IN THE COMPETITION APPEAL TRIBUNAL

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

Victoria House,
Bloomsbury Place,
London WC1A 2EB

5th 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 THREE

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

THE PRESIDENT: Mr. Gordon?

MR. GORDON: Sir, on behalf of Virgin Media, this is the plurality appeal and in order to lay forensic narrative for what follows, may I identify our seven key points. First, we say that when addressing the specific public interest considerations that are itemised in s.58 of the Act, the Commission must do so by reference to the particular and specific public interest consideration or considerations that have been referred to it, and as conditioned by the interpretative provisions in s.58(A).

Secondly, we say that the relevant public interest consideration for present purposes was that, and only that, identified in s.58(2C)(a).

Thirdly, we suggest that materially the Commission had to determine whether there was a sufficient plurality of persons with control of the media enterprises serving a particular audience, and that necessarily required the Commission to examine and to answer two central questions. Those questions are (i) at the relevant time for analysis, that is to say post-merger, how many and which persons were in control of how many, and which relevant enterprises? Question 2: Was that a sufficient, or an insufficient number of persons with control.

Fourthly, we say that the Commission failed to carry out this exercise. What it did instead was to examine the media public interest consideration specified in 58(2C)(a) by reference to the degree of control exercised by Sky over ITV, and consequently by reference to something called – we do not find it in the Act – but called or that the Commission called "internal plurality".

Fifthly, we submit that in so doing the Commission mis-interpreted s.58(2C)(a) and the interpretive provisions in 58A(4) and 58A(5) as we hope to persuade the Tribunal those latter provisions, the deeming provisions make clear, that for the purposes of considering s.58(2C)(a), the Commission was required to treat Sky and ITV as being under the control of a single person.

Sixthly, we say that this analysis does not mean, contrary to all the cases which I think are ranged against us, that any qualititative assessment by the Commission is stripped to nothing. Far from that, we say that the Commission's assessment under s.58(2C)(a) is of the utmost significance. But - and it is a very important 'but' - the assessment must be undertaken within the framework provided by the respective deeming provisions - that is, s.58A(4) and s.58A(5).

Finally, it follows that the Commission's approach was erroneous in law. In particular, the Commission mis-directed itself by investigating the sufficiency of views in the media by

reference to the plurality of views within the merged entity's internal plurality, and failed to address the sufficiency of the number of persons with control of media enterprises, which is the question that s.58(2C)(a) requires an answer to.

Those are our key points. In developing those points - and I am not going to develop them *seriatim*, as in earlier addresses to the Tribunal - what we propose to do is to structure our submissions in the following four stages: first of all, I would like to take the Tribunal in a moment to the relevant statutory provisions; secondly, we hope to explain how we say these provisions are properly to be interpreted and applied, and not to do that by some abstract series of analysis, but to do it by concrete reference to Ofcom's report to the Secretary of State on the media plurality question. For reference purposes that report - which I will come to - is in key document 2 at Tab 17. The Tribunal will be aware that pursuant to the Act, s.44(a), where the Secretary of State has issued an intervention notice which mentions a media public interest consideration, then Ofcom has to give a report to the Secretary of State containing advice and recommendation on that consideration. Here, Ofcom did, we say, carefully consider s.58(2C)(a) and advised the Secretary of State that the Sky/ITV merger may result in insufficient plurality of persons with control of relevant media enterprises, and that the merger may therefore be expected to operate for that reason against the public interest.

Now, what we say about the Ofcom analysis is that the manner in which Ofcom interpreted and applied s.58(2C)(a) was, overall, correct. Crucially, Ofcom's approach gives the lie to the suggestion that our suggested approach to construction would deprive the Commission of any power to undertake a qualititative assessment - the so-called (and I think it comes from Mr. Anderson's skeleton) number-crunching exercise. It is not that.

The third approach to developing our submissions is that I want to take the Tribunal to the most relevant passages of the Commission's report so as to explain how, in our submission, in deviating from the approach required by the Enterprise Act, and as adopted largely by Ofcom, the Commission fell into error and mis-interpreted the relevant provisions of the Enterprise Act.

Finally, having done all that, I hope to address, briefly, the various submissions that are ranged against us.

So, that is the structure of developing our case, our appeal.

May I turn to the first of those four stages - the relevant statutory provisions? First of all, an outline, before getting to the directly material sections. The reference made by the Secretary of State to the Commission, as this Tribunal probably is aware, was the first to be

made under the regime in Chapter 2 of Part 3 of the Enterprise Act (p.166) which applies if it applies to public interest cases. Where the conditions contained in s.42(1) of the Act (on the same page) are met, including materially that the Secretary of State has reasonable grounds for suspecting that it is, or may be, the case that a relevant merger situation has, or will be, created, then we see from s.42(2) that the Secretary of State has power to issue an intervention notice if 'he believes that it is, or may be, the case that one or more [and I emphasise those words - 'one or more'] than one public interest consideration is relevant to a consideration of the relevant merger situation'.

Now, in the present case the intervention notice, which is that at Key Document 2, Tab 16, stated materially that the Secretary of State believes that it is, or may be, the case that the media public interest consideration specified in s.58(2C)(a) of the Act may be relevant to a consideration of the relevant merger situation concerned.

So, the key point here is that the Secretary of State could have referred, under all three considerations, but he decides to refer under one. One of the many points which we come back and back to is that there are three considerations; they have an internal structure; they do not, or should not, collapse one into the other. Each of the different media public interest considerations, whether they be in C(a) C(b) C(c), or 58(2B) itself, all have a particular focus. The word 'focus' is important because we are here looking at the substance, or the focus, of the Commission in this case.

Now, the public interest considerations are, of course, those as I have indicated, set out in s.58 to which I will come back. That is at p.182 of the handbook. It is important to make the point so as to fit it into the structure of our submissions. That is s.44A of the Act which is at pp.169 to p.170 of the handbook. It then requires Ofcom to give a report to the Secretary of State on the public interest considerations mentioned in the intervention notice. Ofcom gave its report on 27th April, 2007. Then, s.45 of the Act - this being a s.45 reference (p.170 of the handbook) - provides the power for the Secretary of State then to refer the matter to the Commission for a fuller investigation. The Secretary of State's reference at Tab 19 of Key Documents 2 recorded his decision that the public interest consideration specified at s.58(2C)(a) is the relevant consideration for this case.

The consequence of two further sections, s.47(7) and s.47(9) and at pp.173-74, which we have looked at before the context of remedies. The consequence of those provisions is that if the Commission determines that the merger may be expected to operate against the public interest as a result of the media public interest consideration specified in s.58 then it must take account of the need to achieve a comprehensive solution to this in formulation of the

appropriate remedy. That is why, of course, amongst many other aspects of this case, I indicated the connection between the two limbs of our appeals – it seems a long time ago now – two days ago.

I turn to s.58 itself at p.181 of the Handbook. As far as that provision is concerned, the starting point, we say, obviously is the public interest consideration relevant to this case. It is 58(2C)(a), and it says:

> "the need, in relation to every different audience in the United Kingdom or in a particular area or locality of the United Kingdom, for there to be a sufficient plurality of persons with control of the media enterprises serving that audience;"

So we lay stress on the words which are key to this appeal and to the debate that it engenders, "sufficient plurality of persons with control of the media enterprises serving that audience". In this case "relevant audience" was defined by the Secretary of State as the United Kingdom cross-media audience for national news and the UK TV audience for national news. Therefore, the provisions of 58(2C)(a) required an assessment of whether there was sufficient plurality of persons with control of the media enterprises serving that audience.

We also draw attention to two other aspects of the wording of 58(2C)(a), which I have shown the Tribunal. First of all, the wording is to be contrasted with 58(2B). So 58(2B) applying to newspapers has a focus not on plurality of persons with control but on views in newspapers. So that is focusing on content rather than who is controlling enterprises.

Secondly, the different wording in 58(2C)(b):

> "the need for the availability throughout the United Kingdom of a wide range of broadcasting which (taken as a whole) is both of high quality and calculated to appeal to a wide variety of tastes and interests;"

So, as I said before, each of these considerations has a different primary focus.

Why is it that we have the focus that we do in 58(2C)(a). The reason why it focuses on number and identity of person with control as opposed to focusing on plurality of content is the intrinsic fragility of media plurality. In a completely different context we see in the Human Rights Act the importance given to the media and the freedom of expression, and we see all these different considerations and their way of focusing on different aspects. Analysing concepts such as internal plurality and editorial independence gives only a short term answer because degrees of control, including editorial control, are liable to fast moving change. What we say is that the focus in s.58(2C)(a) is there to ensure long term protection of the public interest.

The second point to make about the s.58 exercise, and this applies generally, is that it must be conducted in accordance with the statutory rules of construction that are prescribed in s.58A, which is the next page. There would be no point – if I may just step back from the deeming provisions – we say in prescribing rules for construction if that were not the position, if they did not affect the 58(2C) exercise. There are rules of construction in s.58A that regulate the material public interest consideration in this case under s.58(2C)(a).

The first thing we see if we look at p.182 is the entitlement which is "Construction of consideration specified in section 58(2C)". So that is what it is about. The section in its structural positioning is about the interpretation of the 58(2C) series of public interest examinations. Not only do we have that entitlement, but the relevant rules, when we look at them in 58A(4) and 58A(5), use the language of command. So, for example, looking at s.58A(4) we see the phrase "shall be assumed", and in 58A(5) "shall be treated", not a "may" but a "shall".

The third point is that it is, therefore, extremely important, we say, to get right the effect of s.58A(4) and s.58A(5) because they determine the scope of the assessment to be conducted under 58(2C)(a).

Then looking more closely at these deeming provisions, which we say are entirely clear in their legal effect, 58A(4):

> "Wherever in a merger situation two media enterprises serving the same audience cease to be distinct, the number of such enterprises service that audience shall be assumed to be more immediately before they cease to be distinct than it is afterwards."

So the effect, therefore, is that following a merger, the merged entities are to be assumed, for the purposes of 58(2C)(a) as being more before the merger than after it. That here means two to one.

Then moving to s.58A(5), this links, of course – and this is an important connection – to s.26. For reference purposes s.26, which we have looked at before, containing its three degrees of control, is to be found at p.154 of the Handbook. 58A(5):

> "For the purposes of section 58, where two or more media enterprises –
>
> (a) would fall to be treated as under common ownership or common control for the purposes of section 26, or
>
> (b) are otherwise in the same ownership or under the same control,
>
> they shall be treated (subject to subsection (4)) as all under the control of only one person."

So again the focus here on a deeming to take effect when conducting the 58(2C) exercise. The effect of s.58A(5) is to require the decision maker performing the 58(2C) exercise to treat the merged entity as under the control of a single person when assessing whether there are sufficient persons with control of the relevant media enterprises. So when looking at plurality under 58(2C)(a), we say that the Commission was required as a matter of law to treat Sky and ITV as under the control of a single person.

We say that it follows from these two deeming provisions, as a matter of elementary logic, that degrees of control cannot be relevant to a plurality assessment under s.58(2C)(a). To treat degrees of control as the respondents suggest is still to be done we say deprives 58A(4) and 58A(5) of their obvious intended effect. These are not abstract sections or sub-sections, they are inherently inextricably linked to the 58(2C) plurality assessment.

It sounds as if it ought to be straightforward. Those are the provisions, and we say it is straightforward. That leads me to stage 2 of our submissions, which is the Ofcom report (Key Documents 2 bundle, tab 17). What we say is that overall Ofcom got it right. It applied s.58(2C)(a) correctly and if I can ask the Tribunal to look at that report and just take the Tribunal to a few relevant paragraphs of it. First, using the internal numbering, p,3, we have at paras. 1.5 and 1.6 which summarise Ofcom's recommendations.

> "1.5 Ofcom's advice for the reasons set out in this report is that there are concerns that, following the relevant merger situation, there may not be a sufficient plurality of persons with control of the media enterprises serving the UK cross-media audience for national news and the UK TV audience for national news.
>
> 1.6 In light of its advice and noting that Ofcom's role is to undertake an initial investigation Ofcom considers that the creation of the relevant merger situation may be expected to operate against the public interest and accordingly, recommends that a fuller second stage investigation by the Competition Commission is warranted."

Now, the point to make about these two paragraphs is that they followed – and this is important – they followed a qualitative assessment by Ofcom of plurality under 58(2C)(a) applying what we say was overall the correct legal test, and this test is reflected in the next relevant paragraph to which I suggest one comes next, which is para.1.11 at p.5.

> 1.11 We have considered whether there is a sufficient plurality of persons with control of the media enterprises serving the UK cross-media audience for news and the UK TV audience for news. We have assessed this by

identifying the persons with control of the media enterprises serving those audiences, and then by considering whether the control of media enterprises continues to be spread across a sufficient number of persons, taking account of the share of the audiences being served by those enterprises."

Now, that is it – in a nutshell that is it. In our submission it cannot be said that looking at whether there is a sufficient plurality of persons with control of the media enterprises serving an identified audience, looking at market share is a number crunching exercise. The exercise cannot be undertaken of course, and this is again key to our submissions – cannot be undertaken – without identifying the identity of the controllers, the number of controllers of media enterprises as a reference point. We have the reference point because the starting point from which sufficiency of plurality of persons must be determined is the controllers of the enterprises, that is what 58(2C)(a) says and it then locks into 58A(4) and 58A(5). That is why we say, and have said from the beginning, there are the two questions. One is a question of who the relevant controllers are, the other is a sufficiency question, and Ofcom went through this question and looked at market share, nobody can say, in our submission, that that was not a proper qualitative assessment.

Then the next relevant paragraphs in the report, if one goes – again using the internal numbering – to pp.13 and 14, paras. 4.4 to 4.7. Perhaps I can ask the Tribunal to just read those paragraphs to themselves, but can I just preface it by suggesting that what Ofcom is doing in those paragraphs is asking who are the persons with control of the relevant media enterprises, that is the question.

THE PRESIDENT: (After a pause) Yes.

MR. GORDON: So we say, if one just bears in mind this two stage approach, identity of controllers, and then in the remainder of s.4 of the report we suggest that Ofcom is addressing the second question of sufficiency in carrying out its qualitative assessment, and that is what the Act requires, and we would just highlight the following outline or sketch points for the Tribunal's attention. Paragraph 4.9, p.14, we see that Ofcom is applying s.58A(4):

"In making this assessment … there is deemed under the Act to be a reduction in the number of media enterprises … The purpose of this provision is so that it can be assessed whether, as a result of the merger, there will still be a sufficient plurality of persons with control of enterprises serving the relevant audience even though the number of enterprises may be unchanged."

So Ofcom fully takes on board what we say is inevitably to be taken on board, namely the deeming effect of 58A(4).

Then at p.16 of the internal numbering, we see paras. 4.19 to 4.21, and Ofcom there addresses the reduction in plurality of persons in control that would result from the merger. So if we look at 4.19 we see the phrase:

"… reduces from five to four the number of TV news providers with an audience share of more than one percent."

In these paragraphs of its report we say that Ofcom assesses sufficiency of that reduced plurality by reference to qualitative factors. For example, the merger brings together (says Ofcom at para.4.19) "… the second and third largest providers of news on television."

THE PRESIDENT: 4.19 that is dealing with the deeming provision in subsection 4, is it not?

MR. GORDON: Yes.

THE PRESIDENT: That is the media enterprises ----

MR. GORDON: Absolutely, it is ----

THE PRESIDENT: -- being reduced by one.

MR. GORDON: It is the minus one, from 58A(4). But what it is doing, of course, is then looking at the focal point of the reduced numbers and saying "What is the effect on plurality in the market?" "How many players are left?" and it is saying it is reduced from five to four, and it is bringing together the second and third largest providers of news in television.

Paragraph 4.25, at p.17, making the ownership link between the second largest provider of TV news, and news international, and on the same page, really from para.4.27 and following, making the point about greater concentration in provision of news content for TV news and radio news. Finally, by way of headline at para.4.39, p.19, pointing or making observations on the limited impact of the regulatory requirements applying to news.

