**IN THE COMPETITION APPEAL TRIBUNAL** Case No 1059/4/1/06

Victoria House,
Bloomsbury Place,
London WC1A 2EB

11th April 2006

Before:
MARION SIMMONS QC
(Chairman)

PROFESSOR ANDREW BAIN

VIVIEN ROSE

Sitting as a Tribunal in England and Wales

BETWEEN:

**CELESIO AG** Applicant

and

**OFFICE OF FAIR TRADING** Respondent

Supported by

**ALLIANCE UNICHEM PLC**
and
**BOOTS PLC** Interveners

Mr. Mark Hoskins and Miss Kelyn Bacon (instructed by Linklaters) appeared for the Applicant.

Mr. Peter Roth QC and Mr Daniel Beard and Mr Julian Gregory (instructed by the Solicitor to the Office of Fair Trading) appeared for the Respondent.

Mr. Nicholas Green QC and Miss Maya Lester (jointly instructed by Slaughter and May and Allen & Overy LLP) appeared for the Interveners

Transcribed from the Shorthand notes of
Beverley F. Nunnery & Co.
Official Shorthand Writers and Tape Transcribers
Quality House, Quality Court, Chancery Lane, London WC2A 1HP
Tel: 020 7831 5627 Fax: 020 7831 7737

# PROCEEDINGS

THE CHAIRMAN: Can I say at the outset how helpful all the submissions have been. We appreciate the work which must have gone into it by all the parties, and the co-operation between the parties in order to prepare the case within the tight timetable. So, thank you very much. Can I also warn everyone that at ten o'clock the fire alarm goes off. Hopefully we can ignore the fire alarm today. The timetable for today: you will have seen the letter sent by the Tribunal yesterday afternoon. We would appreciate those time limits being kept to. We have included in that timetable forty-five minutes for the intervener, but we do wonder whether, on the issues that now remain, the intervener adds very much to the OFT. So, we flag up again our concerns about avoiding duplication.

Admissibility. We do not intend to make an interim decision, but will deal with admissibility as part of our overall decision. I assume that is what was intended. The issues today: we are proceeding on the basis that Issue 1 of the Grounds of Appeal is no longer being pursued. We received last night a note from the OFT containing further disclosure of third party material. At the last CMC it was indicated that the parties probably were not relying on third party material. We are unclear as to why it is still a live issue. If there is still a live point perhaps that can be addressed at the beginning of the submissions of Celesio so that, if necessary, the point can be dealt with at the outset.

Can I just mention the question about Mr. Ash's evidence which was the subject matter of some correspondence yesterday. In Mr. Ash's witness statement, he refers to para. 2.16 of the Response to the Issues letter. He gives the reference for that as IB32 – it is actually IB30. We note the response of Celesio. The matters referred to by Mr. Ash were part of the evidence before the OFT, and accordingly possibly part of what is relied on in para. 46 of the decision as elucidated in para. 57 of Pritchard. We are therefore a little uncertain as to the effect of the Linklaters' letter of 10 April, yesterday, and would just like some clarification as to the point so that we are clear as to the submissions that Celesio are making.

Finally, I would just mention the question of how confidentiality is being dealt with today, having regard to the fact that this is a public hearing. If confidential material is being used today, then I want to make sure how we are just going to deal with that. Those are my opening remarks.

MR. ROTH: Thank you. First, just picking up your last point, Madam, about confidentiality, just so that everyone is clear. I hope the Tribunal received a version of the decision which is the unredacted version, but with those matters that are confidentiality not only, but also, in bold?

THE CHAIRMAN: We did.

MR. ROTH: I hope it is therefore clear what can be said publicly, and what not. Where express, specific figures are given in that document, one can, of course, refer to them by giving a range as in the non-confidential version which is with the application. That is the first point.

The second point is just to correct a cross reference in Mr. Pritchard's witness statement, in Footnote 16 on p.15. This is a Boots document. It should not be OFT1, Tab 11. It should be intervener's bundle ----

THE CHAIRMAN: Sorry? Mr. Pritchard's witness statement?

MR. ROTH: It is p.17, I am told. But, it is Footnote 16. The reference should be not OFT bundle, but intervener's bundle at Tab E/11. We have, I think, managed not to duplicate documents between the bundles, but that led to some last minute re-bundling. Finally, just in response to your observation about our note of yesterday – as I am sure the Tribunal will appreciate – that was purely responsive to the submissions made about disclosure in the Celesio skeleton. That is why it was put it, and put it when it was put in – because we got that on Friday.

THE CHAIRMAN: Thank you. Mr. Hoskins, taking the last point first, is the third party matter still a live issue?

MR. HOSKINS: I think it is, because our understanding at the CMC was the same as you have indicated this morning. I do not know if you have the transcript in front of you of the CMC. At p.3 of that transcript I say at the top, "I think we're pretty well there in relation to our material, which is one outstanding issue which Mr. Roth and I have been discussing, but I'm hoping we can simply agree that between us, but it's not been raised with me as an issue". Third party confidentiality ---- I do not how big an issue it is at this stage. Obviously, all I can say is that we will want to see anything that is relevant, but I do not see how they are to seize that issue. I was certainly under the impression that if third party material was going to be referred or relied upon by the OFT, some steps would be taken to have it disclosed – or a least the OFT would be alive to the issue that it is wanted to rely on third party material; that there was an issue about disclosure.

Mr. Roth dealt with third party material at p.6 of the transcript. It begins at l.3. He says, "The third category is what has been referred to as third party material. At the moment I would ask you not to hold me to that because we have not finished our submissions. Really, the only third party material concerned is that from the applicants themselves, either in this case or in the Lloyds case just beforehand". So, that is what I understood they were going to refer to and rely upon. Indeed, at the end of that section – if we pick it up again at l.12, Mr. Roth said, "Beyond that we do not at the moment see that we would be wishing to disclose third party submissions. That does, as you know from previous cases, present problems" because the third

party who is concerned about the confidentiality is not here to address you because in the past in these cases one has managed without having to do that.

So, my understanding, coming away from that CMC was that there would be no reliance on third party material by the Office, and yet when one got the skeleton and Mr. Pritchard's witness statement, there is reference frequently, particularly in Mr. Pritchard's witness statement, to third party material.

THE CHAIRMAN: Have you identified what the third party material you consider the OFT are relying on which you want to see?

MR. HOSKINS: Madam, that is not the way we put the point. The point is this: the respondent in judiciary proceedings has an obligation of full and frank disclosure. We know, because Mr. Pritchard tells us, that the Office received submissions from twenty-eight third parties, including Celesio. The only material we have before the Tribunal are the merging parties materials and our materials. We have seen nothing of the 27 other third parties. Mr Pritchard refers to third parties' materials in part of the narrative and very much so in support of the Office's case; he will refer to third parties where it supports the Office's case. We say it is self-evident that amongst the material provided by the 27 other third parties there must be some material that undermines the Office's case, it would be extraordinary of all the 27 other third parties who intervened were all in support of the merger – it is possible, but we say highly unlikely.

Sir, the problem we have is that in a normal judicial review if the respondent wants to rely on third party material, it would start with the obligation of full and frank disclosure and should have to say "This is the third party material that helps us, but in order to be fair there is some third party material that does not help us, and here it is. The problem here, of course, is the confidentiality issue: because of the expedited nature of the proceedings, technically what the Office could and should have done, if there were a longer timetable, is to deal with the third party issue, because of course it is not simply that it can never disclose third party material. If the Tribunal makes an order, for example, then that third party material can be used, but ideally one would want to hear the third parties before making an order. That is the catch 22 and that is the situation we are in. It is not that we want to say well actually we want to see all 27 documents for the sake of it, our point is the one that we refer to in the skeleton and it is a point that was grappled with by the Tribunal in the *IBA* case, which is how do you deal with this catch 22? On the one hand judicial review requires full and frank disclosure – good and bad material has to be disclosed – and on the other, because of the confidentiality issue – you often do not see it. That is the way we raise the point and that is why we rely on the way in which the President dealt with the point in *IBA* because it seems to us that that is the only place where

it has actually been considered as a specific issue, and it seems to us that that is the right solution.

That is the way we raise the point and that is the way in which we rely upon it, that is the issue that was dealt with by the President in *IBA* and we say that is the proper approach in this case. There is no specific disclosure application, that is not our point, our point is that it is the Office's full and frank disclosure and their hands are tied by confidentiality; the question is what flows from that.

THE CHAIRMAN: Shall we hear what Mr Roth says?

MR ROTH: Thank you. I can either deal with this fully now, or in substantive submissions, but the short point is that this is really quite an extraordinary opposition that Celesio is taking. Third party material is relied on repeatedly in the Decision; this is a challenge to the Decision. You have read and I suspect re-read the Decision by now, and repeatedly in the relevant sections is reference to third parties saying this; indeed, at the end there is a whole sub-section of the Decision headed "Third party submissions", saying how important they are, and of course they are important in every one of these cases – that is well-known to everyone involved in the procedure. When at the CMC I broke down the issues of disclosure into three and said that the first was the Decision itself, which is the page before that was read, you may remember, the second those UniChem submissions, the third the third parties, and I said the only third party submission that seems to create any issue is the Lloyds Cohen because we wanted to rely on that because of who the applicant is in this case. I made quite clear that we would wish to disclose other third party submissions; you made clear, madam, that if there were any wish to see them, because I referred also to our restrictions on the Part 9 of the Enterprise Act – so we are not like any other respondent, we cannot just put it on the table.

