client that amount of
15 money, but you are talking about charging us £4 million when all it is going to be
16 servicing is spin B2C, which is a very small business you tell us only broke even last
17 year."

18 "(We have marked up the document to highlight some of the points which would be
19 need to be discussed and we can arrange to discuss this next week if desirable)."

20 MR JUSTICE SAINI: At this point at least they are operating under the assumption
21 that it's a break even business.

22 MR JONES: Yes and there is not a later point in time. This is literally it. There is two
23 points that I take from this. One is the point I have made a few times, which is the idea
24 that they would have taken the £4 million TSA is subject to the enormous uncertainty
25 in this very e-mail, because literally it has just landed two hours before they send this
26 and the reaction is -- well, we have seen what the reaction is. So there is the doubt

1 over the TSA.

2 Secondly, they in my submission clearly thought when they sent this e-mail that the
3 business was breaking even, and I should say, just so that you know, the second offer
4 letter is attached to this and it is at page 440. It is just the same as the first with
5 a couple of tweaks. It is page 440 they send that. I say that is critical.

6 Now if we just look back at what the CMA says about this, it is at page 92.

7 MR JUSTICE SAINI: If I recall, it is in the context of a discussion about Oakvale, isn't
8 it, I think?

9 MR JONES: Well, they mention Oakvale. They are addressing the point head on. At
10 paragraph 5.190 on page 92.

11 MR JUSTICE SAINI: Sorry. 5.190.

12 MR JONES: Yes.

13 MR JUSTICE SAINI: Yes.

14 MR JONES: They quote the e-mail that I have just shown you.

15 MR JUSTICE SAINI: Yes.

16 MR JONES: I'll take this in stages, but I'll read 5.191 out first. So 5.191:

17 "We note that the 10star email Spreadex has cited above does not indicate 10star's
18 views on the profitability of the B2C business, but rather what it had been told
19 previously by Oakvale Capital regarding the profitability of the business. In an email
20 dated 24 March 2023, Oakvale Capital had told 10star that the 'current run rate is
21 12 million plus' and we also not Spreadex's prior submission in the remittal inquiry that
22 10star had been provided with a £12 million plus cost figure. 10star was also provided
23 with a 2022 revenue figure of 10 million and so on this basis, and noting that the
24 12 million plus cost figure is broadly consistent with our estimate cost base for a
25 standalone B2C business, our view is that 10star submitted its bid on the basis of
26 loss-making figures provided by Oakvale Capital for a standalone B2C business."

1 I do say that paragraph is just straightforwardly irrational. I am going to take it in
2 stages. We'll do the first sentence first:

3 "We note that the 10star email Spreadex has cited above does not indicate 10star's
4 views on the profitability of the B2C business, but rather what it had been told
5 previously by Oakvale Capital regarding the profitability of the business."

6 Let's just go back to the e-mail. It is at page 438. What they are doing in this e-mail
7 is complaining about the increasing cost of the TSA. They are saying "We are not
8 sure that it is worth that price for a business which only broke even last year."

9 Now it would simply not make sense to put it that way if you had literally just learned
10 that the company actually made a serious loss last year. It just wouldn't be a logical
11 thing to say. What you would be saying in this e-mail is that is a huge amount of
12 money to pay for a business that you now tell us lost £2 or £3 million last year, but
13 more than that, you wouldn't be putting that in a bullet point about the TSA costs. You
14 would be leading with it.

15 If you'd literally just learned that the business that you are bidding £3 million for is
16 losing 2 or £3 million a year, just to be clear, when I say literally just learned that, it is
17 because the CMA's approach, as you've seen in the paragraph I've just shown you, is
18 they learned it from the run rate e-mail. So if you've literally just learned that, you
19 would (inaudible) that as a point in this e-mail. In fact, you might think you would just
20 pause for breath and wouldn't just send an e-mail then reiterating your original bit.

21 MR OLSEN: It would make the £4 million price of the TSA even more outrageous.

22 MR JONES: It would make it much more outrageous.

23 MR OLSEN: Sorry. Can I just clarify a point? The increased level of the run rate to
24 12 million was current. It wasn't for the previous year, though, was it?

25 MR JONES: That's right.

26 MR OLSEN: So isn't it correct that it still broke even in the last year? It was more that

1 in the current year it was running at that loss rate? So this is a true statement still,
2 isn't it?

3 MR JONES: They are looking at what the business was making -- this particular page
4 at 438 they are talking about what the business made last year. Just as a sort of first
5 point they clearly thought it had broken even the previous year. Now did they realise
6 that going forwards it was going to be making a loss? We don't know. I have given
7 you -- you can look at what was said about the run rate. We are going to go back to
8 that e-mail in a moment. It is a really unclear e-mail, and you can't in my submission
9 take from it because they had received an e-mail regarding run rate they would have
10 realised that there were going to be losses on a forwards looking basis but we are
11 going to go back to it in a moment.

12 MR OLSEN: Okay.

13 MR JONES: In any event that's not what the CMA takes from it. The CMA takes from
14 it that they would have understood broadly speaking the financial position of the
15 business as the CMA worked it out to be when they modelled the sort of due diligence
16 that would have been done, and that's the point that the CMA is making in 5.191.

17 MR JUSTICE SAINI: I think that's the very last sentence. The CMA's interpretation
18 of what's going on here is if you look at the last two lines of 5.191.

19 "... our view is that 10star submitted its bid on the basis of loss-making figures provided
20 by Oakvale ... for a standalone ..."

21 So you are saying their interpretation is that they knew that it was loss making whereas
22 you are saying no, at this point they are proceeding on the basis that it is a breakeven
23 business.

24 MR JONES: It is difficult to read 438 in any other way, because why would you phrase
25 it in that way? It is a lot of money to pay for a business that you tell us only broke even
26 last year if you had literally just learned that it is actually losing millions of pounds per

1 year.

2 Now if I go back to 5.191, they say:

3 "In an e-mail dated 24th March Oakvale Capital had told 10star that the 'current run
4 rate is 12 million plus' and we also note Spreadex's prior submission in the remittal
5 inquiry that 10star had been provided with a 12 million plus cost figure."

6 I just pick up on that point about Spreadex. Clearly Spreadex doesn't have any better
7 evidence on what they knew than the evidence which is before you now. In fact, what
8 Spreadex said in that submission was that this e-mail chain was at best ambiguous
9 and unclear and the CMA needed to evaluate it. What they said is not actually
10 relevant, but it also doesn't support what the CMA's conclusion is.

11 The important point they say is in an e-mail dated 24th March Oakvale Capital had
12 told 10star about the current run rate.

13 So they pin it on the current run rate and on the -- they pin it also on this run rate
14 e-mail. That is how they say they learned. If we just look back at that, which is on
15 page 434, the first point I just remind you of is that this e-mail was that very same
16 morning. That is why to be clear the CMA's case is that 10star learned that morning
17 that the business was not breaking even but was instead losing £2 million per year
18 and that later that same day they decided to just reiterate their bid at the same price
19 without mentioning that.

20 Secondly, there is, as we know from the e-mail above, an immediate answer which
21 shows that whatever was meant by this run rate e-mail, it was not understood. So
22 Mr Powell wrote back to try to work it out, and Mr Olsen, to come back to your question,
23 if you look at the way that he is answering this, he is saying:

24 "Just to confirm current run rate on costs is 12 million plus, ie approx 10 million from
25 2022 plus the TSA added on?"

26 But if you just think about that, that as far as I can see doesn't make sense as a way

1 of thinking about these costs, because we know that the 8.5 million in costs already
2 had the TSA built into them. I showed you that. So he is struggling, Mr Powell, at this
3 point to understand what he has been told and he's speculating about how they could
4 have got to this run rate of £12 million, but he frankly doesn't understand it. That's
5 why he wants to talk to them about it.

6 Then, finally, and just to drive this point home to remind you that when Mr Powell
7 reports all of this back to Mr Headman on page 721, there is nothing to suggest that
8 he told Mr Headman about the run rate e-mail or that there was any suggestion that
9 the business was losing money either historically or on a forward looking basis. All he
10 says is:

11 "I am waiting on updated detail to bridge the 8.5 to 10 million."

12 So that again firstly makes it very unlikely that Mr Powell thought he was being told
13 that it was losing a lot of money, because he would have passed that on, but if he did
14 understand that, he didn't pass it on. So from the perspective of 10star knowing the
15 position when it made its bid, as far as we can see from these documents they clearly
16 in my submission did not know. Either on historic basis or an a forward looking basis
17 when the bid was reiterated 10star thought the business it was buying was breaking
18 even.

19 So I have touched on the TSA side of this. I have been focusing on what they knew
20 about whether it was loss making and how that might impact on the bid value and
21 whether they would have gone ahead, but there is also this question what about the
22 £4 million TSA and would 10star eventually have gone ahead with that? Again the
23 treatment of that question is in my submission entirely unsatisfactory in the decision.
24 Where the point is left in the evidence is that second bid e-mail with the strongly
25 worded complaint about the TSA. That is not discussed in this section of the decision,
26 so the CMA in this particular section when they are asking whether 10star would have

1 gone ahead with the deal, they don't say "Ah, well, hang on. They expressed serious
2 doubts about paying £4 million as a TSA". It is only discussed in the earlier section
3 when they were discussing whether FDJ would have sold to 10star. I have already
4 shown you that, but I do want to go back to it. It is on page 76.

5 You will see at 5.152:

6 "Spreadex [also] submitted that the CMA should have asked FDJ what the financial
7 impact would have been to Sporting Group if it had been effectively required to offer
8 a 4 million TSA at, for example, 3 million or 2 million to agree the sale of the business
9 and what impact that would have had on their assessment of the ... bids on the basis
10 that the B2C business was loss making and lower TSA costs would be the most likely
11 way of closing the profitability gap and 10star also explored ways of reducing the TSA
12 cost."

13 That is exactly the right question for Spreadex to put to the CMA. They are basically
14 saying "It was loss making." If 10star had found out it was loss making, it somehow
15 needed to bridge these positions between them. Maybe one obvious way of doing
16 that might have been to take a hit on the TSA price. You ought to ask whether or not
17 they would have been -- the FDJ would have been willing to do that.