When we look back to p.17 at para.4.26, what we see there is Ofcom rejecting Sky's argument that there was no prejudice to plurality because it has no ability to influence ITV's editorial policy. The key passage in 4.6, with which we agree is this: the purpose behind the public interest consideration is to avoid any one person controlling too much of the media through an ability to influence opinions and control the agenda. Now, that is absolutely central to our suggested analysis. What we say is that that shows that Ofcom correctly recognised, as unhappily the Commission did not, that s.58(2C)(a) of the Act required it to focus on the plurality of persons with control and not on degrees of control. It could not be clearer. The purpose behind the public interest consideration is to avoid any

one person controlling too much of the media. That is exactly what it is about. It is about numbers in one sense, but it is not a number-crunching exercise. It is a qualitative exercise. That is how Ofcom approached it. As I said earlier, overall we would respectfully suggest that that overall analysis was the right approach. But, we contrast that - and now I come to Stage 3 of our submissions - with what we submit respectfully to the Tribunal is the Commission's flawed approach. The Commission report, first of all, is to be found in Key Documents 1 at Tab 5B. The Commission's reasoning is, in part, set out between paras. 5.7 and 5.15 of its report. So, it starts, in the internal numbering, at p.71. At para. 5.7, p.71, the Commission starts from the position that plurality refers to the range and number of persons with control of the relevant media enterprises. It then draws a distinction - and we say treats it as a primary distinction - for the purposes of the s.58(2C) analysis -- If we look at para. 5.10 on the next page,

> "We concluded that a plurality of control within the media is a matter of public interest because it may affect the range of information and views provided to different audiences. In our provisional findings, we defined plurality in these terms. In response to comments on our provisional findings, we thought it important to draw a distinction between the plurality of persons with control of media enterprises and the implications of that plurality for the range of information and views made available to audiences".

Now, there is indeed a distinction between those concepts. The first - plurality of persons with control of relevant enterprises - is, however, the focus of s.58(2C)(a).

Then the Commission analyses s.58(2C)(a) primarily by reference to the second concept - that is to say, the range of information and views. We see the approach from para. 5.11.

> "In considering the range of information and views that might be expressed by media enterprises, we also thought it appropriate to distinguish between the range of information and views that are provided across separate independent media groups ('external plurality') and the range that are provided within individual groups ('internal plurality')".

So, it looks at the internal plurality of views. We will come more closely to what it does, because there is some suggestion that it looked relevantly at external and internal plurality. We will look later at that. But, here is a focal point starting to emerge, which leads the Commission into its first error, which is that internal plurality is something that is the focal point of s.58(2C)(a). We say it should have looked at the core issue, which is what Ofcom did look at, which was the overall significance and influence of the controllers of media

enterprises left on the playing field after the merger. If you like, it is the five to four, "What is the effect?" That is what Ofcom did. In simple terms, that is what the Commission should have done. It goes off on this ramble across sub-sections into internal plurality, and that was an error.

So, we see this beginning of the wrong path, finding its way through the reasoning. If the Commission now looks at para. 5.15 -- At para. 5.15 the Commission states that it did not consider it necessary to take a view on precisely how many owners would constitute a sufficient level of plurality of persons.

What we say is that, again, looking at focus, the focus here is becoming skewed. S.58(2C)(a) required the Commission to assess whether there were sufficient remaining separate controllers of media enterprises following the merger. This was not a head count. It was a qualitative analysis. But, you had to have the right focal point. It is structurally not dissimilar from the SLC approach, but it has the specific focus on plurality of persons of relevant enterprises. It is there, because, as I have already submitted - and it is a very important thing to keep bearing in mind - the specific focus of s.58(2C)(a) is there because of the very high importance attached by Parliament to plurality of numbers. It does not mean that the Commission is simply counting heads. It does mean that Parliament is directing the required focus to the influence and significance of the remaining - and by 'remaining' I mean post-merger - separately controlled media enterprises serving relevant audiences following the creation of the merger situation.

If I may now, with those introductory paragraphs, see where it all pans out later in the report -- If the Commission will now turn to paras. 5.63 and then back to 5.62 -- Paragraph 5.63 is to be found at p.83 of the internal numbering. To give this context, at para. 5.62 - or just above it - we have the headline, "Impact of the acquisition on plurality of news". At para. 5.62, at the foot of p.82, we see that the Commission is looking at the impact of the acquisition on the control of media enterprises serving audiences for news. We do not dispute that that is something that the Commission should be looking at. So, at para. 5.62 we looked at the impact of the acquisition on the control of media enterprises serving audiences for news. In so doing it emphasised two highly relevant factors. First of all, the fact that Sky News and ITN are two of the three significant news providers of TV news programming; and, secondly, the fact that the largest shareholder in BSkyB is News International. This had the effect, so it is said in that paragraph, of creating a link of control between the second largest channel provider of television news - ITV - and the largest provider of newspapers - News International.

But, having made those points, which do go to significance of influence, the Commission then goes on at 5.63, we say centrally, to mis-direct itself. It says this,

> "Nevertheless [so, despite all this], we noted that the acquisition does not bring ITV and BSkyB under common ownership. Rather, the degree of control which BSkyB exercises over ITV is limited to an ability materially to influence matters of policy. That ability may be treated under the Act as control for the purposes of establishing jurisdiction …"

– not "may be", "is" treated –

> "… but it does not equate in practice to full control or ownership."

There it is. "The Act may say this, but we are not going to follow it", is the crude criticism of the Commission's approach. We say that it is clear beyond doubt that s.58A(5) is there precisely because it does require the Commission to treat Sky and ITV as under the control of one person. The Commission's approach at para.5.63, contrary to Ofcom's approach in the paragraphs I showed the Tribunal, runs entirely counter to 58A(5). As I say, we can see it in the somewhat distorted wording, "The Act may say", "may require", I am not sure what it means by "may", but certainly we say that is a misinterpretation.

This is perhaps not surprising given that there had actually been an earlier misinterpretation by the Commission of the effect of s.58A(5). We can see that earlier misdirection back in the earlier parts of the report at paras.5.24 and 5.25, p.74 of the internal numbering. What those two paragraphs are saying is that s.58A(5) holds that it does not cover the merging entities themselves.

> "5.24 In our provisional findings, we thought that the better interpretation of section 58A(5) is that it is applicable not to the merging media enterprises but to the other media enterprises serving that audience."

Unsurprisingly 5.25:

> "Virgin Media argued that this interpretation does not pay regard to the literal language …"

The Commission says that does not pay full regard to the word "would", "would be treated under s.26 in s.58A(5)(a). I will come back to this but we say that is a clear distortion and a clear misdirection of the proper interpretation of 58A(5), and it is interesting to note that the Secretary of State at least accepts that s.58A(5) covers the merging entities as well as the remaining players.

THE PRESIDENT: Do we have to look at the next paragraph, 5.26? I thought you might have convinced them in your argument ----

MR. GORDON: Are you, Sir, referring to 5.26?

THE PRESIDENT: Yes.

MR. GORDON: Then they say:

> "Nevertheless, we recognized that there is an argument that section 58A(5) requires us to treat the merging parties as under the control of only one person. We therefore considered the implications of this alternative interpretation … On this interpretation of sub-section (5) it remains for the CC to assess whether, following the merger, there is *sufficient* plurality of persons with control … In our view, that will depend in part on the extent and nature of any control exercised by BSkyB over ITV, and on the implications of that control …"

So it is going back to ----

THE PRESIDENT: So they move on to "sufficiency"?

MR. GORDON: No, they are going back to degrees of control again, that is the trouble. They are going back to internal plurality.

THE PRESIDENT: For the purposes of looking at "sufficiency".

MR. GORDON: Yes, but internal plurality, as I have indicated, is a concept which does not accord with the focal of 58(2C)(a), which is to look at the plurality of persons in accordance with the deeming provisions.

THE PRESIDENT: I was really on a narrower point. In this discussion they now seem to have, as it were, not come out with a clear view as to whether the merging enterprises are to be considered. They seem now to be saying that perhaps it does not matter.

MR. GORDON: That is an error, that is the problem. You, Sir, are quite right in drawing attention to perhaps the last sentence of 5.26:

> "We therefore conclude that the nature of the assessment we should carry out … does not depend substantially on our interpretation of section 58A(5)."

Why? "Because we are going to look at degrees of control exercised by BSkyB over ITV, we are going to look at internal plurality". So it really does not matter that there is a deeming provision saying that, using the Ofcom approach, it is down from five to four on the playing field, and that is the central question. The Commission is saying here, this is why this paragraph is damning, "It does not matter, the deeming provisions, the effect of the deeming provisions does not matter, because they do not really condition how we carry out the 58(2C)(a) exercise, because we are looking at degrees of control." We say that once you move to that position – you say there were two views of 58A(5), and we do not need to worry which view is right because we are looking at internal plurality. You are missing the

structure of why 58A(5) is there. I go back to 58A(5) for construction of the 58(2C) exercise. That is what it is about. That is why 58A(5) brings the number of players in the playing field down from five to four. Is that enough? That is the sufficiency exercise. That is why the Commission says, "We do not need to worry about numbers of players left, we do not have to reach a view on that". I showed the Tribunal that paragraph earlier. The key deficiency of this approach is that it deprives 58A(5) of its deeming effect, and that is what it is all about.

I did not mean to, as it were, not turn over the page, which I am sure Mr. Beloff would have accused me of. 5.26 is the key reason that unravels the whole of this exercise.

THE PRESIDENT: Can we just be sure what you say is the area you are complaining of in 5.63. Are you going to 5.63?

MR. GORDON: Yes, certainly.

THE PRESIDENT: Have I understood it correctly? Are you saying that where they put this in the last sentence, the last phrase, that it does not equate in practice to full control or ownership, the words "in practice", because you are required to deem it as full control?

MR. GORDON: Exactly, they are revisiting an exercise which you cannot revisit because it is deemed to have happened. The skewed logic finds its way into different paragraphs. You cannot escape. Once there is an inevitability about the operation of deeming provisions you cannot escape the logic by saying, "It really does not matter".

So what we respectfully suggest in relation to the way in which the Commission conducted this exercise is that it did not carry out the assessment which s.58(2C)(a) required. Put very shortly, nowhere do we find – in fact we find the opposite – a determination of the number and identity of separate persons with control of the relevant media enterprise and an assessment of whether that number is sufficient in the light of characteristics and the significance of the remaining separately controlled media enterprises in the playing field. Although we have the reassuring headline "Impact of the Acquisition" on plurality of news it is done by reference to an assessment of internal plurality rather than by an assessment of plurality of persons with control of the media enterprises serving news audiences. By having regard to editorial independence, which is what that 5.26 is all about, within the merged entity and the degree of control enjoyed by Sky, issues which are only ever capable of being determined in the short term, the Commission failed to adopt the cautious approach which we say is the key to understanding s.58(2C)(a), which seeks to ensure full protection of the public interest in the long term. It is this intrinsic fragility of plurality which

58(2C)(a) is getting at, and of course in different directions 58(2C)(b) and 58(2C)(c) are also directed at, but they are directed through a different lens.

So this comes in administrative law as a matter of administrative law principle to the following propositions, that the Commission, if we are correct about this, took irrelevant considerations into account. It did not take into account specifically the central relevant question mandated by the legislation, who were the controllers of the relevant media enterprises remaining following the merger, and were they sufficient. Merely to assert as the Commission does, that it took internal and external plurality into account is nothing to the point, because the Commission never address, still less answered, the question that 58(2C)(a) required it to answer. We can see running through the whole of the analysis after 5.61 a consideration (if one goes through all those paragraphs) and we say a unique consideration of internal plurality, not external plurality. Whatever else may have been said at any other part of the report, that is the relevant section and these are the relevant paragraphs.

So I come finally to the arguments that are set against us. Having looked first of all at the provisions, then looked at how Ofcom did it, then looked at how the Commission did not do it, we then turn to the arguments that are put against us. They can be classified under three headings.

First, it is said that we have not properly construed s.58A(4). Secondly, there are disputes or debates ranging about our construction of 58A(5); and thirdly, it is said that if we are right we removed any element of qualitative assessment and, in effect, we reduce the Commission's task to a number crunching exercise.

So if I may turn first of all to the Act at 58A(4) – relevant number of enterprises – the arguments against us appear to be that despite its clear wording s.58A(4) is solely directed to anti-avoidance, and it is only there to prevent the argument that because the number of enterprises stays the same following the merger. There is no reduction in plurality – that is the asserted reason for that section being there.

We say to that that 58A(4) has a wider aim. It is part of a set of statutory provisions that are designed to assist in the construction of what has to be done in s.58(2C) in order to determine whether there is a sufficient plurality of persons in control of relevant enterprises, 58A(4) and 58A(5) are complementary subsections; they go together, they are part and parcel of an intended injunction to the decision maker in the 58(2C)(a) exercise. So the decision maker has to go to those sections to find out what he/she has to do under 58(2C)(a) – it is as simple as that.

The limited scope of s.58A(4) suggested by the other parties faces other problems. Had Parliament wished simply to prevent a plea being raised along the lines of no reduction in plurality because the number stays the same, it could have said so, but that is not the language Parliament has used; 58A(4) imposes an assumption on the body conducting the 58(2C)(a) exercise. We say it is obvious that the function of 58A(4) is to deem in all merger cases, including those arising from all the three levels of control in s.26 a reduction in the number of relevant enterprises post-merger. So it makes clear that in all mergers between media enterprises they will entail a reduction in plurality. That is the 5:4, the Ofcom 5:4. But that still leaves to be addressed, the true public interest question, does that reduced number of enterprises leave sufficient plurality of persons in control? Is there enough? We would respectfully suggest that the correctness of our submissions as to the proper interpretation of 58A(4) is not affected by Sky's contention, which we find in their statement of intervention at para.25 – I will not take you to it directly, but it is tab 9, Key Documents 1. Sky's criticism is that our reading:

> "… would make purposeless investigation of subsequent increases in the level of control triggering a fresh relevant merger situation whereas the Act specifically provides for such subsequent investigations in s.58(2C)(a)."

But we say that in no way is contrary to the statutory scheme, it does not subvert it because Sky is wrong in saying that the Secretary of State's power to intervene is rendered pointless. It may well be the case that there have been material changes in the market between the first acquisition of control of the relevant media enterprise and any subsequent increase. There could easily have been subsequent reduction in the number of enterprises in the market arising from external events which could well be relevant to a Secretary of State decision to refer where there is a subsequent change of control, e.g. one or more media enterprises might go out of business subsequently, they might merge with each other, they might cease being active in serving the relevant audience in respect of which the reference was made. It might be that the merged companies' share of the relevant audience increases significantly since the first transaction; or that the audience shares of media enterprises one and two declines markedly with the consequences that the merged company is now a much more significant player – all those kind of things may occur.

May I turn briefly then from 58A(4) to 58A(5) but make this underlying point, that if we are clearly right about 58A(4) it is likely that we are clearly right about 58A(5) and vice-versa because clearly they go together. What we say about 58A(5) is that there are, with respect, insuperable obstacles facing the other parties in their differently expressed approaches to

this subsection. I think I have made the point before that the Secretary of State is half on our side whereas the Commission says it does not matter, and Sky says it does not apply to the merged media enterprises, so we have perhaps three different positions here, I do not know.

What appears to be common ground, however, is that this provision does require the Commission to treat linked media enterprises as defined as under the control of only one person, so that must be common ground, that is what the subsection says. It is also common ground that 58A(5) applies at least to the other media enterprises, other than the merged enterprise; that is common ground. That follows, it is said, from the words "would fall to be treated", not "has fallen to be treated" – I think that is the point made against us. The Commission's conclusion, if it is a conclusion, or Sky's argument that s.58A(5) does not also apply to the merging enterprises is, with respect, nonsensical. A number of explanatory notes – this is Sky's focus looking at all the explanatory notes – let us look at them carefully. First, we have para.807 of the explanatory notes, which we find in authorities' bundle 2 at tab 41. So, para. 807 of the explanatory notes makes it plain that s.58A(5)(b) is intended to cover

> "-- any situation where the other media enterprises may never have been brought under common ownership or control at any point in the s.26 EA 2002 sense".

