IN THE COMPETITION APPEAL TRIBUNAL

Case Nos. 1095/4/8/08
1096/4/8/08

Victoria House,
Bloomsbury Place,
London WC1A 2EB

4th June 2008

Before:
THE HON. MR JUSTICE GERALD BARLING
(President)

PETER CLAYTON
PROFESSOR PETER GRINYER

Sitting as a Tribunal in England and Wales

BETWEEN:

BRITISH SKY BROADCASTING GROUP Plc

Applicant

- v -

(1) **THE COMPETITION COMMISSION**
(2) **THE SECRETARY OF STATE FOR BUSINESS, ENTERPRISE AND REGULATORY REFORM**

Respondents

AND

VIRGIN MEDIA, Inc

Applicant

- v-

(1) **THE COMPETITION COMMISSION**
(2) **THE SECRETARY OF STATE FOR BUSINESS, ENTERPRISE AND REGULATORY REFORM**

Respondents

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HEARING – DAY TWO

APPEARANCES

Mr. Michael Beloff QC and Mr. James Flynn QC and Mr. Aidan Robertson (instructed by Allen & Overy) appeared for Sky Group Plc.

Mr. Richard Gordon QC and Ms. Marie Demetriou and Mr. Duncan Liddell (Partner, Ashurst LLP) appeared for Virgin Media, Inc.

Mr. John Swift QC and Mr. Daniel Beard and Mr. Rob Williams (instructed by the Treasury Solicitor) appeared for The Competition Commission.

Mr. Rupert Anderson QC and Miss Elisa Holmes (instructed by the Treasury Solicitor) appeared for the Secretary of State for Business, Enterprise and Regulatory Reform

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THE PRESIDENT: Good morning.

MR. SWIFT: Good morning. We were under a triple attack yesterday. It is not quite The Empire Strikes Back this morning, but I have had discussions with my colleagues overnight. I do not think I need to detain the Tribunal all that long this morning. I suppose you would say, "Oh, he would say that, would he not?" but in my submission when the Tribunal reads the report, and reads the report as a whole as we have suggested, the reasoning stacks up. There is a lot of evidence in there. There is a lot of primary fact. That report reflects the considerable care that the members of the Commission and their staff gave to this inquiry, which lasted from May to December 2007 in the course of some quite remarkable changes in this dynamic market.

What I am proposing to do is to deal at the end with some of Mr. Beloff's masterly statement. Lord Cooke would have been proud of what Mr. Beloff said yesterday about judicial review. All right, it was not in three lines, but -- We have got some comments on that because it was not quite, we would say, perfect, with all respect to Mr. Beloff. That comes at the end. We are conscious of the fact that the Tribunal does not want to have another statement from me about the proper exegesis of all the principles on JR. But, we thought we would add a few points at the end.

I would like to summarise where we are. If the Tribunal looks at the report as a whole, and looks at the individual building blocks, it will conclude that the facts were properly found, there was ample evidence to justify the conclusions, and, in short, the Commission was - and I am using the expression that you, sir, used at an earlier case management conferences - entitled to arrive at its assessment or evaluation, or judgment, or whatever the expression is. You will recall those expressions were the ones used by Lord Justice Richards in the case we looked at yesterday.

However, one of the things that was missing from yesterday's addresses was that there was nothing about the consumer. This case is all about the consumer and competition. There was a somewhat cerebral point about whether 'even if there was a lessening of competition, was it substantial?' But, there was no real focus yesterday on what was occupying the Commission for the entire eight months of the inquiry (subject to media plurality). That was, was there an expectation that the material influence would fetter competitive rivalry, distort competition, or damage the interests of consumers in what is an exceptionally important product market - namely, the all TV market? That is why the issues in this case are so important.

I would like to start with the market, and with those sections of the report -- I have to say, sir, I hope that we are In Camera, because I am going to some quite substantially redacted parts ----

THE PRESIDENT: I was going to ask whether you felt that we would need ----

MR. SWIFT: I have told Mr. Watton from Allen & Overy, and I assume that he has communicated that. Perhaps this is an appropriate moment.

THE PRESIDENT: From now on you would like to be In Camera. I do have a feeling that there might be people who are not, as it were, within the confidentiality ring present. They know who they are. I am so sorry. It does mean that they are going to have to leave the court.

MR. FLYNN: Sir, the point has been communicated. I was waiting to hear Mr. Swift's explanation for it. We made every effort to concentrate the confidential points into a single section. Of course, the normal principle is that hearings in this Tribunal, like any court, would be in public unless there really is a necessity for all of it, or parts of it, not to be in public.

THE PRESIDENT: That is perfectly true, Mr. Flynn. I understood Mr. Swift to say that he was not going to be able to scatter it. Is that right, Mr. Swift?

MR. SWIFT: It really will be a question of having the least adequate and appropriate way of presenting an argument to the Tribunal, which is to say that I can read this bit, I have then got to stop, and then ----

THE PRESIDENT: You can, of course, point us to things to read, but the problem comes then when you want to make a comment about it after we have read it. It may be that that is a problem.

MR. SWIFT: I am really in your hands. I am quite happy to go along, pause, and ----

THE PRESIDENT: Is there a particular part?

MR. SWIFT: It is when I get to the rationale, which is Section 3, from 3.6 through to 3.19 a great deal of that is redacted. When I get to 4.62 to 4.88, which is where the Commission identifies Sky internal documents, I would like to refer to that. I am not going to go at great length.

THE PRESIDENT: Is that is what is coming up almost immediately? I think we should probably go into Camera at this point. But, could you perhaps say when you feel that we can go back into Open Session again?

MR. SWIFT: Yes, sir.

THE PRESIDENT: Probably when you get through those bits that you have just referred to?

MR. SWIFT: I think it is when I get to material ability. I am very grateful.

THE PRESIDENT: I am sorry. Can we just identify anyone who is not in the confidentiality ring? We will go back into Open Session as soon as we possibly can. I am sorry.

(For In Camera hearing see separate transcript)

MR. SWIFT: Sir, we are on a canter home in Open Court. Very briefly on remedies. First of all, remedies. Then, we have some additional observations to make on the principles of judicial review as they were put to the Tribunal yesterday by my learned friend, Mr. Beloff, and also on the civil standard of proof. But, they are very brief.

So, after the pummelling we got yesterday -- I felt I was being dragged in two different directions. In one direction it was, "It is only lawful if you order full divestment". The other one is says, "It is only lawful if you decide on behavioural remedies like law debenture, voting shares". Here I am in the middle, submitting what in my submission is an entirely reasonable and well-reasoned argument throughout Section 6 that a partial divestment down to below 7.5 percent removes any realistic prospect of all these horrible things happening. That was our judgment. In my respectful submission, and however elegantly the arguments were put by Mr. Gordon yesterday, and by Mr. Flynn, they just do not bear scrutiny. This is the area in which we have a duty imposed by statute, but we have got to look at matters in the round, and consider not least having regard to the interests of those people who really count - they are the consumers and audiences out there. Are we satisfied that we have got a remedy which is going to leave them in as good a position as they were before, and likely to benefit from an independent ITV? That is a question of judgment - so long as that judgment is made compliant with statute.

I would like the Tribunal to have before it s.6, which is not redacted, except in very small part, and as I have done in respect of earlier parts of the Commission's report, to say "Please read the section as a whole", and my submission is that when the Tribunal reads that section as a whole, you will find that the reasoning stacks up, that the evidence has been properly presented, and that the Commission's judgment is not capable of being held to be unlawful or unreasonable, or perverse.

I have to say, and maybe I am just being slow – I will start with Mr. Gordon's argument – we set out what we have to do in para.6.2 of the report (p.86) that is what we have to do under s.47(7) – whether action should be taken by Mr. Anderson's client under s.55 of the Act, and he will be addressing the Tribunal on that section and more, "for the purpose of remedying, mitigating or preventing any of the effects adverse to the public interest …" and then the corresponding section in para.6.3 in relation to substantial lessening of competition.

At 6.5 the Commission says:

"In assessing possible remedies, we first considered the effectiveness of different options in dealing with the SLC and consequent adverse effects on the public interest."

I do not understand that anybody is saying that that is unlawful – "we first considered the effectiveness of different options", but it is emphasising effectiveness, because that is our primary duty, we have to make sure that the competitive process is rendered effective by reason of whatever remedies we impose.

Then the Act requires us in particular to have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and any adverse effects from it. You cannot cut and re-paste this little section. It says "as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition", and that is what we did.

Mr. Gordon placed a lot of weight on s.47(9) and quite rightly, but it has to be read together with the purpose of the whole s.47, which is to make sure that we get a remedy which is effective, and if we conclude that one or more remedies may be effective, then it is our duty, under relevant principles of proportionality, to make a judgment as between the two to make sure that if we go for partial rather than total we are not in any way risking throwing the baby out with the bathwater; that is a sensible, practical set of judgments that the Commission is making, and I do not understand this concept of something which is in a sense more comprehensive, or the most comprehensive. I do not understand that in terms of how it fits with making sense of the statute. So long as it is accepted that you can have two or more solutions which can be comprehensive – as comprehensive as is reasonable and practicable – that is it. Why should I be looking for the most comprehensive? The risk is that if I start looking for the most comprehensive I might find something which is intrusive, so it may be effective but if I can provide another effective remedy which is less intrusive, more proportional then I find I am going to be dragged in another direction. They say "Well you have gone for total divestment, you should have gone for partial divestment, even though you recognise that both are equally effective."

THE PRESIDENT: Well that is what Mr. Gordon says, does he not? He says you should not worry about intrusiveness at this point, you have just got to go for the most comprehensive. One thing that has occurred to me is to whether there is a human rights' issue here which comes into play, because I do not know whether Article 1 of Protocol 1 is engaged or not by a divestiture remedy, but if it is then presumably it has to be proportionate.

MR. SWIFT: Yes, absolutely, and proportionality comes in one way or the other; it either comes in because it is part of the practice of the Commission, it is not recognised in the application of the Convention, so that in a sense is my point. I have to be careful, I am not going to use this word "chimera", I am going to reserve "chimera" for later on .

THE PRESIDENT: I thought that was a nightmare – I have not looked it up actually, but I seem to remember at the back of my mind "chimera" was a nightmare sort of creature – that may not be inappropriate.

MR. SWIFT: Well I have to comply with the convention of counsel and not refer to Sky's skeleton as a nightmare! I cannot see anything in the Act that provides room for something which is the most comprehensive. The fact is there is a range of remedies that may serve the purpose and the purpose is to remedy SLC. That is the point on "most comprehensive". Then Mr. Gordon, who was suggesting, I think, that while total divestment in a sense is bound to be effective because it is zero, whenever you start fiddling around with the numbers and there are judgment calls you are making, and that is in terms of votes that could be withheld, and taking a position as to what other shareholders might be inclined to vote together with Sky, and you are creating a burden that you need not have. Whenever you get into things that are likely rather than certain then that is a dangerous road to go down. But in my submission that is a road that is open to the Commission to go on, and unless the Tribunal is satisfied that we got off the road in some way, that we had made some ridiculous or perverse findings by failing to count the right numbers, then that is a route that we can and should go down to arrive at the position where there is no realistic prospect that the adverse effects that have been identified are going to be replicated in the new situation including the merger.

If one goes, Sir, members of the Tribunal, to how we looked at partial divestiture, it really is set out in detail in para.6.19 to 6.35. I cannot in a sense elaborate much on this other than to say that in my respectful submission no reviewing body reading those paragraphs from 6.19 including in particular 6.24 to 6.26, and 6.29 to 6.34 could conclude that the Commission has in some way botched the job or misdirected itself. Of course it involves a judgment call as to what the realistic level of turnaround is going to be. The Commission will have to make that judgment call in respect of its finding on a material ability to influence, but it is seeking to find a solution which is reasonable, and when one has a notion of reasonable that involves judgment. Plainly the decision maker has to act reasonably, but "as comprehensive a solution as is reasonable and practicable" in my judgment allows the decision maker to exercise his judgment as to where to draw the line, and there are some

technical points made in the Sky skeleton about when the Tribunal was referring to "drawing the line" in *Somerfield* it was dealing with a separate issue – which particular store should be sold.

When the Tribunal looked at this in *Somerfield* both Mr. Flynn and I had the honour of appearing against each other in that case, the Tribunal was looking at remedies as a Tribunal looks at remedies in respect of when the European Commission looks at it, recognising that it is precisely the judgment call of the decision maker that is so critical, and allowing in many ways a greater margin of appreciation to the decision maker to determine what are the remedies that in this case he was going to recommend and in the other cases it would be required itself to enforce.

I have to say, with respect, I do not take the Virgin Media submissions as having any real weight. Partial divestment is well within the area of judgment for the Commission, if the Commission can put in place a remedy which it considers results in no realistic prospect of the adverse competition problem arising, that is a sensible and appropriate assessment and whether that remedy is effective. It is also comprehensive, it is also more reasonable by being less intrusive and ordering full investment.

As to the points made about our skeleton, with hindsight the Sky skeleton in relation to the Virgin Media is so short as to be almost abrupt. The relevant sections are in the defence starting at para.96, in which our position is set out fully. In our submission, there is no issue in respect of the Guidance. As we said, it is about anticipated mergers. This is not an anticipated merger. This is a merger that has taken place, but moreover it does not amount to a row of beans. If we are satisfied that there is no realistic prospect that there is any adverse effect then the fact that we adopted that test, rather than one of impossibility, does not make the slightest bit of difference to the net result. It is a very, very technical point of no merit.

Those are my submissions in respect of the Virgin Media submissions, and to an extent that covers the Sky argument that in some way we had erred in going down to below 7.5 per cent and that we should have accepted their original suggestion of 14.9 per cent. I am not sure what weight Sky attaches to that. My understanding is that it is really putting its force on the behavioural issues which are the voting trust and the assurance that its shares will not be voted.

Again, let us look at the report. The voting trust is covered at length at paras.6.39 to 6.53. I see that the proposed trustee has been redacted, so I am not going to mention him, although I noted that Mr. Flynn abbreviated him. I am going to keep within the rules.

This was not something which the Commission said, "Ah, we have never looked at one of these before, it does not look good to us", the Commission considered it in terms of would the voting trust be effective. Would it be effective? Would it enable the Commission to comply with its duty to provide a solution as comprehensive as is reasonable and practicable? When we get into issues of reasonable and practicable, we are looking at something which has got to be in place for an indefinite future which involves a separate transaction between Sky and a voting trust. That is something which is outside the Commission. How is that going to be monitored? How it is going to work in all those situations which may not be precisely predictable but are on the map as within the area of realistic events such as a merger, such as two companies coming in and wanting to merge with ITV? It is possible, in theory, to imagine a situation in which a set of rules can be established by Sky, agreed with a voting trust, and put to the Commission for its review. We know, to use that expression, in the real world that things will happen that cannot be entirely predicted and that is the risk. That is the risk of going down that particular route. It is fully set out in the paragraphs which I will not go through.