18 Now at 5.153 CMA says:

19 "We agree that 10star would likely have looked to negotiate a lower TSA price with
20 FDJ. However, we have not been provided with evidence that 10star would not have
21 ultimately agreed to the TSA quote of £4 million in the context of its £3 million bid if
22 this was considered necessary by FDJ, while 10star confirmed its preliminary bid of
23 £3 million having been provided with a TSA quote of £4 million."

24 Just pausing there, it is very odd when they say, "We have not been provided with
25 evidence" that they wouldn't have agreed to it when the CMA's job is to investigate
26 whether they would have agreed to it or not. It is not as though there is no evidence

1 on this point. There is the evidence. There is evidence that I have just shown you.
2 Their reaction to the 4 million price was the e-mail complaining about it. So you can't
3 deal with it by saying there is not evidence that they wouldn't have agreed to this.
4 As to the point that:
5 "... 10star confirmed its preliminary bid ... having been provided with a TSA quote of
6 £4 million",
7 yes, but, as I've submitted, that was thinking that the company broke even and
8 complaining vociferously about the £4 million TSA (inaudible) and not committing to it.
9 The next sentence then says this:
10 "10star also noted that it was very aware that it was taking the risk that it could not
11 reduce the cost of the TSA by transitioning earlier, and that any shortfall in the
12 performance of Sporting Index would need to be funded from 10star, which it was
13 willing and able to do."
14 Now I don't find that entirely easy to follow as a sentence. It seems to be saying as
15 a sort of general proposition that any shortfall in funding, in other words, any losses,
16 would be covered and that 10star had in some way said that it would cover any losses,
17 whatever they might be.
18 Can I just look at the document that is being referred to in that footnote, footnote 251?
19 It is an e-mail exchange at tab 14 if you have tabs. Page 605 is where it starts and
20 606 is where I want to pick it up. It is question 2 at the top which is asked:
21 "If 10star had been successful in acquiring the B2C business ... would 10star have
22 been willing and able to sustain the cost of a TSA (potentially resulting in losses) in
23 the short to medium term while it transitioned away from a TSA with FDJ. If so, for
24 how long would 10star have been willing and able to do so?"
25 They say:
26 "This is touched on above. The core elements of the TSA...that 10star required came

1 with a minimum 12 month requirement and pro rata beyond that. We were very aware
2 that 10star was taking a risk in the deal and that we couldn't reduce the cost of the
3 TSA by transitioning earlier and FDJ benefited financially the longer the TSA was in
4 place. This is part of the reason why a more detailed discussion around the TSA was
5 required, not least in terms of understanding the commitment of FDJ in enabling
6 a transition, but we were very aware from the outset that any shortfall in the
7 performance of Sporting Index would need to be funded from 10star and we were
8 willing and able to do that."

9 The first point I would make about this is that the losses in that question are framed
10 as potentially resulting from the need to transition from the TSA. So there is a framing
11 point which is not entirely easy to understand, because the reason the business was
12 losing money was not, as it were, a TSA. It was that the business was losing money.
13 So the question is posed on a basis which is not entirely easy to follow, but in any
14 event the answer which is given is not an answer saying "We would have paid
15 £4 million for the TSA and covered any losses which would have flowed from that".
16 That is not what's being said. They are saying they needed a more detailed discussion
17 around the TSA, albeit in a general sentence they were aware that any shortfall once
18 they had done the deal was going to need to be met by them. So that's not
19 controversial but it doesn't show that they would have paid £4 million for a TSA. That
20 is not what they are being asked about. That's not the answer. You can't read the
21 answer as though it's saying "We paid whatever was asked of us and shouldered
22 whatever losses flowed from it".

23 Back in the decision at 76 -- I have shown you this already, but that last sentence of
24 5.153 is where they lock in at the £4 million price.

25 "... our view is even if FDJ would not have been willing to [go below] £4 million, this
26 would...not impact ... [on] the counterfactual", in other words, because that is what

1 10star would have paid.

2 MR JUSTICE SAINI: Can I just ask, and again it may seem an obvious question,
3 which is was 10star ever asked a direct question, we can infer an answer as to what
4 they knew about whether the business was loss making or not at the time they made
5 their bid?

6 MR JONES: Not as far as I am aware.

7 The third broad heading considered by the CMA -- that concludes my points on that.
8 Before we move on I reiterate we say this by itself is an irrational part of the decision,
9 and if this doesn't stand, then obviously the decision doesn't stand, because it is really
10 the critical part of the reasoning.

11 MR JUSTICE SAINI: You say that because it undermines the bid.

12 MR JONES: Absolutely. The third big question is from 96 would the alternative
13 bidders have operated the B2C business as a competitor? Now the points which are
14 discussed under this heading do overlap a bit with the ones that come before, because
15 obviously if you are asking whether or not 10star would have pressed ahead with the
16 purchase, wrapped up in that as a matter of fact would have been the question of
17 whether it had a sensible business plan to run the business. Similarly if you are asking
18 whether they would have run it as a competitor, you need to know whether they
19 understood the financials of the business and had a plan to turn it around. You can't
20 in short come up with a plan to turn a business around unless you know how much
21 money it is losing.

22 The challenge which arose here was that Sporting Index was suffering from falling
23 revenues, but also historic under investment, and that is referred to, for example, at
24 paragraph 5.174 which is on page 82.

25 This is referring to Spreadex's submissions, but it's I think not controversial that the
26 AlixPartners' report which is referred to there stated:

1 "Technology has been under-invested in to date. Development team needs to focus
2 on using modern tools and ways of working. Under-investment in technology platform
3 leading to significant customer attrition' and that there had been a loss of customers
4 due to loss of appeal of spread platform. Few updates since started in 2019."
5 So the challenges that the business was facing were two-fold. It was losing revenue,
6 but it also needed more investment to deal with these historic issues and any
7 programme, any business programme by a purchaser premised on cutting costs would
8 need to deal with the question. In practice if you are going to cut costs how are you
9 actually going to attract more customers given there is this historic underestimate
10 problem.
11 The CMA deals with this issue very briefly and that is inevitable given the lack of
12 contemporaneous evidence, but we do place weight on that, because what
13 I emphasise is there was a short window of time in which 10star and Star Sports could
14 have come up with business plans to turn it around. They didn't do due diligence.
15 They just put bids in which kept them in the running but didn't commit themselves to
16 anything.
17 I will briefly show you the key points the CMA relies on. It is 5.204 on page 97. This
18 is dealing with both Star Sports and 10star but I will just pick out the ones which deal
19 with 10star. At page 97 at (b):
20 "10star told us that it had submitted a bid to purchase Sporting Index as it believed
21 that it could combine its current B2B expertise with Sporting Index's strong brand to
22 develop a product to compete ... 10star explained that as the industry shifted from
23 price differentiation to pricing as content over the past five to ten years, skills and
24 knowledge in price setting had disappeared from bookmaking and that sports betting
25 was now a homogenous market. 10star told us that market prices rarely differed as
26 neither sportsbooks nor the existing supply chain possessed the knowledge to

1 differentiate on price, nor react in real time to the risks generated on their book. 10star
2 has a lot of expertise in this area of understanding risk and setting strong prices."
3 That is fine and that may well have been what they were expecting to be able to do,
4 but they didn't go -- they didn't have time to go but didn't go the next step to say if we
5 had been pricing, let us say, more competitively, our margins would fall and how much
6 would we need to invest to pursue that sort of strategy? So that is just left unexplored.
7 It is just a general statement "We would have been good at pricing". At 5.205 (a):
8 "... believed that Sporting Index's profitability had been negatively impacted by FDJ's
9 over-cautious approach when it came to regulatory compliance."
10 At (c):
11 "10star ... believed that FDJ might have limited its investment in Sporting Index as it
12 had focused on developing Sporting Solutions internationally, noting that FDJ's
13 primary aim in purchasing Sporting Group was the acquisition of the B2B arm of the
14 business ..."
15 That is essentially all that is said about this. So they have identified at a really high
16 level what they think are some of the causes of the difficulties, but there hasn't been
17 any working out of a real business plan to turn it around or the kind of investment that
18 would be needed and, of course, as I have emphasised they anyway had not done the
19 due diligence to work out what the current state of the business was to enable those
20 sorts of investments.
21 So I make those points just because, as you know, we rely on all the uncertainties at
22 all the different stages. There is clearly uncertainty in this limb of the analysis, which
23 I think we haven't unpacked so far, but we do rely on that uncertainty as well.
24 I am going to go on to Star Sports, because that is all I have to say about 10star. So
25 I said I would come back to Star Sports.
26 There is an oddity in the treatment of Star Sports in this decision. You have seen the

1 counterfactual conclusion. The counterfactual conclusion is sale to 10star. Now, to
2 be clear, I accept that the CMA did not have to identify a purchaser, one purchaser,
3 two purchasers, any particular purchaser in their counterfactual. That's not
4 a requirement, but they did identify and it was 10star. That contrasts with what they
5 said in their original decision. I will just show you that. It's at tab 21 and if we turn to
6 page 698, we are at the very end of the original chapter 5. 5.133:

7 "Based on our assessment above, we conclude that the appropriate counterfactual is
8 where the B2C business under the ownership of an alternative bidder would continue
9 to compete in the supply of licensed online sports spread betting services broadly in
10 line with the pre-merger conditions ..."

11 So they changed that and instead of just referring to an alternative bidder, they
12 referred to 10star. As for this challenge, we are entitled to say we are targeting the
13 counterfactual as it is actually described in the final report and we say that that
14 counterfactual is irrational, and if we are right, then the decision must be quashed.

15 Now, as I say, I accept, of course, they could have said something else. They could
16 have said what they said the first time round, that it was just a sale to an alternative
17 bidder.

18 They also could have said "We think sale to 10star is the most likely outcome and
19 therefore the counterfactual. However, we also think there's a reasonable chance that
20 there could have been sale to Star Sports, and taking those two possibilities together,
21 they would have added up probabilistically to more than 50% and therefore taking
22 them together, that leads us to our SLC conclusion".