So, what those notes are looking at -- what that paragraph is looking at, I think, is the word 'otherwise' in s.58A(5)(b). However, s.58A(5)(b) also makes it clear that even if the Commission were right to attach significance to the word 'would' in s.58A(5)(a), that if there is common ownership or control following a merger situation that is caught by the deeming provision in s.58A(5) because the word 'otherwise' is capable of embracing any situation, the point simply being that if 'would' does not cover 'has', well, 'otherwise' covers 'has'. That is one approach to it.

But, there would be no sensible point - and this is really the key point of construction - in distinguishing between the merged entities as being in common ownership or control, but somehow outside being deemed to be controlled by a single person, and any other entity in common ownership or control plainly caught by s.58A(5). Such a distinction would be absurd, given the importance of the identity of controllers of media enterprises to the plurality exercise. One only has to step back and think about this for a moment. If you attach so much significance to the word 'would' and no width or breadth to the word 'otherwise' so as to exclude the very enterprises that have been brought under the ambit of s.26 in the 2002 Act sense, what is the logic? Why, given that the whole point of s.58A(5)

is to condition the s.58(2C)(a) exercise on plurality? There would be no legislative sense in doing so.

Indeed, we say that para. 807, far from being a point against us, makes our case because it says, "-- never having been brought under common ownership or control at any point". Well, there has been a point at which these enterprises have been brought under s.26, common ownership or control, which is the point at which they cease to be distinct enterprises.

So, we cannot, at the moment, see how para. 807 in any shape, size or form militates against our submissions. Far from being any answer to what we say is the obviously correct construction of s.58(A5), the various passages, when we look at a few more of them in the Guidance or explanatory notes, reinforce our submission, we say.

Before I come to them, the key point that is being made in all these passages in different ways is that it is the substance of control of each of the media enterprises that matters, and not the formal number of enterprises or the formal number of owners of shares. So, if we go in the same tab - Tab 41 - to para. 805 of the explanatory notes, and look at the substance of who controls media enterprises -- It is also the point being made at para. 7.14 of the DTI Guidance. We find that at Tab 43. We find that at (internal numbering) p.34. If one looks at the very last part of the last sentence in par. 7.14,

> "It is important to be able to look not just at the owners of those enterprises, but the controllers of those entities to get an accurate picture in relation to plurality in order to carry out the assessment relating to sufficiency of plurality".

We say that the Commission and Sky have simply mis-read the clear effect, when the paragraph is read as a whole, of the immediately preceding words - 'apart from merging media enterprises'. That is what is latched on to by, I think, certainly Sky and I think by the Commission as well. If you look at those words in isolation, apart from the 'merging media enterprises'-- A complete reading, we suggest, of the whole of para. 7.14 makes it abundantly clear that the distinction that is being drawn by the DTI is not a distinction between the merging enterprises and the other enterprises in the relevant market, but, rather, the same distinction that we make and that, more importantly, s.58A(5) makes between the media enterprises and their controllers. The Commission has examined the substance of control in its s.26 exercise, but, says the Guidance,

> "That is only part of the relevant picture for a plurality assessment under s.58(2C)(a). The substance of control for the remaining media enterprises also has to be considered".

That is what 'apart from the merging media enterprises means.

THE PRESIDENT: In other words, it means 'in addition to'.

MR. GORDON: Exactly. That is exactly the point. We say that it is noteworthy. It is important to note that the Secretary of State parts company with the Commission and, necessarily, with Sky in terms of the Commission's and Sky's analysis that s.58A(5) - the better interpretation according to the Commission - does not include the merged enterprises. The Secretary of State accepts that it does. We see that, but we also see something else.

Can I just ask the Tribunal briefly to look at the Secretary of State's skeleton at Tab 15 of Key Documents Bundle 2, at para. 97? (Pause) I think it is p.32 of the document. The Secretary of State says,

> "There is nothing begrudging about the Secretary of State's submission that it is not necessary to exclude the merging enterprises from the application of s.58A(5). It simply makes no difference to the outcome of the Commission or the Secretary of State's investigation. Indeed, Virgin fails to explain why in its view it does. The very fact there is a relevant merger situation means that there has been some effect on the plurality of persons with control, but it says nothing about sufficiency".

That takes us back to the point I made earlier about para. 5.26 over the page. That is the problem with it. We say that the Secretary of State's point here misses the whole point. True it is that s.58A(5) says nothing about sufficiency, but s.58(2C)(a) does. So, the Secretary of State is, in logic, driven to accept the thrust of our case, which is that s.58(2C)(a) is directed to a sufficiency of plurality of persons in control of relevant media enterprises once he accepts that s.58A(5) applies to all the entities. That is what brings the playing field down from the number of controllers -- the single controllers of each enterprise. That is what the Commission has missed, and the Secretary of State has missed the importance of his concession.

** I was going to come back briefly to the fact that although the Commission disagrees with the Secretary of State, or appears essentially to disagree about 58A(5) the Commission's defence of the legality of its decision making process is, we say, unconvincing – this takes me back to that paragraph, 5.26 – and the Commission appears to be saying, as I said earlier, it does not matter if it misinterprets 58A(5) but we say that compounds the existing misinterpretation of the provision – why is it there other than to preclude consideration of degrees of control? That is what the subsection is directed to. There is the deemed control by a single person in the circumstances to which s.58A(5) applies.

THE PRESIDENT: Just so I am clear, does that mean when considering sufficiency – it is not quite the same thing. Is it your submission that when you are looking at sufficiency you are not entitled to look at what the Commission has called internal plurality, in other words the range of views within an enterprise.

MR. GORDON: Within an enterprise that is right.

THE PRESIDENT: You are barred out from that?

MR. GORDON: You are barred out because of the single voice, and the reason the single voice bars you out is because of the fragility of that kind of editorial control.

THE PRESIDENT: Yes.

MR. GORDON: It is subject to fast moving change, and it is precisely because of that that Parliament has taken a cautious approach to the whole issue of plurality; that is exactly the point. It is so easy to fall into the trap of thinking that surely it is commonsense that you can look at that, but you cannot because that is not what 58(2C)(a) is about.

There is a further confusion which Sky, we respectfully say, is guilty of, which is that because Sky cannot acquire more than 20 per cent of ITV it cannot be the case that Sky could be deemed to have total control of ITV, to which the simple answer is – as I have already indicated, and as is supported by all the guidance notes – it is the substance of control that matters, and that if the Commission decision is lawful Sky has acquired control of ITV within the meaning of s.26, so it is not easy to see why the Enterprise Act should treat the substance of control differently as between the remaining players, and as between the merged entities. The substance of control means the substance of control through the eyes of the legislation – the deeming provisions – and all entities are treated in the same way. That which underpins the substance of control is, as s.58A(5) states in express terms, how two or more media enterprises should be treated for the purposes of s.26.

So in all its different formulations of the different circumstances which enterprises cease to be distinct, the three degrees of control s.26 encompasses the different forms of the substance of control, that is what it is all about, thus the ability materially to influence policy, as treated by s.26. As it is under 58A(5) as amounting to the substance of control. It is therefore entirely consistent, we say, with the structure of the statute properly understood, that the concept of the substance of control, and distinction between ownership and control should appear in the relevant passages of the explanatory notes and the guidance notes. So there is, we say, no inconsistency in Sky being treated as having the substance of control; they are treated under the statutory regime – Sky and ITV – as being part of a single enterprise with a single controller, despite the fact that ITV is in – I do not know quite what

to make of these words "in practice", not fully controlled by Sky. That is, as I have said earlier, because of a fundamental importance attached by Parliament, to the media public interest considerations in 58(2C) and because of the intrinsic fragility of medial plurality. So we say that it is in the context of that intrinsic fragility that Parliament has legislated as it has in 58A(4) and 58A(5), and actually 58(2C)(a), that is why the focus is on plurality of persons with control; it is all a straight line running through these three subsections.

The danger of looking at the precise level of internal control – this is really the key point – the danger of that at any single point in time is that it is so vulnerable to change; it can so easily be extended to stronger degrees of influence without triggering a fresh merger situation, it is very easy to happen. Had Parliament legislated otherwise, had it permitted considerations of degrees of control within merged media enterprises to be relevant to plurality of persons in control, had it done that, the need for a number of separate voices would have been weakened – it is the "separate voices" which is the focus.

In fact, the ultimate logic of the respondent's case, perhaps – although disavowed by the Commission in terms of factual finding is that one controller on the playing field – that is the logic – could be enough if there was sufficient internal plurality, it is a possible logical conclusion. It is unreal, unlikely to happen, but as a matter of logic could happen.

We say that Parliament was obviously concerned not to permit the making of judgments by the Commission which would require fine and precise degrees of judgment as to internal plurality at any fixed point in time because the whole thing is so fragile.

But having said all that, I come to the very last part of our response to the submissions against us, we do not accept for a moment that this means that our approach means that there is no qualitative assessment, that it is all just about number crunching, and what the Commission, in short, have to do is the kind of thing that Ofcom did. One is looking at the overall influence of broadcasting interests, serving relevant audiences, following the existence of the merger situation. It is looking at the separate voices, and is there sufficient plurality? How many are there? How many are left? Is it enough in terms of influence, market share and so on, and that is what Ofcom was doing. Can I just give the Tribunal some references, but I do not take the Tribunal to any of them – that is exactly what Virgin Media was arguing for in its submissions to the Commission – so we have Virgin Media's application at tab 16 of bundle 1 of the application, p.442, paras. 1.22 to 1.25, a very detailed assessment at pp.481 to 493 of the same document, paras. 4.30 to 4.80, and then bundle 2, at tab 20, para.5.19, and the same bundle, tab 25, p.13, paras. 4.42 to 4.49. That is

the kind of qualitative assessment which we say Ofcom carried out and which we were contending for.

So that brings me to a few concluding remarks, and they are these. As I think I said at the outset, and as this Tribunal is aware this is the first case in which the Secretary of State has intervened under the media public interest consideration, and therefore it is the first case to come before the Tribunal on this point. The Tribunal has seen the importance of the point; it has seen that Ofcom and the Commission have adopted essentially divergent views as to the proper construction of 58(2C)(a) and the point we say is of the utmost importance. In our respectful submission the watered down interpretation given to the series of statutory provisions by the respondents and by sky fail adequately to do that which the legislation seeks to ensure, namely, the preservations of sufficient persons controlling the relatively few media enterprises serving the UK audience. Indeed – and I have referred to this slightly earlier – the ultimate, and somewhat frightening logical consequence of the submissions advanced against us is that provided there was sufficient internal plurality and editorial independence, notoriously difficult to judge and to secure in the long term, it does not matter how many controllers there are on the market, hence no doubt the Commission say "We do not have to reach a view on that question." That position is, we say with the greatest respect, untenable.

Sir, those are my submissions.

THE PRESIDENT: Thanks, Mr. Gordon. We will just take a 10 minute break.

(Short break)

MR. SWIFT: May it please the Tribunal, on the first day it was three against me, and now we have three against Mr. Gordon. So, finally, on Day 3 we have some support! I am not gong to make the submissions on behalf of Mr. Anderson and Mr. Beloff. They can make their own. First of all, I am very grateful to Mr. Gordon for the very clear taxonomy of his four stage approach. This is the first reference to the Commission under Chapter 2. It is common ground that mergers as between media enterprises raise issues that go beyond what are conventionally considered as relevant under the SLC test. In the days when the Fair Trading Act operated we had the concept of public interest. So, a great deal came in under public interest. We also had provisions in respect of newspaper mergers.

The background to this change in the legislation is, as is well-known, the report of the joint committee of both Houses of Parliament, which, through a process of debate, led to the amendments to the Enterprise Act.

Mr. Gordon concentrated on the relevant statutory provisions, and, indeed, on the Ofcom report. However, in my submission, both in respect of construction of agreements, or documents, or looking at new Acts of Parliament, the context is highly relevant. We can find the background in some of the statements made by the government when the bill was going through the House of Lords, essentially, and, to some extent, in the Guidance given by the DTI, as it then was, and in the explanatory notes.

Why did the United Kingdom introduce these new rules and incorporate them in the process for control over mergers? Why did they have separate rules in respect of changes in the market for corporate control insofar as they relate to media enterprises? Again, it is clear - and I cannot really put it much better than Lord McIntosh of Haringey put it - at para. 5.9 of the Commission's report. Again, it does, in my submission, make sense to start with the background and the context. At para. 5.5, when the Commission begin their assessment, they say,

> "We considered carefully how we should approach the public interest consideration specified by the Secretary of State. We received details submissions from a number of parties both before and after publication of our provisional findings. Our analysis takes account of the views we received".

Then, there is a very extensive footnote at 159, including parliamentary debates about plurality, as well as the findings of other bodies in relation to plurality - Ofcom, European Commission, etc., etc.

Then at para. 5.9 they ask, "What are the underlying reasons for why the plurality of persons with control of media enterprises is the subject of a public interests consideration of s.58?"

> "We recognise the link between media plurality and the democratic process. This is consistent with the views of Parliament when introducing the plurality provisions as part of the Act. For example, Lord McIntosh of Haringey stated that 'media plurality is important for a healthy and informed democratic society. The underlying principle is that it would be dangerous for any person to control too much of the media because of his, or her, ability to influence opinions and set the political agenda'".

Then there is a reference to the Hansard debate, and the fact that that passage was quoted in the Ofcom report to which the Tribunal's attention has been drawn this morning.

That is right. It would be dangerous for any person to control too much of the media because of his or her ability. Interestingly, Lord McIntosh of Haringey deals with it in

terms of persons, "his" or "her", rather than corporate. Never mind, it could be personal or corporate. That is right, I would have submitted it makes entirely good sense. We will go on.

Then we refer to Lord Puttnam. Lord Puttnam was, as the Tribunal will have seen from the references in Hansard, the driving force in the House of Lords to bring what is now s.58. In fact, he proposed a s.58, which Lord McIntosh referred to and said, "We accept it in principle, but we have got problems with the exact wording", and that is why s.58 as in the Act is different. I do not think anything turns on that for present purposes and it is not in any of the material before the Tribunal. That is the background.

Lord Puttnam, driving this amendment forward, says:

> "… 'in Committee, in another place [and we know where that is], Dr. Howells summed it up quite neatly, "our key aim is to ensure that there is a range competing voices available to citizens so that they are free to form their own opinions"."

Then in a passage quoted by Mr. Gordon at 5.10:

> "We concluded that a plurality of control within the media is a matter of public interest because it may affect the range of information and views provided to different audiences."

Then:

> "… [they] draw a distinction between plurality of persons with control of media enterprises and the implications of that plurality for the range of information and views made available to audiences."

Then 5.8, 5.9, 5.10 and 5.11 are pointing to is whether there is control of the media is ultimately a question of fact, whether somebody so dominates the voices in the media that adverse public interest consequences may be expected to follow. That was what was the concern of the Joint Committee, going back to the 1930s, in an entirely different context, the great American legislator, Estes Kefauver, talked about "power in few hands", and that is what we are talking about here, power in few hands such that there is a risk to the operation of the democratic process. That is a question ultimately of fact.

In the debate, and if the Tribunal would just take my word for it because I thought it was in the bundle of authorities but it is note, when Lord Puttnam was arguing in the House of Lords he said the reason why we need a media plurality test is because the SLC test is not good enough, it is not really fit for purpose in respect of media enterprises. He referred in a rather dismissive way – as one would if one was Lord Puttnam – to the other mergers

involving widgets, which is a factor that could involve serious matters, but he drew a nice distinction between what he called "widget mergers" and media plurality mergers.

At no stage, either in the Joint Committee or in the debates, is there a contention that media mergers should be treated differentially from widget mergers in respect of a critical assessment of their likely effects, what is going to happen as a result of this merger. The criteria and the statutory purposes are different. That is why there is no SLC test in respect of media enterprise mergers, but no one on the debates ever suggested that the Secretary of State or the Commission should take a decision other than one based on the likely consequences of the merger in question.

If Mr. Gordon is right and the Virgin argument before Ofcom, which is cited in Ofcom, is that under media enterprises you have what is called a binary approach. By "binary approach" I assume that what is meant is a zero-one game. You either have control or you do not. If you have control or are deemed to have control, all these adverse consequences must be expected to flow. Mr. Gordon is also saying that Ofcom supported that approach when he referred to the "five to four" focus.