However, I would say to the Tribunal, put yourself into the position of the members of the Commission. We have two remedies that we are satisfied are going to be effect, we have a voting trust remedy which is concerned with a block of shares of no less than 17.9 per cent – 17.9. It straddles, overwhelms the share register. Is it fit for purpose? Have we got lots of evidence before us that in similar situations it has worked? The answer is no. This is a unique situation in which a major competitor acquires a major stake in another competitor and where the effects are going to cause those detriments to the public interest identified in 4.121. In my submission, the Commission was right to reject the voting trust for all the reasons set out in those paragraphs to which I refer the Tribunal to read but I am not going to repeat. They are set out in our defence and in our skeleton.

In respect of the undertaking not to vote shares, how can it seriously be argued that a matter which is so peculiar that for the indefinite future someone who holds the economic rights to 17.9 per cent of a company's equity will not vote those shares for the indefinite future. That is not, on the face of it, a remedy which appears to be effective, because Sky is remaining there with this block of shares that act like a cloud over the whole of ITV's corporate structure. It is no answer to say that they will not vote the shares and give an undertaking; and it is no answer for Mr. Flynn to say, "Oh, this just affects the corporate governance of ITV, it does not affect competition". That is unsustainable. If you distort the corporate governance of a company which is critical to the performance of this market that will have

effects in the market place. You cannot stop it simply by saying its corporate governance is a system of controls. It is a remedy that looks bad, is bad and the Commission was quite right to reject it having considered it carefully. That is why the Commission considered these matters at 6.54 to 6.57.

THE PRESIDENT: Even if it did not affect competition is it impermissible for the Commission to have regard to other adverse consequences of a particular remedy – for example, it may lie very difficult, and this is hypothetical, it would not affect competition, it would just make life very inconvenient and difficult for those who had to deal with it or for the target company? Is that something which the Commission has got to exclude from its consideration?

MR. SWIFT: It has plainly got to act within the bounds of reasonableness, it cannot take some particular consequence which does not appear related to the statutory purpose. This is why I am making the connection between the effects on the ability of a board to carry out in the market place the kind of discussions with its shareholders which a board not only is under a duty to do, but which any efficient board will do in order to control its development in the market place. As I say, you can now do it with 83 per cent. It does not, in my submission, make sense.

The other point is, and it is quite a separate point, this monitoring. How is it possible to monitor this for the indefinite future? On a point like this, the Commission does have, in my submission, a very substantial margin of appreciation. It has got to use its judgment. The assurance that it will not vote its shares in any circumstances for the indefinite future is not something that, on its face, is capable of being monitored. Why should the Competition Commission find a third party who would be required to take this on. The monitoring has got to be acceptable to somebody. There is a classic case in the old *Kuwait Oil* case, which is under a different statute. The Sovereign State of Kuwait gave all kinds of assurances to the Commission about not doing this, not doing that, not doing the other. The Commission said, no, it is not appropriate, and the government said, "We are not accepting any deed in respect thereof". It is not fit for purpose, in my submission.

Those are my very brief submissions on each of those arguments that had a stretch both ways yesterday.

Now, with the Tribunal's permission, some brief comments on judicial review which I hope will not be considered to be controversial, and are certainly not intended to trespass upon -- well, it will trespass a bit upon the excellent summary we had yesterday.

So, the approach to the test. We agree with Mr. Beloff that administrative law has moved on rapidly over the past fifty years. We also agree that the level of scrutiny now imposed by the courts is, rightly, greater than that in the past on fact-based judgments. One of the judgments that is cited in the authorities – I think maybe Mr. Beloff was involved in it – *National House Building*. It was one of Mr. Beloff's many cases. The Court of Appeal referred to a judgment of Lord Templeman, going back to the early 1980s. When you read it, it is a voice from the past. Mr. Beloff said that after the Supreme Court Act 1981 we had the seminal judgment in the *GCHQ* case when Lord Diplock set out the famous criteria of illegality, irrationality, and so on, and so forth. Things have moved on since then. But, one case that I am glad to see is still cited is that of the great Lord Radcliffe in *Edwards -v- Bairstow*. This was a case in 1956, involving error of law. Mr. Beloff cited from it, and it is still one a *locus classicus* in terms of the approach of an appellate court which we do not suggest in any way has become obsolete.

We also agree that we do not have any problems with the formulation of the principles in *Unichem*, *Somerfield*, and their relationship with the *IBA Healthcare* case in the Court of Appeal.

We do say that one of the key useful questions for this Tribunal - and I have tried to adopt this in going through the various sections this morning - is to stop and say, "Well, could a decision-maker, acting reasonably, have arrived at that decision?" It helps as a kind of discipline along the way. That, of course, is an extract from the *Unichem* decision. It goes back to Lord Lowry in the *Brian* case. Acting reasonably depends upon the context. That is why I have gone out of my way this morning to set out as much of the relevant context as I can in terms of the markets that we are dealing with. Yes, if there is a material error of fact, of course it can be quashed. If there is no factual basis, that can be impugned. But, it does not change the fundamental exercise that is being carried on by a fact-finding and judgment-making body like the Commission.

I am not suggesting that Mr. Beloff in any way suggested it, but the applicant cannot come along and say, "We don't like your assessment of the evidence. We think you should have got more evidence", or, "We just think you are wrong". It is why, in a sense, I took Linstock as an example - the material ability. I have asked the Tribunal to put yourself in the position of the Commission. Is that a conclusion I can reasonably come to? Yes, it is. Or, is the conclusion that a turn-out has got to be higher than 75 percent something that I am required to make? It is useful to have that little discipline.

However, we do want the Tribunal, with respect, to go back and look again at the *E* case, and what Lord Justice Carnwath said in that case. It is in the mini-bundle. Mr. Beloff referred to the final limb of the four-stage test ... must have played a material -- It is not necessarily a decisive point in the Tribunal's reasoning. If I may, I will just read out what the other three requirements are ----

THE PRESIDENT: I am not sure that the *E* case is there, is it?

MR. SWIFT: It is Tab 14 of the authorities. It is also found in our defence at Tab 5, Bundle 1, p.18.

THE PRESIDENT: Is this para. 53?

MR. SWIFT: Yes, para. 53. I will let the Tribunal read it. It is really the first three points which are italicised at the bottom of p.18. As I say, I am not making great points on this. I am simply saying that if we just could have it as a comprehensive record about the four requirements that Lord Justice Carnwath identified - and particularly the second requirement which excludes matters which involve judgment and, as I sought to point out this morning, so many of those key passages in the report do involve questions of judgment, evaluation and assessment.

Looking at the issue of an inadequate factual basis, again, the Commission does not diverge from the statement in **Wade & Forsyth**. It does not require showing a total dearth of evidence. The test is, as I have said before, "Could no Tribunal reasonably reach the conclusion to the question on the evidence?" Again, repeating myself, there is always the danger that when one gets into the detail, where the devil often lies -- I am not suggesting that the detail should not be examined, but one should never lose sight of the wood as well as the individual trees. That is why, reading the report as a whole is so critical.

On the level of scrutiny, this is a Commission looking into big areas within the economy relating to economic efficiency and consumer detriment. It is absolutely right that the Commission should be held accountable to this Tribunal under the relevant rules that apply to judicial review. We are not defensive. There have been references to arguments made by the Commission in earlier cases in the Tribunal. That is simply in order that we should make it clear that when we are being judged, we are being judged by this specialist Tribunal as a specialist Tribunal, having regard to the principles of judicial review. I do not believe there is anything between ourselves and Mr. Beloff on that. But, for the record, and for the Tribunal, we welcome the review to establish accountability. We are not seeking to show – to hide behind issues like discretion and judgment. We are there to be counted on whether

those judgments are truly grounded on facts and on evidence. If they are not, then we should be rightly be criticised. But, in my submission, we are far from that in the present case. There is another matter that is in issue - that is, the nature of the specialist Tribunal. Again, when I wanted to flatter the specialist Tribunal that I am appearing before -- The reason why there is a specialist Tribunal is that Parliament believes you are likely to be the most efficient way to getting a better result than were it to be done simply through the High Court. That is it. I would hate to describe it as a use of the government's resources; that is very impolite, but, it is an efficient way of getting to a better result than even with the High Court. It is as simple as that. It is a better way of achieving a just result. That applies in matters that involve questions of judgment and analysis of markets, as in this case, as it applies in cases where issues relate to highly complicated econometric analysis of the consequences of reductions in market shares. It is the same point.

As I have said, I would not entirely abandon all the old cases being obsolete, but we are dealing with a new statute. I think Lord Justice Carnwath, in the comment that he made which Mr. Beloff referred to with great politeness - although Mr. Justice Carnwath rather put the boot in, if I can use that expression - as to your predecessors' approach to certain matters – he did refer to the fact that there was a lot of textbook authority on this, and it might be a good idea to have a look at some of the old cases. So, we should not throw them all out.

Finally, on the standard of proof, the word 'likelihood' is found throughout the report. Is it more likely than not? That is the standard that the Commission has sought to apply. What we are saying when we refer to the *Rehman* case in Lord Hoffmann's judgment, and Lord Justice Richards in the *Mental Health* case, is that there are some areas of judgment where applying the civil standard of proof does not seem to work. It does not seem to match what has to be done in terms of prediction and, "What do I think is going to happen?" There are lots of variables about that. It is very difficult to pick one variable and say, "That is more important than another". You are looking at a moving frame in which there are different factors that can influence the final outcome. I cannot put it better -- In fact, I am putting it much worse than it was put by Lord Hoffmann and Lord Justice Richards. It is a risk assessment. When you get into risk assessment, and risk assessment as to how markets are going to work, and the range of things that could happen, then you are forming a judgment as to risk. A risk as to a nuclear explosion may not be a high probability - more probable than not - but if you identify that in an appropriate merger there is a risk that is likely to be increased as a result of a set of facts, then that is the kind of consideration that is taken into

account. So, you could say that something is more likely than not that a risk is going to be increased, but not necessarily that that will happen. I am not getting into philosophical issues here. It is just the nature of the predictions when you are dealing with areas of this kind. That, as I see it, is the relevance of what Lord Hoffmann is saying and what Lord Justice Richards is saying, and those comments are not confined to the fact that they were dealing with human rights cases.

So, it is the civil standard the whole time. It is the language of the burden in relation to the standard.

In conclusion, I have not been able to deal with every point that Mr. Flynn has made, and if there are some points that the Tribunal wish to put to me at the end of my closing -- I realise that this is the only slot that I have got in the course of these three days. The fact that I have not addressed all Mr. Flynn's points is not meant to be any discourtesy to Mr. Flynn. However, I have tried to concentrate on what I regard as the main building blocks which take the commission through from the beginning to the end of an SLC, from the relevant merger situation, through the incentives, looking at the context, looking at the market, and coming to this conclusion. The only reasonable conclusion for the Commission on these facts is that this merger situation may be expected to give rise to an SLC and have the adverse effects on consumers that have been identified at 4.121. Any other conclusion, in my submission, would not have been reasonably open to this Commission.

To conclude, Sky, standing at 17.9 percent, and not being able to fetter the ability of ITV to contribute to the future competitive position in this critically important market, would be, in itself, not in the real world - indeed, a chimera.

Those are my submissions, sir.

THE PRESIDENT: You have cantered home then. Just to go back to scrutiny -- You may have said everything, as it were, that you need to say on that, or that you want to say on it -- the level of scrutiny. If I understood him aright, Mr. Beloff was saying that we are, as it were, obliged JR principles, but that we should not apply them in the same way as the court would apply them because we are a specialist Tribunal. I think the follow-on submission was that therefore we should dig down deeper into the evidence and conduct a more intense review than you might get in the Administrative Court, for example, in this kind of case where there would be a greater degree of deference perhaps to the Commission. You have touched on it, but is there anything more you want to say about that?

MR. SWIFT: What Lord Carnwath said is that the essential question was not different from that which would have faced a court dealing with the same subject matter. I do disagree with

the way that Mr. Beloff has put it - in part because I am not sure how it is capable of being delivered. If one has a choice: Does one do it, as it were, the High Court way, or does one do it the specialist Tribunal way? There must be a point at which in respect of a particular finding, or a particular judgment, the Tribunal says to itself, "At this point I can open the door - the CAT door - and go through that. If this was Mr. Justice Barling, sitting in the High Court, that door is closed to me". That does not make sense to me. It does not make sense to me. It is also likely to be leading to rather absurd situations.

We may come into this in respect of media plurality tomorrow, but there is a point at which the Tribunal, which is itself an experienced Tribunal, will say to itself, looking at a report, "I think we want to know some more about that, Mr. Swift. I am not satisfied that we can just look at that and say, 'That's the evidence'". That is essentially what you did. When you looked at para. 4.101 you said, "I think that we are entitled to see that substantial further evidence that the Commission was relying on" in order that you could satisfy yourselves that we had that information. That, to my mind, was a perfectly permissible use of this Tribunal's expertise, but at the same time it would have been perfectly open had this been before the High Court. We do not object in any way to an intensive scrutiny of fact-based judgment so long as it is done within the framework established by the principles of judicial review, which are also included in those statements in Lord Justice Carnwath's judgment, both in IBA and in E.

In many ways, these are questions of fact and degree, and can only be resolved in respect of a particular issue that arises. It has not arisen in this case. I have not in any way suggested that that is something that you should not yourselves be looking into. I have said that you must satisfy yourselves that the facts were there; the evidence was there. So, there is no issue. I am not trying to hold you back from an intensive scrutiny in this case. At the same time, I am saying that conceptually I find it difficult to see how you can deliver a different degree of intensity depending on which Tribunal it is. I say that the principle advantage is that this Tribunal is probably more likely to spot problem areas that a lay Tribunal might not. That is the way your expertise comes in to assess whether judgments have been made within the margin of appreciation. That is where the intensity of review comes in.

So, unless I can assist you further, those are my submissions.

THE PRESIDENT: Just one moment.

PROFESSOR GRINYER: I did not want to interrupt you at the time, Mr. Swift, could I take you back to your discussion of a merger situation and then relate this to remedies. If the

Commission asked itself whether or not a 7.5 per cent shareholding might be a poison pill, something which would make a merger without it being less attractive to other parties?

MR. SWIFT: That was in relation to the squeeze-out point, but that was in respect of the hostile takeover for ITV. The Commission recognised it was not part of the relevant counterfactual. The Commission formed the view that at below 7.5 per cent ITV would still be able to develop those strategic policies it outlined to the Commission.

PROFESSOR GRINYER: So you regard 7.5 per cent as a squeeze-out and not likely to occur, although if there is another player with another 2.5 per cent it would be attractive?

MR. SWIFT: In a sense that is where one gets to a degree of speculation. It is a contested takeover. It is considered by the Commission at 6.35 in the remedies section and the Commission said:

> "It was put to us that BSkyB's shareholding should be reduced to below the level at which it could effectively block a 'squeeze out' in the event of a contested takeover. A 'squeeze out' can only be effected once 90 per cent of shareholders have accepted an offer. In any listed company, a proportion of votes … will be unavailable to a bidder, so in practice a 'squeeze out' may be prevented by a shareholder with less than a 10 per cent stake."

It is fair to say that the Commission did not look at a shareholding as low as 7.5 per cent as being a factor relevant to an ability to block a special resolution in relation to those matters that would have required a special resolution, which were themselves related to the future independent development of ITV's own policies.

PROFESSOR GRINYER: Thank you.

THE PRESIDENT: Thank you very much, Mr. Swift. How would you like to proceed, Mr. Anderson?