23 So that would be, as it were, another way of riding both horses that would have been
24 open to them. I understand from my learned friend's skeleton that is -- maybe they
25 quibble with the details -- broadly speaking that is how they are trying to position it. So
26 we had a counterfactual but we built on this other alternative as well.

1 Again the decision does not say that either. The decision does say, to be clear, that if
2 there was a sale to another buyer, then that would also have caused an SLC. I accept
3 they make that point in the section of the decision where they are considering the
4 competitive implications, but what the decision does not say is that their assessment
5 that an SLC is likely rests on a combination of the possibility of sales to 10star and
6 sale to Star Sports.

7 So my first, as it were, headline point about Star Sports is that we are entitled to take
8 the reasoning in the decision and to attack the rationality of that. I do under this
9 heading say we are entitled to remind you that the CMA have had two goes at this
10 now.

11 What happened in the first challenge was that there were two grounds of appeal to
12 this tribunal. One of them was about fairness and the information that had been
13 disclosed to Spreadex. The other was a rationality challenge similar to the one which
14 I am advancing today. The decision was quashed. The CMA asked for it to be
15 quashed and they didn't, as it were, accept that either of those challenges were valid,
16 but what they said was "Well, we have looked at the evidence that was disclosed and
17 the gists that have been given and we accept that there have been various mistakes
18 ingesting the evidence, and so it should be quashed and handed back to us". So it
19 was quashed and went back to the CMA.

20 Now it then went through a reconsideration process, and if you were to read chapter 5
21 of the original decision, which is in the bundle, you will see it's quite different to what
22 chapter 5 looks like now. The reason for that you would see if you read back to our
23 notice of appeal from the first challenge, because basically all of the points that were
24 marshalled there under the heading of irrationality are not points that I can pursue
25 today because they've fallen away, because the CMA didn't just take it back and give
26 Spreadex access to the evidence and say "There we are. Now fairness has been

1 done". The CMA reconsidered and rewrote those bits of the decision which we had
2 said first time round were irrational.

3 The two big points that I've been putting to you today on rationality on the question of
4 closure costs, for example, and secondly, the run rate e-mail, those are new points.
5 So that is replacement reasoning. The closure costs reasoning did not feature at all
6 in version one of the decision. There were other points. So what the CMA actually
7 said first time round was "We think there is additional value in the sale from FDJ's
8 perspective, because they are going to have an ongoing relationship with whoever
9 they sell the business to". So they built up a different case around ongoing business
10 relationship which was challenged in Spreadex's notice of appeal. That was said to
11 be rational. That is no longer part of the case, and what appears instead is this
12 reasoning around closure costs.

13 The run rate e-mail and the other e-mail that I have spent some time on, which look at
14 10star's understanding of the costs, they did have that at the time of the first
15 decision -- and actually it is referred to in a foot note I should make clear in the first
16 decision -- but it had not been given to Spreadex. So Spreadex had not been able to
17 make the point "No, you have misunderstood this e-mail". So these paragraphs where
18 they respond to Spreadex and say "No, we have understood it correctly", those didn't
19 appear.

20 So we are very much here challenging, as it were, the second bite of the cherry. I do
21 say it is particularly important in those circumstances that the group who -- it is the
22 same group who made the second decision, do need to be kept to the reasoning that
23 we can see in the decision, which does not in my submission rely on the possibility of
24 sale to Star Sports.

25 There are, however, further points to make about the Star Sports defence and I will
26 make them.

1 Firstly, let us assume that the decision did say or does say there was a real possibility
2 of sale to Star Sports and that's something that should be placed in the balance.
3 Maybe I have overlooked a paragraph and Mr Lask will show it to you. In addition to
4 the points we make about the counterfactual, there's a real possibility, a significant
5 chance it would have been sold to Star Sports. That goes into the balance in deciding
6 what would likely have happened.

7 That actually wouldn't change the position because I would still be entitled to challenge
8 the position by targeting the main limb of impaired reasoning which is sale to 10star.
9 So all the points which I have made, if they were the only points I was making, would
10 be valid even if there was some alternative reliance placed on sale to 10star, because
11 the core of the reasoning would still be -- sorry -- if there was alternative reasoning
12 about sales to Star Sports, because the core of the reasoning would still be sale to
13 10star and the points I have made would still defeat that core reasoning.

14 Then, finally, and just so you don't think I am trying to hide from the merits, as it were,
15 of Star Sports, let me just show you why anyway it just doesn't hold together and we
16 can see why it is that the CMA does not actually rely on it. If you take first the question
17 of whether FDJ would have sold to Star Sports for the value of Star Sports' bid, I just
18 remind you that their bid was £2 million, and when you factor in the closure costs the
19 effective value of that is less than liquidation value. That is why if we look again at
20 5.156 of the decision the CMA says:

21 "... for the reasons given above in relation to 10star, and in particular given 10star's
22 higher net bid value ... we do not consider it necessary to reach a view on whether
23 FDJ would likely have been willing to enter into a TSA with Star Sports."

24 Now, as you know, when the CMA says "likely" and other similar words, they say they
25 are not meaning their balance of probabilities. They are not using it as a term of art.
26 That being so, where this takes us is that there is no finding at all about there being

1 any likelihood, even a small but significant possibility that FDJ would have accepted
2 Star Sports' offer. There is nothing. The reasoning just runs into the sand. It is not
3 hard to see why there is no such finding, because the bid was very low.
4 If you go back to page 39 at paragraph 5.35, you will remember that what Sporting
5 Group told the CMA was if they had not had Spreadex's bid, they would have explored
6 10star against the options of closing the business or some kind of restructuring of the
7 business.
8 So it is easy to see why the CMA does not reach any conclusion along the lines of
9 there was a small but significant chance that there could have been a sale to Star
10 Sports, because it is just contrary to what they were being told.
11 On the other side of the coin, would Star Sports have bought the business and
12 operated it as a competitor, they had even less visibility of the financials of this deal
13 than 10star did. You will remember the timeline. It is at page 33. 10star submitted
14 one bid -- sorry -- Star Sports submitted one bid on 1st February '23. There wasn't
15 another later one. As to what they thought about the profitability of the company when
16 they made that bid, we can see the interview with their managing director at tab 31,
17 please, so at page 727. If we pick it up at 730. Mr Candler is or was the Managing
18 Director at the time:
19 "Let me give a little bit of history into our involvement in the sale process."
20 What he explains firstly is that at some time historically he approached FDJ to see
21 whether they were interested in selling the business. They weren't, but then on 731
22 from line 10 he says:
23 "... then in the August of '22 I think we started the process again because someone
24 within Sporting Index reached out and said 'Look, do you still have an interest?' and
25 I said 'Well, of course we do, but, you know, your valuation has got to be a realistic
26 one'. At that stage we then found out that this was a pre-empted sale of Sporting Index

1 by Sporting Group and the conversations were not just with us but they were obviously
2 with other potential bidders ... Then, as I say, we obviously went through the whole
3 rigmarole of going through the numbers again, seeing what the updated trading figures
4 were, finding out exactly what a purchase would be in terms of headcount because
5 the Sporting Group had kind of realised that there were two brands working as one. It
6 is like the Sporting Solutions part of the business, it was one, and Sporting Index part
7 was another, but there was a lot of staff working across two businesses so they were
8 finding it extremely hard to work out, 'Well, if we sell Sporting Index, what goes with
9 that part of the business?'

10 "We looked at the trading numbers at that point. We made an offer. This was a
11 business that once you took operational expenses out of it and taxes, etc, etc, we
12 generally could not see a positive EBITDA figure in the business. It is like, 'Right. So
13 what are we actually purchasing here? Is it the technology? Is it the brand?' You're
14 definitely not buying a business regarding there is an ongoing concern that was a
15 profit-making business."

16 So what he is describing is not being able to see a positive EBITDA figure. He's
17 struggling with the numbers, but he can't see a positive figure. He is not saying "It was
18 a heavily loss making business". He is saying "We struggled with the figures over the
19 short time period and on the face of it it was difficult to see a profit".

20 Interesting that the CMA when it comes back, if you look at line 22, they say:

21 "You mentioned the business was loss making ...",

22 but that isn't what he said. So the points which I have made to you about 10star's
23 desire to buy a business losing nearly £3 million per year would apply equally to Star
24 Sports.

25 It looks as though CMA maybe thought Star Sports realised the business was loss
26 making -- at least the individual in the interview did -- there isn't a discussion of that in

1 the decision actually, so they don't address whether Star Sports realised that it was
2 loss making.

3 For all of those reasons, the possibility of sale to Star Sports does not in my submission
4 save the decision.

5 My Lord, that concludes my submissions. I see I am slightly early.

6 MR JUSTICE SAINI: What would help, Mr Jones, is that you have obviously focused
7 in the second part of the ground 2 on three big points. One is the objective of FDJ in
8 the sale process and the alleged misreading of its evidence. Secondly, you spent
9 quite a bit of time on the issue of did 10star realise it was loss making, that point. Then
10 you have also made some points about the TSA, but in the original notice of appeal
11 there were quite a lot of points, some of which have been described by the CMA as
12 granular points. You have clarified the position in relation to liquidation value and
13 customer lists. That is gone.

14 What's not clear I think to us or certainly not to me is how many of the other points
15 which are called the granular points are pursued, because they have not been
16 developed orally. I am not asking for any answer on that now, but it would certainly
17 help Mr Lask I suspect if you could confirm that to him and us so that we know what
18 he needs to deal with and what we need to deal with, but certainly I understand the
19 points that you focus on orally, but there are quite a lot of other points in the original
20 notice of appeal which were not then developed in the skeleton, but I am not sure
21 which of them are still live and which are not.

22 MR JONES: I will give an answer which I hope I don't live to regret, because I will look
23 back at it in detail and give a detailed one. I think I have picked up all of the granular
24 points apart from the one I said I was dropping.

25 MR JUSTICE SAINI: The customer lists point.

26 MR JONES: Customer lists subject to this, which is I have said a few times that we

1 rely on all of the uncertainties that are identified in the decision even where we are not
2 criticising the particular reading of the documents and so on.