The Commission took the view, looking at the matter in the round, taking account of what was said in Parliament – I want to refer to a passage in the defence before I go any further – that it would be not complying with its duties under the s.58 provisions if it simply went straight to a conclusion which it knew was contrary to the facts.

According to Mr. Gordon what happened at 5.61 and the rest of the Commission's report is completely irrelevant – completely irrelevant. What the Commission should have said to Mr. Grade when Mr. Grade gave his evidence to the Commission, which I referred to yesterday, when Mr. Grade drew the distinction between the influence that Sky would have on ITV's policy and the influence they would have on the day to day management of the business, is, "Don't worry about that, Mr. Grade, if we find that there is a material ability to influence, that is the end of it, you have lost your control, you will now be deemed to be the voice of Sky or the voice of News Corporation".

It is also interesting that ITV, who one would have thought had most to gain by adopting that forensic approach, never seemed to take it. They seem to have missed the argument, which would tend to suggest that at the very least the meaning of these deeming provisions is not entirely clear.

Lord McIntosh is found again in a footnote to our defence which is tab 6, p.19. Maybe I should start at para.60, half way down the page, because this picks up one of the points that Mr. Gordon was emphasising this morning. Would the Tribunal read what is at para.60,

rather than my reading it out. You see half way down the reference to the "precautionary approach to plurality through a series of legal deeming provisions". We say:

> "This is not a sufficient justification of Virgin Media's proposed interpretation. Other aspects of medial regulation adopt a precautionary approach by imposing 'bright line' ownership rules …"

Mr. Beard is putting a point to me. I should have explained ----

THE PRESIDENT: We have got it now.

MR. SWIFT: It is bundle 1, tab 6, of the key documents. Just to place para.60 in its context, which I should do, this is where we are putting our case on s.58A(4), which we say at para.52, on first reading it is a difficult piece of drafting. Then we go through the reasons. The point I am on is para.60, and it is Virgin's precautionary approach to plurality, which it says is justified because of the fragility of the media enterprises, on the fragility of the public interest concerned.

We say half way down para.60:

> "This is not a sufficient justification of Virgin Media's proposed interpretation. Other aspects of media regulation adopt a precautionary approach by imposing 'bright line' ownership rules which cannot be infringed."

One of the "bright line" ownership rules is the one that prevents Sky, because it is controlled by News Corporation, from acquiring more than 20 per cent of ITV. That is the famous 20:20 rule: if you own 20 percent or more of the newspapers, you cannot acquire more than 20 percent of a media enterprise. Simple.

> "In contrast, a public interest merger reference clearly reflects a different approach to media regulation - see, for example, Lord Putnam's description of a reference to the Commission as an 'analytical, fact-based' and 'evidence-based approach'---

Then we quote the footnote. It is what Lord McIntosh said, "I had a third argument in favour of plurality test". Then he talks about the 20:20 rule.

> "This rule has served us well, but it has a 'cliff edge', all or nothing, element to it. The rule is therefore somewhat arbitrary in its effect. A plurality test would, in principle, allow the Secretary of State to make a judgment on media mergers, based on the particular circumstances of the case' . . . It is inherent in the nature of a test that one cannot predict the outcome in advance of any individual case. It will be necessary to analyse and consider all the relevant circumstances on a case-by-case basis".

Lord McIntosh is not saying a case-by-case analysis only trips in when you have gone from five to four. He is not making that distinction at all. He is taking it in the round - that is, when you are dealing with possible adverse effects on the citizen, as distinct from the consumer. That is the Putnam test -the citizen as compared with the consumer. You look at what is going to happen. That is what the Commission did. It considered that it had to carry out a substantial assessment -- That was the expression used - a substantial assessment of what is likely to happen.

Let me just say parenthetically that Mr. Gordon made several references to Ofcom and prayed Ofcom in his aid in saying that the Commission had taken a different view from Ofcom. Well, Ofcom is not represented here. It is true that in the Ofcom report there were lots of pie charts that showed shares of audience attributable to different broadcasters, and another pie chart showing the market shares of newspaper proprietors. There is an interesting last sentence -- It is a peg. I am not saying that the whole case hangs on this peg, but there is an interesting last sentence in the Ofcom report at para. 4.26 - Bundle 2, Tab 17. The internal pagination is p.17. This is in the section headed 'UK TV Audience for News' which follows the previous section that was headed 'UK Cross Media for News'. So, this is where Ofcom is looking at a separate market for the UK TV audience for news.

Now, when Mr. Gordon was taking the Tribunal through these relevant passages he went straight to paras. 4.27 and 4.28. I wondered why he was missing para. 4.26 He went back to para. 4.26. That saves me from reading it all again. Mr. Gordon emphasised the penultimate sentence in para. 4.26 which says,

> "In addition, Ofcom notes the purpose behind the public interest consideration which is to avoid any one person controlling too much of the media through an ability to influence opinions and control the agenda".

That is perfectly consistent with a fact-based assessment. No-one could quarrel with Ofcom were it to say that. It is entirely consistent with the views expressed by Lord Haringey, Lord Putnam, and others in the parliamentary debates.

> "In light of this, taking into account the level of the shareholding, Ofcom continues to be concerned that Sky's acquisition of shares in ITV gives rise to plurality considerations".

No problem, Ofcom. No problem. It may, and did, have a concern that Sky's acquisition of shares in ITV gives rise to plurality considerations. That is why it was sent to the Competition Commission for a full investigation as to what the plurality considerations were and whether they were so serious that the Commission should make a finding under

s.58(2C)(a). "Ofcom continues to be concerned --" That is all it said. That was the consideration taken into account by the Secretary of State. Nowhere do we find on this critically important piece of legislation relating to the citizen and his rights to have a free, multiple, plural agenda in the media -- Nowhere do we find, either from the DTI, in either the Guidance or the explanatory notes, something as simple as to say, "Media enterprises are going to be treated differently from widget mergers". The big distinction is that at the lowest level of gradation of control that is deemed to be a controlling interest and full control in the de facto sense. You control the output - if I can use that economic term - of the media enterprises in which you may have only, as I say, a 17.9 percent holding. Nothing could have been clearer than to say that - in which case, had that been the case, the Competition Commission would have done what Mr. Gordon said it should have done - assumed a five to four, and then it considers, Mr. Gordon said.

Now, let us see what is left in the rest of the market and see whether they will exercise such a constraint on this single group as to effect in some way the agenda, or whatever it may be. It did not. Nothing could have been simpler. In my submission the Commission was entitled to carry out the substantive assessment that it did, and that its analysis of the difficult sections of s.58A(4) and s.54A(5), which I am quite happy to take as linked (if only because of the obvious link with s.58A(5) contains in parenthesis 'subject to s.58A(4)', a notoriously difficult parenthesis to understand what it means, but still at least it says there appears to be a link between the two, however difficult they are to interpret --

None of those deeming provisions suggests that control is binary -- that control cannot be divided into the real levels of control that exist de facto. What s.58A(5) is looking to is to make sure that when you are dealing with this worry about dominance, the single voice - the ventriloquist (as it was referred to yesterday) -- You have lots of voices, but there is only one ventriloquist and you have got a problem. They were concerned about -- Ownership may not tell you everything. You are going to be looking at who is the ventriloquist -- who is the controller -- pierce the corporate veil. That is what s.58 advises: make sure that you have covered all the ground and you are not deterred from going to the person who really controls the voice. It is what Lord McIntosh said - 'his or her control'. That is what it is about, and that is what the Commission did. I am not going to take you through it.

Our defence at para. 57 is in respect of s.58A(4). Consequential provisions - s.58A(5). The key point there is that there is nothing in s.58A(4) or s.58A(5) that would stop the Secretary of State in a situation where there was a real concern - and assuming that Sky was not controlled by the 20: 20 rule -- If Sky were to rule from 17.9 percent -- Let us assume that

there was no finding of SLC. If Sky were to move from 17.9 percent to 30 percent, or even 51 percent, then s.58A(4) is there to make sure that even if, for example, the Commission, or this Tribunal, has held there is material influence over policy, but it does not amount to an SLC -- in other words, there is jurisdiction and the enterprises in this most peculiar s.26 have ceased to be distinct, nevertheless the phoenix arises and there can be another merger reference under s.26 because there has been a change in control, and an ability materially to influence, to control.

I am going to allow Mr. Anderson the pleasure of going through in detail s.58A(4) and s.58A(5). I am simply highlighting, saying, "What is the real meaning? What is this addressed towards?" It is that. It is that. It is to make sure that, in a sense, the authorities are not outwitted -- that they can watch for any change in control of media enterprises that may indeed lead, on a substantial assessment, to a conclusion that there is not a sufficient plurality of control. Where, as in this case, the Commission is saying, "There is no risk to the citizen", then there is no risk to the question of sufficiency of plurality. Mr. Gordon's arguments, were they to be effective, I would have thought we would have found them elsewhere than in Virgin's submissions. But, I cannot see where. We know that the public interest considerations are different from SLC, but these deeming provisions, when they produce a fiction, should, in my respectful submission, be looked at exceptionally carefully by this Tribunal.

I am going to stop there, if I may, sir. Since Mr. Anderson is following, and Mr. Beloff is following after that, it could be that there is some gap that we have fallen through, and it may be that we have not dealt with all the issues raised by Mr. Gordon. I thought I would give, in a nutshell, the justification of why the Commission did what it did.

THE PRESIDENT: Thank you very much.

MR. ANDERSON: On behalf of the Secretary of State, I do not propose to repeat the points that Mr. Swift has made. Of course, we would agree with the thrust of what he said. Of course, the entire debate on the scope and meaning of s.58 and s.58A do, of course, concern the concept of sufficiency of plurality. Mr. Swift was quite right to remind the Tribunal what exactly that concept means. Competing voices available to citizens so that they are free to form their own opinions, as Lord McIntosh put it. Or, avoiding any one person in control to influence opinions and set the political agenda. So, that is the important public interest consideration. We say that that is clearly concerned with far more than -- I think it is a head-counting exercise - which is the phrase we used - rather than a number-crunching exercise (which Mr. Gordon referred to).

So, when one is construing s.58(2C) one of course has to have regard to its purpose - that is to say, ensuring a sufficiency of plurality is not undermined by a merger situation. When one thinks about what that in fact means, it is whether the merger situation is having an adverse impact on the range of information and ideas, opinions that are available within a society to enable its citizens to form their own opinion. That is at the heart of any sufficiency of plurality exercise.

So, what the Competition Commission did in this case was to consider whether this merger situation in fact affected that position. They found, as a matter of fact, that it did not. Any other approach - such as adopting legal fictions - under s.58A(4) or (5) in place of a substantive analysis of the kind that the Competition Commission undertook would disable the process of having any real, meaningful purpose. That is why we say the scheme envisages a detailed inquiry by the Competition Commission into the issues, and to explore the true effect of the merger on sufficiency of plurality of persons in control of the media enterprises - that is to say, consider the impact of this merger on the range and number of sources of information and opinion available through the media in this democratic society. Well, just as the Competition Commission did not lose sight of that objective, nor of course should the Tribunal.

Given that the Commission found on the facts that in this particular instance the merger and the degree of Sky's influence arising out of that had no impact on the range of competing voices available to citizens, or the views and opinions available to citizens, it simply, as I say, cannot be right that legal fictions, deeming provisions, should compel the authorities to reach a different conclusion. Yet, we say that is the inevitable consequence of Virgin's approach.

Virgin's case effectively nullifies the need for the Commission to undertake any inquiry into the nature of the control at issue - in particular, the change of control occasioned by this merger. We say that defies common-sense. It should not be accepted by the Tribunal unless the wording of the Act compels the Tribunal to reach no other view. But, we say, of course, that that is not the case. It is interesting, of course, that the explanatory notes, the DTI Guidance, the background debates that Mr. Swift has taken you to, emphasise the need for scrutinising the merger, carrying out a plurality assessment, looking at each case on its facts, taking into account all the relevant circumstances. We would say, of course, the nature of the control at issue is, on any view, a relevant consideration. It is a circumstance that has to be looked at.

Virgin's argument necessarily results in treating the present merger situation, which we know from the debates on substantial lessening of competition - the merger situation - was at what is regarded as the lowest level of control under s.26. Virgin's case requires that to be treated in precisely the same way as if Sky had purchased 100 percent of the shares in ITV. Those circumstances could clearly dictate editorial content.

One asks rhetorically, "Can that be right?" Is that really what the effect of s.58A(4) and s.58A(5) really mean? Well, we say the answer is, "No". We say those provisions address separate issues. They are aids to construction. They are tools to enable the Commission to undertake its task. They are not substitutes for the analysis that the Competition Commission should undertake. They are not intended to be substantive replacements for the qualitative assessment based on the actual evidence. We do not regard the Ofcom report as in fact saying anything different.

You were taken to para. 4.26. Perhaps we can invite the Tribunal to look at that briefly again in Volume 1 at Tab 17. (Pause) This paragraph was presented to you by Mr. Gordon as demonstrating that when Sky submitted to Ofcom that it did not in fact have influence over ITV's editorial content, that that argument was rejected by Ofcom. That is how Mr. Gordon puts it. Well, if one reads para. 4.26 one sees that it did not reject the argument as legally irrelevant - which is Virgin's position. They simply pointed out that they had had a range of views on that issue, and they were not themselves going to form a view that what Sky was submitting was necessarily right. Sky submitted that it has no ability to influence ITV's editorial policy. In contrast, a number of third parties have made representations that a prudent management of ITV will, in formulating policy have regards to the interests of the company's major shareholder and that Sky has the ability to influence. We also note that ITV does not argue in its representations that Sky does not have influence. Ofcom notes the contrasting representations made as to the likely future ability to influence ITV. In addition, Ofcom notes the purpose behind the public interest consideration, in the light of this taking into account the level of shareholding Ofcom continues to be concerned.

In our submission that cannot conceivably be construed as Ofcom rejecting as legally irrelevant the nature of Sky's control and, of course, it is worth just reminding the Tribunal of what this report is intending to do.

It is not intending to undertake a qualitative assessment with a view to reaching a conclusion; it is an advisory report designed to assist the Secretary of State in coming to a view as to whether or not a reference should be made, and that is clear if, for example, one looks at paras.1.3 and 1.4. Ofcom's role in this context is to conduct an initial investigation

and report on the effect on the media public interest consideration. This involves providing advice and recommendations to the Secretary of State as to whether the relevant merger situation raises plurality considerations which may be relevant to his decision whether to refer the matter to the Competition Commission for further consideration.

They did recommend that and the Secretary of State made the reference.

So we say that sections 58A(4) and (5) serve a very different purpose to that which is suggested by Virgin. They do not operate in such a way as to relieve the Commission from the need to look at the nature of the control at issue. Indeed, we would say the whole point of, in particular, s58A(5) is to enhance the Competition Commission's ability to look at the substance and reality. They are designed to assist the Competition Commission to get to the heart of what the effect of the merger is on sufficiency of plurality – the effects of that – as a result of the merger.

58(2C) which is, of course, the actual public interest consideration itself, refers of course to sufficiency of plurality of persons with control, it does not define what is meant by control. Where one finds what is meant by control is essentially in s.26, expanded if you like in 58A(5)(b) to include other situations possibly, but nonetheless, we do know that the notion of control, undefined as it is in 58(2C) can involve varying degrees of control – ability to exercise material influence over policy, ability to control policy, or a controlling interest, and each of those involves a different degree of control. Indeed, those different levels of control are concepts that have been familiar to the merger legislation for over half a century.

But what Virgin is asking this Tribunal to accept is that when the word "control" is used in 58(2C) it means only a controlling interest; there is simply no basis for that conclusion in our submission. It is inconsistent with the purpose of the scheme, the process of the scheme, for that assumption necessarily to be made; it does not need to be made, it should not therefore be made.

THE PRESIDENT: What about subsection 5 of s.58A, there it talks about where you have the lowest form of control under s.26 you obviously have more than one controller ----

MR. ANDERSON: Yes.