MR. ANDERSON: I am entirely in your hands, sir. I am not going to be very long, but I can see that it is nearly ----

THE PRESIDENT: Shall we do the same as yesterday and give you a clean start. We will start at five to two.

MR. ANDERSON: Certainly.

THE PRESIDENT: Thank you very much.

(Adjourned for a short time)

THE PRESIDENT: Mr. Swift, Mr. Anderson, my colleagues have got a point and I think they would quite like your thoughts on it, and therefore before, Mr. Swift, you sit down you may

want to deal with it first, or it may be that Mr. Anderson wants to deal with it first, but we will leave that to you to decide. Do you want to just raise the point?

MR. CLAYTON: Yes. To pick up the point made by my colleague on the 7.5 per cent, and he touched on the squeeze-out, and there is also the indirect impact of that quite large pot of shares on the market place, but that actually would give some degree of influence to Sky with that very large shareholding in ITV. Is that a reasonable....

MR. SWIFT: My answer to the question is that I cannot go further than what is in the report. Plainly, developing the answer I gave to Professor Grinyer before, the Commission must have been of the belief that at a level of below 7.5 per cent there is going to be no material influence on what I call the market for corporate control. That is almost something that follows from the findings in respect of adverse effects which are set out at para. 6.74 in "Conclusions".

Again, Mr. Clayton and the Tribunal, where it talks about the various building blocks, the share of 17.9 per cent is one of the mechanisms by which Sky is going to influence another party, namely ITV, whereas if you are below the 7.5 per cent that ceases to be an effective mechanism for that purpose.

MR. CLAYTON: I understand that. One of the reasons, as I understand for choosing the 7.5 per cent was that this would avoid the squeeze-out problem, but it does not cover the other side of the same issue, there is still a large block of shares which would be very useful in the market.

MR. SWIFT: Well this is bound to happen as an inevitable consequence of any decision to go for a partial investment. If one goes back to the 1980s when the Kuwaitis take 21.6 per cent of BP, and this came to the Competition Commission. 21.68/22 per cent was held to be material influence. The decision was taken to get that share down to 9.9 per cent and even at 9.9 per cent there is going to be some effect on the market control. The Commission actually decided – on a similar basis to here – it could no longer be regarded as the relevant mechanism to determine the future policies of BP.

MR. ANDERSON: On that last point, our understanding in relation to the squeeze-out point as described by the Competition Commission at paras. 6.35 and 6.36, that even if a shareholding at the level of 7.5 per cent would prevent a squeeze-out, that was not relevant to the question of whether or not Sky could exercise material influence over ITV's strategy because squeeze-out would necessarily only occur in the context of a hostile take over and it would be no part of ITV strategy to become a victim of a hostile takeover which is why our reading of 6.36 was that the squeeze-out point could be put to one side on that basis.

MR. SWIFT: I am sorry to interrupt Mr. Anderson. Just thinking it through, what we are saying is that addressing 7.5 per cent, you would neutralise the impact. Sky is then just another shareholder; it is a shareholder with up to 7.5 per cent, but it is then, say two percentage points more than Brandaus ** and the others. In other words, we have taken the dynamism out of the 17.9 but you are still leaving them with a significant shareholding. To that extent, yes, they can exercise their shareholding, it will be exercised, but it cannot be exercised in the Malyan way that we identified.

MR. ANDERSON: My submissions to the Tribunal this afternoon are confined to the question of remedies, since of course the Competition Commission's conclusions on relevant merger situations and substantial lessening of competition were binding on the Secretary of State. I do not propose to repeat on remedies all the points made by my learned friend, Mr. Swift, but before I turn to remedies, if I could just say a few words in response to what Mr. Beloff said yesterday on the question of standard of proof. He appeared to suggest that the main thrust of the Secretary of State's submissions on this topic was to urge the Tribunal to beat a retreat, back track, on the intensity of the review that had been endorsed in recent cases – that is not our position.

The simple point that we were seeking to make in our skeleton in our defence is that it is not the role of the Tribunal to take the underlying evidence relied upon by the Competition Commission and substitute itself as the fact finding and fact appraising body, one must accord to the Competition Commission a margin of appreciation in its assessment of the material before it, and before one could upset its findings and conclusions a threshold of unreasonableness has to be established. It is of course interesting that in the course of Mr. Flynn's submissions he repeatedly sought to categorise what he saw as the Competition Commission's failings by using words such as "perverse" and "irrational". We invite the Tribunal simply to adopt the test that is employed in *IBA* and in that respect if I could quickly invite the Tribunal to look at the *IBA* case, which is at tab 15 of the first bundle of authorities. The particular paragraph I wanted to take the Tribunal to was paragraph 53 of the Vice-Chancellor's judgment and that is at p.15 of 25.

> "Counsel for IBA accepted that the principles to be applied by CAT are the ordinary principles of judicial review. In my view he was right to do so. I would accept the submissions of counsel for the Appellants that if and in so far as CAT did not apply the ordinary principles of judicial review as would be applied by a court whether on the ground that CAT is a specialist tribunal or otherwise then they failed to observe the mandatory requirements of s.120(4)."

So when Mr. Beloff invites the Tribunal to (I think the way he puts it is) apply the principles but not necessarily in the same way as a court, I would urge the Tribunal to approach that submission with some caution, because one is nonetheless applying JR principles, and one of those principles is that there are limits to the circumstances in which this Tribunal should substitute its own view on the facts for those of the primary fact finding body, the Competition Commission. That is not to say that we are submitting that the Competition Commission's conclusions should only be overturned if they were, to quote one of the phrases in the case, "so outrageous and in defiance of logic". Our point is simply that a threshold of unreasonableness needs to be met before the findings could be overturned. The way we would put it is, are they conclusions that no reasonable body in the position of the Commission could have arrived at. We say, and you have been taken through the evidence this morning by Mr. Swift, that they were clearly entitled to reach the conclusions that they did reach.

What we would say conversely is that much of what Mr. Flynn was seeking to establish yesterday fell into the category of simply inviting the Tribunal to substitute its view on the evidence for that of the Competition Commission which is not legitimate.

The view we took was that the Competition Commission's conclusions were soundly based on the evidence before it.

Turning now to remedies, the first point I want to make is simply that although, under the scheme of the Act, it is for the Secretary of State to reach his own conclusion on remedies, he is bound by virtue of s.55(3) to have regard the conclusions of the Competition Commission on remedies. That is an important point in the context in particular of Virgin's submissions which challenged the Commission's conclusions that divestment to 7.5 per cent was the appropriate remedy on essentially two grounds: one, that the Competition Commission failed to apply para.4.24 of its guidelines; and secondly, that 7.5 per cent was not as comprehensive a remedy as total divestment. That is based on an interpretation of s.47(9), which is the provision you were taken to. For reasons given by Mr. Swift this morning those are misconceived grounds.

From the point of view of the Secretary of State they are, in fact, inapplicable grounds. The Secretary of State takes his decision on remedies pursuant to s.55. Can I just invite the Tribunal to turn to s.55, which can be found at p.180 of the Purple Book.

> "55(2) The Secretary of State may take such action … as he considers to be reasonable and practicable to remedy, mitigate or prevent …"

the adverse affects arising out of the merger situation.

That test, of course, incorporates neither the Competition Commission Guidance nor the s.47(9) provision directly. So what we would say is that unlike the position that follows if Sky's challenge to remedy succeeds, it does not follow that if Virgin's challenge to the Competition Commission's conclusions on the basis of not following the Guidance or not adopting the most comprehensive of all remedies, it does not necessarily follow that the Secretary of State's decision falls to be impeached. We readily accept that if the Tribunal is persuaded that it was irrational for the Competition Commission not to have recommended the voting trust then we would accept that the Secretary of State's decision cannot stand, but we would not accept that if the basis for the Virgin challenge succeeds, the Guidance or as comprehensive a remedy, the Secretary of State's decision necessary falls.

What the Secretary of State did was accept the Competition Commission's conclusions that at 7.5 per cent there was no possibility of material influence and that that remedy then fell within the test in s.55, which was the test that the Secretary of State was applying.

The next point to make is that had this been a case concerned only with a substantial lessening of competition then it would have been for the Competition Commission, and the Competition Commission alone, to impose remedies. That is the effect of 56(6) and is explained in para.33 of our defence.

Of course, by the time the Secretary of State came to take a decision on remedies in this case, it was in effect only a substantial lessening of competition case because he had accepted the conclusions of the Competition Commission that the relevant specified public interest consideration, plurality, did not have an adverse effect. So in those circumstances we say it was entirely right for the Secretary of State to place particular weight on the conclusions of the Competition Commission, the Competition Commission, of course, being the specialist body entrusted by Parliament with considering the competition implications of mergers. The Competition Commission had the opportunity to consider the question of remedies at length, including putting proposed remedies to the interested parties. Of course, by the time it comes to the Secretary of State he is only got a 30 day period in which to consider the report and take a decision, including on remedies. Of course, in this case what the Secretary of State did was give the parties an opportunity to make further representations to him. They did. He took them into account. No new points were made to him and therefore he saw no reason to depart from the conclusions of the Competition Commission on remedies.

So having reached that view there was no legitimate reason to disagree with the Competition Commission's substantive conclusion that at below 7.5 per cent there was no

realistic prospect of Sky exercising any material influence over ITV in the sense that they would no longer have any prospect of defeating a special resolution. It reached that conclusion having considered a range of options, and it had considered the arguments from the interested parties. The Secretary of State reached the view that the Competition Commission had reached a soundly based conclusion which discharged its obligation to produce a remedy in accordance with the statutory test applicable to it. He further took the view that the Competition Commission had correctly applied the principle of proportionality by adopting the less intrusive of two equally effective remedies.

The Secretary of State was satisfied that the Competition Commission had committed no error of law, that it had regard to the relevant evidence and it had respected due process by enabling the affected parties to make representations on the proposed remedies.

So the Secretary of State, as with the Competition Commission, has a margin of appreciation in what is an appropriate remedy in the circumstances, and in our submission the Secretary of State was entitled to take the view that he did, namely that there was no good reason to depart from the conclusions and recommendations of the Competition Commission.

Could I just turn very briefly to the actual remedies. Firstly, total divestment: no real criticism can be levelled against the Competition Commission for at least considering total divestment as an option – no real criticism because, at the end of the day, the Competition Commission neither recommended it, nor did the Secretary of State impose it. Yet Sky do seek to challenge that. Their argument is that the Competition Commission should not have adopted it as "their starting point". Well, what is meant by that? It is true that they appear to have considered it first in their report, but we can detect nothing in the report, and it certainly was not our approach, that total divestment was used as a benchmark against which the effectiveness of all the other remedies were measured. All the remedies, so far as we could tell from the report, had been considered on their merits against the relevant statutory test, and assessed in terms of effectiveness and other issues such as incrementation.

Well, the Competition Commission concluded that total divestment would be effective, and clearly it would have been. But, of course, it was not adopted. But, even if the Competition Commission had adopted total divestment as a starting point in some more substantive sense, in our submission that would not have constituted any error. Restoration of the status quo ante, which is what total divestment would have achieved, has been recognised by this Tribunal, as well as in other jurisdictions, including Europe, as a legitimate position, at least

as a starting point. That emerges, for example, in the case of the Co-Op case (Tab 23 of the first volume of authorities). This is a case about having to dispose of a number of outlets following a merger. The situation was that the OFT had refused to give consent to a particular purchaser of the outlets on the ground that that purchaser was not unconnected to the Co-Op. The issue was whether the OFT, in seeking to restore pre-merger levels of competition, had adopted the wrong test because the right test should have been, according to the submissions made against the OFT, remedying, mitigating, or preventing the SLC - not restoring competition. What the Tribunal says at paras. 148 to 151:

"In its skeleton and at the oral hearing, CGL contended that, by seeking to restore pre-merger levels of competition, the OFT applied the wrong legal test when implementing the undertakings. In CGL's view, in accordance with the purpose and wording of section 73(2) [which is not materially different to the sections we are concerned with today], the role of the undertakings is to remedy, mitigate or prevent the SLC. CGL submits that the OFT should have looked at the state of competition on the market post-divestment to see if there would still be an SLC.

> The objective of restoring competition to pre-merger levels was only the OFT's starting point in this case. That is an important qualification in our view since it left open the possibility for a merging party to satisfy the Oft (without requiring the OFT to conduct a detailed investigation) that its proposed remedy clearly and comprehensively removes the SLC without restoring competition to pre-merger levels, thereby satisfying the requirements of section 73(2). However, CGL did not so satisfy the OFT.
>
> We consider that the remarks of the Tribunal at para. 99 of Somerfield apply equally to the approach of the OFT in the particular circumstances of this case and in particular that:
>
> > 'in our view it is not unreasonable for the Competition Commission to consider, as a starting point, that "restoring the status quo ante" would normally involve reversing the completed acquisition unless the contrary were shown. After all, it is the acquisition that has given rise to the SLC. So, to reverse the acquisition would seem to us to be a simple, direct and easily understandable approach to remedying the SLC in question'.

> Accordingly, we do not consider that it is unreasonable for the OFT, in the particular circumstances of the present case, to seek to ensure that competition is restores to pre-merger levels. We consider that to be a permissible approach by the Oft in the particular circumstances of the present case, given the broad margin of assessment bestowed upon it by sections 73(2) and 72(3) of the Act. Such an approach, depending on the circumstances, is a straightforward one to remedying the SLC in question, especially in cases which have only involved a preliminary investigation by the OFT".

Of course, in that case the starting point was also the OFT's finishing point, and was accepted by the Tribunal. Of course, in this case, even if reversing the acquisition - in the sense of ordering total divestment - was taken as a starting point, it was not in fact the finishing point.

The second remedy is partial divestment. Clearly, the key issue here is down to what level would be necessary to provide a reasonable and practicable remedy to remedy, mitigate or prevent the adverse effects of the SLC. The critical aspect of the SLC, of course, rested on the ability to block special resolutions. So, the question for the Competition Commission and the Secretary of State was, effectively, "At what level would that problem be removed?" Well, the approach of the Competition Commission, with which the Secretary of State agreed, was to consider the evidence and to identify the level below which there was no realistic prospect of Sky retaining the ability to block a special resolution. Well, the Competition Commission satisfied itself that 7.5 percent was the correct level, and it did so, we would say, by reference to the right legal test. Now, whether the formulation of that test is 'no possibility of material influence' as per the guidance, or 'no real material risk' (that is how it is put at para. 95 of the Competition Commission's defence), or 'no realistic prospect' (which is how it is phrased at para. 6.34 of the Commission's report), they, in our submission all amount to the same thing - namely, 'At what level does one conclude that the ability to block a special resolution becomes fanciful?' If one adopts a level designed to remove a fanciful risk rather than a real risk, then one is adopting two draconian a remedy. This is really the substantive answer to the Virgin point. One would be open to the charge of disproportionality if one adopted a level that was designed to remove what is not a real prospect, but a fanciful prospect.

The Competition Commission was very well-placed to assess the evidence on the level below which the ability to block a special resolution was effectively removed. That evidence is reviewed and assessed between paras. 6.19 and 6.37 of the report. The

conclusion is found at 6.38. Sky appears to advance only two paragraphs of challenge to those findings - that is, at paras. 175 of its skeleton, in which it alleges that the Competition Commission had erroneously proceeded upon the basis of 60 percent effective shareholder turn-out instead of 72 percent; and, secondly, at para. 176, in which it is alleged that the Competition Commission over-stated the extent of Sky's indirect influence over other shareholders.