THE CHAIRMAN: That is accepted by everyone.

MR ROTH: Which is accepted. That you would be available for an application to make an order if necessary. The applicants did not make any application; having decided not to make an application they say now the Tribunal is stuck in a catch 22 and the only way that can be resolved is by annulling the decision and making, effectively, instruction that when it is reconsidered should be referred to the Competition Commission. They rely on what the Tribunal said in *IBA*; the Tribunal indeed did say that that is a problem and those are precisely the remarks of the Tribunal which received, to put it slightly impolitely, robust criticism from Carnwath LJ in particular in the Court of Appeal, saying there is not that problem at all and that that is a misunderstanding of how judicial review works. I can take you to the passage, but I suspect you are familiar with it and we refer to it in our skeleton argument. So there is no such grounds for complaint here whatsoever, and no difficulty arises, there is no catch 22 and

what the applicants are seeking, as Mr Hoskins, frankly, made quite clear in what he just said, is to fish around and see is there something that might help them, because as he put it is very unlikely that among the 27 third parties is not something that might help the applicants, so they want to conduct a sort of adversarial litigation – in fact going beyond that even under the traditional old-fashioned disclosure test, a *Peruvian Guano* exercise, seeing if they might find something there, and they are relying on it. That is not the approach to disclosure in judicial review and this whole point is completely misconceived.

THE CHAIRMAN: What concerns us is the relevance and whether, in fact, on the issues which are now going to be decided there is any third party material which is relied upon.

MR ROTH: You appreciate, of course, Mr Pritchard made his witness statement before ---

THE CHAIRMAN: Absolutely that is why ---

MR ROTH: So a lot has fallen away now.

THE CHAIRMAN: And whether there is anything there. That is why I put it in the way I did at the beginning, whether there is anything there that is relied on which is third party material, or whether that really all went to the first issue which has now gone.

MR ROTH: This is now, effectively, a reasons challenge, saying that the reasoning is not adequate. That is what it comes down, in effectively the amended grounds, and on that I think the answer is not, although looking at Mr Hoskins and Ms Bacon's skeleton it does sometimes seem to stray back occasionally into a sort of substantive grounds as opposed to a reasons ground, but on the approach whereby the OFT decided that there is no risk of an SLC at a four to three reduction as opposed to the possibility of a three to two eventual reduction, that is not on the basis of third party comments and so, if I may say so, it is not relevant to what seems to be now the real point in this case.

THE CHAIRMAN: We will have to see how that turns out.

MR HOSKINS: If Mr Roth's position is that he is not relying on this any more, I do not have a problem, but if when Mr Roth comes to make his submissions he is saying that we have found that there was limited competition etc because Pritchard tells us that it is so, and one of the reasons is because third parties told us, that is where the problem arises. As you will see from our skeleton, our challenge is a clean judicial review one, but it is the OFT that has muddied the waters because the first point I am going to turn to is you have the Decision and you have Pritchard and they do not match.

THE CHAIRMAN: Probably the way to proceed now is just to see what Mr Roth does, but Mr Roth having heard what has been said, my understanding at least at the moment is that you are not relying on any third party material for the issue which is now before us.

MR ROTH: Not on that specific point, but of course the decision, as Mr Pritchard explains, on four to three, as on three to two, as on two to one – although it is not complained of – all of them are based on the evidence of how the market works and what sort of competition in the market exists, and that did of course depend on evidence from everyone – third parties, Celesio, the merging parties, customers, ECTs and so on, and that is of course what is in 36, where they describe the nature of competition and pricing and so on. Yes, all of that is the background against which one judges how much competition is there in this market. That is clear, it is clear from the Decision, you do not need to look at Mr Pritchard.

MR HOSKINS: It strikes me that there is probably not much point in debating it any further now, let us see where it goes.

In relation to Mr Ash's evidence, Mr Pritchard made some factual points that were not in the Decision so it was the first time we had seen them, about regulation of opening hours and the requirement to have a consultant's area. Obviously, my clients, when they saw this, said that is simply not right, so we thought it was important, given that that had arisen that Mr Pritchard's witness statement should correct that. As I said, I am not intending to make a free-standing submission on it, but it seemed to us that it was important to correct what we believed to be a factual error in Pritchard. It is probably not going to go anywhere with the Tribunal today because it is not the sort of issue that you can decide. It may well be that if it goes back to the OFT the point will be taken up.

THE CHAIRMAN: Except if we referred it on a point it would not be taken up.

MR HOSKINS: Sorry, if you referred it on a point it would not be taken up?

THE CHAIRMAN: If we quashed the Decision and referred it back completely then the whole thing is going to be considered, but we do not have to refer back the whole of the Decision so it may be, I do not know, that we decide to refer back on a limited basis, and then it would not be taken up.

MR HOSKINS: It depends whether it was relevant to the particular reference back, but that is something that can be worked out after the event. It just seemed to us it was important not to leave that issue unchallenged, but it is not something I am going to make a free-standing submission on today. If, by the time we come to the end of my reply, there is a concern with the Tribunal about relevance and how that is viewed, obviously I can address it then, but I suggest it is probably one where we see if there really is a need to focus on it in submissions.

THE CHAIRMAN: Is it part of the evidence on which the OFT would rely in paragraph 46?

MR HOSKINS: Of the Decision? We say the first sentence of paragraph 46 is a statement of a conclusion not a reason, but it is material that Mr Pritchard refers to when he tries to gloss the Decision, so our submission would be that this point is not relevant to the Decision, certainly

not in relation third party paragraph 46, but if we get into looking at Mr Pritchard then it might become relevant.

THE CHAIRMAN: You say it is not a point that was taken in the Decision.

MR HOSKINS: It is not on the face of the Decision.

THE CHAIRMAN: It is now being said that it is somewhere in the Decision, by Mr Pritchard. If Mr Pritchard is elucidating the point paragraph view which is the OFT's point of view then it would be part of the Decision.

MR HOSKINS: We have made the point that we actually think that is an error of fact, but if I lose on all my submissions today and that is the only thing that is left, I will not be submitting that we nonetheless win the case on that point.

THE CHAIRMAN: Thank you.

MR HOSKINS: In terms of the bundles, it is probably worth making sure quickly that we are all working from the same script. There should be three applicant's bundles, there are the first two which are white bundles and are our applications and authorities, and we have submitted a further short bundle with our skeleton in.

THE CHAIRMAN: If it helps you, the two white bundles are marked for us 1 and 2. The extra bundle is bundle 6. I have it as a blue bundle. Then we have Confidentiality A and B as 3 and 4. The intervener is 3, the OFT is 4 and we have a bundle of authorities which is 5.

MR HOSKINS: Thank you very much.

THE CHAIRMAN: Does that sort that out?

MR HOSKINS: It does, and I will try and keep to those numbers. If I could just base my submissions on the skeleton argument as I think that is the quickest way to do it, the scope of the appeal we have set out and I will obviously take you through that. The test for review by the Tribunal – this is picking up the skeleton at para. 3 ---- There is probably no harm in just starting at the beginning and very quickly looking at the sections. I am sure you are well aware of them. We have copied them, just for ease of reference. I do not know if that is going to be easier if I hand them up. (Handed) We are concerned primarily with three sections, but it is worth looking at four of them. Section 33 is the duty to make references, and, in particular, Section 33(1)(b)is the section we are concerned with. Obviously, the crucial point there is that the OFT has to make a reference if it believes that it is, or may be, the case that the creation of that situation may be expected to result in an SLC. So, the double 'may' is obviously important. Section 36 is just useful terms of contrast, and one sees it in the judgments – because that is the obligation on the Competition Commission if a reference is made. Again, it is Section 36(1)(b): "The Commission shall, on a reference under Section 33 decide the following questions". One sees in the cases the distinctions made between the OFT's role and

the ---- Section 73 is the power to accept undertakings in lieu of a reference and it is particularly Section 73(2) that we are concerned with. Section 120 is the power of the Tribunal to conduct a review, and, in particular, one needs to look at Section 120(1), 120(4) (which is where one sees the parallel of a review being drawn) and (5) which is the powers of the Tribunal which differ from an infringement appeal. (After a pause): That is the complete statutory framework that we are concerned with.