THE PRESIDENT: -- because you have material influence, but subsection 5 says in a merger situation, which includes material influence cases, you have to treat – assuming for the moment that it applies to the merged entities, assuming that, which I know is an issue, but assuming it does you have only one controller, by statutory requirement you have to treat it as there being one controller?

MR. ANDERSON: But that does not assist you in what investigation into the nature of control then needs to be undertaken, it simply does not help you one way or the other there. We say that 58A(5) is primarily designed, as Mr. Swift was indicating, to enable the Competition Commission to cut through to the heart of what the actual control is. For instance, if there is a media enterprise out there that is controlled by, for example, members of the same family you are not going to treat them as different tpersons. You will treat that situation as under the control of under one person. It would be the same if there were group control, for example, the position with Sky and News Corporation itself, you treat that as one person for the purposes of the investigation. It is designed to enable the Competition Commission to cut through those sorts of issues and treat that as a single person, it does not tell you anything about what the nature of the control at issue is. That is why we say it is really unimportant whether 58A(5) applies to the merged concerns, or only to third party concerns. It does not matter whether it applies to merged concerns, because you are actually looking at the effects of the merger. You cannot consider, in our submission, the effects of the merger on the sufficiency of plurality without taking into account all the circumstances, and those circumstances clearly include the nature of the control at issue. It is simply counterintuitive to assume that where the Competition Commission has found as a matter of fact that there is no impact on the sufficiency of plurality in the sense that it has no impact on the range and number of views available, to treat 58A(5) as suggesting one has to do something different.

So if one can find an adequate explanation for what 58A(5) is doing, and we can – I have cited some examples – there is simply no need to attribute to it this far more draconian meaning. We say the same is true of 58A(4) it serves an entirely different purpose. We say that the primary purpose of that provision is simply to head off any argument that might be made in the context of a merger situation involving moving up from one level of control to another – the argument being there are no fewer media enterprises, and therefore there is no jurisdiction to consider the effects on plurality; 58A(4) puts paid to that argument. We say that is entirely consistent with the DTI Guidance and the explanatory notes.

If I ask you to take up vol.2 of the authorities, tab 43, you will find the DTI Guidance, and it is at para.7.13, p.545.

"When assessing plurality, where a merger situation (i.e. a relevant merger situation or a special merger situation) involves two media enterprises serving the same audience as defined … then there is deemed to be a reduction in the number of media enterprises serving that audience for the purposes of the plurality assessment in

> subsection (2C). All such mergers, including those involving an increase in levels of control of such media enterprise, may be examined for the purposes of (2C). This means the Secretary of State can assess whether, as a result of the merger, there will still be a sufficient plurality of persons with control of enterprises serving the relevant audience even though the number of enterprises serving that audience may be unchanged."

Quite clearly, the DTI in that guidance is indicating that this is a jurisdictional provision, it is designed to head off an argument. In the explanatory notes, which are a couple of tabs earlier, para.804 behind tab 41:

> "New section 58A(4) makes clear that where a merger situation (…) involves two media enterprises serving the same audience, then there is deemed to be a reduction … This means that all such mergers, including those involving an increase in levels of control of such media enterprises, may be scrutinised …"

Again, therefore, it is a question of enhancing the jurisdiction to investigate, it is not providing through the route of a legal fiction or a deeming provision the substitute for genuine investigation.

So we say those the primary purposes of those two provisions, 58A(4) and 58A(5). If, for example, 58A(4) had the effect that Mr. Gordon suggests it has, it would not use the terminology, as it does:

> "Wherever in a merger situation two media enterprises serving the same audience cease to be distinct, the number of such enterprises serving that audience shall be assumed to be more immediately before the cease to be distinct than it is afterwards."

It would have said, "wherever in any media situation two media enterprises serving the same audience cease to be distinct, the plurality of persons with control of media enterprises shall be assumed to be less before than after". It does not refer to persons in control at all, it refers to the number of media enterprises. It does not assist on the exercise that the Competition Commission was undertaking at all. As I say, s.58A(5) is simply directed at looking at the reality of control where one a situation concerning more than one person in control. As I say, it does not matter whether it applies to the actual merged concerns or not, because the merged concerns are the very subject matter of the investigation that is being undertaken. It probably is directed primarily at media enterprises other than the two that are the subject of the merger.

THE PRESIDENT: So it is affecting the head count, therefore, even on your argument, does it not? You would say it may affect the head count but it does not qualitative exercise of looking at the sufficiency of that head count?

MR. ANDERSON: Well, it may affect a head count in so far as a head count is relevant, but a head counting in the sense of counting Sky and ITV as one is a meaningless exercise in the context where you have an investigation by the Competition Commission that concludes as a matter of fact that there is no influence on the editorial content of ITN News arising out of that merger. That is why we say head counting is far too narrow a concept.

THE PRESIDENT: What about Mr. Gordon's argument that there might be no present effect, but this is a sort of failsafe, it is designed to create a sort of safety net, if you like, or a barrier – I do not know what the right analogy would be – because of the importance of the aim of this public interest consideration?

MR. ANDERSON: If that is what it wanted to do then it would have spelt that out. What, in fact, the scheme of the Act is designed to do is to enable the Secretary of State to refer to the Competition Commission to assess the impact of this merger on sufficiency of plurality. It is a matter of evidence for the Competition Commission to consider, "Well, at the moment we think Sky cannot influence the policy or the editorial content of ITN, but we are not so sure that is true six months down the line". That is exactly why it is important that the facts are investigated and assessed by the specialist body. That the scheme of things.

THE PRESIDENT: Whatever the deeming provisions mean, they do mean something, and they might, as it were, require the decision maker to compress what would otherwise be its assessment of the facts because otherwise there is no point in having them.

MR. ANDERSON: It would have spelt that out far more clearly than in a deeming provision under 58A(5). If, by that, what is being suggested is that the Competition authority must assume that there has been a total reduction of plurality as between the two merged concerns and its inquiry should be confined solely to considering whether the rest of the market provides a sufficient plurality, then that would have been spelt out in that way. No, all 58A(5) is doing is enabling the Competition Commission to cut through concepts such as family ownership, group ownership, the relationship with News Corporation and say, "Look at the actual control in those circumstances, do not just top them up and ask how many people are actually controllers of media enterprises", and finding that there were in fact 97, that is enough, when 50 of them are all controlling the same media enterprise. That is what 58A(5) is designed to do. It does not assist the exercise of considering the impact of this merger on sufficiency of plurality at all. The route to determining whether this merger has

any impact on the sufficiency of plurality is a detailed investigation by the Competition Commission into the actual facts. Part of those facts are quite clearly the nature of the control that Sky exercises over ITV. In this case it was found that the nature of that influence was insufficient to affect plurality at all really.

That is the factual premise from which you need to assess all these arguments that have been advanced by Mr. Gordon, it simply demonstrates that there is nothing in them. That becomes apparent when one looks at the explanatory notes again, if I can invite you to take up volume 2 of the authorities bundle again and go to tab 41, paras.805 to 807. All three of them are directed at 58A(5)

> "New section 58A(5) ensures that the authorities can look at the substance of who controls media enterprises when carrying out a plurality assessment.
>
> New section 58A(5)(a) provides that, for the purposes of section 58, where a number of media enterprises would fall to be treated as under common ownership or common control for the purposes of section 26 … they are treated as being controlled by one person. This is because, in assessing the effect of a merger on the sufficiency of plurality of persons with control of media enterprises, the decision-making authorities need to assess the total number of persons with control of media enterprises and what effect the merger will have on the plurality of media as a whole. Apart from the merging media enterprises, in order to get an accurate picture of who has control of the remaining media enterprises, it is important to be able to look not just at the owners of those entities, but at the persons with ultimate control of those entities."

So it is quite clear from that that the explanatory notes are explaining that 58A(5) is a tool designed to enable the investigative authority to get to the true position. That is quite the opposite of the purpose that Virgin is suggesting the provisions should be directed at, which is, forget the true position, adopt some legal fiction instead, and adopt that legal fiction only in respect of the merged concerns, not the others. That is why, in our submission, Virgin's argument is attempting to use s.58A(4) and s.58A(5) for purposes they are simply not designed or ever intended to be used for.

Another point that Virgin makes - and this arises out of a distinction between s.58(2)(c) and s.58(2)(b) - is that because the Commission identified in their report that sufficiency of plurality of persons with control is really getting to a plurality of sources of information and views in the media, they are confusing plurality in the sense that it is used in s.58(2)(c) with plurality in the sense it is used in s.58(2)(b) concerning with newspapers, because in the

context of newspapers reference is made to plurality of views, whereas in the context of media enterprises the reference is only to plurality of persons with control. We say that that is a misconceived point.

The references to views in those two contexts are slightly different. Newspapers are permitted to have views. One can see in The Sun, "Vote Tory". Media enterprises are not permitted to have views. Their content is heavily regulated. So, it is far more important to concentrate on plurality of views in the context of newspapers. The sufficiency of plurality in the context of media enterprises is a more sophisticated notion and involves a range of views, opinions, and sources of information setting the political agenda, if you like, rather than expressing a view on it. That is the reason why the terminology is different. But, the underlying rationale is the same - that is, to maintain numbers as well as variety. One can see that from para. 800 of the explanatory notes - going back to Volume 2 at Tab 41. This is the explanation of s.58(2)(b) concerning newspapers.

> "New s.(2)(b) specifies the need for sufficient plurality of views in newspapers. This is intended to enable a number of plurality issues going beyond free expression or accurate presentation of news to be taken into account - in particular the structural impact of a transaction on the overall range of views and distribution of voice within the market. The test of a sufficient plurality of views is intended to enable regard to be had not only to the need for a sufficient number of views to be expressed, but also to the need for variety in those views, and for there to be a variety of outlets and publications in which they can be expressed. There is a qualitative element to the plurality assessment that requires account to be taken of the context in which titles circulate and the nature of those titles".

The key point that emerges out of that is that the notion of plurality is not simply about numbers, but it is about variety as well as numbers. That is a point which, in our submission, Mr. Gordon and Virgin miss. It is a reason why the explanatory notes in the context of newspapers in fact assist in the approach that the Competition Commission and the Secretary of State has adopted. Sufficiency of plurality cannot simply be equated with counting the numbers of persons who control, in a technical sense, within any of the levels of control set out in s.26. One must engage, as part of the exercise that the reference to the Competition Commission instigates, in an investigation into the impact of this merger on the sufficiency of plurality of persons with control, having regard to the underlying purpose. Whatever the effect of s.58A(4) and (5) -- whatever the deeming effect of that is, they are clearly concerned only with numbers: s.58A(4) - the number of media enterprises is deemed

to be fewer after the merger than before; s.58A(4) - the number of persons in control to be treated as one. That is number. It does not shed any light on what the exercise is under s.58(2)(c). It is s.58(2)(c) that the Competition Commission is required to consider - that is to say, the impact of the merger on that concept of sufficiency of -plurality.

So, the two-stage inquiry that Virgin submits should be undertaken -- We say it is an irrelevant distraction. The reality is that in considering the impact of the merger on sufficiency of plurality, it is not necessary to split sufficiency of plurality into two concepts. One is considering the impact of the merger on the range of voices available in the market. If, by reason of the level of control in fact occasioned to Sky through the acquisition of this shareholding is insufficient to have any impact on that, then the conclusion must be that which the Competition Commission drew, and the Secretary of State accepted.

Even Virgin acknowledges - at para. 29(b) of their skeleton - that any analysis undertaken by the Competition Commission must have regard to all relevant considerations. Well, we say - and this is consistent with the view that Ofcom took in its report - that a relevant consideration is quite clearly the level of control occasioned by the 17.9 percent shareholding. Well, Virgin do not in fact address that point anywhere in their submissions as to why that is not, at the very least, a relevant consideration.

What the Competition Commission did was to conduct a full investigation of the existing levels of plurality at paras. 5.39 to 5.54. They considered the positions of Sky and ITV (at paras. 5.46 to 5.52), and they considered the internal plurality of news generally (at paras. 5.53 to 5.60). They then considered the impact of the merger on that, having regard to the question of whether or not Sky could exert relevant editorial commercial influence. They concluded they could not, because the 17.9 percent would not provide Sky with the ability to influence ITV, and that was based on regulatory mechanisms combined with a strong culture of editorial independence within news production. That is what the Competition Commission was called upon to investigate. That is what he did. It sought evidence on it. It assessed that evidence. It reached its conclusions. We, in the Department of Business Enterprise & Regulatory Reform, and the Secretary of State, considered what the Competition Commission's report contained - the material. The Secretary of State satisfied himself that the Commission had reached that view on the basis of a proper assessment of the evidence, having regard to all the relevant considerations. The Secretary of State was satisfied that the Competition Commission's approach was correct, and that its conclusions were soundly based. He also had regard to written submissions provided to him by Virgin following receipt of the report. Those submissions - perhaps in a slightly more primitive

form than are now in the pleadings before the Tribunal - in fact amounted to exactly the arguments that we are debating today. So, we had regard to those very arguments before reaching the conclusion that he did. For the reasons that I have set out this morning, but also in our defence and skeleton, we took the view that the Commission was right and that Virgin was wrong. Sir, we submit that Virgin's appeal on the plurality issue should be dismissed.

I should say just one final point - and this is the point that we make at para. 101 of our skeleton: if, on the first half of the case, the Competition Commission and the Secretary of State are right, and that the remedy of reducing the shareholding to 7.5 percent is maintained, the effect of that will be effectively to remove Virgin's s.58A(4) and s.58A(5) arguments, because on no basis in those circumstances would either of those deeming provisions apply. So, it would in fact all become rather academic if we win on the first half of the case.

Sir, unless I can assist the Tribunal further, that is our position on that.

(Adjourned for a short time)

THE PRESIDENT: A mini plurality bundle?

MR. BELOFF: Yes. Members of the Tribunal, Mr. Chairman, as I listened to submissions of my learned friends for the Commission and the Secretary of State I inevitably adopted the tactic of slash and burn to the notes that I had prepared before the hearing.

In summary, I agree with them on the issues which are relevant to the outcome of Virgin's application and where Mr. Gordon is astute enough to detect some perceived disagreement between the three of us, they are on issues which are not relevant to the outcome of that application. I am bound to say perhaps when my learned friend, Mr. Swift's magisterial and, dare I say, succinct summary of the issues in play at this stage of the hearing I was reminded that forensic fools may rush in where advocate angels fear to tread, and I shall try not to be guilty of such an unwise move.

The issue is primarily concerned, as is common ground, with statutory construction and the statutory construction in particular of s.58(2C)(a) of the Enterprise Act of 2002. The first issue was what is meant by "plurality" and, indeed, in our submission there are distinct limbs of the section that have to be considered, and it was of some interest to us when we read the Commission's report, and if you would be good enough to go to it at p.77, footnote 159. In determining what was meant by plurality, as they rightly pointed out in para.5.7, there was no statutory definition of that noun, they said that we took into account the

dictionary definition of plurality, other legal provisions which refer to plurality, and the existing literature on media plurality.

If they were referring, when they made a comment on other legal provisions which refer to plurality their exercise of research was more successful than my own, since the only other reference in legal parlance to the concept of plurality that I was able to ascertain fell in the realm of canon law, which is far removed from the subject matter with which this august Tribunal is concerned. But there is a point of construction at the outset that we would venture to make to the Tribunal has not perhaps been distinctly emphasised. The fact that the word "plurality" is used rather than the word "number" which is a word which, as you are well aware, is used in s.58A, a cognate provision of the Act must suggest as a matter of ordinary interpretation that the concepts were intended to convey something different. We respectfully accept the analysis of the Commission that it embodied notions of range and not only of numbers. We sought some assistance – insofar as there was assistance – from considering dictionary definitions or associated material, and we again provided (as I think you all have now) a mini bundle in order to spare unnecessary turning up of this, that and the other reference.