Well, the evidence was before the Competition Commission. It considered it. It took perhaps a cautious, but certainly not an unrealistic approach to the evidence. The evidence was there. The conclusion it reached was fully justified. The Secretary of State was satisfied that that is the basis upon which the Competition Commission had reached that figure.

The Virgin advocates advocate total divestment. In their original submissions they make essentially two points - and this is in addition to the points which Mr. Gordon was making. What we say in answer to that is that by reducing the level of Sky's shareholding to below 7.5 percent -- If that, in fact, removes any real influence in the sense of influencing the strategy of ITV, by going further, as I say, and by removing any prospect at all - even a hypothetical possibility - is simply going too far. That is really, in essence, the answer to Virgin's contention that the appropriate level was zero.

THE PRESIDENT: That is really the proportionality point.

MR. ANDERSON: It is the proportionality point, yes.

So, that brings me on to the voting trust. Well, the Competition Commission clearly considered that very carefully. A number of paragraphs are devoted to it. It was novel as a final remedy. Thus, it was untested. Accordingly, the Competition Commission was entitled to approach this proposal with caution - as, indeed, did the Secretary of State.

There were two main concerns identified by the Competition Commission in relation to the voting trust: one was that it involved monitoring and enforcement problems which did not arise in the context of an order for divestment at whatever level that order may have been made; and, secondly, it did not address the adverse effects of the retention by Sky of an economic interest in ITV and the problems attendant on that. Those were real concerns which undermined the effectiveness of that remedy. The Secretary of State took the view that the Competition Commission had reached the right conclusion in rejecting that proposal, and he was therefore fully entitled to take the line that he took, which was also to reject that proposal. No new material - or relevant material - was put to the Secretary of

State after the report which caused him to take a different view to that of the Competition Commission.

One point to make clear, of course, is that the concerns about the voting trust were not dependent upon the reputation of the proposed trustee. Professionalism and impartiality of the proposed trustee played no part in the Secretary of State's or, indeed, the Competition Commission's conclusion to reject that. So contrary to what Mr. Flynn said yesterday, no part of the reason for dismissing this proposal turned on "not trusting the proposed trustee".

In relation to an undertaking not to devote, we have nothing really to add to what is in our defence. We relied on the Competition Commission's conclusion that such a remedy would retain the distorting effect of Sky's continued shareholding and the problems associated with ongoing monitoring enforcement. Those are perfectly legitimate reasons for rejecting that proposal and so for those reasons we submit that both challenges to the remedy adopted by the Secretary of State in this case fail.

Unless I can help you further?

THE PRESIDENT: I wondered if you could help a bit more on the statute, which you took us to at the beginning.

MR. ANDERSON: Yes.

THE PRESIDENT: As I understand it you say there is, as it were, in terms of a rationality challenge you accept that if the decision of the Competition Commission was irrational then your decision would fall for the same reason.

MR. ANDERSON: Yes, because our decision was essentially that we saw no reason to depart from the conclusions of the Competition Commission.

THE PRESIDENT: Effectively you adopted ----

MR. ANDERSON: Yes.

THE PRESIDENT: Whereas you did say, and I think this was reliant, at least in part, on the difference in the statutory provisions between s.47(9) and s.55, that if Mr. Gordon was right that the Competition Commission as it were had misdirected themselves in terms of s.47(9), that did not mean that your conclusion under s.55(2) was necessarily bad and it is curious, is it not, that they have to report or recommend a remedy which is as comprehensive a solution as is reasonable and practicable, whereas the decision maker merely has to – I say "merely" that is not meant ----

MR. ANDERSON: Yes, take some ----

THE PRESIDENT: -- has to provide necessarily something different, but at least it is phrased differently – a remedy you consider "reasonable and practicable".

MR. ANDERSON: Having regard to the conclusions of the Competition Commission. Well the only point I was making was if the sole criticism that can be levelled against the Competition Commission's proposed remedy in this case is that it is not as comprehensive as total divestment that is not a criticism that will get them home against the Secretary of State, because the Secretary of State's test does not actually include the obligation to have as comprehensive a remedy as is possible, if that is the right construction of s.47(9).

THE PRESIDENT: So you submit there is a real difference, it is not just, I do not want to use the word "accidental", but you say there really is a difference .

MR. ANDERSON: Well there is not in fact a difference because Mr. Gordon's construction of the provision in 47(9) is wrong, because he fails to take into account in his submissions at all the reasonableness requirement in s.47(9) so in practice there is not going to be a difference, but it is simply that if the Tribunal was persuaded that there was anything in Mr. Gordon's construction of 47(9), which we say there is not, it does not actually get him home against the Secretary of State who is the Body who in fact took the decision, because that notion of comprehensiveness is not spelt out in s.55(2).

THE PRESIDENT: So on your construction you say he is wrong, and the correct construction is that there is no difference, new provisions.

MR. ANDERSON: Well in practice ----

THE PRESIDENT: No, I was not quite saying in practice.

MR. ANDERSON: Well there is clearly a difference because the word appears in one and not in the other. There is clearly a difference in the words used.

THE PRESIDENT: We interpret them differently. Should we interpret them as having the same effect?

MR. ANDERSON: We should interpret them as having the same effect, yes, because we are having regard to the report of the Competition Commission and the Competition Commission will have included the notion of comprehensiveness, but not in the way that Mr. Gordon has suggested it, and in circumstances where if it were not for the existence of the public interest consideration, this would have been a decision solely by the Competition Commission who would have been exercising powers that include the notion of comprehensiveness, and our decision was in fact simply to adopt the conclusions of the Competition Commission, there is in fact no difference.

THE PRESIDENT: Thank you.

MR. ANDERSON: Unless I can assist the Tribunal further, that is all we were proposing to say at this stage.

THE PRESIDENT: Thank you very much. I have lost track now where we are.

MR. GORDON: Sir, I think it is me. May I preface this with a logistical observation that the scheduling of submissions has, on paper at least, compelled us to close our appeal before my learned friend Mr. Flynn makes any submissions on our remedies' points so may I reserve the right to come back if he raises anything new in his final address.

Sir, I propose to divide our intervention into four essential stages or parts, first of all to deal with context, secondly, to set out our core submissions on Virgin Media's intervention, thirdly to develop those submissions and finally to semi-close our appeal by dealing with remedies, the submissions of my learned friends, Mr. Swift and Mr. Anderson.

What I want to say about context is this, that we submit that the entire submissions advanced on behalf of Sky by my learned friend, Mr. Beloff, at the start have to be placed in context. Mr. Beloff accepts, as he must, that the principles governing this Tribunal's jurisdiction are those of ordinary judicial review, that was his starting point. His only new point to which I will come, and which we respectfully submit is a heresy, is that in some fashion the Competition Appeal Tribunal must apply conventional judicial review principles in a different way because it, the Tribunal, is a specialist Tribunal, and I need to come back to that.

First of all, as I say, it needs to be put in context, because even if Mr. Beloff were correct, how differently could the Competition Appeal Tribunal address a factual challenge like this. At the extreme end of high intensity review is a human rights' challenge, let us say an Article 3 torture challenge, and that will plainly be a million miles away from a case such as this, but that would fall to be determined by the very closest scrutiny of a court.

Moving backwards to less extreme human rights' challenges, let us say those involving a balancing or proportionality equation under, say Article 9, 10 11 or 8 of the Convention, are still several thousand miles away from this case, but they too involve proportionality in its ECHR dimension. I mention that not because it is anything to do with this case but because as Lord Steyn observed in the *Daly* case, there is still not a merits' challenge. So even with a human rights' challenge using fuel injection proportionality you are still not into a merits' challenge, even though you are into high intensity judicial review.

Moving backwards slightly we get proportionality in EU law where again one has a very strong look, a close and penetrating look sometimes, and in some context at the merits, but that is not this case either. So this is not a human rights' case involving proportionality, it is not an EU law case involving proportionality. This is a case about fact and nothing that has been produced by my learned friend, nothing – of all the various materials he took the

Tribunal to at the beginning – can displace the forensic reality of that which we are all aware, which is that the Administrative Court does not interfere in factual matters, save on carefully defined criteria, and we are content in terms of context, to rest our response to Mr. Beloff's analysis with one of his own materials. If the Tribunal would turn to tab 5 of the mini bundle? Having moved away from proportionality to findings of fact, and their role in judicial review, the latest edition of **Wade**, 9th edition, says this:

> "Findings of fact are traditionally the domain where a deciding authority or tribunal is master in its own house. Provided only that it stays within its jurisdiction, its findings are in general exempt from review by the courts, which will in any case respect the decision of the body that saw and heard the witnesses or took evidence directly. Just as the courts look jealously on decisions by other bodies on matters of law, so they look indulgently on their decisions on matters of fact.
>
> But the limit of this indulgence is reached where findings are based on no satisfactory evidence. It is one thing to weigh conflicting evidence which might justify a conclusion either way, or to evaluate evidence wrongly. It is another altogether to make insupportable findings. This is an abuse of power and may cause grave injustice. At this point, therefore, the court is disposed to intervene."

We agree entirely with that citation, but what it shows in context is how far removed we are from the proportionality contexts which even then are not merits reviewed, which I have already referred to.

Not only, just finally to put the lid on context, is this a case about fact – in other words, the outer rim really of judicial review case law – but, as *IBA*, itself, shows (the judgment of Lord Justice Carnwath), there are fact cases and there are fact cases. A decision of the Commission of this kind following this process must also be seen in its proper context, because *IBA*, itself, which is the relevant authority in terms of distillation of principle, emphasises the significance of context. The OFT decision in *IBA* was, we would suggest, a somewhat thin clearance decision. It was a decision that would not be subject to any further scrutiny save for judicial review by the Tribunal, but it was clear in that case that the OFT's decision contained little factual analyse or reasoning. By contrast, the report with which the Tribunal is concerned in this case, the ITV/Sky Commission report, is immensely thorough, immensely detailed, it contains 171 pages of text and accompanying detailed appendices. So whilst, therefore, the relevant principles as to the Tribunal's jurisdiction and the role of the court in judicial review proceedings are clear, it is against the background of a report

such as the present, following the most extensive investigatory processes by the specialist Commission, after an earlier investigation by Ofcom, that the Tribunal must also consider the appropriate threshold of review.

Sir, that is context. May I turn to our core submissions. First of all, we submit that it is common ground that the relevant principles in respect of the Tribunal's jurisdiction under s.120 of the Act are the same principles as would be applied by the Administrative Court on an application for judicial review.

Secondly, it is also common ground that the scope of the applicable principles for judicial review was authoritatively stated by the Court of Appeal in the *IBA* case. That takes us straight to *IBA*. Our third proposition is that *IBA* demonstrates that the burden of proof in an application for judicial review and therefore an appeal under s.120 lies on a claimant or applicant. The fourth point is that *IBA* is also authority for the proposition that in relation to a challenge founded on a decision maker's approach to the evidence, the Tribunal may intervene on judicial review principles where the only reasonable decision that could have been reached on the evidence before the decision maker was one contrary to the relevant finding or findings under challenge. Fifthly, therefore, we submit that the various decisions of the tribunal to which this Tribunal has been taken in the mini-bundle and other authorities bundle, subsequent to *IBA*, must all be read in the light of the *IBA* ruling and can indeed so be read.

Finally, we submit that on that basis, and applying those principles, Sky's appeal constitutes for the most part, if not exclusively, a series of impermissible evidential challenges. The Commission plainly, we say, applied its reasonable judgment to the material before it.

Sir, those are our core propositions. Then can I develop them all, rather like yesterday, all together except the last one, the last one being applied to this case.

Looking just at the correct review criteria, Mr. Beloff's submissions as to intensity of review appeared to rely on numerous different materials. In the event, we would suggest that nothing that he said was controversial. Indeed, Mr. Swift, I think, agrees with that, save for the one key point, but it is a key point, and in a sense it is very clever forensic *leger de main*. The key point was the submission that, although the applicable judicial review principles are the same for the Tribunal as those applied by the Administrative Court, they must somehow be applied in a different way. I am not quite sure how you apply the same principles in a different way without transmuting the principles, but that is a logical argument. Forget that for the moment. The problem with the argument is that it is self-evidently eroded when one looks at para.100 of the *IBA* case itself.

Could I invite the Tribunal to look at that. It is in the mini bundle at tab 6. I will read, if I may, from the material part of para.100. Mr. Swift came to this, but on his feet without taking the Tribunal to it.

> "… the Tribunal did not need to rely on some special dispensation from the ordinary principles of judicial review. Those principles, whether applied by a court or a specialised Tribunal …"

So we would highlight those words and underline them:

> "… are flexible enough to be adapted to the particular statutory context. No doubt the existence of such a special jurisdiction will help to ensure consistency from case to case; and the expertise of the Tribunal will better fit to to deal with such cases expeditiously and with a full understanding of the technical background. However, the essential question …"

– and this again we would highlight –

> "… was no different from that which would have faced a court dealing with the same subject matter."

We say that is the end of this somewhat cerebral debate because these words could not be clearer. The only relevance of the specialist nature of the Competition Appeal Tribunal is that will in practice be able, as this citation shows, to deal with cases more efficiently, more quickly, more cost effectively, but it must apply the principles in precisely the same way as the court.

A good example of where the Tribunal will apply different principles to a court, but not different judicial review principles, are where it is exercising its full merits jurisdiction. Then you are, of course, dealing with matters, for example, under the Competition Act. We are dealing with a statutory context where s.120(4) makes the position clear, *IBA* makes it even clearer. There is in truth no debate whatever in our submission. So we say the Competition Appeal Tribunal can go no further in terms of its review jurisdiction than as articulated by the Court of Appeal in the *IBA* case.

What I was proposing to do, rather than taking the Tribunal to that case again, was to give a list of what we say are the three essential propositions in terms of review jurisdiction that flow from it. Giving the Tribunal the relevant paragraph numbers for reference -- Sir, there are three essential points of principle which we have distilled from *IBA*. The first is the cardinal requirement (as it was called) that the legal onus on an applicant for judicial review is on the applicant. That is at para. 54 of the then Vice-Chancellor's judgment. Secondly, apart from considerations of procedural fairness the court can only intervene -- When I use

the word the 'court', I of course also mean the Tribunal. The court can only intervene on an application for judicial review if the decision-maker has (1) committed an error of law; or (2) has reached an unreasonable conclusion. 'Unreasonable' in this context means unreasonable in the *Wednesbury* sense. We see that from para. 61 of the Vice-Chancellor's judgment, and at para. 90 of the judgment of Lord Justice Carnwath.

Finally, where, as in this case, the challenge is not to the exercise of discretion, but to a factual judgment, the court is entitled on judicial review to inquire into whether factual judgments made by a decision-maker fell outside the bounds of reasonable judgment. We see the citation from Lord Radcliffe in *Edwards -v- Bairstow*, cited by Lord Justice Carnwath at para. 95, and especially the last sentence of what Lord Radcliffe said and cited there. Also, Lord Justice Carnwath at para. 100.