In terms of the cases, all the parties have summarised bits of the cases, etc. Can I just take you to just a very few paragraphs, just to highlight the particular ones upon which we rely. If I can start with IBA in the Court of Appeal. That is in Bundle 2, Tab 6. First of all, looking at the Judgment of the Vice-Chancellor which begins at para. 1, I would like to pick it up at para. 47, at p.10. Paragraph 47 distinguishes between Section 33(1)(b), which is the OFT's obligation under Section 36, "The belief that must be held by OFT under Section 33(1)(b) is that it is, or may be, the case that this introduces two alternatives. The certainty posed by the word 'is' and the possibility envisaged by the words 'may be'---- " and the Vice-Chancellor goes on to distinguish between Sections 33 and 36.

Paragraph 48 is important because he explains: "At the other end of the scale, it is clear that the words 'may be the case' exclude the purely fanciful because the OFT, acting reasonably, is taken to believe that fanciful may be the case. In between the fanciful and the degree of likelihood less than 50 percent, there is a wide margin in which the OFT is required to exercise its judgment".

So, if the prospects of there being an SLC are between fanciful and 50 percent or above, then there is an obligation to refer.

Then para. 58 – this is the debate about the application of the Wednesbury test in the context of this particular statutory context. First of all, at para. 58 the Vice-Chancellor sets out certain of the paragraphs in the CAT Judgment (223, 224 and 225). If I can ask you to look at 225, which is at the top of the second column on p.12, "As a matter of general approach, the broad question we ask ourselves is whether we are satisfied that the OFT's decision was not erroneous in law, and was one which it was reasonably open to the OFT to take, giving the word 'reasonably' its ordinary and natural meaning". That is what the CAT said was the approach. At para. 64 the Vice-Chancellor accepts that is a proper approach. "For these reasons I reject the first and third objections raised. I do not consider that CAT adopted the wrong standard of unreasonableness when seeking to apply the Wednesbury test". So, their application is, "Was the decision reasonable in the ordinary meaning of the word?"

If I can look at UniChem, which is in the same bundle at Tab 3? UniChem was a decision of the Tribunal, having had the benefit of the Court of Appeal's Judgment in IBA. If I can ask

you, first of all, to turn to para. 168, which is on p.67 ---- The previous pages, beginning at p0.63, are where the Tribunal sets out what the Court of Appeal found in IBA. So, it is simply a recitation of IBA. But, a new point comes in at 168 and 169. There is a reference to the European Court of Justice and Tetra-Laval. Simply picking up the quote as to the standard of review to be adopted ---- I pick it up about half-way through: "Not only must the Community courts **inter alia** establish whether the evidence relied on is factually accurate, reliable and consistent, but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation, and whether it is capable of substantiating the conclusions drawn from it". We are going to rely in particular on those two principles – the need to take into account ---- the need to make sure that the evidence before the decision-maker contains all the information necessary to take account of a complex situation, and also whether the evidence that is before the decision-maker is capable of substantiating the conclusions drawn from it. Those will feature very heavily in our submissions.

Over the page, at p.68, para. 172 elucidates further on this notion of something between fanciful and less than 50 percent. The Tribunal said in the third sentence of para. 172, "We also accept Unichem's point that when, in para. 48 of IBA the Vice-Chancellor said 'between the fanciful and the degree of likelihood of less than 50 percent there is a wide margin on which the OFT is required to exercise its judgment', he was not implying that the OFT had a wide discretion – only that the degree of likelihood of an SLC will vary widely, depending on the circumstances". That meets a point which one finds in the interveners' skeleton argument where they say that that passage of IBA means the OFT has a wide discretion. That is clearly not correct, because the Tribunal has told us that in UniChem.

Paragraph 173 – "We also accept the submission that the Tribunal's approach must be multi-layered. The first question is whether the OFT has properly evaluated the primary facts of the case. The second question is whether on those facts the OFT was entitled to draw the conclusion that there was an insufficient likelihood of SLC". One sees there an echo – a parallel – with the second part of Tetra-Laval that I just referred to, and indicated that we are relying on.

Then, para. 174 – "A succinct expression of the legal test is set out in ----" etc. It looks at the concept of reasonableness. Picking it up about half-way through that paragraph, "Indeed, it appears to be common ground that the Tribunal has jurisdiction, acting in a supervisory, rather than appellate capacity to determine whether the OFT's conclusions are adequately supported by evidence; that the facts have been properly found; that all material factual considerations have been taken into account and that material facts have not been omitted". So, again, one sees the two points that we are focusing on. First of all, have all material factual

considerations been taken into account? Secondly, have the facts that have been taken into account ---- are they sufficient to support the conclusion? Are they adequate to support the conclusion? That, we say, is the legal framework. That is certainly the legal framework that we rely upon.

If I can pick up our skeleton argument at the bottom of p.4 – the nature of the appeal – I can begin to look at the relationship in law between the decision and a witness statement that seeks to expand upon it. In this case, obviously, the review is of the decision, and the question is what relevance, what weight, etc., what admissibility does Mr. Pritchard's evidence have? The best place to see the legal principles applicable to this is in Somerfield, which is in Bundle 5, Tab 13. Somerfield was an appeal against a decision of the Competition Commission –so, the next stage from this. But, at p.24 and onwards the Tribunal considered the issue as the heading indicates – Witness Statements in a Judicial Review under Section 120. It made general observations that apply equally to this sort of review.

If I can look at two particular paragraphs – the ones identified in the skeleton argument. First of all, para. 64. This is looking at the general principle in judicial reviews. We are not looking at just Section 120 reviews. This is the general principle of judicial review in **Ermakov**. "The court can and, in appropriate case, should admit evidence to elucidate or, exceptionally, correct or add to the reasons; but should, consistently with Steyn LJ's observations in **Ex Parte Graham**. Be very cautious about doing so".

That is clearly a statement that applies generally to judicial review. Equally at para. 67: "Accordingly, we would anticipate that in most cases such as this supplementary witness evidence from the CC should be kept to a minimum. As with judicial review generally [so we are about again to get a general statement about judicial review, not just a review of CC decisions] any witness statements that are necessary should be closely cross-referred to the report under consideration with any appropriate explanation of the relevance of the additional evidence, bearing in mind that it is the report, not the witness statement that is the subject of the review. While it may be helpful for a witness statement to elucidate technical matters contained in the report or respond to evidence submitted by the applicant, witness statements are not submissions and should not need to repeat or place any particular gloss on the report in question".

The interveners say Somerfield is only about a review of CC decisions, and these two paragraphs clearly show that there are general statements about the scope for evidence supplementing a decision in judicial review.

THE CHAIRMAN: In para. 66 there was a distinction made between the CC and the OFT, and that is, for my part, quite an important distinction.

MR. HOSKINS: There is a distinction. However, at para. 64 **Ermakov** is undoubtedly a general judicial review, and para. 67, because of the words in the second sentence, as with judicial review generally, is clearly making a statement that is valuable. I accept that CC decisions are more fully reasoned. I simply rely on the general statements that we see.

I am sorry to switch back - but I think it is important to take these things in order – to IBA very briefly in the Court of Appeal. In Bundle 2,Tab 6, at para. 106 he says there is certainly nothing unusual, particularly in a case which has to be dealt with in a relatively short time scale for the stated reasons that will be amplified by evidence before the court. "In some areas of the law the court may need to be circumspect to show that this is not used as means of concealing or altering the true grounds of the decision. That does not arise in this case. As I understand it, no objection had been taken to any of the evidence to be put before the Tribunal or additional evidence adduced in the Court of Appeal".

So, the first point is that whilst in that case no objection was taken to the extra evidence submitted, it is clear that evidence may not be admitted which is used as a means of concealing or altering the true grounds of the decision. That is probably self-evident. We probably do not need Lord Justice Carnwath to tell us that. There it is in black and white.

You will have seen from our skeleton argument that our submission is that Mr. Pritchard does introduce evidence that is inconsistent with the decision, or at the very least glosses the decision. I will develop that point when I come to Mr. Pritchard's witness statement. What I would like to begin with is the decision itself. In the skeleton argument at p.6 onwards I have set out the relevant paragraphs of the decision. It is probably also useful to have a copy of the decision open at the same time so that one can see the context. The decision is in Bundle 1 at Tab 3. As the Tribunal will be aware, in the decision there is a finding that an SLC may arise in relation to areas where there is a reduction from two fascias to one, and three to two areas. In relation to four to three areas, the conclusion is that there may be a lessening of competition, but it is not expected to be substantial. That is basically what that bit of the decision is about.

However, it is important to look at the reasoning by which that conclusion is reached in the decision. First of all, the starting point at para. 38 ---- If one looks at the decision at para. 33 on p.9, different evidence that was available to the OFT is set out, and then at para. 38, the sub-conclusion in terms of the reasoning that has been put forward there is that there is nonetheless some evidence to suggest that the reduction in pharmacy facia numbers could bring about a reduction in competition whether by lowering service/quality levels, or reducing choice in the quality of level, or affecting prices, particularly for fee medicine. So, an acceptance that there is some evidence to suggest possible reduction in competition as a result of reduction in facia numbers.