In Rogert's Thesaurus, which is at tab 2 of the mini bundle, we did identify something which may give a clue to the flavour of what the legislature had in mind at this particular juncture. You will see in characteristic mode the Thesaurus identifies a number of synonyms or analogues to the concept of plurality and you will see that as a noun it refers to *inter alia*: "the plural; multiplicity and multitude", all of which might be said to be simply a matter of numbers, but then many sidedness, in our respectful submission, comes closer to introducing or injecting some concept of variety, and further "multitude", which is one of the synonyms, if one looks across the page under the adjective for "multitude", "multitudinous" one sees that the fourth of the adjectives again is "various".

So in our submission, just as a matter of ordinary parlance there is some support for the notion, not only as the statute makes clear that the concepts of plurality and number are distinct, but the concept of plurality embodies within itself some notion of variety, but one has to bear in mind in any event what one is reminded by Lord Hoffmann in a recent speech in a case called *Moyna* which was involved in the area of Social Security, a notoriously obscure area of legislation. That is at tab 3 of the mini bundle, and he repeated what he had said more elaborately in the context of contractual construction in the famous *West Bromwich Investments Compensation Scheme* case which he now transferred into the area

of statutory construction and at para.24, referring to some well known observations by Lord Reid in the case of *Cozens v Brutus* he said:

> "Lord Reid was here making the well-known distinction between the meaning of a word, which depends upon conventions known to the ordinary speaker of English or ascertainable from a dictionary and the meaning which the author of an utterance appears to have intended to convey by using that word in a sentence. The latter depends not only upon the conventional meanings of the words used but also upon syntax, context and background. The meaning of an English word is not a quest ion of law because it does not in itself have any legal significance. It is the meaning to be ascribed to the intention of the notional legislator in using that word which is a statement of law."

In our submission accordingly, one has to give weight to the fact that by legislative choice there was a different word chosen from the word "elsewhere" used in the numbers, so that even if you were not consider that plurality in its ordinary sense carried a connotation of variety you would, in our respectful submission, be compelled to the conclusion in this particular context that it meant something different from numbers, and that is the only, as it were, if I can put it colloquially, "other show in town".

Virgin, throughout their written submissions, and indeed in my learned friend Mr. Gordon's oral submissions, effectively appeared to equate the two.

We also respectfully submit that it is quite clear that, whether one places emphasis exclusively on the word "sufficient" or on the noun "plurality", the purpose of the legislation and that particular part of it is precisely that which my learned friend Mr. Swift, with his references to Hansard and other material, and my learned friend Mr. Anderson, by his emphasis on the background to the statute, had in mind.

It is well epitomised in the Encyclopaedia of Competition Law, which is at tab 4 of our mini bundle, which says, and we would respectfully adopt these words, at para.1-947, p.1486 of the Encyclopaedia, referring to all the media considerations under the rubric "Media Public Interest Cases":

> "Broadly, the media public interest considerations are intended to prevent the debasement through merger of the quality and range of public expression within the public sphere."

That is a statement or analysis that is made by reference to all three of the prospective public interest media considerations, and one notices just a few lines further down the page in reference to 58(2B):

> "… prescribes the need for 'a sufficient plurality of views in nps in each market for newspapers' with the United Kingdom. This consideration …"

That, in our respectful submission, "sufficient plurality" has both quantitative and qualitative dimensions. This is, I should say, the only commentary on these provisions that I have been able, with the assistance of my learned friends, to identify on these particular provisions. That is all conformable with, and indeed no doubt may be derived from the legislative history of the Act to which my learned friend Mr. Swift referred.

The adjective "sufficiently" obviously qualifies the noun "plurality". The fact that it appears both in relation to newspapers and to other broadcast media, in our respectful submission, does not mean that the concept of "sufficient plurality" by itself differs. It is not affected by the contrast between views and persons as its subject matter, the explanation for which was amply provided to you by Mr. Anderson, and I shall not repeat. The fact of the matter is there is a noun, there is an adjective, and whether or not the noun carries within it a concept of qualitative assessment, indisputable the adjective does.

Therefore, in our respectful submission, it is obviously not enough, as a matter of ordinary construction in application of the primary provision with which the Tribunal is concerned to say, as my learned friend Mr. Gordon says, there are less persons in control of the media for a particular audience after this merger than there were before, therefore there is insufficient plurality. In our respectful submission, the issue is: what is the consequence of that diminution or decrease in number of persons in control. That necessarily engages, amongst other factors, the degree of control, the potential for its exercise, and indeed the likelihood of its exercise.

One bears in mind that the entirety of these provisions come under the rubric "public interest considerations", and, in our submission, the Commission were obviously correct in para.5.10 of their report at p.72 when they said:

> "We concluded that a plurality of control within the media is a matter of public interest because it may affect the range of information and views provided to different audiences."

Mr. Gordon, or at any rate Mr. Gordon's predecessor, in drafting the application or skeleton argument for Virgin, made some criticism of the distinctions that were drawn in both paras.5.10 and 5.11 of the report. In our respectful submission, far from those dissections on the one hand between plurality of persons and implications of plurality in 5.10 and, on the other hand, 5.11 between external plurality and internal plurality showing that the Commission misdirected themselves, or were confused as to the statutory test, it actually

showed a sophisticated and focused emphasis on the true issues. They recognised that there was not simply a read across between plurality, whatever that may mean even if it only meant number of persons with control of media enterprises, and the implications of that plurality, they had to look at both to proceed, as it were, from the one to the other. That is not a matter of criticism, but rather, with respect, a matter of praise.

Equally, the fact that external plurality and internal plurality were considered separately pursuant to their self-administered injunction in 5.11 is a matter for praise not for criticism. Again, it showed that they were considering all material matters in the context of a public interest consideration on which they needed to focus.

It is common ground between all three of those who are supporting the Commission at this juncture that Virgin Media's interpretation of the section seeks, in effect, to remove from the assessment of plurality, or indeed of sufficient plurality, any, or any sensible, consideration of whether indeed the plurality is sufficient and indeed for what purpose. What they seek to do rather is to limit the interpretation either of noun or in particular of adjective so that the only criterion by which it can be judged is the number of persons with control of media enterprises.

Although Mr. Gordon says with his usual fluency that of course they accept that they need not only to show or to focus on the noun "plurality", but also on the adjective "sufficient", it is by no means clear, in our respectful submission, what they say "sufficient" is meant to be directed to – "sufficient" for what?

If one looks at the two junctures in their written skeleton where they touch upon this point, with great respect one does not find the illumination that one would be entitled to find. It is at p.10, first of all, at 29. One may perhaps just look *en passant* at 29(a) at p.9 where the second sentence makes clear that they regard "plurality" and "number" as synonymous because they say indeed, having cited the relevant extract from the sub-section:

> "This requires a determination of the <u>number</u> of such persons".

Therefore, in our respectful submission, they, themselves, are guilty of conflating two distinct concepts.

When they come to the question of "sufficiency" over the page at (b) they say that what is required is

> "… an assessment of whether there is 'sufficient' plurality remaining following the acquisition. This requires a decision-maker to assess whether the number of persons with control of relevant media enterprises is sufficient in the public interest having regard to all relevant considerations."

With respect, though Mr. Gordon did not clearly draft this particular document, but is no doubt at any rate, as it were, seized of the carriage of defending it, that simply does not answer the question, "What relevant considerations and what is the public interest with which you say the Commission ought be concerned?" If one looks further, to be fair, the matter is touched upon again at p.17 between paras. 63 and 67. With great respect - and I have no doubt that the Tribunal both have read and will re-read this - there is no indication of what they say sufficiency is directed to. They simply repeat that sufficiency may be required, and then they criticise the Commission again for the way in which, again, unfairly, they say, they concentrate on internal plurality, etc., etc.

It is, with respect, fundamental to any analysis of this section to ask why it was that the legislature shows the formula that it did. In our submission those who are acting for Virgin are guilty of the same error in approach as was shown in the case of *South Yorkshire Transport*, which is in our mini-bundle at Tab 5. As you may recollect, sir - you and your colleagues - what this was concerned with was the jurisdiction of the Commission to embark upon a consideration of a merger in relation to local bus services. What fell to be considered as a jurisdictional threshold was what was meant by the phrase 'substantial part of the United Kingdom'. Lord Mustill, who gave the reasoned speech with which the other members of the House agreed, twice (both at p.6 and at p.8 of his speech) identified what he considered was the proper interpretation of that phrase. The foot of the first paragraph at p.6, what he says is,

> "Nevertheless, I am glad to adopt, as a means of giving a general indication of where the meaning of the word in s.64(3) [that is the section which embedded the concept of the substantial part of the United Kingdom] lies within the range of possible meanings, the expression of Lord Justice Nourse in the Court of Appeal worthy of consideration for the purposes of the Act".

He returns to that phrase at the end of the first paragraph on p.8. So, what one is asking is, is: if there is some issue as to what is meant by 'sufficiency of plurality', one has to ask the question, as was asked in *South Yorkshire*, "What does 'sufficient' mean for the purposes of this particular legislation, the Enterprise Act?" We give, with respect, the same answer as has been given by my learned friends, Mr. Swift and Mr. Anderson.

> There is another, perhaps more remote use, to which this particular authority can be put, because the debate between, on the one hand, the Commission and, on the other, those who sought to judicially review it for error in arrogating to themselves a jurisdiction they did not properly, as was asserted, enjoy is that the argument was

between the challenger who said, in effect, "What one must do is consider this matter mathematically", and the Commission who said, "On the contrary, we must, and are entitled to, look at the matter more broadly". Lord Mustill and the members of the House agreed with the Commission.

Again, I can take this matter very shortly. If you go to p.7, having determined what the section or provision mean, Lord Mustill marshalled the rival argument. In the penultimate paragraph at p.7, the paragraph which begins with the words, "I have reached the same conclusion ----", he goes on to summarise the two arguments which came to the forefront of the respondent's case in the House - namely, the decisive factor consists of a comparison between the number of bus miles run by the services under investigation and those in the country as a whole. Then, again, another issue of a mathematical kind was debated on behalf of the respondents, and he summarises at the last paragraph on that page,

> "Accordingly, although I readily accept the Commission can, and indeed should, take into account the relative proportions of the area by comparison with the United Kingdom as a whole, as regards surface area, population, economic activities and (it may be) in some cases other factors as well, when reaching a conclusion on jurisdiction, neither of them, on its own, nor all of them together, can lead directly to the answer. The parties could reasonably expect that since the test for which the respondents contend has been rejected another would be proposed in its place. I am reluctant to go in this direction because it would substitute non-statutory words for the words of the Act which the Commission is obliged to apply, and partly because it is impossible to frame a definition which would not unduly fetter the judgment of the Commission in some future situations not foreseen".

Then he repeats the definition that he had adopted from Lord Justice Nourse, and again he says that matters other than, as it were, the numerical comparison of the proportion of the area in terms of extent to the United Kingdom as a whole was that insufficient exclusive test, and he goes on to say that there were a whole variety of other factors that the Commission were entitled to take into account.

So, one sees in that case an eerie prescient of Mr. Gordon's argument juxtaposed with the argument that the three on this side pose - the argument between those who seek to confine a particular epithet - in that case 'substantial'; in this case 'sufficient' to effect a mere numerical comparison - and those who on this side argue, on the contrary, that in an issue of

this character one would tend to assume that the Commission were given, as it were, a larger remit in relation to that which they need to consider.

Before I come then to s.58, could I just refer you to a passage in the Guidance from the Secretary of State? One bears in mind that in this particular statute there are provisions not only for the Secretary of State to give guidance, but those factors on which he gives guidance must, as it is accepted, axiomatically be taken into account by the commission and any other bodies who are seized of the issues that are raised in any particular merger.

Indeed, the very function of s.106A, at p.214 of the Purple Book, is to fill in gaps in relation to those areas where the legislation has not been in some sense confined or circumscribed the activities of the bodies to whom it applies.

So, in the authorities' Volume 2, Tab 43, at p.32

THE PRESIDENT: What tab is this, Mr. Beloff?

MR. BELOFF: Tab 43 of the second volume of the bundle of authorities. At para. 7.6 it is really the first sentence which says it all, if I can put it that way:

> "The Secretary of State recognises that in applying the broadcasting and cross-media public interest considerations it will be necessary to analyse and consider all the relevant circumstances at the time on a case by case basis."

and in our respectful submission that is antithetical to the way in which Mr. Gordon suggests that the matter should be approached, because he would confine the Commission within what he submits is a rigid framework provided by the interpretive provisions of s.58 in relation to these particular media mergers.

It is common ground that s.58A provides interpretive aids to s.58 itself in this particular context of 58(2C). The first observation one would make is that obviously s.58A(4) and s.58A(5), it would be an exercise in legislative redundancy were they in fact to have identical functions, and no one, as I understand it is contending to that effect.

The attitude that is taken by Virgin is best summarised again in their skeleton argument, if you would be good enough to turn that up again, at para.42. This is where those responsible for the drafting of this skeleton, indeed Mr. Gordon has adopted this, he has said:

"If there is one less media enterprise in separate ownership there will inevitably be fewer persons with control of the relevant media enterprises and a reduction in plurality".

In our respectful submission that is a *non sequitur* and not only is it a *non sequitur* but it also starts from a false premise.

The interpretation that Virgin seek to impose upon this interpretive aid in relation to the subsection itself is again quite contrary to the overall purpose of the Act, and it is also quite

inconsistent with the explanatory notes to the Communications Act 2003, which introduced this section into the Act. It has been taken, quite rightly, by all parties before you that modern rules of statutory interpretation permit resort to explanatory notes and just, as it were, for the assistance of your own judgment, if I may respectfully put it in that way, we have referred in our mini bundle to one of the several cases in which this has been recently established, most particularly since it is the most recent, *R(S) v Chief Constable of South Yorkshire* – that is at tab 6. The reference to the legitimacy of resort to explanatory notes is to be found in the leading speech of Lord Steyn at para. 4, and I selected this out of the trilogy of cases that supported the proposition because my learned friend, Mr. Gordon, had appeared as the advocate in that particular case.

The purpose of s.58A(4), what Mr. Gordon described as our argument that this was merely an anti-avoidance provision was, in our respectful submission, so well developed by my learned friend, Mr. Anderson, that I would risk impairing what he said if I were effectively to repeat it. But the conclusion that he reached, which we respectfully adhered to, is that it says nothing itself about the degree of control that is envisaged in application of this particular provision. One goes back again to the subsection itself, it simply is a deeming provision, interestingly and unhelpfully although both (4) and (5) are deeming provisions, one uses the phrase "shall be assumed", and the other uses the phrase "shall be treated", but in ordinary legal parlance they are both deeming provisions, but the question is: what do they deem? In this particular instance they deem that numbers will assume to have been lessened, or lowered, whenever two media enterprises cease to be distinct, whether or not they cease to be distinct through any of the three mechanisms envisaged in s.26, which axiomatically refer to different degrees of control. So all that is said there is that you treat them as being less after than there were before in order to avoid precisely the kind of argument that Mr. Anderson reminded you could have been ventilated by the ingenious or persuasive advocate. But it says nothing about degree of control.

When Mr. Gordon says, as he said on many occasions, substance of control is important, in our respectful submission, we adopt that. What is meant by "substance" as distinct from form is that one looks at the actuality, one looks at what happens in the real world, and one does not simply determine matters by the amount of shareholding or matters of that kind. We respectfully submit that, indeed, Mr. Gordon while entitled to say that to an extent there is some legal fiction – as in any deeming provision – is inherent in 58A(4), he is not entitled to go so far as to say that this provides for illegal fiction. As has been pointed out, and as Mr. Gordon anticipated we would submit, we are prohibited under para.2 of schedule 14 of

the Communications Act 2003 from acquiring more than 20 per cent of ITV, it cannot be right that in the self same scheme of legislation we are to be treated as having complete control such as we would enjoy if we had whole or complete ownership of ITV when we are actually in that legislation prohibited from acquiring more than 20 per cent.

What s.58(4) in short does not do is to substitute a legal fiction of the acquisition of full control for an analysis of actual control and it does not compel the Commission to ignore the actual consequences of the actual increase in the particular levels of control such as would take place under s.26. Indeed, in our respectful submission, if the Commission or the Secretary of State were obliged to consider by reason of s.58A(4) that full control was enjoyed by application of that particular provision from the start, there would be no basis for any subsequent investigation because any change in control under s.26 which would otherwise trigger a further investigation would be purposeless, since the Secretary of State would have to start from the position that there was already full control; in our respectful submission that is another argument which contradicts Mr. Gordon and Virgin's approach.