So, we submit that what is apparent from that distillation, if it be correct, is that although the intensity of review - and I accept the spectre of unreasonableness may vary according to the context - factual judgments made by a decision-maker will, putting it at its highest, only be interfered with by a court if the factual judgments fell outside the bounds of reasonableness. *IBA* is not authority for - and is, indeed, authority against - the wider proposition that in the name of context, a court or a tribunal may, in a case involving factual judgment, go any further, as, for example, substituting its own view for that of a decision-maker who has investigated the merits in detail.

That being the case, we say that there are three questions which this tribunal should ask itself, applying those principles. First of all, is this a case, on any, or all, of the grounds which are advanced, involving a point of law? By a 'point of law' I used that as shorthand for what Mr. Beloff called a pure point of law - a hard-edged point of law. If it is, has the Commission erred in law? Here, the onus of proof lies on Sky, although, of course, we accept that when one is in the arena of legal argument one will be looking at the responses of the parties and reaching a determination of law.

Secondly, if the case does not involve a hard-edged point of law, does it involve one or more series of factual challenges to judgments made by the Commission? In the loosest sense, of course, that is a point of law, but only in the sense of *Edwards -v- Bairstow*, or *IBA*.

Thirdly, if it does - that is to say, if there are one or more series of factual challenges to factual judgments - has the applicant (Sky) shown that the factual challenge is beyond the bounds of reasonable judgment of the Competition Commission?

If that is a correct summary - a very quick summary - of the relevant principles, we, on behalf of Virgin Media, now seek to apply the principles to this case - first of all, generally; then, a little bit more specifically, although we recognise that as interveners Mr. Swift has had the burden of doing that.

Essentially we submit that looking at the matter broadly, Sky alleges various errors of law, failure of the Competition Commission to apply the correct standards of proof, failing to take account of relevant questions, irrational conclusions on the facts, etc., etc. But, what they come down to, properly analysed - all of them - are attempts to dress up as a legal challenge what are essentially factual challenges to merits.

Now, I would like to deal, if I may, with standard of proof. It comes in twice. It comes in, first of all, generally, and then it comes in on these events. The principle argument of law invoked by Sky, particularly in relation to the Commission's conclusions that there was a relevant merger situation and that this resulted in an SLC, is that the Commission applied the wrong standard of proof. This allegation, we say, is without foundation. It is common ground between all the parties that the Commission must apply the civil standard of proof. However, the Commission did not apply a different standard of proof. The underlying question is: What do we really mean in a case like the present by 'the civil standard of proof'? The whole of Sky's approach to this depends upon the underlying assumption that the Commission was required, when determining the questions it had to determine, to decide whether every single piece of relevant evidence, and every single submission relevant to those questions was well-founded, applying a balance of probabilities. That is essentially what is said at para. 51 of Sky's notice of application.

That proposition, we say, is wrong. What the civil standard of proof means in a case such as the present is very different from what it might mean in a case involving the ascertainment of what had happened in the past. As I think Mr. Swift put it - and certainly Mr. Anderson put it - we are in an area of the evaluation of risk. The Commission was looking at the future.

Reference has already been made to the *Rehman* case. I want to take the Tribunal to a case to which reference has not been made in a moment. However, may I just emphasise what Lord Hoffmann said in *Rehman* at para. 56? The Tribunal will find this in Authorities Bundle 1 at Tab 11. I read from a short way down the paragraph.

> "I agree with the Court of Appeal that the whole concept of a standard of proof is not particularly helpful in a case such as the present".

Let me not duck those words - 'in a case such as the present' - to which Mr. Beloff drew attention. *Rehman* was, of course, a case about future national security risk.

> "In a criminal or civil trial in which the issue is whether a given event happened, it is sensible to say that one is sure that it did, or that one thinks it more likely than not that it did. But the question in the present case is not whether a given event happened but the extent of future risk. This depends upon an evaluation of the evidence of the appellant's conduct against a broad range of facts with which they may interact. The question of whether the risk to national security is sufficient to justify the appellant's deportation cannot be answered by taking each allegation seriatim and deciding whether it has been established to some standard of proof".

So, certainly what we say Lord Hoffmann is analysing in that case is the difficulty of attributing to a civil standard of proof the duty to examine each and every area of fact in a case where one is looking to the future -- where one is looking at future risk.

It is, we suggest, clear that a body such as the Commission is required to make an overall assessment, taking account of all relevant evidence, some of which it may place more weight on than others. It is not, in our respectful submission, obliged to find that every piece of evidence of which it takes account is proven to the civil standard of proof.

The best analysis we have seen of this question of: How do you use a label like the civil standard of proof in a context of evaluation of risk? Is the Court of Appeal case that we mention in our skeleton argument - the *Karanakaran* case. Can I take the Tribunal to Authorities Bundle 1, Tab 10? This was a case in which the issue was whether it would be unduly harsh to remove a Tamil to Colombo, so the content again is different, but if I can ask the Tribunal to look at p.477 at e and read from the judgment of Lord Justice Sedley where, in our submission, he is spot on in a general analysis of the civil standard of proof to evaluation of future risk.

> "The civil standard of proof, which treats anything which probably happened as having definitely happened, is part of a pragmatic legal fiction. It has no logical bearing on the assessment of the likelihood of future events or (by parity of reasoning) the quality of past ones. It is true that in general legal process partitions its material so as to segregate past events and apply the civil standard of proof to them so that liability for negligence will depend on a probabilistic conclusion as to what happened. But this is by no means the whole process of reasoning. In a negligence case, for example, the question will arise whether what

> happened was reasonably foreseeable. There is no rational means of determining this on a balance of probabilities; instead the court will consider the evidence, including its findings as to past facts, and answer the question as posed."

Then these words:

> "More importantly, and more relevantly, a civil judge will not make a discrete assessment of the probable veracity of each item of the evidence; he or she will reach a conclusion on the probable factuality of an alleged event by evaluating all the evidence about it for what it is worth. Some of it will be so unreliable as to be worthless; some will amount to no more than straws in the wind, some will be indicative but not, by itself, probative; some may be compelling, but contra-indicated by other evidence."

Then this is the important bit as well:

> "It is only at the end point that, for want of a better yardstick, a probabilistic test is applied. Similarly, a jury trying a criminal case may be told by the trial judge that in deciding whether they are sure of the defendant's guilt they do not have to discard every piece of evidence which they are not individually sure is true; they should of course discard anything they suspect and anything which in law must be disregarded, but for the rest each element of the evidence should be given the weight and prominence they think right, and the final question answered in the light of all of it. So it is fallacious to think of probability (or certainty) as a uniform criterion of fact-finding in our courts: it is no more than the final touchstone, appropriate to the nature of the issue, for testing a body of evidence of often diverse cogency."

We say this explains so much of what Lord Justice Sedley often analysis, this explains the problem that this Tribunal is dealing with. It does not matter that this case was dealing with a Tamil, it does not actually matter that *Rehman* was dealing with a national security risk. What Lord Hoffmann and Lord Justice Sedley are saying in their different ways is that when one is evaluating future risk, as this Competition Commission was doing, one is looking to the end result. The end result is an evaluation of all the material of whether there is a material influence, or SLC – whatever the issue may be. In our respectful submission that is exactly what this Competition Commission did. I will come back to para. 4.104 in a moment more specifically with these principles in mind, because it was around this area that Mr. Flynn, in our submission, squirmed; he never gave an answer to the question he was asked by the Tribunal, and I still do not know to this moment how he articulates the burden

of proof in relation to these events, but what we say is that the key to understanding it is not to say: "Oh well all these cases are about mental health, or national security, or Colombian nationals", whatever it may be, they are all about crystallising how a court in reality goes about applying the civil standard of proof to the evaluation of risk.

The context here is of one competitor gaining a significant holding in a fast moving market over another competitor, and the context is the evaluation by the Commission of what is likely to happen in the future. So we say that properly analysed the standard of proof point is a wholly artificial exercise, it falls at the first hurdle because it does not actually raise a point of law at all. It is an attempt to skew the way in which these decisions should be reviewed into one that is impermissible.

So looking at Sky's challenge broadly, moving away from the standard of proof for a moment and looking at it in the round, what is the shape of Sky's challenges? Well just a scattergun for the moment of quotations – or citations. Sky, at para.62 and 63 of its skeleton "has given no weight to". Or notice of application at paras. 78, 90 and 118, "has given no good reason for rejecting". Or perhaps para.79 of Sky's notice of application – "wrongly and perversely chose to have regard to [alternative] evidence." Or, coming a little closer, para.134 of Sky's notice of application: "This hypothesis is unsupported by any adequate evidence." None of those, in the way they are cast, are errors of law. None of them involve arena, or arenas of fact in respect of which the Tribunal is permitted to intervene.

Looking very briefly – because Mr. Swift has done this far more comprehensively than we could ever do – at the specific case advanced yesterday by Mr. Flynn, no relevant merger situation, the point on discretion. That point collapses in our submission. First, the Commission did make a factual finding that the material influence enjoyed by Sky gave rise to common control. Secondly, and this should, in our submission, be the end of it, Sky has not identified any basis on which this ground could be material. Sky has not suggested that the Commission could rationally have concluded that Sky's material influence did not give rise to common control.

Then coming back to the standard of proof when we get to SLC, the target here, of course, is para.4.104 of the report. I have already made submissions as to the effect of cases such as *Rehman* and *Karanakaran*. We say, coming back to these events, it was simply not incumbent on the Commission to determine whether each of its three examples of SLC situations were more likely than not to happen. We say it was sufficient that it, the Commission, answered the broad question of whether the merger situation was likely to

give rise to SLC on a balance of probabilities. In answering that question, we say the Commission could take account of a broad range of factors and situations which might arise without determining whether each would arise on the balance of probabilities. In other words, it was perfectly lawful for it to determine the broad question in the round without determining each sub-issue on a balance of probabilities. We could not help noticing, being handed the transcripts this morning but remembering it vividly yesterday, the answer – or non-answer we would say – given, or not given by Mr. Flynn to the question that was put to him specifically about burden of proof. At p.35, I do not know if the Tribunal has the transcript.

THE PRESIDENT: We have.

MR. GORDON: At the top of p.35, line 6, Professor Grinyer asks:

> "There is a difference in the way the balance of probability in favour of an option course of action and the probability of least one of a number N, which in this case of examples is three occurring, and the probabilities are clearly greater that at least one will occur than any individual one will occur.
>
> MR. FLYNN: I think as a matter of probability that must be right.
>
> PROFESSOR GRINYER: You are talking about here the probability of at least one of them occurring, are you, or are you looking at the balance of probabilities on the basis of ----
>
> MR. FLYNN: I think one also has to remember that the category of examples, the first category of examples, investment in content, is itself quite broad, and we have detailed arguments about that as to why the probability test will not be satisfied in respect of a broad category. So we are not saying, 'The Commission has to establish that ITV will wish to invest in a particular company, we identify that company as so and so', but there has to be a plausible theory from ITV may wish to invest to what nature of transaction would that be and how could Sky influence it.
>
> PROFESSOR GRINYER: Do you mean when you say a plausible theory, do you mean one that is established on the balance of probabilities?
>
> MR. FLYNN: Yes, I do. When I say 'plausible' I mean more likely than not, because that is what the statutory test is.
>
> Sir, I think that is about as far as I can take it without going into a closed session."

There is simply no articulation there of what is being said about the standard of proof in relation to these three events. Our case is quite clear based on cases such as *Rehman* and *K*,

that the Commission did not have to answer any of those events in relation to a specific probability. It was enough that it looked to the evidence, evaluated it in terms of risk and reached what Lord Justice Sedley calls the "end outcome in terms of a probabilistic calculation". As I say, we still do not know what the case is.

Finally, Mr. Flynn looked in some detail at whether or not ITV might require non-pre-emptive equity funding to fund investments, content acquisitions, spectrum investments, and what we say about the challenge on those points was that they were challenges to the factual evaluation and judgment of the Commission. The evidential material Sky referred to was all before the Commission. It was all taken into account by the Commission, and there was of course directly contrary evidence of Michael Grade, which Mr. Swift took the Tribunal to this morning. We can see none of the points made going anywhere in terms of a judicial review jurisdiction.

Mr. Flynn also referred to Sky's ability to block future transactions, the counterfactual point, and we endorse what the Commission says at para.22 of its skeleton argument.

The key point we really raised in the context of all the points that have been made is that there is nothing, in our submission, that stacks up in terms of a point of law or a high threshold attack on the facts which would enable this Tribunal on *Edwards v. Bairstow* principles to intervene.

May I turn very briefly and finally to the question of remedies. We do not accept that it can be an argument, as my learned friend Mr. Swift began his submissions by saying, that it was entirely reasonable of the Commission to adopt a middle point faced with two extreme positions. That ignores the logical possibility, perhaps not accepted by Mr. Swift, that our legal submissions are correct. If they are correct then a middle position cannot, by definition, be a lawful position.

Can I take the arguments backwards, because one is very easy. In relation to our arguments on Guidance, we listened carefully to what my learned friend Mr. Swift said this morning and he did not come back with an answer at all. He, first of all, accepted, as we say he was driven to accept, that what is set out in para.29 of the skeleton is wrong. He did not seek to defend it. The consequence of his not seeking to defend it was that he could not, and cannot adopt the position that it was other than irrational for the Tribunal to depart from its Guidance, if it did depart from its Guidance, because it was only in the skeleton that he said it is not directly applicable Guidance, therefore the Commission did not misdirect itself by not following it.

His second point was that the Guidance was all about anticipated merger rather than actual merger. As I had already suggested yesterday, there is no logical difference in terms of remedial action needed, and Mr. Swift did not suggest any. He merely articulated almost word for word what the Tribunal itself had said at footnote 206 of the report.

His third point in relation to the Guidance was that the point was a technical one. Well, it is not a technical one, but apart from anything else if there is no answer to what we say about the Guidance, then it must be the case that the Commission has acted irrationally, because it has purported to follow its own Guidance. It has articulated the reason for distinguishing the Guidance, which is not a reason of any logical coherence, and it has then moved to a different test, a lower test. Nobody has set out to deny, except I think very briefly Mr. Anderson, that no possibility can mean in any sensible use of the language ----

THE PRESIDENT: No realistic possibility, or no realistic risk.

MR. GORDON: Exactly. He says they are all the same. They are not all the same. If that argument fails we submit that we must succeed on our remedies point in relation to Guidance. That says nothing about the detail of s.47(9) or, what I am only beginning to think through slowly, the connections between s.47(9) and s.55, it is Mr. Anderson's recent point. May I simply say this: first of all, it is no part of our submission that s.47(9) does not import a statutory proportionality test. It does import a statutory proportionality test, but the test is directed towards establishing whether or not there are equally comprehensive remedies. If there are, as I indicated yesterday, we fully accept that proportionality compels that the less draconian of two equally comprehensive measures be adopted.

THE PRESIDENT: Why do you build proportionality into the comprehensive bit rather than the reasonable bit, because it is qualified by having to be reasonable, is it not?

MR. GORDON: It is to achieve as comprehensive a solution ----

THE PRESIDENT: As is reasonable.

MR. GORDON: -- as is reasonable and practicable.

THE PRESIDENT: Why should not proportionality be part and parcel of the reasonable qualification?