Then, if one looks through the decision and goes to para. 43, one finds what is entitled 'Conclusion on Local Overlap Analysis'. So, this is bringing everything together. In para. 43 one finds the conclusion which is reached in relation to two to one areas. I have picked up ---- It is the last part of para. 43. It is in my skeleton argument at para. 16. "The parties internal documents do, however, show that a level of competitive interaction between retail pharmacies does exist, and that new entry will usually prompt some competitive response. Such evidence will clearly [and obviously I emphasise the word 'clearly'] suggest that the reduction in pharmacy fascias from two to one within a one mile radius could lead to reduction in the incentives to compete, and have a detrimental effect on various matters".

So, the structure of para. 43 is that there are things that go in terms of finding a reduction in competition, and things that suggest not a reduction in competition, and then the conclusion in relation to 2(1). There is clearly, in relation to two to one reductions, the possibility of a reduction in competition. It is important to understand the structure of the reasoning – weighing up in conclusion the use of the word 'clearly'.

One then finds the same structure in relation to three to two reductions in para. 44. It starts with, "The pharmacy sector is unique in terms of being a highly regulated retail sector ----" etc., etc, but then comes the conclusion: "What does the OFT actually conclude?" Again, I am going to set it out in our skeleton at para. 17(a) . It is the last few sentences of para. 44. "Even in those areas [that is the three to two areas] switching of customers between Boots and UniChem stores may be high [not just 'may happen'; 'may be high'] and for a large proportion of customers [so, not for some customers – for a large proportion of customers] Boots and UniChem would be the closest competitors." Then the next part: "This may arise particularly in those localities where the merging parties' pharmacies are located close together. In such a situation, the competitive scenario post merger does not significantly differ from that in the two to one areas".

Then, at para. 45 it considers the barriers to entry and concludes, "On balance the OFT believes that an SLC may go beyond those areas outlined at para. 43 [that is, two to one areas] and may also arise where facia are reduced from three to two within a one mile radius". So, those are the conclusions in the decision on three to two reductions. It is clear that the conclusions are as follows (and this is para. 18 of our skeleton), "The OFT finds in the decision that a reduction from three to two may lead to an SLC in all such areas – not just some three to two areas, or a very limited number of three to two areas" – because that is what is said in para. 44. One can see that point particularly if one looks at the third last sentence of 44 and the second last sentence of 44. The third last sentence has the general conclusion of an effect on

competition. The second last sentence says, "And this is a particular problem in certain areas". It is not saying that it is not a problem in the other areas.

PROFESSOR BAIN: Could I just ask, Mr. Hoskins: you are distinguishing between the word 'particularly', which you stress, and an alternative which might have been 'in particular'. These would have different connotations. You are stressing that the word used is actually 'particularly'.

MR. HOSKINS: I am stressing what we say is the juxtaposition between the third last sentence and the second last sentence, and we say the only natural reading, given the general terms of the third last sentence which finds that switching of customers in three to two areas may be high, and for a larger proportion of customers in three to two areas means UniChem would be the closest competition. We say the only natural reading of that is in three to two areas generally.

PROFESSOR BAIN: If you were to change 'particular' to 'in particular this may arise in those localities', that, to you, would change the sense of that sentence.

MR. HOSKINS: I am not sure. My submission would be that it would not make a difference.

THE CHAIRMAN: Mr. Hoskins, following on from that, in such a situation is that referring to the previous sentence so that there were sort of three levels, and they are looking at the whole area, and they say that for a large proportion of customers ----- and then 'this may arise particularly where the merging parties' pharmacies are located close together' ---- in such a situation, i.e. where the merging parties' pharmacies are located close together, the competitive scenario post merger does not differ.

MR. HOSKINS: I think it is ambiguous. I think it could either refer to 'in such a situation of three to twos' or in the particular situation of three to twos, where Boots and UniChem are the closest competitors. I do not know the answer. It is ambiguous.

THE CHAIRMAN: Is that not an area where maybe we ought to look at Mr. Pritchard and see whether he helps us out?

MR. HOSKINS: If he helps us out on that. But, of course, as we will see when we come to Mr. Pritchard, he throws the baby out with the bath water because he does not get anywhere close to this sort of analysis. That is the problem with Mr. Pritchard. But, certainly, if Mr. Pritchard dealt with that ambiguity in a way which was not a gloss or inconsistent, yes, that is the sort of thing one could look at Mr. Pritchard for.

So, there are two points in relation to the three to two reductions. First of all, the finding is that there may be an SLC in relation to all three to two areas. Secondly, it is important to look at the nature, or the degree, of the lessening of competition that is identified. It is not low level; it is not marginal. It refers to high switching of customers, and it refers to 'for a large

proportion of customers Boots and UniChem would be the closest competitors'. So, it is not marginal competitive effect – it is high, and it is a large proportion of customers affected.

THE CHAIRMAN: So, for your case do you need to go as far as the highest – in other words, all cases – or is it sufficient for you that it is limited to the last sentence?

MR. HOSKINS: It depends how tailored the Tribunal's remittal is, because we say there is a problem with all three to two areas, and we also say, further or alternatively, the OFT has failed to appreciate that insofar as there as there may be a problem with just some three to two areas, you may have a problem with just some four to three areas. But, I certainly do put my case at the moment on all three to two areas – on our further or alternative reasons.

Then one goes to what is said in relation to para. 46, which is obviously the most crucial paragraph of the decision for the purposes of this appeal. It really breaks into three sections. The first section is the first sentence: "Any higher reduction in facia number than this – for example, four to three or higher – could also give rise to a lessening of competition. But, on the basis of the evidence before the OFT it believes that this cannot be expected to be substantial".

The second part is the next sentence. "One major competitor suggested that it would be usual to face two other competitors within a local area".

THE CHAIRMAN: That is abandoned, is it not?

MR. HOSKINS: Exactly. That is abandoned. The third part is, "Moreover, the CC's 1995 report considered only two to one facia reductions. While there have been small changes to the market since then … removal of resale price maintenance on OTC medicines, which might suggest some small increase in the scope for potential competition, these changes do not support an argument that reductions from four to three fascias might give rise to competition concerns". There is an obvious typographical error there. It should be the 'MMC's 1996 report' that is referred to.

So, let us break down the three sections of para. 46. The first sentence is not a substantive reason at all. It is simply a statement of the OFT's conclusion. It is simply saying, "On the evidence we conclude this ----- "It has got a reason which explains why that conclusion was reached. But, in any event, one has to bear in mind what has already been said in relation to two to ones and three to twos. In relation to two to ones, the decision has already said that the reduction could clearly have an SLC. It is important that that is the conclusion that is reached in the decision. It is not simply part of the reasoning. That is the conclusion, weighing up everything that went before. Similarly, with three to two, the conclusion that is reached is that in three to two areas generally, switching between Boots and UniChem may be high, and for a large proportion of customers, Boots and UniChem would be the closest competitors. So,

against that backdrop, having identified significant competition concerns two to one and three to two, if all that was in the decision was the first sentence of para. 46, we would have an open and shut case because against that backdrop, simply to turn round and say, "Having looked at everything we think there is not a problem with four to threes" really does not take anyone anywhere. There is no attempt to give reasons. There is no attempt to grapple with the substantive issue.

So, the first sentence, we say, is not a reason. It is simply a conclusion. Let us look at the two substantive reasons that are giving in the decision. The first one, madam, as you pointed out, is abandoned. So, that goes. Strike it through. The second one is the reference to the findings of the 1996 report, and the suggestion that even with the removal of resale price maintenance there might have been some small increase in the scope for potential competition. Again, it is inconsistent with what has gone before, because what has gone before includes consideration of the MMC's 1996 report and what happened thereafter, and contemporaneous evidence it comes to the conclusion of a significant problem for two to ones and a significant problem of three to twos. So, having said that against the backdrop of the 1996 report, to then simply turn round when one gets to four to threes and say effectively the opposite – "Oh, actually it's not a problem at all" – is simply not good enough.

But, there is another problem that the OFT has, which is effectively all but disavowed. This particular reason as well … (inaudible) … conclusion in relation to four to threes. That is clear from Mr. Pritchard's witness statement at 118 – 119. We will obviously have to come back to Mr. Pritchard, but at p.44 he deals with the four to three areas. At paras. 115 to 117 he puts forward what we will say is inconsistent new reasoning. But, at 118 – 120 he deals with what was actually in the decision. At 118, he says, "At the drafting stage two supplemental observations were added to the key conclusions set out in the first sentence.". At 119, "One relates to the MMC report and was intended to add some historical context to the OFT's conclusions". So, Mr. Pritchard's own evidence is that that reason was a supplemental observation added to give some historical context. He puts it no higher.