Turning to what is a more difficult and it may even be controversial area, s.58A(5) it is again, standing back, a deeming provision. In our submission there are two separate issues: one, what does it deem? Secondly, to whom does it apply? What it deems is relatively clear. What it seeks to eliminate is any argument that there may be, as it were, between the impact of common ownership on the one hand, and common control on the other. It amalgamates those two concepts under the deeming provision and says it is all going to be treated as control.

A second aspect again is that it compels departure from any consideration as to whether the control is vested in a group as distinct from a person. Those are alternatives that are contemplated under s.26. So it says you must consider these are all under the control of one person. But again, as Mr. Anderson rightly says, it tells you nothing about the degree of control to which the Commission is obliged or entitled to have regard. Indeed, if one takes, as it were, an overview of (4) and (5), what it does is simply to eliminate areas of inquiry that might otherwise be troublesome and take one to the position that there were fewer than there before, you are going to treat these persons to whom it applies as all being under one control. That is the start of the exercise, but the conclusion of the exercise after consideration of all material features will depend upon the degree of control which the Commission, as an expert body, have ascertained upon investigation.

The second issue of course is to which persons does this apply. There are, in effect, three choices. It could be that s.58(5) applies only to the two merged enterprises. That is

hypothesis one. It could be that it applies only to media enterprises other than the two merged enterprises. That is hypothesis two. It could apply, as it were, to both.

Mr. Gordon made some criticism of the way in which we had argued the matter in our notice of intervention, with respect, I think fairly. We meant to say no more than that 58(5) must do something different than 58(4).

Mr. Swift has identified the source of the puzzle. The source of the puzzle lies in the parenthetical phrase in s.58A(5) "subject to sub-section (4)". That has the capacity to be, on the one hand, a bridge – in other words, showing that whereas sub-section 58(4) refers clearly to the merged media enterprises, the subject of the investigation, 58A(5) must do as well because there is a bridge between them. The alternative interpretation is to say that subject to sub-section (4) it actually shows that the two provisions are, in fact, distinct, and to identify the fact that the subject matter of each is distinct. In our submission, in company with that of my learned friends, at the end of the day it matters not because the overall obligation of the Commission is to consider the state of the media market after the merger, which will need to take account of matters which the Commission themselves, in our respectful submission, have usefully summarised under the twin heads of internal control and external control, and have also looked at the impact of the merger, as it were, between the two merged companies and indeed in the context of the market as a whole.

Virgin Media's contention is set out in their skeleton argument and elaborated by my learned friend Mr. Gordon in their notice of application, 5.56 at p.28.

THE PRESIDENT: Not the skeleton, but the notice. It is tab 4 of bundle 1.

MR. BELOFF: This, of course, 5.56 at p.28, depends upon Virgin's construction of 58A(5), and one sees that their focus their attention on the merged media parties. They say:

> "Once ITV and BSkyB are found to be under the common control of a single person, the extent and nature of any control exercised by BSkyB over ITV is irrelevant for assessing whether there is a sufficient plurality of persons with control of media enterprises."

Once again, with deference, we say that strikes at the heart of the purpose of the legislation. It is not required by – indeed it is inconsistent with – the language of s.58A(5), which, although focusing on issues of control, says nothing again about degree of control, and it is inconsistent with those passages in the exploratory note to which my learned friend Mr. Anderson in particular drew your attention.

Penultimately, if I may, I want to deal with a matter that was not foreshadowed in the skeleton argument of Virgin, though we make no particularly criticism of that. That is the

reliance that my learned friend Mr. Gordon sought to place on Ofcom's analysis. With respect, one starts from this proposition, that Ofcom are in no better position to engage in an exercise of statutory construction than any other body. It is ultimately, with respect, for you and your colleagues to determine what these provisions, subject to any further appeals to higher courts that might be envisaged. Although, of course, what Ofcom said is of interest, it has no legally compulsive force, although anyone in Mr. Gordon's position would naturally have been glad to pray in aid support from that particular quarter. What we do say about Ofcom is that they were operating, as is clear from the chronology, under strict time constraints and we do respectfully submit that although Mr. Gordon in certain passages purported to identify a construction consistent with Virgin's, there were other passages referred to by my learned friends Mr. Swift and Mr. Anderson which were consistent with ours. I am not going to repeat those.

What is important is that the Secretary of State himself sought further advice in relation to the approach that was to be adopted. He sought further advice because Ofcom are obliged, by reason of the provisions of s.106B at p.215 of the Purple Book to provide that advice when requested to do so by the Secretary of State in connection with any case in which they are required to give a report. The Secretary of State, because one infers he was not entirely confident with the interpretation that Ofcom themselves had given to these sections, sought such further advice. One sees that if one goes to the main bundle of key documents, volume 2, tab 19, para.12. As you and your colleagues will see, it is p.425 in the bottom left hand corner of the bundle.

> "`In coming to his decision, the Secretary of State has taken into account the reports provided to him by the OFT and Ofcom, now published by the Secretary of State. Further, the information and range of views contained in the detailed summaries of representations made by the parties and third parties, and included in the Oft and Ofcom reports, have been taken fully into account".

This is the key sentence:

> "In making his decision, the Secretary of State has asked Ofcom for further advice in response to specific questions, the answers to which the Secretary of State has also taken into account".

This advice was a document published on Ofcom's website. It is a public document. I wish, if I may, to refer briefly to it. We have had copies handed to my learned friends. I am unaware whether the Tribunal have already been furnished with copies of this document? It would be a free-standing document, headed 'Advice by Ofcom to the Secretary of State'. It

may well be that you have received that yet. (Same handed) You and your colleagues, Sir, will see a variety of questions were posed by the Secretary of State in soliciting this advice. We can focus, mercifully, on Question 1 only. The first question was,

> "Does the application of s.58A(4) EA 2002 remove the need for there to be an assessment at this stage of the regulatory process of the level and degree of control that BSkyB may exercise over ITV?"

Now, if Mr. Gordon and Virgin's submissions were correct the answer would have been a short one: "Yes, it does". But, in fact, as you see, that was not the answer ventured by Ofcom. They said,

> "In considering the effect of Sky's acquisition of shares in ITV in relation to plurality issues in its report, Ofcom covered both the application of s 58A(4) and the level of Sky's acquisition of shares in ITV".

That was obviously a factor that they considered material.

> "Ofcom's view, taking into account the level of Sky's shareholding, was that at this first stage the issue of whether Sky has the ability to influence ITV's editorial policy warranted a further second stage investigation. In reaching this view, Ofcom took account of the purpose behind the public interest consideration which is to avoid any one person controlling too much media [and then there is the important qualification] through an ability to influence opinions and control the agenda".

Then it goes on to the different representations that it had received.

Then, in relation to the second question -- They asked about s.58A(5). Again, the answer was perhaps less distinct here. They simply said they considered the application of s.58A(5) in respect of the relationship between News International and Sky and said that if one applied it to the relationship of Sky and ITV it would not change their analysis in their report. They did not, at that stage, touch upon the ambit of s.58A(5) itself, or indeed the extent to which it did, or did not, enable them to look at degree of control. But, one may perhaps fairly say that if they thought the question of degree of control, which was obviously in the Secretary of State's mind in seeking the advice was foreclosed if not by s.58A(4), then by s.58A(5), they would, in our respectful submission, certainly have said so. So, in short, even if one stayed with the text of the report itself, there are arguments as to precisely in which camp Ofcom would have found themselves on the arguments now ventilated before this Tribunal. However, if one looks in addition at the supplementary advice that was given, in our respectful submission it is clear that the answer that was

available was far more nuanced than that which Mr. Gordon was prepared to accept. Indeed, in our submission, the conclusion was more favourable to our analysis than it is to his.

In short, we say that neither of these two deeming provisions resulted in disabling the Commission from carrying out a sensitive factual analysis in the real world as to how matters would, and could, be anticipated to operate. It was a matter, in our submission, for their judgment.

I want to come, if I may, lastly and briefly, to the Commission's report itself. I have already made certain observations on why I say the criticisms have been ventilated against the Commission's approach appear to be misconceived. What is interesting is that they hedged their bets on the two issues of construction as to s.58A(4) and s.58A(5). In respect of s.58A(4), at para. 5.18 they set out what they consider Ofcom - and certainly Virgin - were contending to be the construction of s.58A(4). At para. 5.19 they set out the rival construction. At para. 5.20 they preferred the rival constructions to which we three have given further voice. At para. 5.21 they say, effectively, that they have looked at the matter in both ways and did not think that the outcome of their assessment of plurality would depend upon which interpretation of s.58A(4) we adopted. That does not, of course, mean that in saying that it does not matter which way they mis-directed themselves. What it simply means is, whether we look at it as Virgin would have us looking at it, or whether we look at it as Sky would have us look at it, we would have come to the same conclusion.

Likewise, in relation to s.58A(5) one sees, again, they set out the rival interpretations. At para. 5.22 there is an interpretation advanced by Virgin, and at para. 5.23 there is an interpretation advanced by Sky which may go a little beyond that which we now contend for, and need to contend for. In the end they appeared to consider that the preferable interpretations at s.58A(5) was entirely free-standing of s.58A(4), and referred to other media enterprises than the merging media enterprises. Again, at para. 5.26 they determined that it mattered not. Again, with respect to Mr. Gordon, the fact that they determined that it mattered not gives rise to the conclusion that looking at the material before them, through the lens of either construction, they would have come to the same conclusion.

This perhaps it is worth bearing in mind what has been frequently asserted in relation to documents of this kind: that they should not be construed as a statute, and that they should be given a benign construction. The benign, but, we would say, fair construction here is that which we have advanced of the Commission's reasoning.

What is interesting is that embedded in para. 5.26 is really the key to their thinking, the key to our submission, and, indeed, the key, in our respectful contention, to the analysis of the Act. They recognise in the penultimate sentence of that paragraph that s.26 of the Act covers a range of different degrees of control. They concluded that there was nothing in s.58A(4) or (5), to whomsoever they applied, that stopped them making a real assessment of the effect of control on the public interest -- the consumer interest -- the interest of those who constitute the relevant audience of the kind upon which they embarked.

> Mr. Swift himself determined - and we take no criticism of this; we had anticipated that he might have the carriage of taking you through swiftly the various paragraphs of the Commission's report that indicated that they did take the correct approach -- they looked at all the evidence they summarise the arguments. They came to an entirely proper conclusion. Can we simply say at para. 5.63 that we see what is really, here, the key, it is the second sentence: "… the degree of control which BSkyB exercises over ITV is limited to an abil8ity materially to influence matters of policy. That ability may be treated under the Act as control for the purposes of establishing jurisdiction, but it does not equate in practice to full control or ownership."

And there is nothing in the vocabulary of the provisions that contradicts that The epithet of full control is simply not there present, and again one sees the assumptions that they make, when one sees what they have looked at by reference to the editorial independence of ITV at 5.67, one looks at 5.70 they set out a reference to the evidence they have considered,

> "… insufficient evidence to suggest that the acquisition of a stake of this nature would give BSkyB or its parent companies the ability or incentive to exert editorial influence over the ITV news output."

Then again, if one looks, they go through the headings under "Commercial Influence" as well, and again they concluded that the acquisition may not be expected to operate against the public interest having regard only to the specified public interest consideration, so when Mr. Gordon said they ranged more widely they there say "We knew what the specified public interest consideration was, and we have had regard only to that." The conclusions are based (next paragraph) on the evidence available and take into account the circumstances of this case – precisely what the paragraph from the DTI Guidance said they should do. They say:

"We note that each case must be decided on its own facts, and we may in other cases, where there are, for example, different degrees of control, arrive at a different conclusion in relation to the impact of any acquisition on plurality."

What we say, with respect, when you re-read, as you no doubt will, the passages on plurality under s.5 of the report, you will come to the conclusion that the Commission looked at the matter from every conceivable legitimate objective, the relationship of BSkyB and ITV, the relationship of BSkyB and News Corporation, the position of other players in this particular market, they addressed the right question and they came to the correct conclusion in particular at para.5.79. Really, we leave you, if we may, with this thought, why should the legislature have given the Commission, in fact, a blunt instrument of assessing a degree of control which was contrary to the actual facts? It would, in our respectful submission make no sense at all. Why should the Commission – an expert body vested with the power to make recommendations, come to determinations in this area – be deprived of the power to assess the actual degree of control and the consequences of that degree of control. In our submission the epithet "counterintuitive" used by Mr. Anderson is, in our respectful submission, a correct summary of the Virgin arguments.

You may have noticed over the last three days a certain consistency in Mr. Gordon's approach. On the first two days he sought to confine the powers of this particular Tribunal in exercise of its supervisory jurisdiction, on the third day he now seeks to confine the powers of the Competition Commission when seized of a reference of this kind in each case, with great respect, seeking to undervalue the specialist nature of these bodies and the jurisdiction that they were given. So they are consistent in approach, and they are consistent in another way, that is to say that the submissions on all three days, in our respectful contention, were consistently wrong; we invite you to reject this application.

THE PRESIDENT: I have a feeling we are going to hear the answer to your rhetorical question!

(Laughter)

MR. GORDON: Sir, the way in which we would propose to answer the submissions against us is first of all to try – it is always very difficult at this end game stage – to structure a way of looking at this case which hopefully resolves the various arguments and counterarguments whatever answers the Tribunal comes to, and then in a slightly scatter gun ending to deal with random points that I think were made – some by Mr. Swift, some by Mr. Beloff – just to make sure that I have got everything.

We say that there are essentially three questions to resolve; surprisingly we find ourselves in accord with Mr. Beloff on the first question, which is sufficiency of what? That is what we are engaged in; it is an important question.

Secondly, we say that the case involves consideration of the proposition that the deeming provisions must have a meaning – the question then becomes: what is the meaning? Then the third proposition or question is that those deeming provisions must have a legal effect, and then the question becomes: what is the effect? That is really all it is about, that is what this whole argument is about.

"Sufficiency of what?" is not very difficult to answer, because s.58(2C)(a) answers it. It says: " … a sufficient plurality of persons with control of …" relevant enterprises. So that is what that section is getting at.

My learned friend, Mr. Beloff, with forensic skill talked about what "plurality" meant, what "sufficiency" meant, but it is really quite simple, you start with identifying how many players are left, how many separate voices are left in the playing field after the merger, and you ask the question: is that sufficient? We do not shrink from the proposition that plurality means "number", I think it was the first definition given to plurality in Roget, but we certainly accept that sufficiency is a question that brings with it a qualitative assessment, and we noted with interest the document which my learned friend, Mr. Beloff, handed up, the Ofcom document – I wonder if I could ask the Tribunal to look at it briefly. I hope the Tribunal remembered my using this word, I used it quite deliberately several times when talking about Ofcom, I said "overall, we agreed with the analysis". We did not quibble with it because ultimately we think that Ofcom did ask itself generally the right questions, and certainly applied ultimately the correct legal test. But we were not looking at the Ofcom report – still less do we look at the Ofcom answers – as I think Mr. Swift was looking to Hansard, for some way of construing the section. The reason we relied on Ofcom was to rebut the suggestion that our interpretation does not permit a full qualitative assessment because that is the key reason why we went to the Ofcom report.

Now, Mr. Beloff took the Tribunal to paras. 1 and 2 (perhaps paras. 1, 2 and 3). I wonder if one could just look at paras. 11 and 13.

THE PRESIDENT: Can you just remind me which tab the Ofcom reference to the advice is?

MR. GORDON: No, I was not taking the Tribunal to the report, but the report is actually at tab 17 of key documents 2. What I was asking the Tribunal to look at was the single document ----

THE PRESIDENT: That is where I put it! (Laughter).