MR. GORDON: For present purposes it does not matter because the point we make is that at para.6.18 of its report the Commission expressly accepts, as it must, that total divestment is a comprehensive solution. At 6.74 of its report the Commission says in relation to partial divestment that it is likely to be as effective a remedy – likely to be. The point we make is that you only need to take those two aspects together to say that one remedy cannot be comprehensive. It is not just a question of effectiveness of putative effectiveness. In some

of his submissions Mr. Swift appears to confuse the two concepts. There is no doubt as to what the section says. It uses the words "as comprehensive solution as is reasonable and practicable". There is no atomising here. We say that that has got to be identified. It is a proportionality test but what the section does not allow you to do is either to impose a remedy that is less than comprehensive, even if it is likely to be effective; and nor does it allow you to do other than to identify a range of comprehensive solutions, if there is a range, and then to apply the proportionality equation to that. Whichever way you do it, what you cannot do is take a remedy or solution which is less than comprehensive, assume that it is equal (because it is likely to be as effective), and then work in concepts such as intrusiveness, which is an irrelevant consideration.

Now, that being the case, we are not saying - though we come close to thinking it -- We are not saying that if the matter is remitted, the Commission, going through a process of logical decision-making and rational decision-making, might not, in terms of the statute, come to whatever conclusion it comes to. We are not binding it. But, what we do say is that in relation to the Guidance, there is only one answer that they could have adopted in logic. There is no escape from the Guidance point, because the Commission was purporting to implement its own Guidance. It regarded this Guidance as equally applicable, despite the fact that we were dealing with a s.45 reference, and not a s.22 or a s.33 reference. It just got its logic wrong. If I can make this point: It does not sit easily, in our submission, in the mouth of Mr. Swift to attack Mr. Flynn's arguments by saying that the one thing that has not been mentioned is consumers, when the whole point of a section such as s.47(9) -- the whole point of the Enterprise Act is about consumers. That is why we say that as a matter of statutory interpretation 'comprehensive' has an important part to play. It is about protecting consumers. It is about being cautious. About caution we will come back to tomorrow when we get on to plurality, but that is a different issue.

What we do submit is that the analysis against us is not a focused analysis. It asserts technicality without unravelling on what basis that is suggested. Had the Commission acted in the way we say it ought to have done, it would have focused on the question of whether there was any possibility.

Now, of course, you can look at words on a page, and you can look at the words which were used in para. 6.74 of the Commission report at a later stage. However, you have got to look at what the Commission was doing. It was going through - if we go backwards, and go back to the start of this - a series of subjective assessments of risk. That is what it was really doing. It was trying to get to a probabilistic conclusion in the context of remedy.

However, we only have to look at a para. Like 6.36 -- If I can just take the Commission to that for a moment? This bears on some of the questions which Mr. Swift was asked earlier. It is the point at the very end of 6.36.

"Accordingly, we do not place weight on the argument regarding the squeeze-out in itself, although we note that a shareholder with a stake large enough to block a squeeze-out could enjoy additional credibility with other shareholders ----"

That is the sort of arena, when you are looking at the protection of consumers that we say makes it, as obvious as night following day, that partial divestment could not in a month of Sundays be described as having comprehensiveness in the language of s.47. Still less could it be described as resulting in an outcome that was no possibility - using the language of para. 4.24 of the guidance.

As to the short submissions made this afternoon by Mr. Anderson, the very short answer to his arguments - which seemed suspiciously like an attempt to jump ship - the first and most basic answer to his submissions comes from the Secretary of State's own decision which place significant weight on the Commission findings. This is before one gets into any analogue of ss.47 and 55. I just show the Tribunal the report which Mr. Anderson took you to at para. 22. I just want to show the Tribunal para. 25. This is at Tab 2 of Key Documents, Bundle 1. I want to show the Tribunal, first of all, the last sentence:

> "This is a matter on which it is reasonable to place weight on the judgment of the Competition Commission as the relevant expert body".

Then, at para. 25,

> "In this case remedies are being devised to address an adverse effect on the public interest arising only from the substantial lessening of competition . . . In the circumstances it is reasonable for the Secretary of State to place significant weight on the Competition Commission's analysis and conclusions as to appropriate remedies".

But, if the Competition Commission's analysis and conclusions are irrational - which is the thrust of part of our analysis - it cannot be the case that the Secretary of State has done other than take irrelevant considerations into account when adopting an irrational and unlawful analysis.

THE PRESIDENT: I think he accepts that, does he not?

MR. GORDON: It may be that he does. It may be that he does. That is the answer to why the Secretary of State, in our submission, cannot jump ship.

The only final point in Mr. Anderson's analysis, I think, is that he seeks to separate s.55 from s.47(9). What we would say about that is that it is certainly true that different language is used. It may be that the fact that different language is used in s.55 emphasises the significance and importance of the concept of a comprehensive solution when it comes to the Commission. We are slightly troubled, however, by the statutory scheme in which the Secretary of State takes action which is recommended under s.47(7), the Commission recommending that action in the light of the certain way in which it has been instructed to proceed. So, we would submit that the correct starting point cannot be divorcing s.55 from s.47, but, rather, as part of the object and purpose of the statute, binding the Secretary of State when he, or she, the Secretary of State, takes such action as is reasonable and practicable, it can only mean, in the light of the recommendation made by the Commission under the over-arching s.47(7) which takes you to s.47(9).

THE PRESIDENT: It says you have got to have regard to it.

MR. GORDON: Exactly.

THE PRESIDENT: The Commission has to have regard to it.

MR. GORDON: Exactly. So, the greater conditions, the lesser. The greater is -- The starting point is the Competition Commission. The Competition Commission has the parameters which have this notion of a comprehensive solution. It does the spade work. It makes the recommendations. Then, the Secretary of State, in deciding what to do under s.55, adopting a Padfield object and purpose approach to the statute, must take that very strongly (we would submit) into account. But, it does not erode our analysis. Mr. Anderson, from memory, used the words 'In practice, they are the same thing'. No, not in practice. As a matter of legal analysis the very fact that they are worded differently shows the burden on the Competition Commission that it has to go through. Then, it having reached its analysis it affects the way in which the Secretary of State must look at the reasonableness and practicality. Whether it wholly compels compliance is another matter, but it certainly conditions the way in which the Secretary of State should act, and what actions should be taken.

Sir, those are my submissions.

THE PRESIDENT: Thank you. Can I just ask you one thing? I just want to be quite clear. As I understand it, you do not challenge what the Competition Commission says - that they found that both partial and full divestment were effective. You do not challenge those factual findings.

MR. GORDON: No. We challenge it to this extent ----

THE PRESIDENT: You say it is the wrong test?

MR. GORDON: No. "We say that the correct finding of the Commission, which we do not challenge -- I do not go so far as to say it was correct. The finding which we do not challenge is the finding at para. 6.18 in relation to total divestment, and the finding in para. 6.74 in relation to partial divestment - that it was likely to be, in practical terms, as effective a remedy.

THE PRESIDENT: Yes. You do not challenge that.

MR. GORDON: We do not challenge that. We do not accept, and we do challenge, because there is simply no analysis or explanation, the parenthetical reference -- It is not parenthetical, but it is at para. 6.67 -- the assumption that there were two equally effective remedies, because that is not consistent with the finding. We say that the Competition Commission never found that the partial divestment was equally comprehensive to total divestment.

So, that is the way we put our case. Of course, it is part of the whole approach that we do not seek to unscramble the analyses carried out in relation to the various matters. However, I have taken the Tribunal already - and I hope that the Tribunal have the references (I can go back to them) - to the three different issues (squeeze-out, etc.). My point was that all this is the area of uncertainty. I think I also showed the Tribunal para. 6.28 actually using the phrase "not possible […] with any degree of certainty". So, our point is not that on an *Edwards -v- Bairstow* basis it could not be found that partial divestment was likely to be as effective, but that by definition if something is likely to be as effective, that is not certain. It cannot be comprehensive. It does not meet all contingencies. Also, we say that it certainly falls, on any basis, outside para. 4.24 of the Guidance.

Those are our submissions.

THE PRESIDENT: Thank you very much.

(Short break)

THE PRESIDENT: Are we doing all right to finish tomorrow?

MR. BELOFF: Yes, Sir - the quantity if not the quality.

Sir, we have all agreed that the plurality issue can be dealt with well within the course of a single day. So, even if - which we do not anticipate from our side - we exhaust the afternoon, we will still be on course.

Sir, as you have probably noticed, I wonder whether, with your indulgence, I might reprieve my role as the prologue to Mr. Flynn. I feel a little bit like a small tug boat dragging a majestic liner out into sea! Whether the sea is choppy or otherwise, Mr. Flynn

has the stabilisers on all sides! It is remarkable, if I may say this at the outset, dealing with the only matters that fall within my remit, that after one authority, Court of Appeal judgment, and five subsequent decisions of this Tribunal, there does still appear to be a debate about the proper approach.

One may identify three issues which appear to divide the parties with, perhaps, uneven emphasis. The first is whether principles of judicial review can remain the same, but engage a different application to which the answer that Sky gives is, "Yes". Secondly, is there a difference in the intensity of review carried out by a specialist tribunal such as this is, and an ordinary court of law? Sky again says, "Yes". Thirdly, is there any role for a probability test when a body such as the Commission or the Secretary of State is determining what may happen in the future? In fact, it would be for the Competition Commission alone. Sky's answer is, "Yes, there is such a role".

Now, as to the first point, my learned friend Mr. Swift referred you to a passage previously unread in the Vice-Chancellor's judgment in the *IBA* case. Can I just take you back to that at Tab 15 of the first bundle of authorities? What Mr. Swift focused on was para. 53 of that judgment at p.15 of the Westlaw extract. In the second sentence, "I would accept the submissions of counsel for the appellants that if, and insofar as, the CAT did not apply the ordinary principles of judicial review as would be applied by the court, whether on the ground that the CAT is a specialist tribunal or otherwise, then they fail to observe the mandatory requirements of the section".

That sentence does no violence to our submission because all that the Vice-Chancellor was there concerned with was the need to apply the ordinary principles, and not to diverge from them. He said nothing as to whether their application could vary. Indeed, in other passages it is quite clear that he recognised that they could. If you go to the preceding passage he refers to an argument for the OFT, second last sentence:

> "The appellants recognised that the circumstance of the cases to which the principles (of judicial review) had to be applied are so diverse their application is dependent on the facts".

And the same recognition of that diversity of approach appears from para.50 where he refers to statements without quarrelling with those statements from such well known cases as *Tameside* and *Daly* to which Mr. Gordon made allusion, to the effect that the principles of judicial review depend on the context in which they fall to be applied; that he accepted, and he then went on to say "but", and this is where he detected, or perceived some departure from orthodoxy on the part of CAT, CAT went on to suggest that its constitution by

Parliament as a specialist Tribunal is in contrast to the normal situations where a non-specialised court is called upon to review the decision of a specialised decision maker, for that reason we (that was the Chairman speaking for the Tribunal) are not persuaded there is necessarily a direct read over s.120 from cases such as *Cellcom*, etc.

What the Vice-Chancellor fairly, or unfairly – it is not for me to say – perceived the CAT to be saying in the *IBA* case was that because they were a specialist Tribunal ergo the concept of what was or was not reasonable diverged from ordinary judicial review. If that was what they were saying rightly he said that was inappropriate. But what he did not say was that as long as they applied the principles of judicial review they could apply them differently given the context in which they were operating and the nature of the body and, as I say, if one reads it fairly that group of paragraphs from 50 through to 53, in our respectful submission, the argument that Mr. Gordon found illogical has a firm foundation both in practice and in the jurisprudence.

The second issue that divided the parties was whether or not there was a difference in the intensity of review to be carried out by a body such as this operating against the backcloth of a statute such as the Enterprise Act of 2002 and the way in which the Administrative Court might approach a similar issue. Mr. Gordon rightly said that there is a spectrum of intensity of approach in ordinary judicial review depending upon the issues at stake, and the context in which the issues fall to be determined. But, it was exactly that point, exactly for t hose reasons that Lord Justice Carnwath, with whom Lord Justice Mance (as he then was) agreed, said that that variety of approach was germane to the exercise of this particular jurisdiction. Again, in the same tab in the first bundle of authorities, passages that I have already read and therefore merely give you a note at the side, the first at para.91 he said that the intensity of review is issues specific, and at 92 – I read the first sentence only:

> "A further factor relevant to the intensity of review is whether the issue before the Tribunal is one properly within the province of the court."

So Lord Justice Carnwath, far from saying that there was no difference in the intensity of review carried out by this Tribunal, clearly endorsed the fact that there was. In relation to issues it is true that at one end of the spectrum analysis relevant for a body such as this he identified pure issues of policy in which case, if I may use the phrase, a more hands-off approach would be demanded, but on the other side inference from fact, or findings of fact it was perfectly appropriate to adopt a more hands-on approach. If I may usefully, at this juncture, diffuse one of the propositions made by Mr. Gordon, and to an extent with the

support of Mr. Swift in anticipation, if one looks at the end of para.93, Lord Justice Carnwath said:

"Although the question is expressed as depending on the subjective belief of the OFT …" That was in the particular context …" (and I emphasise those words) "… there is no doubt that the court is entitled to inquire whether there was adequate material to support that conclusion."

The various citations that Mr. Gordon made by way of criticism from the skeleton argument of Sky suggesting that that kind of formula was heretical, unorthodox, and trespassed beyond the boundaries of judicial review, with great deference to a scholar of judicial review and the standing of Mr. Gordon, is simply inconsistent with the statement of Lord Justice Carnwath and, for that matter, of case law going back a quarter of a century and more.

If I may also say, referring as he did, to Professor Sir William Wade's analysis of the 'no evidence' rule, Mr. Gordon helpfully read to the Tribunal the first of the two pages which was in our mini-bundle at tab 5, at p.272. But for reasons no doubt best known to himself foreswore from reading the second of the two pages which were of importance, at p.273 where Professor Sir William Wade said, entirely rightly, and in one sense prophetically having regard to the *Re E* case which Mr. Swift referred to but has not yet found its way into the case books, indeed, had not even at that stage been decided. What Professor Sir William Wade said was:

> "'no evidence' does not mean only a total dearth of evidence. It extends to any case where the evidence, taken as a whole, is not reasonably capable of supporting the finding: or where, in other words, no tribunal could reasonably reach that conclusion on that evidence."

So, with respect, Sky do submit that intensity of review, whether of factual findings or of inferences, including those to the future, by a specialist tribunal in preference to the Administrative Court is greater than that would be of a court where, in the situation which obtained before the Act of 2002 it would be considering judicial review of a body such as the Monopolies & Mergers Commission.

On the third issue that has divided the parties, the standard of proof to an extent it may be a somewhat sterile debate because the Competition Commission accepted that the 'likelihood' test was appropriate and, indeed, my learned friend Mr. Swift was at pains to say that the report reflected that acceptance throughout its various chapters. Whether X did happen is a question which can be decided by looking at the evidence and seeing whether it passes the

50 per cent threshold of which one would then conclude it is more likely than not that it did happen. Whether X will happen is also a question which can be decided by looking at the evidence and saying whether it passes 50 per cent threshold, that is to say that it is more likely than not that it will happen.