So, what one is left with in the decision is that there are three parts to para. 46. One is not a reason – it is a trite statement of conclusion. No. 2 is abandoned. No. 3 is unsustainable in view of what has gone before, but, in any event, on the OFT's evidence is merely a supplemental observation that was added to provide some historical context. That is not enough to substantiate the conclusion that there is not a problem with four to three areas. Once one has stripped out the irrelevancies, the abandoned points, etc. in para. 46, all one is left with, at its highest, in relation to para. 46 of the decision is that they say, "Well, because four to three reductions are higher than three to two reductions, there is not a problem". That

is really all it comes down to. What is clear is that the OFT has not carried out any substantive analysis of the effect on competition in the four to three areas. In the decision, it looked at two to one in detail, and said that there was clearly a problem. In relation to three to two, it looked at them and said that there was clearly a problem – a high proportion, a large number of customers. Suddenly they stopped. No attempt to look at four to three. Just stopped. Logically, as a matter of reasoning, that is simply not sufficient.

I think it is probably useful for us to say, "Well, is there a problem here?" We can look at some of the factors that suggest that the OFT has failed to look at something it should have looked at – i.e. actually looked at four to three areas. I am going to refer here – as we have indicated in the skeleton – to some of the LECG material. What I would like to do - given the way that Mr. Roth has indicated he is happy for it to be dealt with, and the Tribunal has indicated it is happy to be dealt with – is to make my submissions on that material; to explain why we rely on it; and then to explain why we say it is admissible. So, as long as you are happy with that approach, I will explain why we rely on it, and then hopefully the Tribunal will be in a better to say, "Admissible", or, "Not admissible".

This is para. 32 of our skeleton argument. LECG obviously had very limited information when it produced its first report. But, what it did – part of what it did – was obtained information from Lloyds (which is the chemist chain in the chain in the Celesio group) as to what Lloyds thought were the relevant four to three areas for this merger. As explained at para. 99 of the application, LECG identified forty-eight possible four to three areas, and it accepts that they may not be an exact fit with what the four to three areas are, given that it does not have that complete information. But, it shows that statistically it has probably got most of them right.

I say by way of aside – because I will come back to admissibility – that identifying four to three areas on the basis of information from Lloyds is probably something that we could have done by way of witness statement from Lloyds, but the easiest way certainly for us to do it practically and to present the information was for Lloyds to provide the information to LECG and for LECG to present that information. But, there is no magic here. It is simply that factual information from Lloyds.

When it looked at the forty-eight four to three areas, what LECG did – just as a very simple starting point – was to look at the number of stores that were in each four to three area, just as a starting point. In forty-one of the areas, the merged entity would end up having half, or more, of the outlets. There is a very useful diagram – and we have actually reproduced it - in Bundle 6, Tab 2. This is an indication of all the four to three areas identified on the basis of Lloyds information in which there are more than four stores, and then colour-coding to show

how many of the stores in that area Boots and UniChem would have vis-à-vis all the other competitors. The ones to look at are (b) ---- In (b) out of nine total stores, Boots and UniChem would have five after the merger. In (c) Boots and UniChem would have five out of seven. In (d) four out of six. In (e) four out of six. In (f) three out of six. Then, (h), (i), (j), (k), (l), (m), (n), and (o) are all three out of five. 66 percent-odd of the outlets.

The point is simply this: this is information that the OFT could easily have got from the merging parties. It got the information on two to one. It got the information on three to two. It did not even ask for this sort of basic information in relation to four to three, and yet when one looks at four to three, without going into an economic analysis, one can see, "Well, there may well be a problem here. This may be something we should follow up". Even that initial process was not done by the Office.

I should point out by way of contrast that in our merger case, the Cohen Scholl case, Lloyds did provide information of all the overlaps in a one mile area (even above four to three) and provided detailed maps for all of them. I do not think I need to show them to you. It is referenced. It is para. 32(b) of our skeleton. That gives the reference. In fact, the maps that we provided are in the OFT bundle, Bundle 4, Tab 3(f). But, we do not need to look at them in detail.

PROFESSOR BAIN: Mr. Hoskins, I just want to be quite clear what you are saying. Are you saying that really we have to be concerned with the information that is contained within this chart, or are you saying that the OFT could not properly take a decision without having before them information of the kind that is in this chart?

MR. HOSKINS: The latter.

PROFESSOR BAIN: The latter. Thank you.

MR. HOSKINS: I am relying on this evidence to show the paucity of the investigation that the OFT carried out in relation to … (inaudible) … Paragraph 33 of our skeleton ---- I think that is certainly the point we are trying to make there. We are not suggesting the Tribunal goes on an analysis. It is simply the narrow point that the OFT failed to do the simplest things.

The other point – and I will develop this later, but I will put down a marker now – is that in relation to three to two areas, what the OFT did (and Mr. Pritchard tells us this) was that it got detailed maps, and it looked at the areas to see where Boots and UniChem stores were closest together in the three to two area. Where they were closest together, and the third facia was outlying in comparison to them, it is said there was an SLC problem. The OFT did not ask for any maps in relation to four to three areas to see how the geographical spread looked.

So, for those reasons we say the decision is clearly flawed. The reasoning does not stand up, and the OFT did not even begin to do the most basic things that one would have thought of in

order to check whether there was actually a problem in four to three. They simply relied on inferences and presumptions from three to two, which we say were unjustified.

Let us move on to Mr. Pritchard's evidence and see what it says and compare it to the decision. If I can begin by picking it up at para. 100 ---- Again, I have set out the relevant paragraphs in the skeleton, but it may be useful to have the witness statement open as well. Paragraph 100 on p.39 tells us that the OFT considered it appropriate to use a iterative approach beginning with the most concentrated markets, the two to one, or post merger monopoly areas where consumer choice is effectively eliminated. "If further competitive effects analysis reveals ongoing concerns for two to one areas, the OFT next considers three to two areas, and the iterative process continues until no concerns arise at a given facia reduction".

So, what one would expect from that is that you look at two to one. "Is there a problem?" "Yes." We have to look at three to two. "Is there a problem?" Here, in fact, we see from the decision the answer was 'Yes'. So, even on the OFT's own iterative approach they should have gone on to look at four to three. But, they did not. They looked at two to one. "Is there a problem?" "Yes." They looked at three to two. "Is there a problem?" "Yes", Mr. Pritchard says, "but not a very big one". And then stop. But, that is not even what he says was the test they were trying to apply in para. 100. They could only have stopped on the iterative approach if there were no concerns at three to two.

Let us move into the gloss. Paragraph 105. This is where Mr. Pritchard deals with two to one areas. He says, "Although the evidence was not entirely conclusive, the internal documents of the merging parties supported the conclusion that there existed some, albeit limited, competition". Those are the crucial words – 'some, albeit limited, competition'. Then he goes on to give more of an explanation of that.

The attempt to play down the effect of competition of a two to one reduction in that paragraph of Mr. Pritchard's witness statement is clearly inconsistent with para. 43 of the decision which states that a two to one reduction could clearly give rise to an SLC. Contrast 'some, albeit limited, competition' with 'clearly giving rise to an SALC'. Also contrast that conclusion in Mr. Pritchard's witness statement on two to ones with the decisions finding in relation to three to two areas. Even in relation to three to two areas the decision found that switching of customers between Boots and UniChem stores may be high, and that a large proportion of customers would find Boots and UniChem as being their closest competitors. So, simply contrast 105 Pritchard with paras. 43 and 44 of the decision.

Then, in relation to three to two areas one finds the same downplaying in Pritchard which simply clashes with the decision. Para. 109 – "The OFT developed concerns in relation to the

three to two areas only because following our scrutiny of the relevant maps [I have already referred to the fact that the OFT requested detailed maps in relation to three to two areas] we could identify a minority of three to two areas that closely resembled two to one areas".

Then, at para. 112, "Given its position, the OFT then considered whether it was possible to segregate the vast majority of three to two areas that were not marginally problematic from the minority that were".

At para. 113 he says that, "Having considered that it was not possible to do so within the statutory timetable [that is, separate out the three to two areas] the OFT was therefore obliged to conclude reluctantly, as a result of the limited number of three to two areas that were marginally problematic, its duty to refer applied across the board to every three to two area".

So, Mr. Pritchard in his witness statement – this is para. 40 of our skeleton – suggests that the OFT concluded, first of all, that there was no problem in relation to the vast majority of three to two areas, but that a minority of them were marginally problematic. No more than that. A minority were marginally problematic. Again, compare those paragraphs of the witness statement with paragraphs 44 and 45 of the Decision. I have already made the point that paragraphs 44 and 45 make it clear that the OFT concluded that there was a problem with three to two reductions in all areas; a particular problem in some but nonetheless a problem in all of them, and the problem in all of them was not marginal, it was – I am sorry to keep repeating this – that there would be high switching of customers between Boots and UniChem stores and for a large proportion of customers Boots and UniChem would be the closest competitors, so it is all three to two areas, not a small minority, and the effect on competition is not marginal, it is high, it is a large number of customers who are affected.

We say this, that having regard to the case law that I have already referred you to, when one compares the reasoning in Pritchard with the conclusions in the Decision, they are clearly inconsistent. The most charitable one can be about Mr Pritchard is that he applies a couple of coats of gloss, but even that is not permissible and, therefore, when the Tribunal comes to judge the legality of the Decision it cannot and should not look at those bits of Mr Pritchard because he contradicts the Decision.