MR. GORDON: Can I just ask the Tribunal to hold the Ofcom document open at para.11 without reading it at the moment and then indicate what we say is the answer to "sufficiency of what?" The answer is, to the question asked by the legislation, "What is the sufficiency of the number of person with control following the application of the deeming provisions?" That is the question the legislation asks. I appreciate that before the Tribunal accepts that that is correct question we have to go to my stages two and three and look at the deeming provisions, but that is what we say the relevant question is. We say that relevant question is answered by a qualitative assessment and we say, just to meet Mr. Beloff's point, that the content or the space to be given to the qualitative assessment is answered in para.11 of this document. What it says is:

> "Our approach to the assessment of the sufficiency of plurality …"

- so it could not be more clearly put by Ofcom -

> "… is set out clearly in our report. As explained therein, the assessment is based on consideration of both the number of persons with control of media enterprises serving the relevant audiences, and their audience shares."

Precisely.

> "This is in accordance with the requirements of the Act and the associated DTI Guidance. The statutory framework does not establish a quantitative test."

So Ofcom is here saying in the clearest possible terms number is relevant – number is, in our submission, relevant, and that is what "plurality" means, but "sufficiency of plurality" is to be determined by looking at the considerations that Ofcom did, and the question there is necessarily audience shares because what you are looking at is, are there sufficient players left after the merger? Are there a sufficient number of controllers with control following the application of the deeming provisions?

The reason why it is there, as we indicated earlier, is because of the fragility of the concept of plurality. One should not dismiss this question of material influence lightly. Why is there deemed control? Because levels of control are subject to flux and to change over time. For example, just to take this case, if you started with 17.9 per cent of a limited company you would be able to obtain a shareholding of up to 30 per cent without triggering a fresh merger situation and therefore fresh scrutiny. You would also, without creating a merger situation, be able to appoint one or more directors of the board. That is why – forgetting this case, forgetting the 20/20 rule – the deeming provisions are not confined to the 20/20 rule. It is a general provision affecting all acquisitions. What we say is precisely because of this inbuilt fragility the question directed by 58(2C)(a) is the one we have

identified. Is that a sufficient number of persons with control following the application of the deeming provisions?

That is our stage one, and it is the answer, we respectfully submit, to Mr. Beloff's question, sufficiency of what? We quite agree that is the first question that has to be asked and answered.

The second point in our response deals with the deeming provisions. We say those deeming provisions obviously have a meaning and one has to find out what the meaning is. I am not sure that there is a great deal of difference between us. I do not think there is as to the meaning. I may be wrong. They are, in our submission, very clear. Where the difference may lie is in their effect. What has to be remembered is, and perhaps this was an underlying central point in Mr. Beloff's address, he was at great pains to say they are different. Of course, they are different in one sense, but they do go together. One of the points we make and have made is that they are complementary provisions which are directed actually to the s.58(2C)(a) exercise.

First of all, it is a long meaning, what are they saying about control? Well, 58A(5) is the key provision. It is deeming a relevant enterprise – we get the number of enterprises from 58A(4) – to be under the control of a single person. So that is the extent of control which s.58A(5) is deeming. It is not deeming a degree of control, it is deeming the fact of total control. Why it is doing it is for the reasons I have already suggested.

THE PRESIDENT: Fragility.

MR. GORDON: So that only leaves the third stage of the analysis. If that is the meaning, what is the effect? It is here that we say that no matter how eloquent Mr. Anderson's submissions were, this tremendously dynamic suggestion of cutting through which sounds as if it ought to be cutting through to the core of something or to some weakness in our argument, it is absolutely senseless in the context of s.58A(5), because why do you need an anti-avoidance provision when the number of persons are still going to be around? What is the difficulty without s.58A(5) of examining degrees of control? The answer is there is not any. You do not need an anti-avoidance provision of the kind in 58A(5) as suggested by Mr. Anderson. The simple answer is 58A(5) can only have one sensible legal effect and that is to deem total control for the purposes of the s.58(2C)(a) exercise and that is reinforced by the fact that that would be entirely consistent, and is entirely consistent, with our suggested interpretation of 58A(4). So the argument that the sections do not talk about the degree of control is wrong, they do; but it is also wrong in terms of the suggested effect of the sections or the sub-sections because nobody has identified the need for an effect, or the

contended effect, of s.58A(5) advocated for by, I think, Mr. Anderson, which Mr. Beloff adopted.

So that is the simple but, in our respectful submission, correct way to analyse the issues that arise.

What I want to do finally is to look at just a few arguments which were raised by Mr. Swift and one or two by Mr. Beloff, but they are not very many and they are sweeping up. In our submission, if the Tribunal focuses upon those three stages and analyses them in the way we have there is no valid counter-argument. May I simply go to Mr. Swift's early points – they seem early, they were just before lunch. At one stage I did get the impression that Lord Puttnam and Lord McIntosh were the answer to the case because they were being bandied around as if they controlled the interpretation of the relevant sections. The key to the points that Mr. Swift was making is, first of all, that Lord Puttnam and Lord McIntosh, when one goes to the citations that were selected by Mr. Swift, were talking about s.58(2C) generally. In other words, they were not focusing upon the specific section with which this Tribunal is concerned, namely 58(2C)(a).

It is worth looking at a citation from Hansard which was not cited by Mr. Swift, which does focus obviously on this particular sub-section. It is in tab 33 of bundle 2 of Virgin's application, which I believe the Tribunal has got. It is not one of the key documents bundles. It is the deliberation starting at column 1431 on 5th June 2003 in the House of Lords on the Communications Bill ----

MR. SWIFT: I am sorry to interrupt my learned friend, we simply do not have this document.

MR. GORDON: I am quite happy to pass it along. I wonder if I could read it. It is in the Virgin application bundle.

MR. SWIFT: If we let Mr. Gordon read it and then if we need to study we can pass it around.

MR. GORDON: I am very grateful. It starts at column 1431, it is tab 33, and if the Tribunal goes over the page we see the citation that Mr. Swift came up with this morning:

> "'Our key aim is to ensure that …"

This is Lord Puttnam citing the Minister, does the Tribunal have that?

> "'Our key aim is to ensure that there is a range of competing voices [etc]'
>
> I stress 'currently' –
>
> 'has universal access to a mass audience – we risk a significant reduction in the number of voices in play in the media, and there would be a risk that one voice could become much louder than the others. That would represent an unacceptable concentration of the influence in the current circumstances.'

The Minister went on to say:

'I believe that such a concentration in one voice would also be harmful to politics, because it could create a media owner so powerful that they could exercise direct influence over political decisions'."

The just skipping the next paragraph:

"In a period of rapid economic, technological and ownership change …"

- the emphasis is on change -

"… the one thing we cannot do is even begin to guess at who might or might not attempt to control this or that element of the media. What we can do, however, is refuse to contemplate any broadly unacceptable level of media concentration where each of the component parts is of significant size and reach in its own right."

That, in our submission, is the key. I am very happy to hand this round.

THE PRESIDENT: Have you found it, Mr. Beard?

MR. GORDON: We can pass it along. That is the point, that is what this is all about, this section. It is all about unacceptable concentrations of separate voices. Mr. Swift did not deliberately cite selectively obviously, if he had not got this, but the point is that the Commission cited the first bit, which was a general bit, but this is obviously highly relevant to s.58(C2)(a). We say that para.802 of the exploratory notes is all of a piece with this approach. I wonder if I could just take the Tribunal to that again. It is authorities bundle 2, tab 41. This makes the point quite specifically again. 802 starts at the foot of the second page at tab 41.

"New subsection (2C) has three elements …"

- and then it sets out those elements. Then we can see seven lines from the end of this paragraph of the exploratory notes:

"The first limb of this subsection is concerned primarily with ensuring that ownership of media enterprises is not overly concentrated in the hands of a limited number of persons."

Exactly, so cross-refer to Hansard, cross-refer to this.

"The second and third limbs of the test look at the content of the media enterprises involved and the extent to which media owners demonstrate a genuine commitment [etc] …"

So certainly the Act is concerned with media plurality in all its forms, sufficiency of media plurality in all its forms, but what the exploratory notes, a permissible aid to interpretation, what Hansard debates show is that there is a specific focus of what has become s.58(2C)(a).

Mr. Swift referred to "bright line rules". He took us to para.60 of the Competition Commission defence. He said the 20/20 rule was a bright line rule. What he was saying by Boolean logic was that our case does not involve a bright line rule. Well, it does and it does not. The deeming provisions are bright line rules. The bright line rules are there for a specific purpose. The purpose is the purpose that we have respectfully identified.

As far as my learned friend Mr. Beloff's points are concerned, I think I have dealt with most of them. There were one or two extra ones. In the mini bundle which Mr. Beloff took us to this afternoon, he referred to tab 4, which I think was the Company Encyclopaedia. He looked at para.1-947 under the heading "Media Public Interest Cases". Obviously what that is is a discussion of the three limbs of the section without focusing on any specific limb. What my learned friend did not take you to, if one turns over the page – this is certainly not authoritative, but it is just an interesting aside – if you look at the paragraph headed 1-948 and look at the last two sentences:

> "Evidently, editorial independence is not considered a warranted presumption."

That apart, my learned friend took the Tribunal to the Commission report, and what we say is that, when one looks at the Commission report it is clear that when one is looking at the analysis of the Commission of the impact of the acquisition, which starts, I think, at para.5.61, those paragraphs are entirely concerned, in the detailed consideration given by the Tribunal, with considerations of internal plurality. That is what they are dealing with. We say that is, for the reasons we have given, an irrelevant consideration.

Finally, I wanted to go to the DTI Guidance at authorities bundle 2, tab 43. Mr. Beloff took the Tribunal to para.7.6 of that document, and presumably took the Tribunal to that document because of the reassuring sounding noises about all circumstances of the case being taken into account. As far as that paragraph is concerned, we would not quarrel with it provided one reads it in this light, that when one considers all relevant circumstances that is what it means, the legally relevant circumstances. It does not mean anything else. Mr. Anderson, for his part, took the Tribunal to para.7.13 of this Guidance. We say that 7.14 on the next page is absolutely key:

> "Where a number of media enterprises would fall to be treated as under common ownership or common control for the purposes of section 26 of the Act, they are treated as being controlled by one person for the purpose of determining whether there is sufficient plurality of control of media enterprises. This is because in assessing the effect of a merger on the sufficiency of plurality of persons with control of media enterprises, the Secretary of State needs to assess

> the total number [we see the number again] of persons with control of media enterprises and what effect the merger will have on the plurality of the media as a whole. Apart from the merging media enterprises, when looking across the spectrum to assess who has control, it is important to be able to look not just at the owners of those entities, but the controllers of those entities to get an accurate picture in relation to plurality in order to carry out the assessment relating to sufficiency of plurality".

Read as a whole, that paragraph, we say, completely supports our interpretation.

Sir, those are my submissions.

THE PRESIDENT: Mr. Gordon, just before you finish, can I take you back to sub-section 5 again? It is my fault. I just want to be absolutely sure that I have understood where the argument really bites. We get to the deeming of a single controller in sub-section 5. Now, is the next logical step in your argument from there, which excludes the consideration of the degree of control -- Is it because the implication of that is that a single controller can only have total control?

MR. GORDON: Absolutely, yes.

THE PRESIDENT: So, it is a sort of double-deeming really. There is an implication as well.

MR. GORDON: Absolutely.

THE PRESIDENT: It is not just that one deems there to be one controller, but one also deems that controller to be ----

MR. GORDON: Yes. It is quite important that it says 'only one person'.

THE PRESIDENT: Yes.

MR. GORDON: That is exactly the effect of this section.

THE PRESIDENT: You say that it is really that that excludes -- It does not necessarily exclude it, but it just means that if you are going to consider him, you consider him as having total control.

MR. GORDON: That is right. The reason you do that is because -- First of all, nobody has suggested a reason for needing an anti-avoidance provision to allow degrees of control to be examined. So, what is the purpose of this? Well, the purpose of this is that (4) and (5) link into the s.58(2C)(a) exercise. S.58A(5), in its meaning -- its deeming meaning is entirely clear. It is deeming single control and total control. It is doing that precisely for the purpose of the s.58(2C)(a) exercise. So is (4). (4) is reducing the number of enterprises. (4) and (5) go together in providing a framework for the s.58(2A) exercise, and they are

doing that -- the reason -- the whole rationale for doing that is the fragility of plurality of the media in this context.

THE PRESIDENT: You do not want to leave anything to chance because it is too important to leave it to chance. So, you impose what may be an artificial ----

MR. GORDON: Things can change. Because of the flux point, things can change so quickly in terms of increasing influence reducing plurality before you ever get to another scrutiny.

THE PRESIDENT: What about Mr. Anderson's point that sub-section 5 is really just avoiding the problem you get where you get a group ownership or you get several people who could - I do not know - have equal shares in a company, and it really is just so that you treat them all as being one.

MR. GORDON: But that is not what it says. It says, "For the purposes where two or more media enterprise . . . They shall be treated as under the control of one person". It is not limited to any form of anti-avoidance. It is entirely without ambiguity - and not only without ambiguity, but with a totally coherent, intended legislative effect.

I am reminded - I had forgotten, and I will not, at this late stage in the afternoon, remember where to find it in the labyrinth of *IBA* - that somewhere in the judgment of the Vice-Chancellor he said you do not put a gloss on the provisions of the Communications Act or the Enterprise Act. They mean what they say. I am speaking from memory without the passage in front of me. But, we do say that even without the assistance of the learned Vice-Chancellor this is as clear as daylight. It could not be clearer. When you link it to everything else, and you link it to the other provisions, you link it to a very important point that if any other view is right you might as well collapse 2C(a), (b), and (c) in terms of what qualitative assessment was going to be. These are distinct provisions, as the Hansard extract showed, as para. 802 of the Guidance shows, and they have a clear purpose.

In my submission Mr. Beloff was right to acknowledge that s.58A(5) created difficulties for his side -- or, created problems (it was not entirely clear) if you do not take the clear and obvious meaning of the sub-section. The clear and obvious meaning, in our submission, is what it says, and how it links into everything else. We do suggest that the Tribunal analyses it in the three stages we have suggested.

THE PRESIDENT: We are going to have to analyse it in a lot of stages.

MR. GORDON: I am sure.

THE PRESIDENT: That is very helpful.

MR. BELOFF: Sir, could I just say that I did not say that it created difficulties for our side. I said that it created certain difficulties of construction, but that however it was construed it was consistent with our overall argument - that advanced by my learned friends.

MR. SWIFT: May I have one postscript? The suggestion that in some way I have been a bit selective in the quotation from Hansard when I opened -- Mr. Gordon drew your attention to a document in the Virgin application. I had not realised when I said we had not got it. In fact, it is Tab 42 of Bundle 2 of the authorities. That is not the reason why I have got to my feet.

The reason I have got to my feet is that what Mr. Gordon did not cite is the passage at p.455 -- I can read it into the transcript. This is Lord McIntosh. He is dealing with s.58(2C)(a) I think in its penultimate state before it became statute. He says,

> "What we can do, however, is refuse to contemplate any broadly unacceptable level of media concentration where each of the component parts is of significant size and reach in its own right".

That is entirely consistent with what I said. Then he goes on to say,

> "What we need therefore is the ability to identify these concentrations as and when they occur, examine them in an analytical, fact-based way, and ask whether they fit our definition of unacceptable. The drawback of relying on cross-media ownership rules is that they can all too easily be overtaken by changes in market circumstances. As Dr. Howells acknowledged in response to a question from Andrew Lansley … during the Committee stage. We must also dispel the current fantasy that should unacceptable levels of ownership emerge, regulators can move swiftly to put the genie back in the bottle."

and then he refers to the consumer who is protected by competition policy.

"For the citizen, we have the public interest plurality test. Together, they represent a formidable duo, and they are both flexible and future-proof."

– each balances the other, no indication that one is being subject to a quite different test than the other, so in my submission Hansard is definitely on the side of our approach in terms of context.

THE PRESIDENT: Tab 2, is it?

MR. SWIFT: It is tab 39, I am very sorry, and it is bundle 2 of the authorities. I am grateful for the opportunity to make that observation.

THE PRESIDENT: Thank you very much. Is that it? (Laughter) Well thank you all very much indeed for all the assistance you have given us. Needless to say we are not going to give an extemporary judgment now. Thank you.

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