All that *Rehman* (to which attention is being paid on all sides) did through the speech of Lord Hoffmann was to point out that the two exercises are not identical. Obviously, and with respect to Mr. Gordon, it is quite clear from a fair reading of the speeches that the degree of likelihood required depends upon what is at stake. Obviously, if there is a threat to national security, or whether there is the possibility that a mental patient released prematurely might do damage to himself or others in the community demands a lesser degree of likelihood to trigger the particular remedy open to the administrative authorities than a case of this kind where the consequences would not be of that degree of severity.

If one looked at the case that Mr. Gordon referred us to for the first time, there is nothing in our respectful submission in the judgment of Lord Justice Sedley that is inconsistent with that proposition. If one goes to tab 10 of bundle 1 at p.477. I am much obliged to my learned friend, it was not a diversion that I intended to create. (Laughter). Page 477, *Karanakaran*, there are perhaps just two passages. As always with everything with Lord Justice Sedley it is both elegant and it is educated, but if one looks really it is the start and the end of the paragraph that are critical, what Lord Justice Sedley said was that the civil standard of proof which treats anything which probably happened as having definitely happened is part of a dramatic legal fiction -- it has no logical bearing on the assessment of the likelihood of future events, or by parity of reasoning, the quality of past events. So, what he was there saying was not that there was a difference between the approach to what had happened and what might happen. The notion of a civil standard of proof was, on one analysis, a fiction that was equally inapplicable to either, but, in fact, did not differentiate between the two. He then went on to say that all bodies, whether they be officers, public authorities, or tribunals or courts have, in their various contexts, to assess evidence. He rightly said that some evidence is incredible; some evidence is of nugatory weight; some is of importance; some is compulsive. But, at the end of the day what he said is that the notion of probability - and I quote the last line - “is no more than the final touchstone appropriate to the future of the issue for testing a body of evidence of often diverse cogency”. There is nothing, with respect, controversial in that. All that he is saying is that at the end of the day, depending on context, one has to make a variety of assessments of

evidence. At the end of the day, however, one has to decide whether something was more probable than not of happening or will more probably than not happen in the future.

I do remind you that in the other case to which we referred, which was the *Mental Health Tribunal* case at Tab 20 of this bundle -- I merely remind you that after an exhaustive analysis, including that of the *Rehman* case, drawing the distinction appropriately between the exercise in determining what has happened and the exercise of predicting future events, Lord Justice Richards, for the Court of Appeal, said at para. 100, "It is acceptable to refer to the whole process as one in which the court has to be satisfied on the balance of probability".

That is why we say on Sky's behalf that, overall, when the Commission had to form a conclusion as to, in particular, the CLC, whether something was to happen in the future, they properly applied - and if they did not apply, they should have applied - the question: Was, looking at the evidence overall, this more likely to happen than not?" There was nothing about the context, such as national security, future of the realm, or anything, that either required them to adopt a test other than that which would be conventionally applied in circumstances of this kind. The criticisms of the way in which they departed from that will be developed by my learned friend, Mr. Flynn.

Unless I can assist you further, those are my submissions in reply.

THE PRESIDENT: Thank you very much.

MR. FLYNN: Sir, I hope the risk of further diversion has now been avoided. I am ready, if the Tribunal is ready.

THE PRESIDENT: We are ready.

MR. FLYNN: I am going to deal with the points which have been made by Mr. Swift in Open Session. I may do a bit of pointing to relevant documents, if I may. I am going to try to follow the points in our order, as it were. However, I think we do need to start with something which was confidential, which is the rationale issue. So, if I might just point you to para. 3.8 of the report? Para. 3.8(a) identifies as part of the rationale a possible future development.

THE PRESIDENT: Is this going to be possible for you to do?

MR. FLYNN: Yes, because my only point on that is that that is part of the rationale, as was pointed out extensively today and in submissions made on the basis of that. That development is precisely not the transaction which was before the Commission, or which the Commission was to examine in reaching its decision in the present case. That is a wholly different potential development which has not taken place, and if it did take place it

would be evaluated in its own terms, for its own effects on competition. If that had been the matter which the Commission had to evaluate then you would have in the report a detailed consideration of the effects of competition that that development would have. I hope I am not being too unclear. I think it will be clear if one has it in mind.

However, since it has not happened, one does not see consideration of that in the report, and all the conclusions and insinuations, if I may say so, which Mr. Swift sought to draw from that I think are again properly characterised as speculation because they do not fall in the category of predicting the future based on what is known, but on what is unknown, if you like. This is going beyond a predictive assessment based on what has happened. Mr. Swift is trying to make points that would derive from a predictive assessment of what has not happened. It is linked, if you like, to the counterfactual point. It goes beyond the counterfactual because it has not happened at all. It is also like the point we make in respect of future transactions involving ITV - it is contrary to the counterfactual found by the Commission.

Now, it is also important, I think - and we should be clearly understood on this - that we have never said in relation to what may happen in the future that ITV will not make investments that relate to its core business - investments in content, and so forth. What we say in relation to counterfactual, in relation to future transactions involving ITV, is that the Commission has no basis for drawing conclusions on that because it has disclaimed that as part of its counterfactual analysis. The relevance of the future investment in content, and so forth, that ITV may make is, "How can Sky influence them?" That, of course, I will be coming on to.

I just remind you also that so far as the rationale of the transaction is concerned, as I said yesterday, it is not the case that Sky material indicated that the matters on which the Commission relies for its SLC finding, stymieing investment in content or additional spectrum were the underlying rationale for Sky's acquisition.

So, I hope that is not too obscure, but that is what I wanted to say in response to the extensive reliance on the rationale in what Mr. Swift said today, which as I said yesterday, and as we said in our skeleton, is not the emphasis that in fact one finds in the report. This is a new emphasis.

In relation to the relevant merger situation I have a few limited points to make on that, I think. Could I point you to another paragraph of the report which does have some redactions. That is para. 3.53. (Pause) This may be a little more difficult. This was said by Mr. Swift to relate to some advice that Sky had been given in connection with the

transaction. Our point on that simply is the fact that Sky may have received that advice in relation to the transaction that is there under consideration was not probative -- does not show that in fact Sky either would, or could, block a special resolution. That is what it in fact is being used for. Firstly, that is advice at a general level as to what may happen in the event that the transaction with which this inquiry is concerned takes place, but it hardly (as I said yesterday) convincing evidence for a finding that Sky actually would have the ability to block a special resolution.

With any luck, sir, those will be the only points where I actually wish to make a submission which requires me to be a little circumspect in what I say.

In relation to the ability of Sky to block a special resolution, despite only having a 17.9 percent shareholding. So, we are on the point of the possibility that at a general meeting, despite only having 17.9 percent, it would actually have 25 percent. Our submission is that the acquisition caused a shift in the shareholder base of ITV. It made a difference. That is why we say that it was perverse to give the greater weight to what came before the change than to what happened since. This is also linked to the point about the indirect influence and mesmerising other shareholders. The principal shareholders in ITV remain -- are still - described as a category - well-resourced, informed, serious and professional investors whose living is made, and whose incentives are, to maximise the returns on their shareholdings. The theory that they can be drawn away from their own interests or ITV's we have described as fanciful.

If you take a step for the Commission to conclude that Sky has the ability to block a special resolution, that, it is common ground is not conclusive of a material influence finding. It is a factor. It may be an important factor. But, it is not conclusive of the issue. You have to take the analysis quite a bit further than we have discussed in our written application, the previous cases, and the special features that they had in addition to an ability to block a special resolution. That is why we attach some importance to the issue of discretion. The point about whether, even if you find material influence, do you treat it as what it is not, which is control? Mr. Swift, as in so many places, just slightly reverses the burden or turns the tables on us. He says the relevant question then -- He recognises that there is a discretion which would be exercised in exceptional circumstances (I think he said) - and *Gillette* was quoted - is: Is there any reason not to? That is the way he puts it. We say it should be the other way around - that there has to be a good reason in line with the policy of the Act for treating a situation which falls short of common control as common control.

The next stage is the taking of jurisdiction. If the Commission assumes jurisdiction, and properly exercises that discretion, addressing its mind to it, how then does exercise its jurisdiction? It is common ground between us all, I think, that the civil standard applies. How you apply it - and I follow Mr. Beloff in that, and I will not go over it - may vary according to the circumstances. One particular point I would make on that is that if the acquirer of an interest in a company does not have control, but is being treated as having control for the purposes of s.26, we would say that the decision-maker should exercise caution, should take a cautious approach because the decision maker should require a higher level of persuasion that the future possible course of events is likely to eventuate. I believe this is spelt out in our notice of application. A cautious approach is indicated in a material influence case, particularly one at the lower level of interest acquired.

I think I want to come on substantial lessening of competition, and I have a few points on material influence. Mr. Swift's approach was, "I will be unkind". He was not unkind to me, but it was, "Never mind the quality, feel the width". We had, "There is a lot of material", and we went through it all. Undoubtedly the Commission had a lot of material, a great deal of material, and you can, if you like, call that evidence. The substance of it is really what matters, not the weight. An example that Mr. Swift attached a lot of importance to is the list in appendix C to the report at para.13. It is unpaginated bit towards the end of the report and you may well have a flag in it. It is the highly coloured page, so I do not quote it. It is a long list, it is a list with many items in it. We would say there is no consideration of likelihood, probability, which of them are entirely water under the bridge, which may come back, which are just brainstorming. It is the kind of thing that any company would do, consider all the possibilities. There is a further comment that I would wish to make but I do not think I can, but it is entirely confidential.

THE PRESIDENT: Do you want to ----

MR. FLYNN: I really do not want to come out just for a sentence. I think I will ----

THE PRESIDENT: Write it down maybe.

MR. FLYNN: I can write it down. I will write it down and hand it up. I have a short observation there. I do not trust my own writing in this, sir, but we will hand you up a note afterwards.

THE PRESIDENT: If you just show it to the others.

MR. FLYNN: Yes. The point the Commission is dealing with at this stage in the analysis is what possible investments, steps and strategy ITV might take in the future which Sky could influence. The mechanism of influence, potential influence, identified by the Commission is the ability to vote down a special resolution required for the raising of equity funding on a

non-pre-emptive basis. We have said this is a chimera in our skeleton. I do not know, sir, if you had the chance to look that up over the short adjournment. My dictionary does say that it is some kind of imaginary beast and it is also, therefore, a fanciful conception. It may well be the sort of thing that haunts you in your dreams. I hope it will not be too often after this hearing! We call it a chimera because it is fanciful, this is not what is going to happen.

THE PRESIDENT: A mythical beast.

MR. FLYNN: A mythical beast. We have been asked to prove a negative. We should apparently have provided evidence that these things do not happen. Well, as well as we could we did. I think you should please bear in mind that the list that you were taken to, for example, and all the other material that Mr. Swift flipped through this morning was, of course, not available to us at the time before the Commission reported. None of that had we seen, but would you perhaps like to take up bundle 3 of the key documents and go to tab 37, our response to the provisional findings, para.3.7 of that document, p.523 of the bundle. Perhaps rather than me read it out I would just suggest that the Tribunal reads to itself paras.3.7 to 3.9.

THE PRESIDENT: We will read that.

MR. FLYNN: Not that is confidential, but just to spare the shorthand writer. (After a pause) At the end of that there is a reference to annexes 2A and 2B, which are the last two pages in that tab, which are the tables. They are marked confidential so I shall not say more than that. (After a pause) They make the point, we say, that we make in 3.7 to 3.9, that there are no examples of non-pre-emptive equity funding for content since ITV was created.

As I said, we had no sight of any detailed documentation from ITV in the course of the inquiry and what it was that they might be proposing to fund. Obviously we knew the Commission's general theory. We put in the paper from our financial advisors which we looked at in some detail yesterday. That fact itself is not a confidential matter. We put it in which explains those advisors' views. In fact, when I say "our financial advisors", Sky took the trouble to go to an investment bank with which it does not usually deal. You will know that the financial advisors on the transaction were another firm. This firm was chosen precisely because they were independent of both parties to report on what they understood the position to be. In submitting that report to the Commission Sky said that if there were any specific points arising from it, or other issues to do with the financing that the Commission wished to put back to Sky for comment then they should do so. That did not happen so there was no further engagement with that advice. Indeed, as I think you are

aware, sir, from the previous application, that advice was passed without Sky's permission to ITV's financial advisors.

So all that said, I do not think it is a fair criticism to say that this is a new point or it is just evidence from Flynn, which I think is the way Mr. Swift put it this morning. This is not just evidence from counsel or from Sky's legal team, this is conclusion which we can draw from matters before the Commission in our submission.

As far as the HD TV example is concerned, Mr. Swift pointed to para.4.166 of the report and to tab 38 within the disclosure, which I am not going to pick up now. That is a letter which he said summarised the entire position in relation to that aspect of the case, the hi-definition and the possibility of bidding for spectrum, for hi-definition broadcasting. As you know, and as I mentioned yesterday, five days later Mr. Grade was telling the House of Lords that there was no investment case for making an investment in additional spectrum for hi-definition broadcast. So while Mr. Swift says there was consistent evidence throughout the inquiry in relation to hi-definition, we say that is not the case and, in any event, one thing that is consistent is that the Commission did not test with ITV the credibility of the investment case; and in particular, even if the investment were to be made, whether it would be funded by a means which Sky could influence.

Those are the reasons why we say and we maintain that, in relation to its examples concerned with potential investments by ITV, the Commission reached unsustainable conclusions for which there is no evidential basis. When it comes down to it what you have are some assertions by ITV in the two contexts, in one of those contexts contradicted by other assertions by ITV, that are not supported, not materially supported. "These are things that we may do", it is said, and the validity or sense of that assertion is not tested by the Commission.

As far as the content side goes, remember our chart, our simple chart. We say the Commission really misunderstood the mechanisms by which equity finance would be obtained even if ITV needed to resort to it, despite everything it said in public, despite having some debt capacity. We are not saying in relation to the standing authorities, as I think Mr. Swift tasked me this morning, that the Commission did not know about them. Clearly it was in evidence, or somewhere in the volumes of material. What we are saying is that they completely failed to attach any importance to them and failed to understand the relevance and importance of those standing authorisations. In particular, or furthermore, they made no finding at all that Sky would seek to block them, which we say is the act of a

disruptive shareholder and the Commission attached no weight to the argument put forward by ITV and by Virgin in the different ways that Sky would act as a disruptive shareholder. In considering the funding aspects, I think it is also important to remember that if debt capacity is constrained or if pre-emptive rights take time to launch, those are facts of life which, of course, have nothing to do with Sky's presence on ITV's shareholder register. Our bottom line on that, if you like, is that the *ad hoc* pre-emptive equity fundraising option, the EGM called in the light of a specific transaction, is not to be found in practice. It is a theoretical possibility. It has not happened with ITV before. We cannot find any example of it happening in the last five years. It is not something which is going to happen in the real world.

Taking these two things together and dealing a bit more with the probability issue – what probability – I am sorry I did not satisfy Mr. Gordon, but I stand by the answer that I gave to the Tribunal yesterday to Professor Grinyer's question. We analysed this, of course, in detail in our notes of application. We did not say, and have never said, that the Commission has to establish that ITV will make X investment in content. It does not have to say, "We think, on the civil standard of probability ITV will buy such and such a company or will bid for such and such rights". You take that as a category and you decide whether or not those investments are likely to happen and you have to take the same view on whether they are likely to be funded by the mechanisms that Sky can influence.