THE CHAIRMAN: What you are really saying is that we should ignore those bits of Mr Pritchard which are inconsistent with the Decision.

MR HOSKINS: Precisely. Madam, I have reached page 14 of my skeleton, paragraph 42. That deals with one of the points we dealt with first thing this morning, which is what to do about the catch 22 situation where the OFT in its skeleton argument and in Mr Pritchard relies on or refers to third party evidence, yet because of confidentiality problems does not disclose that

evidence. As we agreed this morning, I will simply park that and we will see how Mr Roth deals with it, and then if needs be if I will come back to that in reply.

I would simply, at this stage, highlight paragraph 46 of the skeleton argument which is where, in *IBA* the Tribunal identified this problem, analysed it and indicated how it felt the problem should be dealt with. We will see what Mr Roth says, but in my submission Lord Justice Carnwath's judgment in the Court of Appeal does not expressly overrule what the Tribunal said.

PROFESSOR BAIN: Mr Hoskins, as you know, I am a layman. Are you contesting any of the references to third party material in the Decision, other than perhaps the third party material that came from your own side which I assume you are not contesting. The rest is rather general statements, it is allegedly consistent with what Celesio told the OFT; are you actually contesting it? It would help us, I think, if you could point to particular statements referring to third party evidence that Celesio think are questionable.

MR HOSKINS: Sir, I hope that we do not have to get into the detail. That is not avoiding the question and I will explain why I say that. If our submissions on the Decision are correct, and if our submissions on the clash between the Decision and Mr Pritchard are correct – and I will go on to make submissions on Mr Pritchard in any event – hopefully we do not have to get into the question of the degree of competition that existed, was there limited competition or not. Our concern is simply this: if the Tribunal in its judgment feels the need to look at the degree of competition in ay substantive way, shape or form, it should be aware that it does not have all the material before it. That is as high as I want or need to flag the point at the moment, so to try and answer your question more directly in a different way, why are we concerned, why have we raised this point, it is because the OFT, in Mr Pritchard's witness statement, continually says there was limited competition, there was marginal competition, and the point is that the Tribunal and us have not seen all the evidence upon which that is based.

Mr Pritchard's witness statement can only be the rosy side of the picture for the OFT because it simply beggars belief that all the 27 objectors all said this is the best merger since sliced bread, but that is as high as I need to put the point.

THE CHAIRMAN: Would you not need to be alerting us to some factual evidence that you say the OFT has missed in order to make good that submission? Just to turn round and say you may not have all the material before you, without saying that the OFT failed to take account of some evidence – it might be that you put it in a very broad way. You do not have to go and get the evidence etc, but the broad way that you put it identifies something that magnetises a review.

MR HOSKINS: That is the catch 22. In a normal judicial review situation the OFT would be under an obligation to disclose the evidence that harmed its case.

THE CHAIRMAN: But if you go off to experts who look at this – and you have gone off to an expert who has looked it – therefore if you know about the market, you are not completely outside, you are involved in all this market and you have actually been through one of these mergers very recently, you know what it is about and, therefore, if there is something there which is relevant – and it would have to be relevant because the judicial review test is also this broad whether they came to the right decision at the end of the day – or may be relevant, one should be able to put it out so that it does not magnetise the judicial review.

MR HOSKINS: It is probably my fault. I do not want this point to become more important than it is; we simply put it down as a caveat, that if the Tribunal felt the need to go into the material in detail it has not seen everything. In our submissions our primary submission will be the Tribunal does not need to do that.

THE CHAIRMAN: When would the Tribunal need to do it?

MR HOSKINS: If there were particular factual issues between the parties, for example, and it is possible that some of the third parties would support our view of the facts, then we might want to look at them.

THE CHAIRMAN: I think that is what we are asking you. Where is that material?

MR HOSKINS: Madam, my fervent hope is that the Tribunal will not have to look at this; therefore, I do not really need to take the point any further, I think it would not be a good use of everyone's time.

THE CHAIRMAN: You say we have to wait and see.

MR HOSKINS: Yes. The way I put my case I do not need to go into the facts, my only concern is that if Mr Roth starts digging into the facts, and that is why we put the marker down there, but we are not running any free-standing argument on it, we do not need it, it is a marker for the OFT. I am not simply trying to sidestep it because I do not fancy dealing with it, I just do not want the Tribunal to spend time on something that may not arise.

THE CHAIRMAN: Let us just see where we go. Can I move on to paragraph 47 of the skeleton argument? Let us assume that you are against me and we have to look at first Pritchard. Our submission is that even on the basis of the arguments in Mr Pritchard's witness statement, the OFT has failed to obtain all the necessary evidence, it has failed to carry out the obvious investigations.

We have identified a number of concerns and these begin at paragraph 50 of the skeleton argument. First of all, the OFT of course accepts that it had to consider four to three areas, that is why one sees paragraph 46 in the Decision, that is why one sees a section in Mr Pritchard's

witness statement dealing with them; it had to deal with them, it had to consider them, but what is clear is that the OFT did not at all give active consideration to the particular four to three areas. What it did, according to Mr Pritchard – because here I am assuming that we are working on Mr Pritchard's basis – was it looked at two to one areas and drew conclusions, it looked at three to two areas and drew conclusions and then on the basis of that it presumed or inferred that there was not a problem with four to three. So it was an inferential form of reasoning rather than an investigation of the actual four to three areas.

The second point is this. The new case which is put by Mr Pritchard is that there was only very limited competition in the relevant markets, and I take you to the particular paragraphs – throughout his witness statement I have highlighted the ones in relation to two to one and three to two. He says that because there is only limited competition, that is a reason that excuses the OFT from conducting any detailed consideration of four to three areas. Limited competition in two to one, limited competition in three to two, you do not have to worry therefore about f our to three.

The problem with that is that it actually reverses the proper approach. In a market where firms are competing fiercely, a loss of one competitor out of four may not be a problem, because the ones that are left are competing fiercely, but it is a very odd way to approach the problem, to say where competition is weak, where one of the parties drops out we do not have to be worried about it.

PROFESSOR BAIN: Something has been puzzling me in your papers here. Are we talking about a substantial lessening of competition, or are we talking about the competition that remains afterwards? It seems to me that if you take a market that is very competitive, if you take out one competitor you will take out quite a lot of competition and that might be substantial. If you take a market that is very uncompetitive, maybe it would not matter how many competitors you took out, the competition would never be substantial so there could not be a substantial lessening of it. It seems to me that in your submissions you are focusing on what remains, whereas the test if one looks at the words of it, on the face of it, seem to me that it should be looking at what is taken away. Have you any comment on that?

MR HOSKINS: Sir, the question of what is substantial must be looked at in context. It would be odd if merger control only bit in situations where pre-merger there was health competition and post-merger there was healthy competition. It would be odd if the test did not bite where before the merger there was inadequate competition and after the merger the competition was even worse, so in our submission when one is looking at the question of substantial lessening of competition, it has to be looked at in context.

PROFESSOR BAIN: So in a sense it is a proportionate concept rather than an absolute concept.

MR HOSKINS: One might see the point if there were no competition in the market and a merger took place because there is no lessening at all, but it is different where there is weak competition and we say it is actually even more important where there is only weak competition to make sure the merger does not harm it further. That is the logic point that we make in paragraph 51 of the skeleton argument.

The third point we make is that it is very instructive to look at what the OFT actually did in relation to analysing the test. The first chronological document one finds in this investigation is actually in the interveners bundle, bundle 3.

THE CHAIRMAN: This is the bundle we have to be careful with.

MR HOSKINS: Yes, I understand it is. I shall have to be careful because mine has completely collapsed. What I intend to do, if there are any confidential matters is simply say please read and endeavour not to say it out loud.

THE CHAIRMAN: The only problem arises if we have a question which relates to it.

MR HOSKINS: I understand. If there is a serious issue we may just need to have a very short period in private. Tab 1 is the first document chronologically that we have been provided with, but it is apparent that there was some contact before that. This is the first one we have been provided with and it is an e-mail from the OFT to the solicitors acting for Boots and it attaches a "list of the further information we consider should be included in the submission you make on this case." Then over the page one sees the request of what is asked for, seven bullet points. "Details of all areas in addition to those provided in the two to one analysis where the parties are each other's closest pharmacy competitors", and I do need to refer to that document specifically. Then, at the bottom, the final two, the only specific requests for detailed information in relation to particular fascia areas are for three to two and two to one areas.

The other requests that were made by the OFT which are relevant are at tab 15, and if one turns to the third page I think some of this may be confidential so I simply refer to numbers 1, 2 and 10. The only inquiry is in relation to two to one and three to two areas.

Tab 24, the second page, the same point.

THE CHAIRMAN: The second page?

MR HOSKINS: My 24 is a letter from the OFT to Slaughter & May dated 6 January 2005.

THE CHAIRMAN: No, tab 23.

MR HOSKINS: I am sorry, my tabs are different.

THE CHAIRMAN: At 24 we have the first page of something headed "Potential issues raised".