3 Now what we did in the notice of appeal was try to highlight all of those. We sort of
4 summarised them. We summarised the way in which the decision discussed them,
5 because, as I say, we rely on them as part of the context. Now I do say the CMA in
6 their defence, one of the points they make is, summarising, they sort of say "We don't
7 understand the relevance of why you are summarising this paragraph that you are not
8 criticising" but I hope I have made it clear why we have summarised paragraphs that
9 we don't criticise.

10 What I am leading up to saying is I think that we have touched on all of those between
11 Ms Berridge and myself, but if we haven't, it is only because, you know, we didn't want
12 to read out bits of the decision over and over where we are not criticising it, but I will
13 go back over it and check.

14 MR JUSTICE SAINI: I suppose the difference is as follows. Using Ms Berridge's
15 helpful six uncertainties, let's call them the six uncertainties. Ground 1 is that the
16 uncertainty of each of them had to be factored into the ultimate conclusion.
17 I understand that point, but the ground 2 challenge is a different one, which is in
18 relation to particular issues, for example 10star's willingness to complete the purchase,
19 which is one of your big ones, that is not an uncertainty issue. That's just that you are
20 saying that at the time 10star made its bid, it made it on the basis this was a breakeven
21 business and there was an error in the way the CMA have approached that particular
22 uncertainty, because when you look at the true facts what the true facts were, this
23 particular uncertainty, which is would 10star have made a bid, should it have been for
24 a very low value in terms of likelihood, because the actual bid they made was on
25 a premise that it was a breakeven business, but, in fact, it is a loss making business,
26 and therefore if you do the thought experiment as to what 10star would have done,

1 you have to first of all imagine that they made a new bid. What would it have been,
2 appreciating that it was a loss making business, and what's the likelihood of that
3 happening?

4 I suppose in a kind of not very straightforward way I think I am trying to make the point
5 that some of your ground 2 points are based upon misunderstandings of the evidence
6 and irrational conclusions whereas all of the ground 1 points are let's assume that the
7 CMA didn't make any misunderstandings and assume that they were right in all of their
8 assessments of likelihood, there was still an error, because when they came to the
9 end of the analysis they didn't stand back and consider the overall likelihood, but
10 I suppose it is really -- the difficulty I am having is pigeon-holing your ground 2
11 complaints into a public law error, because there are a large number of them in the
12 notice of appeal -- large number of points made in the notice of appeal and I am trying
13 to pin this down to what are the errors.

14 Two of them I can understand the argument. One is that the one you spent some time
15 on, which is the 10star bid was made on a false basis effectively, which is -- I can
16 understand that. If there is an error, there is an error there. I can also understand the
17 argument that CMA have misunderstood the objectives of Spreadex based on that
18 answer to the request for information. You are saying basically it is an irrational
19 conclusion to read those answers and assume -- to read from those answers that
20 those were Spreadex's intentions. I can kind of understand that as a public law error,
21 but it's really a question -- it may be my obsession with classification of how was it
22 working in public law terms.

23 MR JONES: I understand. At least my two main points are comprehensible, my Lord.

24 MR JUSTICE SAINI: I can understand the complaints, but I am trying to understand
25 how they work within a public law framework. So the one about was it a loss making
26 business or was it a breakeven business, you know, we have to take a view on the

1 material that the CMA had and whether or not the CMA's conclusion from that material
2 was a rational one. You say it wasn't, because having taken us through the
3 correspondence, you say that clearly up to the very end at the time they are making
4 the bid they are still operating, that is 10star, under the misapprehension that this is a
5 breakeven business when, in fact, it is loss making. CMA says "Well, they always
6 knew that". We have to take a view on that. Similarly I can kind of understand we
7 have to take a view on whether or not the CMA may have misinterpreted what
8 Spreadex's intentions were for the sale, but aside from that there are lots of other
9 points which, granular or not, are made in the notice of appeal, and I suppose what's
10 concerning me is that it is useful to have clarity as to which of those are put in your
11 notice of appeal just as helpful background material to show the
12 uncertainties -- I understand those -- or which of those are put in as showing different
13 kinds of errors.

14 MR JONES: The two which you focused on and which I had focused on could be
15 presented as standalone rationality points.

16 MR JUSTICE SAINI: Yes, and I can understand that.

17 MR JONES: I think I emphasised that today. I think we have emphasised that from
18 the start, that they are both on their own terms rationality points. So the grounds in
19 a sense could have been drafted differently, because they could have been ground
20 2(a) and ground 2(b) or grounds 2 and 3. They could have been standalone points.
21 For that reason we only need to persuade you of one of those. I don't need to go
22 further than that.

23 I think, my Lord, what's causing the confusion is that I do also have a further point,
24 which I am going to call ground 2(c) for the purposes of this discussion, which is that
25 you also are required to look at the overall evidence and ask whether the overall
26 conclusion is rationally justifiable by that evidence.

1 MR JUSTICE SAINI: Yes.

2 MR JONES: And it's there that I say even on points that I'm not on their own terms
3 criticising, so even if I don't have another rationality point, as it were, if there are
4 a series of uncertainties in the decision and if you are able to look at all of those
5 uncertainties and ask yourselves is the evidence strong enough for the CMA to be
6 able to say "All of these uncertainties would have been resolved in favour of sale to
7 10star" -- now you might say it is. Put aside my "(a) and (b) you might say it is strong
8 enough, in which case ground 2(c) fails" but my submission to you on ground 2(c) is
9 that it is not strong enough for the CMA to be able rationally to conclude that it all
10 would have come true as a most likely counterfactual. It is a rationality point. On your
11 classification it is a rationality point.

12 MR JUSTICE SAINI: I have always understood that. So would it be fair to say, and
13 I am not holding you to this, ground 1, I don't think there is any dispute about what
14 ground 1 is. Ground 2 has three parts. The first part is a misunderstanding of FDJ's
15 objectives in the sale and what they would have wanted out of a transaction, and we
16 have been through -- you have put your arguments about FDJ's description in that
17 request for information and the way that the CMA have interpreted it. So let's call that
18 ground 2(a).

19 MR JONES: Yes.

20 MR JUSTICE SAINI: Ground 2(b) is that there is an error in the CMA's approach to
21 the 10star bid, because CMA wrongly failed to appreciate that 10star was bidding on
22 the basis that this was a breakeven business when, in fact, it was a loss-making
23 business.

24 MR JONES: Yes.

25 MR JUSTICE SAINI: And therefore that bid was of little or no value in the analysis of
26 the counterfactual.

1 MR JONES: Yes.

2 MR JUSTICE SAINI: Is that fair to say?

3 MR JONES: Yes.

4 MR JUSTICE SAINI: Then 2(c) would be -- assume all of that is wrong for the
5 moment -- okay -- 2(a) and 2(b) are wrong, the inherent uncertainties of the six points
6 that Ms Berridge identified, when you put them all into the mix, there was an irrational
7 overall conclusion to decide that this was the correct counterfactual, that it is likely
8 there would have been a successful sale to 10star.

9 MR JONES: My Lord, I will go back and look at the granular points, but I think that
10 when you are putting to me that there are granular points in the notice of appeal there
11 is our points where we are emphasising the uncertainties --

12 MR JUSTICE SAINI: That's what I am trying to get at. They are not criticism of the
13 conclusions made, unlike you have criticism of conclusions made in grounds 2(a) and
14 2(b) but the other points are that these are all just uncertainties that needed to be
15 properly factored into the overall balance and they weren't.

16 MR JONES: Not that they weren't, but when you look at those six steps and ask
17 yourself is it rational to say that they all would have happened, so is it rational to say
18 that each of them -- the CMA is so confident that each of them would have happened
19 that it can conclude they all would have happened together, to assess whether that is
20 a rational conclusion you need to have regard to all the uncertainties that were before
21 them on the evidence and that is why we have emphasised those in our submissions.
22 So again it is not the CMA -- on all of those points it is not that the CMA did not
23 recognise that there were uncertainties. It is just me emphasising what they are to
24 support the punchline which was given all of these uncertainties, it is not rational to
25 say they all would have been overcome.

26 MR JUSTICE SAINI: Thank you very much. Again I am not holding you to that

1 classification. If you think it is wrong then you will let me know.

2 MR JONES: There is no chance of me disagreeing with the classification. I think the
3 classification is absolutely right. What I will do is see whether there are any other
4 points we should clarify, we are not pursuing those in the appeal. I don't want to put
5 more work on your collective plate.

6 MR JUSTICE SAINI: I suppose it is a question of knowing whether or not there are
7 factual conclusions that you disagree with on ground 2 other than the 2(a) and 2(b)
8 points.

9 MR JONES: Understood.

10 MR JUSTICE SAINI: Thank you very much. Shall we perhaps take a quick break for
11 just ten minutes. Thank you very much.

12 (Short break)

13 MR JUSTICE SAINI: Mr Lask.

14

15 Submissions on behalf of CMA

16 MR LASK: I propose to structure my submissions under the following headings, three
17 headings. Firstly, the framework for the CMA's counterfactual assessment; secondly,
18 the CMA's assessment of the exiting firm test in this case and in the course of taking
19 you through that I propose to address Spreadex's challenge under ground 2 regarding
20 the evidential basis for the CMA's assessment; and the third broad heading will be
21 Spreadex's challenge under ground 1 regarding the issue of compound probabilities.

22 What I don't propose to do is take you through the factual background on a standalone
23 basis since that's been covered by my learned friend but of course it will be necessary
24 to refer to various factual matters as I address Spreadex's grounds.

25 The first heading, the framework for the counterfactual assessment.

26 As the tribunal will now be aware, Spreadex's challenge is concerned only with the

1 CMA's counterfactual assessment, the framework for which is set out in the merger
2 assessment guidelines, which I would like to take you to, please, in authorities
3 bundle D2, tab 15. If we could pick it up at page 1279. I appreciate you have been
4 shown some aspects. I would like to show you some additional aspects.

5 MR JUSTICE SAINI: Can you give me the page number again?

6 MR LASK: 1279. What I propose to do is show you some additional passages from
7 the guidelines but also make some points of emphasis on some of the passages you
8 have already seen.

9 So the starting point is paragraph 3.1, which introduces the counterfactual. What we
10 see there is an acknowledgment by the CMA that the statutory question as to
11 whether -- the statutory question is whether the merger has resulted or can be
12 expected to result in an SLC compared to the competitive situation without the merger.
13 The latter is called the counterfactual. The counterfactual is not a statutory test but
14 rather an analytical tool used in answering the question of whether the merger gives
15 rise to an SLC.