What we do say is that the content broad category, the numbers of possibilities cannot be, as it were, aggregated in probability terms with the separate example of HD. I think this is right as a matter of probability theory, but if you have a deck of cards and your question is: what is the probability of one card coming up? Your next question is what is the possibility of three cards coming up? Then you have a higher probability that three cards come up. These, we would say, are in different decks. If the investment in HD is unlikely, below the balance of probabilities, that cannot affect the probability of an investment in content, they are two separate issues in probability theory. It does not become more likely – these, as I say, are separate probability assessments.

The short answer to Mr. Gordon, I suppose, is "read our notice of application" and we devote 60 plus paragraphs to the issue of how the SLC assessment should be carried out starting at para.103. The third example, the other transactions involving the ITV example is rather different because there we say firstly there is no evidential basis because it is expressly contrary to the Commission's findings on the balance of probabilities, it could not form an expectation that there would be a bid of any kind for ITV in the foreseeable future,

so it is entirely contrary to the counterfactual, and that is why we say that the Commission is indulging in speculation in 4.117, this is not predictive assessment, this is going beyond what it can possibly do.

May I turn to remedies, if the Tribunal has no more questions? I would like to deal very briefly with Mr. Gordon's points, which have already been dealt with by the respondent. So I will be very short. His case is, as we understand it, that the Secretary of State was compelled – by the wording of s.47(9) of the Act and by the guidance made under s.106, para.3 – to order full divestiture on the basis that this is the only comprehensive solution to the perceived SLC.

We support the respondents in saying that s.47(9) does not say simply that the Commission must achieve as comprehensive a solution as possible and therefore must aim for the most stringent conceivable remedy. The concept of what is a comprehensive solution in the wording of the subsection is immediately qualified in three ways. I am sorry, Sir, I should have read it out. The wording is:

> "In deciding the questions mentioned in subsections 7 and 8, the Commission shall, in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the adverse effects on the public interest."

- and so on, and the SLC and any adverse effects flowing from it. So the concept of comprehensive solution is qualified by three sets of words, firstly "in particular" so other factors may be relevant. Secondly, the phrase "have regard to", and thirdly, "as is reasonable" with all that comports, and "practicable". As far as the words "have regard to" are concerned, in our submission these words do not mean "slavishly follow", they mean "take into account", "have regard to", and there is case law, authority, on that should it be needed, which I think is not in the bundle, and I have not at the moment ascertained whether there are copies, but it is a very simple point. There are copies to be handed up.

The case is in the House of Lords called *City of Edinburgh Council* and all I rely on it for is a quotation made in the speech of Lord Clyde, in fact he is quoting a Scottish case but he adopts it, and the words that he quotes and adopts are those of Lord Guest. (Document handed to the Tribunal) If copies are coming up then we do not need to spend any time, I think, on the facts. The relevant page is 1457. It is a very simple point, I apologise to my friends, I should have handed it out before. It is simply the quotation at the bottom of p.1457 concerning guidance, Lord Guest says:

> " 'To have regard to' does not, in my view, mean 'slavishly adhere to.' It requires the planning authority to consider the development plan, but does not oblige them

to follow it … If Parliament had intended the planning authority to adhere to the development plan, it would have been simple so to express it …"

So it is simply "have regard to", it has, as it were, its natural meaning that one has regard to it, it does not oblige one to a particular course of action. This we say is, of itself, the qualifications to the concept of comprehensive solution that the Act implies, particularly what those words have regard to are fatal to a submission that it is a logical consequence of the statute that the Commission is obliged to recommend complete divestiture. That in fact would deprive the Commission of the ability to recommend the minimum effective remedy. I am conscious of the time, Sir ----

THE PRESIDENT: No, no.

MR. FLYNN: We will be finished by 5, that is a promise! We also submit that "comprehensive" in this context means comprehensive to deal with the problems identified are not so comprehensive that we can deal with every conceivable situation that you can imagine, so it goes to effectiveness, it goes to the effectiveness of the remedy; that is really what is meant. A comprehensive remedy is one that deals effectively with the problem, and while Mr. Gordon took you to, I think, para.6.18 of the report, where the Commission says that full divestiture would be an effective remedy, I think it is important to note a passage I think he did not take you to in para.6.38, the Commission makes the same finding in the same terms about the partial divestiture remedy. So the Commission found that that also was an effective remedy. No statutory guidance can alter the requirements of the statute, so if the suggestion is that the task of the Commission is narrower than the statue suggests because of what is said in the Guidance then the conclusion one would draw would be that the Guidance was wrong, the Guidance is *ultra vires*, the Guidance can only operate within the confines of the statute.

Lastly if I just give, for your note, the paragraphs of the Guidance itself, you will see that it is deliberately an open textured form of guidance intended to cover multiplicity of situations. If you look at para.4.8 for example, it refers to the facts and circumstances of the case, it also refers to the principle of proportionality. 4.9 refers to the least cost solution. (Pause) Yes, least cost to achieve the remedies is the object. It makes express reference to partial divestiture as an example of other possible remedies. So, partial divestiture and other possible remedies, including ours. So, we say that nothing is precluded by the Guidance and that Mr. Gordon is trying to read far too much into it.

Lastly, sir, a few words on our own case on remedies. You made a point in an intervention earlier about the proportionality issue. We would say that that goes not only to -- We have

not made an Article 1 point as such, but the proportionality issue goes to a choice between a divestiture remedy and another form of remedy, such as our alternative non-voting remedies, as much as it goes to the degree of divestiture that might be ordered, whether that is partial or full. I pointed out yesterday the considerable disparity in the effect on Sky between any divestiture, whether partial or full, and the alternative non-voting remedies that we offered. I took you also to an observation of Mr. Justice Moses, as he then was, in the *Interbrew* case. The key to all of this is what remedy is effect. That is the issue - not whether it is structural or behavioural, or whatever the question is. What remedy is effective to deal with the SLC finding?

We made submissions to you, of course, both on the divestiture remedy and on the alternative voting remedies. Mr. Swift suggested this morning that he thought we did not care about the divestiture remedies, and that we were putting all the weight on the voting remedies. That really is not the case. We do care about the arguments that we have made in relation to the divestment remedies, and to the, we say, unreasonable and disproportionate approach that was taken to the headroom that the Commission considered it needed, both to avoid Sky itself having any chance of blocking a special resolution, and, as far as concerned the additional 7.5 percent headroom for what we have called the mesmerised shareholders. Sky could, of course, have influence of a kind - industry stature influence - without even having a shareholding. Sky is a player in this market whose views are well-known, and made known through Ofcom consultations and in a variety of other fora. We say that taking that into account as well as the excessive buffering, makes the level at which the Commission arrived in its partial divestiture remedy, as opposed to the 14.9 percent that we suggested that would be adequate to avoid any possibility of blocking a special resolution was excessive.

The members of the Tribunal asked my learned friends whether the Commission had considered other aspects - the poison pill point from Professor Grinyer; I think Mr. Clayton was asking us about what I think Mr. Swift called the cloud of Sky as a shareholder in ITV sort of hanging over the market. We would say in relation to those, of course, that it would be pretty major and unprecedented step for either of those to be taken as the basis for a material influence finding, but in any event, as we read paras. 6.36 and 6.37 of the report the Commission did consider those hypotheses and took them into account in setting its 7.5 percent level. So, they were considered, and in the exercise of its judgment that was a factor which the Commission took into account. So, if that is a concern of the Tribunal's I would say it has already been dealt with. Those paragraphs relate to the divestiture remedy,

but the same point is made in respect of the voting trust. Those two paragraphs should be taken together.

The last points are on the voting remedies - the trust or the undertaking not to vote. Leaving aside what I might call a penumbral influence of Sky over other shareholders, we say that that really evaporates in a situation where Sky cannot actually vote, and has not got the Sword of Damocles which Mr. Swift refers to hanging over anyone because it has an ability to vote. The sword turns into a sort of stage dagger at that point, and is really nothing.

But, concentrating on the voting remedies then, "What", one might ask rhetorically, "was ineffective about entrusting the shares to the proposed trustee or accepting an undertaking not to vote from Sky? What monitoring really is required?" is what is being envisaged in a 'phone call every now and then to the trustee or to Sky, saying, "Are you complying with your undertaking not to vote?" Any breach of that undertaking by Sky would be immediately apparent to ITV. Mechanisms were proposed, as you have seen from the report, with the trustee for it to report itself to the authorities should Sky attempt to persuade it to vote, or to influence the way in which it would vote. We say that those mechanisms were fully effective to deal with all the concerns that are identified and require no more policing than other negative undertakings which have been sought and accepted in these sort of cases, such as an undertaking not to seek board representation.

The other principal objection to a non-voting undertaking - and we discussed this yesterday, sir - is the point made in para. 6.55 of the report about some distortion of corporate governance. I think it is accepted by the Commission that whatever it meant by that is not meant to suggest that there would be any effects in the marketplace. It is not going to lead to distortions in competition. It is an effect on the corporate governance of ITV. What is that effect? What effect is feared, not spelled out in para. 6.55 at all, other than the issue that we again mentioned yesterday, which is that because Sky is not voting, then each individual shareholder gets a slightly higher than 1 percent maximum to a small percentage additional share of the potential vote. What consequences flow from that, given the range of shareholdings of ITV is simply not spelled out at all. The Commission does not draw any conclusions, and we say that that is not a legitimate ground of objection. One might say that the 2008 AGM, which took place just the other week, was a natural experiment for this. There is no suggestion that there was any problem from the corporate governance point of view in ITV going ahead with a general meeting, despite Sky taking no part in it and not voting.

So, the closing point on remedies is that the remedies that we offered as to voting, whether putting them in a trust or in the some way simpler and cleaner solution of undertaking not to vote at all, provide a comprehensive solution to the SLC problems identified. When you bear in mind that this is a material influence case, and the question is, "What can Sky do? What opportunities does it have to exercise that influence?", it is all to do with voting. We say that those remedies provided a comprehensive and transparent means of eliminating that opportunity to exercise influence. So even if you are not with us on material influence or on the substantial lessening of competition point, on each of which we have separate arguments, we have a final set of arguments in relation to the remedies, both the divestment and the voting remedies. As to the last of those we say that it was utterly perverse of the Commission to reject them.

Unless you have anything else.

MR. CLAYTON: Even on the non-voting undertaking you have still got the overhang of shares on the market, the 17.9 per cent of Sky shares is still there on the register, which is effectively a big block of shares which will influence the market?

MR. FLYNN: We have submitted that the pure economic interest that Sky has in those shares in circumstances where it is not vote them is not a matter which goes to the distortion of the competition. It is not the SLC. You may say it is an overhang in the market but it does not allow Sky to influence ITV's policy. The only matter that it has said to be relevant to is the future transactions where, as we have said, that is not an issue of policy for merger control purposes. That is to do with decisions by shareholders as to whether they will or will not sell their shares. That is the way we have addressed that concern in our pleadings.

PROFESSOR GRINYER: Is there any possibility that the 17.9 per cent of the shareholding, even if you are not voting, there will still be an indirect informal inference in respect of the board, which may be discerned – for instance, if you have just bought your shares in large blocks it would damage the share price or it could be a platform for other people to vote coming in with a hostile bid which you would wish to avoid, probably?

MR. FLYNN: I am sorry, sir, I am afraid I did not hear the entire question.

PROFESSOR GRINYER: [*Question redacted for reasons of confidentiality*]

MR. FLYNN: Sir, I would say that goes beyond the considerations that the Commission itself addressed. It is in the same camp, if I may say so ----

PROFESSOR GRINYER: It is indirect influence.

MR. FLYNN: It is indirect influence but in relation to a potential future transaction as to which the Commission has made no findings. In our analysis, in our submission, it falls into that

category. It is being suggested that if you wish to pursue that then we should go into Camera.

THE PRESIDENT: Shall we let that hang over, as it were, and then if you wish to say anything more about it it can be said ----

MR. FLYNN: We could either put in a note or start on it tomorrow.

PROFESSOR GRINYER: It is just a possibility which occurred to me, which is following on from the point that my colleagues made.

MR. FLYNN: Understandably so, it is a very fascinating case where a lot of theories are being ventilated.

THE PRESIDENT: Was there something else that you were going to put into writing, or do you want to leave that also?

MR. FLYNN: I can do that now.

THE PRESIDENT: I am simply reminding you that there was something.

MR. FLYNN: Thank you for that.

THE PRESIDENT: It can be done tomorrow if you like.

MR. FLYNN: Very well.

THE PRESIDENT: Thank you very much.

MR. GORDON: Sir, at the risk of being squeezed, I just wondered – it is very late – if I could have two minutes to answer Mr. Flynn on remedies? If you recall, I reserved my position.

THE PRESIDENT: Very well.

MR. GORDON: It will not take me more than two minutes. There were really two basic points. The first is in relation to the case that he handed up, the *City of Edinburgh* case, and he referred to "having regard to" in a totally different statute. The fundamental point is that words in one statute cannot be, as it were, axiomatically regarded as construed in the same way for all statutes. That is an elementary principle of construction. One sees from p.1457 that in this statute, which is planning legislation, the composite phrase is:

> "... 'have regard to the provisions of the development, so far as material … and to any other material considerations …'"

So plainly having regard to one consideration in conjunction with a whole host of others carries one meaning for "having regard to". The point I made in opening and continue to make is that s.47(9) it is having regard to an imperative, the need to achieve a solution. That is different from having regard to one consideration amongst many. That is important difference between the phrase as used in the 1972 Planning Act and the phrase as used in the Enterprise Act.

The second point which we would make in response to Mr. Flynn's point about the Guidance is that we are not saying, and I did not say it in opening, that Guidance is binding. I can give Mr. Flynn a better case than this one which relates to a statute, *De Falco v. Crawley* in 1980, which said that one does not have to pay slavish adherence to guidance. That is not the issue. The point is that whilst guidance cannot fetter discretion, discretion must be exercised lawfully taking all material considerations into account. If, as they do at para.6.4 of the report, the Commission says, "We are guided by the considerations set out in our Guidance", that being this Guidance, but then are not guided by those considerations because of a reason which does not bear logical scrutiny, then the Commission has not exercised its judgment lawfully but has taken an immaterial consideration into account, namely its defective understanding of its own Guidance, or failed to take a material consideration into account, that is what the Guidance actually says. Sir, what we say the Commission is obliged to do is to follow through the logic of its own reasoning, and we do not say, and I hope I made that clear at the latter end of my address this afternoon, that does not necessarily mean that a particular result is compelled. What it does mean is that the Commission must consider the matter according to law, taking all relevant considerations into account. So it must reconsider this case. We say there has been no answer to our submissions guided by the considerations and the Guidance which refer to no possibility. With respect to Mr. Flynn, the test set out in para.6.38 is not the same as in 6.18, and that is made clear when one goes to para.6.74 of the Guidance, a likely effectiveness is not the same as no possibility. That is our short answer to Mr. Flynn's extra points.

THE PRESIDENT: Thank you very much, Mr. Gordon.

You are content to start at ten tomorrow? Is everyone happy with that? Fine.

(Adjourned until 10.00 am on Thursday, 5th June 2008)