MR HOSKINS: In the short adjournment I may just have to check because something has gone wrong. All our bundles are 24.

THE CHAIRMAN: Have you got as 23 what we have got as 24?

MR HOSKINS: My 23 is headed "Potential issues raised".

THE CHAIRMAN: So they have just been reversed.

MR HOSKINS: Thank you. It is the second page of 23 and it is same point, the only request for detailed information relates to three to two fascia. Then tab 26, the second page, exactly the same point. The only detailed information relates to three to two. Then 27, item 3, again just three to two. There is one that is slightly different that I should flag up, it is tab 20.

THE CHAIRMAN: We have got "Deliberately blank".

MR HOSKINS: Can I just check we are looking at the same document. It is 21 December 2005.

THE CHAIRMAN: No, our document just says "deliberately blank".

MR HOSKINS: If the document is no longer relied on, it makes my job easier.

THE CHAIRMAN: Are you sure that is the document or is it 21?

MR HOSKINS: The document I am looking for is a letter from the OFT to Slaughter & May dated 21 December 2005.

THE CHAIRMAN: Mr Roth will know whether that was 20.

MR ROTH: I am not sure I can help.

THE CHAIRMAN: Could somebody behind you help?

MR ROTH: It was that document.

MR HOSKINS: So it is no longer relied on. The point under this heading – it is paragraph 52 of my skeleton argument – is that detailed information was requested to study two to one and three to two fascia, and no detailed information at all was requested in relation to four to three fascia, so it is not simply that the OFT failed to give active consideration to the detail of four to three fascia, it did not even ask for the information necessary to carry out such an analysis.

The first point may be subsumed by the point I have just made, it is paragraph 53 of the skeleton argument. The OFT did ask the merging parties to provide maps of each two to one and three to two overlap area, and it might be useful just to have a quick look at what those look like. They are in the OFT bundle, bundle 4. There are a number of annexes here and annex 1 is maps of two to one local overlap areas, and there are nice coloured maps showing where the Alliance, Boots and other pharmacies are within a one mile radius. Annex 4 is the same, details of three to two local overlap areas, and these are the maps that Mr Pritchard says were scrutinised very carefully to identify which of the particular three to two areas according to him created problems, because Boots and UniChem were close competitors whilst the other competitor was outlying.

If we look at page 54 of the maps that shows details of three to two local overlap areas within a one mile radius. I am told the numbering does not quite work because the maps are also numbered.

THE CHAIRMAN: Page 54 says "Annex 4, details of three to two local overlap areas.

MR HOSKINS: That is the one I am looking for, madam, yes.

THE CHAIRMAN: So it must be the maps for page 5, the numbers at the bottom.

MR HOSKINS: That is right, yes. These are the maps that Mr Pritchard tells us the OFT pored over to discover the three to two areas that he says were a problem. While we are wrestling with this, I am going to come back in a minute to annex 5 and it may be worth just slipping a yellow sticker or something on that. If one goes to the end of the bundle it is about eight pages in, it says "Page 55" at the top and I am going to come back to that.

Madam, the point in relation to this is again it shows that the OFT did consider it necessary to get detailed maps for two to one and for three to two areas, and it was only by obtaining such maps for three to two areas that the OFT, according to Mr Pritchard, was able to conduct its analysis. No maps in relation to four to three were ever requested.

When one thinks about the logic one sees why that is an important omission because in relation to the three to two areas, what Mr Pritchard tells us at paragraph 109 of his witness statement is that for certain of the maps, when one looks at them, Boots and UniChem are each other's closest competitors, and the other competitor in that one mile overlap is sufficiently outlying to give rise to a competition concern. We simply say it is perfectly possible, if one looks at the four to three maps, one would find Boots and UniChem are the closest competitors and the other two competitors, because here it is four to three, are sufficiently outlying that one would get a similar sort of problem. Having identified that sort of problem with three to two, the OFT did not consider the same issue in relation to four to three; it looks like it did not even direct its mind to the possibility.

There is some limited information that goes to this issue, and again this is the second and final time I need to refer to the LECG report. This is annex 5 of the OFT bundle, bundle 4.

THE CHAIRMAN: That is the document we were just looking at.

MR HOSKINS: It is the one I asked you to flag, yes. On my title page this is marked "Confidential" but I am not sure that the rest of any of the text is confidential. Mr Green will probably be able to tell me whether that is the case or not. Annex 5 is entitled "Overview of local overlap areas where the parties are located in the areas nearest to each other.

THE CHAIRMAN: What is the distance in miles between the two?

MR HOSKINS: I obviously do not want to refer out loud to something I should not.

THE CHAIRMAN: Only if the whole information … (inaudible) …

MR HOSKINS: I am obviously just trying to be as cautious as possible.

MR GREEN: … comments are going to be made about it.

THE CHAIRMAN: There are no maps here. Annex 5 is about seven pages in.

MR ROTH: Just to clarify the word "confidential" at the top, that is from the original document that came with the replies while a merger was being considered. It has not been put on for this hearing, so it is different from the manuscript confidential written in other places. Quite what the status of it now is, is for my learned friend Mr Green, not for us.

MR GREEN: I do not think this is problematic. This is what I am looking at and there is no problem with that.

MR HOSKINS: Excuse me for being cautious, but you understand.

THE CHAIRMAN: You are absolutely right.

MR HOSKINS: The OFT asked for a list of areas where the Boots and Alliance stores were the closest to each other. What LECG have done is I referred to the fact that in their first report they identified 48 four to three areas on the basis of information provided by Lloyds. This is probably something we could have done by way of submission or by expert, but what they have done is they have taken those 48 four to three areas and they have checked which ones have Alliance and UniChem close together, indeed as the closest competitors within that one mile overlap area. The chart that is produced as a result of that exercise is in our reply bundle, bundle 6 at tab 5, the very last page of tab 5. What one has is a list of 48 four to three areas that LECG have identified as four to three areas, then they have taken these areas and looked at the list in Annex 5 to the OFT submissions to find out in which of these four to three areas Boots and Alliance are close to each other. It is simply that.

THE CHAIRMAN: Can you just explain why it has the three to two areas?

MR HOSKINS: Simply because, as I said, we did not have the same information as the OFT so some of the four to three areas are Lloyds information and some are three to two areas in the OFT's information. We are trying to recreate information that we do not have.

The point is that if one looks at the 48, the total four to three areas we have identified, in 24 of them Boots is the nearest pharmacy to Alliance and vice versa. If one takes the first example, Frome, and call that number one, the postcode is BA11 1EU and if one goes to the third page of annex 5 to the OFT's bundle and goes down 16 entries, it is the first 0.35 miles entry. That is how the comparison has been done.

THE CHAIRMAN: Wait a minute.

MR HOSKINS: There are two different postcodes because there are two different shops, one is an Alliance shop and one is a Boots shop, but they are both BA11. It does not quite tally here because we have got 1EU and it is 1EZ in the list, but that is how it fits. If one takes the second one on the list which is Littlehampton, if one goes to the second page of annex 5 to the OFT it is the first heading at 0.12 miles ---

THE CHAIRMAN: AM16 3NR.

MR HOSKINS: And then 3DJ is the Boots postcode. Madam, I am not pretending that this is very sophisticated, but that is the point. If one identifies the four to three areas and then one asks in which of those areas are Boots and Alliance the closest to each other out of the competitors in that area, one finds that in 24 of the 48 they are the closest competitors in the one mile area. Given the OFT's reasoning in relation to three to two areas as described by Pritchard, which is that you have to look at the maps, and where Boots and Alliance are the closest shops and the other competitor is outlying, the alarm bells start ringing for four to three areas if half the four to three areas have those closest competitors. It cries out to say you need a map to see where the other competitors are for you to identify whether there is a problem, on your own approach. That was not done.

MR ROTH: While the Tribunal has that table open I wonder if Mr Hoskins could clarify the last but one of the two columns on the right. Four to threes by type, four to threes by number. This is on the table exhibited by the expert with the blue and orange. You see in the far right "Number of stores" but in the previous two columns you see "Four to threes by type, four to threes by number". We cannot follow that.

MR HOSKINS: I will take instructions on that at the next adjournment.

THE CHAIRMAN: You can deal with it over the luncheon adjournment and if it proves relevant then we can deal with it.

MR HOSKINS: Certainly. The final point, just to remind ourselves where we are – we are looking at Mr Pritchard's evidence, assuming it is admissible – the final point in relation to that is one I have already made, so I can make it very quickly, it is at paragraph 57 of the skeleton argument. It is Mr Pritchard's own iterative approach

THE CHAIRMAN: Yes.

MR HOSKINS: It is paragraph 57 of our skeleton argument, it is paragraph 100 of Mr Pritchard which I have set out in the skeleton. His iterative approach is that you look at two to one and if there is no problem you do not have to go any further; if there is a problem you have to go further. On his own evidence he went to two to one and there was a problem, so he had to go to three to two. He went to three to two, there was a problem, but he did not go any further. Even on his own methodology he has not done what they are supposed to do because his iterative approach is not based on if you get to a certain level and there is not much of a problem we do not have to go any further. That is not the approach he has followed.