16 Just pausing there, the statutory question is a threshold that must be crossed in order
17 for the CMA's remedial powers to apply under section 35. The counterfactual is
18 different. It is an analytical tool that the CMA uses to assist in answering the statutory
19 question, but it is not in itself the statutory test that needs to be satisfied in order for
20 the CMA to find an SLC. So the CMA is not seeking to cross a threshold in order to
21 proceed with its analysis. It simply has to identify a counterfactual in order to make its
22 analysis work.

23 Then 3.2:

24 "The counterfactual may consist of the prevailing or pre-merger conditions of
25 competition or conditions of competition that involve stronger or weaker competition
26 between the merger firms than under the prevailing conditions. The appropriate

1 | counterfactual may increase or reduce the prospects of an SLC finding."

2 | 3.6:

3 | "In determining the counterfactual the depth of analysis in the CMA's assessment is
4 | usually not to the same level as in its competitive assessment. Indeed, in many cases
5 | the counterfactual assessment is likely to be brief, although this will vary across
6 | cases."

7 | Now, of course, in this case, as you will already appreciate, the CMA's counterfactual
8 | assessment was very detailed. That reflects in part the significance of the exiting firm
9 | test, because if the exiting firm test is satisfied, that is the end of the story. 3.7:

10 | "The counterfactual is not intended to be a detailed description of the conditions of
11 | competition that prevail absent the merger. Those conditions are better considered in
12 | the competitive assessment."

13 | Then 3.9 you will see in the penultimate sentence:

14 | "The CMA will generally conclude on a counterfactual of conditions of competition
15 | broadly."

16 | That is apparent also from the end of chapter 5, as you have seen and as I will come
17 | on to show you again. Paragraph 5.218 is a broad conclusion on counterfactual
18 | conditions.

19 | If we could turn over, please to, page 1281, paragraph 3.13. This is an important
20 | passage in the guidelines:

21 | "At phase 2 the CMA has to make an overall judgment as to whether or not an SLC
22 | has occurred or is likely to occur. To help make this assessment the CMA will select
23 | the most likely conditions of competition as its counterfactual against which to assess
24 | the merger. In some instances the CMA may need to consider multiple possible
25 | scenarios."

26 | Then you see again at the end of paragraph 3.13 a reference to finding the most likely

1 conditions of competition.

2 I emphasise that the CMA does not and does not need to satisfy itself that the chosen
3 counterfactual is more likely than not. The reason I emphasise this -- it is not in
4 dispute -- but the reason I emphasise it is because it is relevant to Spreadex's
5 arguments under ground 2 that the CMA did not have adequate evidence to support
6 its conclusions. As a matter of logic the adequacy of the evidence required to support
7 a conclusion depends on the strength of that conclusion, or to put it another way the
8 threshold that needs to be passed.

9 To give an obvious example, the evidence required to support a finding beyond all
10 reasonable doubt has to be more compelling than the evidence required to support
11 a finding on the balance of probabilities. Here the evidence did not need to support
12 a conclusion that the CMA's chosen counterfactual was more likely than not because
13 the CMA did not need to put its case that high.

14 You will see from footnote 60 at page 1281 that the CMA's approach is based on the
15 decision in BSKyB. I am not sure I need to take you to that. It is in the authorities
16 bundle at tab 4, page 213, but that's the authority that the CMA relies on for the
17 proposition that although you need to apply the balance of probabilities to the overall
18 statutory question, it doesn't apply to the individual stages of analysis that feed into
19 answering the overall statutory question.

20 Paragraph 3.14 on page 1282 is also important:

21 "Establishing the appropriate counterfactual to assess the merger against is
22 an inherently uncertain exercise and evidence relating to future developments, absent
23 the merger, may be difficult to obtain. Uncertainty about the future will not in itself lead
24 the CMA to assume the pre-merger situation to be the appropriate counterfactual. As
25 part of its assessment the CMA may assess the ability and incentive of the merger
26 firms to pursue alternative to the merger, which may include reviewing evidence of

1 specific plans where available."

2 Now in this case Spreadex's bid was accepted by the FDJ at a fairly early stage. I think
3 you have already seen from the decision that preliminary bids were submitted in
4 February 2023 and Spreadex was selected as the preferred purchaser at the end of
5 March 2023. This means there was limited evidence available to the CMA as to what
6 would have happened in negotiations between FDJ and other potential purchasers,
7 absent the merger. What the CMA had to do, therefore, is form a judgment on
8 a hypothetical in the circumstances of incomplete evidence in order to address what
9 is an inherently uncertain question. But just as uncertainty will not lead the CMA to
10 assume that the pre-merger situation is the appropriate counterfactual, nor does it tilt
11 the scales in favour of a conclusion that some other scenario such as an exiting firm
12 scenario is appropriate.

13 The task of deciding what outcome would have been most likely, absent the merger,
14 based on the evidence that is available ensures that the effect of uncertainty is neutral.
15 The CMA obviously has to take uncertainty into account, but it doesn't tilt the scales
16 in either direction.

17 Next, please, page 1284, paragraph 321. This is the exiting firm scenario and the
18 tribunal will now be familiar with the two key conditions. "(a), that the firm is likely to
19 have exited through failure or otherwise and if so, (b) there would not have been an
20 alternative less anti-competitive purchaser for the firm or its assets to the acquirer in
21 question."

22 At 3.22:

23 "The exiting firm scenario is most commonly considered when one of the firms is said
24 to be failing financially. However, exit may also be for other reasons, for example, that
25 the target firm's corporate strategy has changed."

26 I emphasise, and I will come on to show you where the CMA says this in their decision.

1 I emphasise that in this case the CMA found that Sporting Index wasn't at risk of
2 financial failure. That finding is unchallenged but I emphasise it because it is relevant
3 to the state of the business and in particular what the alternative bidders 10star and
4 Star Sports would have discovered had things proceeded to due diligence. So there's
5 been lots of emphasis placed on the fact that Sporting Index was loss making and it
6 was according to the CMA's calculations, but it wasn't at risk of financial failure and
7 that is an important contextual point to bear in mind. Paragraph 3.23:

8 "For the CMA to accept an exiting firm argument at phase 1 it would need to see
9 compelling evidence that it was inevitable that the considerations listed in
10 paragraph 3.21 would be met. At phase 2 the CMA will consider what is most likely.
11 Where the CMA concludes that one of the merger firms would exit absent the merger
12 and there would have been no alternative less anti-competitive purchaser for the firm
13 or its assets, it will not find an SLC."

14 Because it is potentially definitive, it really underlines the care that the CMA has to
15 take and does take when considering an exiting firm argument.

16 At 3.24:

17 "When considering any exiting firm argument, the CMA will usually attach greater
18 weight to evidence that has not been prepared in contemplation of the merger. It may
19 be particularly important in the context of an exiting firm scenario for the CMA to
20 understand the rationale for the transaction under review, ie to consider why the
21 purchaser is acquiring a firm or its assets in the context of claims that it would have
22 exited from the market."

23 That is obviously relevant here, because, as my learned friend alluded to, there was
24 internal evidence from Spreadex showing that part of its rationale for acquiring Sporting
25 Index was to diminish the competitive threat of someone else acquiring the business
26 and improving its performance. In my submission, just taken at a very broad level,

1 that evidence obviously undermines the argument that absent the merger, the target
2 business would simply have exited the market altogether.

3 (ii) is addressed in further detail on page 1286. My learned friend Ms Berridge already
4 showed you these pages, 330, the analysis is not restricted to purchasers who would
5 have paid the same price, and 3.31:

6 "When the CMA considers that the most likely counterfactual would have involved
7 an alternative purchaser, it will conduct its competitive assessment on that basis."

8 So that's all I wanted to say about the framework set out in the merger assessment
9 guidelines. I will turn then to my second broad heading, which is the CMA's
10 assessment and the arguments raised under ground 2.

11 If we could start by going to the decision, page 41, paragraph 5.40, which is the CMA's
12 conclusion under limb 1 of the exiting firm test where the CMA concluded that absent
13 a merger or a sale to an alternative bidder, Sporting Index would likely have exited the
14 market for strategic reasons. You will see at the top of 5.40:

15 "Our view is that although Sporting Index was not at risk of financial failure, FDJ would
16 likely not have been incentivised to continue supporting a loss-making business ..."

17 As I say that is unchallenged and it's relevant context for the remainder of the CMA's
18 assessment under (ii).

19 Turning then to (ii), we see at paragraph 5.41:

20 "In broad terms, the second part of the exiting firm test is to assess whether, absent
21 the merger, the target business would most likely have been sold to an alternative
22 purchaser that raised fewer competition concerns. Importantly, for (ii) to be met in the
23 context of the assessment of the most likely counterfactual the CMA must be satisfied
24 that there would not have been such a purchaser."

25 Turning the page, please, to 5.45. This is important for context:

26 "FDJ consistently told the CMA that if the sale to Spreadex had not proceeded, it would

1 have continued engaging with other interested parties, including the alternative
2 bidders. In addition, the alternative bidders had put in bids to acquire the B2C
3 business, and we consider that this would also have been the case in the absence of
4 Spreadex's participation in the B2C sale process."

5 Now, as one sees at 5.49 on page 43, the CMA addressed (ii) by reference to three
6 broad questions:

7 "[first] whether FDJ would have been willing to complete a sale of the B2C business
8 to the alternative bidders.

9 [second] whether the alternative bidders would have been committed to completing a
10 purchase of the B2C business.

11 [third] whether the alternative bidders would have operated the B2C business as
12 a competitor."

13 Now Spreadex has made granular complaints about the CMA's assessment of the
14 evidence under those questions. Those have in the course of my learned friend's
15 submissions boiled down to two key complaints which I will address, and I will come
16 on to explain why there was no irrationality in the CMA's assessment of the evidence
17 or those questions, but there is also this broader point that my learned friend Mr Jones
18 was addressing at the end of his submissions and which has been labelled ground
19 2(c).

20 Essentially the broader point is what they call in their written argument the "delicate
21 chain of reasoning", that given the uncertainties underpinning the CMA's analysis, the
22 CMA's overall conclusion on (ii) was irrational.

23 I would like to deal with that briefly now, if I may. We say that argument is
24 misconceived. If, as we submit, the CMA's assessment of each of these three
25 questions was rational and properly supported by the evidence, then its overall
26 conclusion on (ii), which is built on those assessments, cannot have been irrational

1 unless it committed a distinct and specific error in reaching that overall conclusion.

2 To put it another way, if the evidence was sufficient to support the CMA's conclusion
3 on each of these three questions, then the overall conclusion which flowed naturally
4 from the answers to these questions cannot be outside the legitimate bounds of the
5 CMA's judgment, particularly when one factors in its margin of discretion.

6 That is why Spreadex has been driven to pursue ground 1. That's why it has ground
7 1. Ground 1 says in effect that even if the CMA analysed each of the three questions
8 rationally, it then failed to stand back and consider cumulative probability. There was
9 a logical gap they say.

10 If ground 1 fails, as we say it must, and if the CMA's conclusion on each of these three
11 questions was rational, as we say it was, then there is nothing left besides Spreadex's
12 disagreement with the merits of the CMA's overall conclusion on (ii). It is common
13 ground that such disagreement on its own does not establish a basis -- a sustainable
14 basis for a judicial review challenge.

15 So against that background I propose to take to you two authorities first on the correct
16 approach to determining evidential challenges such as the one advanced by Spreadex
17 and then I want to address the detail of the challenges by reference to the meat of the
18 analysis in chapter 5.

19 So the first authority is at authorities bundle D1, tab 5 page 250, please. This is the
20 Stagecoach case before this tribunal. The Chair was Vivian Rose, as she then was,
21 now Lady Rose. This case concerned a merger between two bus companies. The
22 competition commission found that there was an SLC and, as one sees from
23 paragraph 4 on page 237, one of the grounds of challenge was that -- two of them
24 maybe -- was that the findings weren't supported by sufficient evidence. You see that
25 from paragraph 4.

26 If we could pick up the judgment, please, at paragraph 43 on page 249:

1 "The Commission referred us to the passage in BSkyB ... where the Tribunal quoted
2 from Wade and Forsyth:

3 '... It is one thing to weigh conflicting evidence which might justify a conclusion either
4 way, or to evaluate evidence wrongly. It is another thing altogether to make
5 insupportable findings. This is an abuse of power and may cause grave injustice. At
6 this point, therefore, the court is disposed to intervene.

7 "No evidence" does not mean only a total dearth of evidence. It extends to any case
8 where the evidence taken as a whole is not reasonably capable of supporting the
9 finding; or where, in other words, no tribunal could reasonably reach that conclusion
10 on the evidence. This "no evidence" principle clearly has something in common with
11 the principle that perverse or unreasonable action is unauthorised and ultra vires'."

12 Then paragraph 45:

13 "We accept the Commission's analysis of the case law on this point and we agree that
14 the hurdle that Stagecoach has to overcome in order to make good its challenge under
15 ground 2 is a high one."

16 Pausing there, I submit that the same applies in this case because it is the same sort
17 of challenge:

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

1 characterised Stagecoach's ground 2."

2 Just pausing, my learned friend freely accepted that he was asking the tribunal to
3 engage with the merits and he took issue with our characterisation of Spreadex's case
4 as a thinly veiled attack on the merits.

5 The only point is yes, the tribunal may have to engage with a review of the merits of
6 the decision, but in accordance with the relevant test for a judicial review. So it is not
7 for this tribunal, with the greatest respect, to look at the evidence and reach a view on
8 what it would have decided if it had been the primary decision maker. The task is to
9 decide whether the conclusions that the CMA reached were conclusions that no
10 reasonable CMA could have reached on the evidence.

11 46:

12 "The Commission also reminded us that it is important to consider the evidence relied
13 on in the decision 'taken as a whole' and that the decision should not be analysed as
14 if it were a statute."

15 Then 48:

16 "It is important to get to the kernel of Stagecoach's assertion that the Commission's
17 findings were irrational and beyond the bounds of what the Commission could
18 reasonably have found by considering its legality and the decision making process, as
19 disclosed in the decision. The question we must ask ourselves, paraphrasing the
20 description of the Wednesbury test expressed by the Vice Chancellor in IBA, is
21 whether the decision is so unreasonable as to be a decision which no commission
22 properly instructed and taking account of all but only relevant considerations could
23 arrive at."

24 That is the test we say applies here to Spreadex's ground 2.

25 Then the next authority, please, is the C r lia case, which you were taken to this
26 morning in bundle D2, tab 12, page 887. I would like to pick it up, please, at

1 paragraph 32. I am sorry. That is on page 888. We see in the bottom third of that
2 paragraph:

3 "In paragraph 93 the court observed that the IBA case" -- I think the reference to the
4 court is a reference to the Court of Appeal in the IBA case -- "was not concerned with
5 questions of policy or discretion which were the normal subject matter of a low intensity
6 challenge. Under the legislative regime the issue for the regulator was one of factual
7 judgment (high intensity). The court observed: '... there is no doubt that the court is
8 entitled to inquire whether there was adequate material to support' the conclusion of
9 the decision maker."

10 We don't take issue with that proposition, but what's important is how the tribunal has
11 to approach that task. You see in paragraph 33:

12 "The CAT in the present case also cited, with approval, the observations of Carnwath
13 LJ in IBA endorsing observations of the House of Lords in *Edwards v Bairstow* ... to
14 the effect that:

15 '... there is no reason to make a mystery about the subjects that commissioners deal
16 with, or to invite the court to impose any exceptional restraint on themselves because
17 they are dealing with cases that arise out of facts found by the commissioners. Their
18 duty is no more than to examine those facts with a decent respect for the tribunal
19 appealed from and, if they think that the only reasonable conclusion on the facts found
20 is inconsistent with the determination come to, to say so without more ado'."

21 In my submission that is in substance the same as the test articulated in *Stagecoach*
22 which I just showed you, unsurprisingly, because *Stagecoach* was also drawing on
23 IBA.

24 Paragraph 38, which you were shown by Mr Jones, or at least shown part of it, the
25 court explains here that where the task is to determine that there was adequate
26 material before the CMA the tribunal must be ready to do a deep dive on the evidence

1 and roll up its judicial sleeves. At the end of this paragraph it says:

2 "It is at the point that the CAT is seized of a detailed understanding of the evidence
3 that it can then decide whether the CMA was acting within legitimate bounds in its
4 determination and evaluation of the facts."

5 Again you see this concept of reasonableness, legitimate bounds. Has it reached
6 a conclusion that no reasonable CMA could have reached? That's the test.

7 Paragraph 39 is also important. This is concerned with the degree of deference
8 accorded by the CAT to the CMA. A point made at the outset of that paragraph is this:

9 "Fact and context specific ... if, for example, the dispute concerns the interpretation of
10 a contract or letter then the view of the CAT on a question of interpretation might be
11 as equally valid as that of the CMA."

12 At the end of this paragraph, and I don't think Mr Jones read out this bit, but it is
13 important:

14 "At the other end of the scale if the CMA has evaluated a wide variety of complex
15 evidence, not all of which is consistent, a broader margin will be accorded to the CMA
16 in relation to its findings of fact and the inferences to be drawn therefrom."

17 That's really important here, because that was precisely the position before the CMA.
18 The CMA had to evaluate the wide variety of complex evidence, not all of which is
19 consistent, as you have already seen. So a broader margin of discretion applies in
20 those circumstances.

21 Then at 54, please, on page 893 we see the court applying these principles. I really
22 show you this for completeness. You will see about a third of the way down that
23 paragraph:

24 "We have however systematically considered the CMA's findings in the light of that
25 evidence. In coming to a conclusion, and in accordance with the indications given in
26 IBA, we take account of the following when considering the nature of the margin of

1 appreciation: (i) that the exercise engaged in by the CMA involved the evaluation of a
2 disparate and not entirely consistent body of evidence; (ii) that the CMA interpreted
3 this evidence in the context of both its own (horizontal) and C  r  lia's (vertical)
4 competing theories of harm; (iii) that the evaluation involved the CMA in making
5 a qualitative, prospective, assessment of the extent to which the acknowledged ability
6 of Bells to impose some degree of constraint ... could serve now and into the future to
7 counter or off-set to a sufficient degree the SLC created by the merger. We conclude
8 that the approach adopted was logical and rational. We have not identified any
9 document that we consider has been misconstrued by the CMA. We are clear that,
10 bearing in mind the nature of the issue, there was sufficient material before the CMA
11 as contained on the file and as recorded in the final report ..."

12 So we draw two propositions from this case law. First, in deciding whether there was
13 adequate material to support the CMA's conclusions the question for the tribunal is
14 whether the CMA misconstrued the evidence or reached a conclusion on the evidence
15 that was not reasonably open to it and, two, that the degree of deference to be
16 accorded by the CAT to the CMA will be at its greatest where the exercise engaged in
17 by the CMA involved a qualitative prospective assessment and the evaluation of
18 a disparate and not entirely consistent body of evidence. As I have said, that latter
19 point bears emphasis, because that is exactly the position here.

20 Just finally on the principles, it is a trite proposition in my submission that sometimes
21 there may be more than one conclusion that could reasonably be drawn from the
22 evidence. The question in that case is not whether the tribunal would have reached
23 the same conclusions as the CMA. It is whether the conclusion that was reached by
24 the CMA was one that was not reasonably open to it on the evidence. Just for your
25 note, that last point is consistent with the judgment in Wells, which Ms Berridge took
26 you to. It is paragraph 33 of the Wells case, authorities bundle D2, tab 17, page 1356.

1 So with that I would like to turn, please, back to the final report and it is page 43 to
2 deal with the first of the three broad questions that the CMA assessed. That was:

3 "Whether FDJ would have been willing to complete a sale of the B2C business to the
4 alternative bidders."

5 One sees from paragraph 5.50 that the CMA assessed this question by reference to
6 four issues. It is helpful I think just to look at the CMA's overall conclusion on this
7 section before I get into the detail. One can see that at paragraph 5.170 on page 81:

8 "Based on our assessment above of all the evidence in the round, we conclude that in
9 the absence of the merger FDJ would likely have been willing to complete a sale of
10 the B2C business to an alternative bidder, most probably 10star, noting in particular
11 that (a) FDJ's objective in the sale process was to recover closure costs associated
12 with a sale, and 10star's bid would likely have been 2.05 million higher than the closure
13 costs that would have been incurred by FDJ if it were to have sold to 10star, (b)
14 10star's bid would in any case have likely been above the liquidation value of the B2C
15 business, (c) FDJ submitted that 10star's bid could have reasonably been viewed as
16 being aligned with FDJ's expectations, subject to negotiations over the TSA, (d) a TSA
17 with 10star would likely have been in line with FDJ's expectations of a TSA when it
18 had initiated the 2023 B2C sale process; (e) the perceived disadvantages in relation
19 to the B2B business from a buyer's perspective would not likely have dissuaded FDJ
20 from entering into a TSA, (f) FDJ submitted that a sale scenario was always preferred
21 to liquidation and (g) non-financial considerations would not likely have dissuaded FDJ
22 from a sale of the B2C business to one of the alternative bidders."

23 Just pausing there, you have been taken through chapter 5 already. I am going to
24 have to do it again and I hope the tribunal will bear with me, but even then it is
25 obviously important for the tribunal in its own time to read chapter 5 in its entirety
26 because there is only so much we can cover here and now.

1 Also it is important to appreciate that chapter 5 is based on a body of evidence wider
2 than the evidence you have here. The evidence in the bundle is the evidence the
3 parties have chosen to put in so they can refer to it at this hearing, but that is not all of
4 the evidence that was before the CMA and, of course, if the tribunal wanted to see any
5 further evidence based on its reading of chapter 5, then that can be provided.

6 So that was the overall conclusion on this section at 5.170. I propose to show you the
7 key parts of the CMA's assessment that fed into that conclusion and explain why,
8 contrary to Spreadex's submissions, there was nothing irrational in that assessment
9 and indeed there was ample evidence to support the conclusion.

10 So the first issue concerns FDJ's objectives for the sales process. I think this is what's
11 now being described as Spreadex's ground 2(a).

12 So essentially the challenge concerns the measure against which FDJ would have
13 assessed the alternative bidders' bids. If we could pick it up, please, at page 43 at
14 5.51. This sets out the nature of the CMA's assessment under this heading.
15 Essentially what the CMA was trying to do was to ascertain whether FDJ would have
16 dismissed the bids from alternative bidders as unviable in light of its objectives for the
17 sale process. So that obviously required the CMA to identify the FDJ's objectives and
18 those are described at 5.51 and 5.52:

19 "As explained above, FDJ submitted during the remittal enquiry that its objective in
20 a sales process would have been to recover the redundancy and other closure costs
21 of the business and that it would have recovered the consolidated net asset value of
22 the business to the extent possible. We understand this to mean that FDJ would have
23 assessed the liability of the alternative bidders' bids against the closure costs
24 associated with a sale to the alternative bidders and at least some of the net asset
25 value of the B2C business.

26 "We also understand this to mean that FDJ was not seeking or necessarily expecting

1 to recover the full net asset value of the business. FDJ also submitted that it would
2 only have considered the liquidation value of the B2C business if it had concluded that
3 the alternative bidders' bids were unviable."

4 Then 5.53:

5 "For the purpose of [this assessment] ... we have estimated (a) what the likely closure
6 costs associated with a sale to the alternative bidders would have been and (b) what
7 the net asset value of the business would likely have been around the time of the 2023
8 sales process. We have then considered whether these estimates are likely to have
9 rendered the alternative bidders' bid values unviable ..."

10 Closure costs or the CMA's estimate of closure costs is at 5.59 on page 45, and there
11 the CMA estimates the closure costs associated with a sale to 10star and a sale to
12 Star Sports. You will see total closure costs in relation to 10star's bid are
13 approximately 0.95 million and in relation to Star Sports' bid approximately
14 1.25 million. The difference is different levels of redundancy costs.

15 Then 5.60:

16 "By netting these estimated closure costs against 10star's bid of 3 million and Star
17 Sports' bid of 2 million, we estimate 10star's net bid and its overall bid value to FDJ to
18 be approximately 2.05 million (with the possibility that this would have increased if
19 required, subject to engagement on the TSA) and we estimate Star Sports' net bid and
20 its overall bid value to FDJ to be approximately 0.75 million."

21 Just pausing there, you will see in relation to 10star footnote 147:

22 "During the remittal inquiry we also asked 10star whether there was any scope for
23 increasing their bid beyond the submitted figure if the increase was deemed necessary
24 to place a deal. 10star submitted that whilst it was possible (maybe even likely) that it
25 would have raised the headline bid from 3 million, given the opportunity, this was
26 dependent on FDJ engaging on the TSA properly in order for it to be able to value the

1 overall deal (something that it had not been able to do to date). On this basis our view
2 is that it is possible that 10star would have increased its bid beyond £3 million if
3 needed, although this would be subject to its engagement ... on a TSA."

4 I am going to come on to show you the underlying evidence in due course.

5 5.62:

6 "We note that at the time of the merger there were approximately £3 million of net
7 assets on the Sporting Index completion balance sheet (as acquired by Spreadex
8 under the merger)."

9 Just finally you see at 5.63 to 5.64 the CMA compares these figures to the bids:

10 "Our estimate of the alternative bidders' net bids are both positive, and given that these
11 estimates have (in each case) netted off the approximate closure costs associated
12 with the alternative bids, our view is that if FDJ were to have sold the B2C business to
13 either of the alternative bidders, it would likely have more than fully recovered the
14 closure costs associated with such a sale.

15 "We also estimate that in a sale to 10star, FDJ would likely have recovered
16 approximately 2.05 million of the net asset value of the business at the time of the
17 merger whereas in a sale to Star Sports FDJ would likely have recovered
18 approximately 0.75 million ..."

19 Then the conclusion at 5.65:

20 "Having regard to FDJ's submissions that absent the merger it would have continued
21 discussions with the alternative bidders, and its objective with a sale of the B2C
22 business would have been to at least cover the associated redundancy and closure
23 costs and, to the extent possible, recover the consolidated net asset value, we
24 conclude that the alternative bidders' bid values would not have rendered their bids to
25 be unviable to FDJ on these grounds."

26 Now Spreadex does not challenge the CMA's estimates or its comparison of those

1 estimates to the alternative bidders' bids. Instead it says that it was irrational for the
2 CMA to conclude that FDJ would have assessed those bids by reference to the closure
3 costs and net asset value so far as possible.

4 Now there are two answers to that. First, as I will show you, CMA's assessment of
5 FDJ's objectives was based squarely on what FDJ said to it during the investigation
6 and that is explained at 5.66 to 5.67 of the decision.

7 Second, it is an arid debate in any event, because, as you have seen the CMA went
8 on to assess the liquidation value in the alternative and found that 10star's bid would
9 have exceeded it, not Star Sports, but 10star. That's why the CMA concluded a sale
10 to 10star was most likely.

11 I will elaborate on each of those points if I may. Firstly, by turning to an RFI response
12 from FDJ in April of 2025. This was at tab 16, page 613. I don't think you have been
13 shown this document yet, but it is important. You will see at the top of the page "FDJ
14 United". This is a response from FDJ to the CMA. So this is straight from the horse's
15 mouth. You see the question numbers on the left-hand side:

16 "Did FDJ estimate or calculate a liquidation value for the B2C business at the time of
17 the 2023 B2C sales process. If so, please state what this liquidation value was."

18 The answer in the final column:

19 "FDJ confirms that it did not estimate or calculate a liquidation value for the B2C
20 business at the time of the 2023 B2C sales process."

21 Then question 1(c):

22 "If FDJ did not estimate or calculate a liquidation value at the time of the 2023 B2C
23 sales process, how would FDJ have done so? Please include the methodology that
24 FDJ would have used, including any inputs and assumptions that FDJ would have
25 used, if available."

26 Answer:

1 "FDJ did not factor a liquidation scenario, as the sales process was the preferred and
2 pursued option. Accordingly no methodologies inputs or assumptions for estimating
3 a liquidation value were developed or considered by FDJ at the time as such exercise
4 was so not necessary. FDJ further refers to our declarations from previous RFIs:
5 a sale scenario was always preferred."

6 Question 1(d):

7 "Would FDJ have estimated or calculated the liquidation value for the B2C business if
8 Spreadex had not bid ...?"

9 "Had Spreadex not submitted a bid during the 2023 sales process, FDJ would have
10 continued engaging with other interested third parties, including 10star and Star
11 Sports, and explored alternative transaction opportunities (a list was previously
12 provided to the CMA). A liquidation value would likely only have been considered if
13 no viable sales options had materialised through this process."

14 Now in light of this evidence straight from the horse's mouth it is in my submission
15 untenable to submit that FDJ would, in fact, have assessed the viability of the
16 alternative bid by reference to a liquidation value. It didn't even estimate a liquidation
17 value. It didn't even have a methodology for estimating a liquidation value. That is
18 because a sale of the business was a preferred option. As it says there, it would only
19 have considered a liquidation value if no viable sale options had materialised.

20 So then the question becomes: how would it have assessed viability if not by reference
21 to a liquidation value? For the answer to that let's turn, please, to tab 19, page 635.

22 This is a document you have been shown. This is a follow-up RFI in May 2025. One
23 sees at the bottom of page 635 that the CMA is explaining it has estimated a liquidation
24 value for itself. It explains the basis for that estimate. Then it asks FDJ three
25 questions. At the bottom of page 635 and the top of page 636. Then the answers are
26 provided on page 631. Sorry. I should have said the first question was:

1 "Do you have any comments on our estimates of the liquidation value (around 1.6
2 million - 1.7 million) ...?"

3 Pausing there, that was not the CMA's final estimate. The final range was 1.3 to 1.76
4 I think. So the final range was a lower band. Second:

5 "... please [tell us] whether:

6 FDJ would likely have completed a sale to 10star on the basis of an effective bid of
7 2.5 million and a liquidation value of 1.6."

8 "3. [Whether] FDJ would have completed a sale to 10star on the basis of an effective
9 bid of 2.5 million and a liquidation value of 1.7 million (ie the upper end of our range)."

10 Then the answers on page 631 is:

11 "Question 1. We do not have specific comments on this estimate based on the
12 statutory accounts position."

13 Unsurprising, because it never calculated the liquidation value.

14 "Questions 2 & 3. The Group's objective would have been to preserve and recover as
15 much value as possible from a sale transaction with a view to at least covering the
16 associated redundancy and closure costs and, to the extent possible, recovering the
17 consolidated net asset value. Whether the group would have ultimately completed a
18 sale to 10star would have depended on the overall economic balance of the
19 transaction, in particular on whether the negotiation of the TSA terms rendered the
20 offer financially viable in light of the anticipated burden and transitional risks as
21 explained during the remittal phase. Considering the progress of negotiations with
22 10star throughout the process, both offers could have reasonably been viewed as
23 aligned with the Group's expectations."

24 Now you will recall, because I have just shown you in the decision, the CMA's
25 assessment of FDJ's objectives was that FDJ would have sought to recover the
26 redundancy and other closure costs of the business and the net asset value to the

1 extent possible. As this evidence shows, that is exactly what FDJ said. So the
2 suggestion that the CMA has misinterpreted FDJ's evidence is in my submission
3 hopeless.

4 Now Spreadex says that the premise for FDJ's answers was that 10star's bid was
5 above liquidation value. So it is irrational for the CMA to read this evidence as
6 suggesting that FDJ would have chosen to sell for less than the liquidation value.
7 That's not what the CMA took from this evidence. As I have said, it relied on this
8 evidence to identify how FDJ would have assessed the bids, what measure it would
9 have used to assess the bids, and this evidence makes clear that the measure it would
10 have used was closure costs and net asset value to the extent possible, but also the
11 suggestion that the CMA misconstrued this evidence is even more hopeless when one
12 puts it in the context of the other RFI responses that FDJ provided which I just showed
13 you, where FDJ said a sales process -- a sale of the business was always its preferred
14 option. It didn't calculate a liquidation value. It didn't even have a methodology. So
15 I say this evidence is clear on its face. It is even clearer when one puts it in its proper
16 context, which with the greatest respect my learned friend did not do. He did not take
17 you to the other RFI responses.

18 Now for what it is worth I agree it is implicit in FDJ's evidence that it may, in fact, have
19 sold for less than liquidation value. That is a consequence of two things: firstly, FDJ's
20 preference for a sales process over a liquidation scenario and (b) the measure against
21 which it chose to assess the bids. So since it didn't estimate a liquidation value and
22 since it was assessing bids against closure costs and net asset value, it may have
23 ended up selling the complete business for less than it could have recovered had it
24 sold off the assets individually. Why might it have done so? We don't know but one
25 answer might have been because it was seeking to make a quick sale. One sees that
26 from the decision at 5.39 on page 40:

1 "We also consider it unlikely that FDJ would have concluded a sale of B2C business
2 if it could not have done so with an alternative bidder. Although it would likely have
3 reached out to other potential purchasers, there was very limited interest for the B2C
4 business under the B2C sales process. We note that FDJ had considered multiple
5 scenarios for the B2C business, but our view is it was unlikely that it would have
6 decided to pursue a separate sales process under a differently configured transaction
7 parameter given (i) its incentives to quickly dispose of the B2C business and (ii) its
8 willingness to engage in this would likely have been impacted by the limited interest in
9 the business during the sale process."

10 So that may have been why it would ultimately have sold for less than liquidation value,
11 but my case does not depend on it. I would say it is for that reason that the CMA did
12 not rule out a sale to Star Sports and it didn't need to, because although Star Sports'
13 bid was below liquidation value, as the CMA rightly found, liquidation value wasn't the
14 point.

15 Ultimately that point goes nowhere, because the focus of the CMA's conclusion on
16 FDJ's willingness to sell was on 10star, whose bid was above liquidation value.

17 Then in terms of liquidation value we did previously have a challenge to the CMA's
18 calculation of the liquidation value, but my understanding is that my learned friend
19 doesn't pursue that challenge. There are one or two points I still would like to make
20 on the liquidation value, because it feeds into the wider assessment.

21 The starting point is in the decision at 566 on page 46. I have already pointed you to
22 566 and 567. This is where the CMA explains why it doesn't think liquidation value is
23 the right comparator. Then at 5.68 -- sorry. Apologies for jumping around. 5.67:

24 "Spreadex has argued that the relevant comparator for this assessment is the
25 liquidation value. In our view this is not correct, given the direct evidence provided by
26 FDJ above on how it would have considered liquidation value, closure costs and the

1 net asset value of the B2C business."

2 So that's the stuff I have been showing you. Then 5.68:

3 "Nonetheless, given the language in our guidance, Spreadex's submissions and to
4 test whether any conclusion to be made would change if the reference point were to
5 be taken as the liquidation value ... we have calculated a liquidation value ... we have
6 then considered whether the ... bids would likely have been above the liquidation value
7 ..."

8 As I say, I will try to take this more quickly than I would have because it is no longer
9 challenged. Well, if we could flip forward, please, to page 63, we see 5.115:

10 "The table below shows our ranged estimates for the liquidation values ... and closure
11 costs ... under a liquidation scenario."

12 Then over the page on 64 table 5.1 you see the components of the liquidation value.

13 You see the total is a range, 1.3 million to 1.76 million. Then 5.116:

14 "Based on our estimates above, we estimate a total liquidation value of approximately
15 1.3 to 1.76 million (the variation reflects the range of estimates for the value of the
16 customer list and brand) ..."

17 Just pausing there, that's the 460,000 one sees in the top row, table 5.1, and that was
18 the focus of Spreadex's original challenge, which is no longer pursued.

19 It is important to show you what else the CMA said about that. If we could start, please,
20 at paragraph 5.74(a). 5.74, which is page 49:

21 "We have considered below the value of the Sporting Index customer list on a
22 standalone basis under a potential liquidation scenario. FDJ and Spreadex both made
23 submissions ...

24 (a) FDJ submitted during the remittal inquiry that the customer list would not have had
25 any liquidation value."

26 So that's the 460,000.

1 "FDJ submitted that the sale of the customer list on a standalone basis would have
2 been unlikely, given the extremely limited number of operators lawfully offering spread
3 betting services in the UK at the time of the sale ..."

4 So the FDJ was saying the customers would have had no value at all.

5 Then one sees on page 51, paragraph 5.77:

6 "On the basis of the evidence ..."

7 Pausing there, the reason I am showing you this, despite the challenge having fallen
8 away, is that one of the submissions that my learned friend did make and I think does
9 still rely on is that even 10star's bid was only just above liquidation value and that goes
10 to sort of undermine the weight that the CMA placed on this factor and undermine the
11 overall conclusion on FDJ's willingness. That's why I am showing this, because that
12 is not right to say that it was only just above liquidation value. 5.77:

13 "On the basis of the evidence provided, our view is that the value of the customer list
14 on a standalone basis would likely have been low or even zero. In particular, we note
15 that FDJ did not consider the customer list would have had any liquidation value, and
16 the third party evidence also shows that the customer list did not carry material value
17 for them and that for fixed odds providers any value would have been limited to the
18 fixed odds customers."

19 Then 5.86 on page 54:

20 "Our view is that the liquidation value of the customer list is likely to have been lower
21 (and likely much lower) than this £460,000 estimate."

22 Then the CMA gives a number of reasons for that. It says towards the end of 586:

23 "On a cautious basis we estimate the upper limit for the liquidation value of the
24 customer list to be 460. We estimate the lower limit ... to be zero."

25 Then on page 64 you see the subheading "Our view" which comes after CMA sets out
26 its calculated range. It says at 5.119:

1 "We recognise that there is an inherent margin for error in each component of our
2 liquidation value estimate (and in the resulting overall valuation). However, there are
3 varying degrees of uncertainty across our different estimates."

4 It elaborates. I emphasise 5.119(b)(ii):

5 "As set out in paragraph 5.77 above, our view is that the liquidation value of the
6 customer list is likely to have been very low or even zero, based on the evidence
7 provided to us by FDJ and third parties on the liquidation value of the customer list.
8 Our view is, therefore, that the liquidation value of the B2C business and customer list
9 is more likely to be closer to the lower end of our range (approximately 1.3 million for
10 the B2C business as a whole and zero for the customer list). A liquidation value close
11 to the higher end of our range, ie approximately 1.76 million ..., is less consistent with
12 the evidence from FDJ and third parties, but represents our highest reasonable
13 estimate for each."

14 The CMA is concluding there that actually it thinks that the true liquidation value is
15 more likely to be closer to the lower end, 1.3 million, and, of course, there is no
16 challenge to that. There is no challenge to the range and there is no challenge to that
17 view expressed there, and given that 10star's net bid after closure costs was
18 2.05 million, it is wrong in my submission to say it was only just above liquidation value,
19 because the CMA thought most likely liquidation value was at around 1.3. So 2.05 is
20 not only just above 1.3.

21 So I have dealt with the first two issues that the CMA dealt with under the first question.

22 That's FDJ's objectives and liquidation value.

23 I was going to come on next to deal with the feasibility of the TSA. I am conscious of
24 the time.

25 MR JUSTICE SAINI: We will do that tomorrow.

26 MR LASK: We will do that tomorrow. Very good.

1 MR JUSTICE SAINI: Thank you very much. So we will meet again tomorrow at 10.30.

2 **(4.25 pm)**

3 **(Court adjourned until 10.30 am**

4 **on Friday, 20th February 2026)**

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

Key to punctuation used in transcript

--	Double dashes are used at the end of a line to indicate that the person's speech was cut off by someone else speaking
...	Ellipsis is used at the end of a line to indicate that the person tailed off their speech and did not finish the sentence.
- xx xx xx -	A pair of single dashes is used to separate strong interruptions from the rest of the sentence e.g. An honest politician - if such a creature exists - would never agree to such a plan. These are unlike commas, which only separate off a weak interruption.
-	Single dashes are used when the strong interruption comes at the end of the sentence, e.g. There was no other way - or was there?