Just to compound matters, and this is a point that comes out of the submissions I have been making and also was a question that you asked me earlier, another problem with the OFT is it is not simply that they assumed that there were no SLC concerns in any four to three areas. They did not ask themselves whether there might be problems in some areas but not others; for

example, using the OFT's own reasoning, areas where Boots and Alliance were the closest competitors in a one mile radius and the two other competitors were on the outskirts of the one mile overlap. They do not consider the nuance – they considered it for three to two and they simply do not turn their mind to it in relation to four to three. It is for that reason that we say that even if Mr Pritchard's witness statement is admissible, which it is not, the OFT case falls down for two reasons: one, it failed to carry out the necessary investigations which were simply asking the merging parties for the same sort of basic information it had asked for in relation to three to two, and further or alternatively the reasoning set out in Mr Pritchard's witness statement is not sufficient to justify the conclusion reached for the reasons I have just described. Those are the two tests I highlighted in *Tetra-Laval* and in *UniChem* etc.

Paragraph 60 of the skeleton argument is simply a continuation to the interveners' witness statements. It seems to us, having read them, that either they do not add anything to the OFT and therefore we do not need them because the OFT has already said it, or if they do gloss the Decision then they are inadmissible, so again we do not need to look at them, so query what those witness statements add.

The second ground which we are still pursuing – we are now pursuing three grounds, but they are all linked to the first one and if we fail on the first one then the second and third ones go, they are all consequential on each other – is the national retail markets analysis. We say that because of the way the Decision links the national analysis to the local analysis, if the Tribunal quashes the local analysis it must follow that the national analysis will also have to go back to the Office. This is paragraph 61 and onwards of the skeleton argument.

If you look at the relevant parts of the Decision, first of all it is clear that there is this linkage between national and local markets. I have set out again the relevant paragraph – it is paragraph 62 of the skeleton – it is paragraph 14 of the Decision. That states: "The OFT notes that the extent to which national chains face each other across the country. Two issues are relevant in this regard: first the degree of overlap as a proportion of each party's national estate, second, the degree of competition concerns in those overlap areas."

That is precisely what we say the OFT failed to do in the local areas. Having failed to do that, it cannot then have done a proper analysis of national areas.

Paragraph 40: "As to the degree of competition concern in local areas, this goes to the heart of the local analysis conducted in this case. The OFT decided that local divestment in two to one and three to two areas addresses concerns at the local levels and in turn those that may arise at the national level …"

I think you should say "through increased instance of problematic overlaps within the merging parties national store portfolio."

Again, express acceptance that the local analysis impacts on the national analysis, there is a necessary link.

Our case on this is very simple: yes, there are other factors that are considered at the national level, but clearly a material factor was the local analysis, and if the local analysis fails, because that was a material consideration, then the OFT will have to go back and reconsider the national analysis as well in light of the new local analysis.

It is also important to realise what is actually relied upon heavily in the decision about the nature of competition between Boots ands UniChem, and this is paragraph 31 of the Decision, and it is set out at paragraph 65 of the skeleton argument. One sees, again, a very strong theme in Mr Pritchard's evidence is that there is not a problem at the national level, because Boots and Alliance are said not to be close competitors.

How does the OFT come to that conclusion? It relies on two things. First of all – this is paragraph 31 – the point is made that one would argue that competition in retail pharmacies is in the main driven by local competition. "In respect of the argument about local competition influencing national policies, the parties would note that, on the whole, Boots & UniChem do not tend to be located close to each other". So, that is what the parties have told the OFT. It is not something that the OFT has checked itself.

Let us look at the evidence that was provided about the general suggestion that Boots and Alliance generally do not face each other, or compete with each other, in local markets. "The Boots stores tend to be based in High Street locations while UniChem's pharmacy stores fit the community pharmacy model and are generally found in residential areas, health centres or smaller shopping centres. Boots' own analysis of catchment areas breaks down pharmacy coverage across classes of shopping centre areas. Boots appears most frequently in major regional centres. UniChem's most frequent location is small district centres. However, both appear with relatively high frequency in rural towns, and such locations form the majority of the local overlap analysis discussed below. Overall, the evidence suggests limited competition between the parties in respect of the pricing of P medicines. However, any pricing concerns which may arise on a local level will be addressed below."

The point that is being made, and the point that is being relied on, is that Boots stores and Alliance stores do not tend to be located close to each other. The evidence that is relied on for that is – and we see this as Footnote 8 of the decision – referring to a Boots' internal document which one finds in the intervener's bundle, Bundle 3 at Tab 11. There is confidential material here, and so I do have to be careful with this. This is a document from Boots, entitled 'Analysis of Store Catchments'. Then one sees on the left-hand side a description of locations. Then, under 'pharmacy facia' one sees how often Boots appeared as a facia in each

of these areas; how often Lloyds appears in each of these areas; how often Moss appears in these areas, etc.

The point that the OFT makes is that in major regional centres that is where Boots appears most often (this is the second row down) and that Moss does not appear very often. That is the point that is made. In relation to Moss, in relation to small district centres (that is, four up from the bottom), it is suggested that Moss appears quite a lot, and it is suggested – though query whether it is actually right to suggest – that Boots does not appear that often. In fact, one sees there is not a great deal of difference between the figures. Two points in relation to this. First of all, it is not information about actual area overlaps. It is not an indication that Boots and Moss stores overlap in a number of areas. It is simply telling you the number of Boots facia in, for example, major regional centres and the number of Moss facia in major regional centres. Almost certainly, the actual overlap numbers will be less than the total number of Moss numbers. So, it is not an overlap analysis at all. It is only at the very highest level.

Even if one were to accept this as evidence of how often Boots stores and Alliance stores are close to each other in terms of location, the analysis which was adopted by the OFT actually suggests that one cannot simply look at the area in which Boots appears most often in major regional centres, and the area in which Moss appears most frequently in small district centres. That clearly shows that there are no other areas to be particularly concerned about. One only has to look at other examples. Look, for example, at small rural centres. Yes, there is a disparity in numbers, but that by no means precludes that there may well be a number of overlaps between Boots and Moss in those areas. Look at small suburban centres. Again, this is not a particularly sophisticated analysis, but it is the one the OFT adopted. Even on its own approach, it is quite clear that one cannot look at these numbers and say, "It's obvious from this that Boots and Alliance do not face each other ---- do not tend to be located close to each other [I will use the words of the decision]".

So, the point in relation to this document is that it is not actually an overlap analysis, and even on the OFT's approach it does not show what the OFT suggests it shows. So, on this crucial area of national competition, which is the question of the extent to which Boots and Alliance tend to be located close to each other, the evidence relied on in the decision is the say-so of the merging parties, and the evidence they provided which is this, which does not prove the point. The OFT did not conduct any further investigation of the issue as far as we can see.

THE CHAIRMAN: Can you just help me? Why does that not apply to three to two areas as well? Why is it confined to the four to three?

MR. HOSKINS: It is not.

THE CHAIRMAN: But you are not challenging it on the three to two, are you?

MR. HOSKINS: Because in relation to three to two, they found in our favour.

THE CHAIRMAN: But it does apply across the board.

MR. HOSKINS: Well, if one were to take this form of analysis, then, yes, one could say, "Well, look. They're not located close to each other. Therefore we don't need to look at three to twos".

Those are the submissions we need to make in relation to the national analysis, and that is why we say if we are right on the local area, then … (inaudible) … local and national issues.

The third ground, which is wholly dependent on the first certainly, is the acceptance of undertakings in lieu, because clearly if the OFT got its analysis wrong of local areas, then it cannot accept undertakings in the form currently suggested. I do not think there is any dispute. I think the OFT's skeleton accepts that that would be the position if we win on local areas. Then, obviously, the undertakings will have to fall.

THE CHAIRMAN: If we went with you and we agreed on the national/local point, and it was sent back to the OFT, including that point, does that upset their three to two and two to one analysis so that they would have to reconsider the undertakings in relation to the three to two?

MR. HOSKINS: But we have not challenged the three to two and two to one areas. So, no, in our submission, you would not have to revisit those issues. The problem would be that the undertakings currently suggested are intended to solve not just the local two to one and three to two issues, they are also intended to solve the national issues, and if we are right ----

THE CHAIRMAN: Well, are they?

MR. HOSKINS: Yes.

THE CHAIRMAN: What did they find in relation to national issue?

MR. HOSKINS: Well, they found that there was not a problem – because in relation to the local areas where there were problems - two to one and three to two – there was going to be divestment. So, for example, if the merging parties had refused to offer undertakings on two to one and three to two, there would have been a reference on local and national issues.

THE CHAIRMAN: Well, no. Would it be on local and national, or would the reference have been limited?

MR. HOSKINS: It would have to have been on both.

THE CHAIRMAN: Why?

MR. HOSKINS: The local issues are not solved. Because of the reasoning in the decision ----

THE CHAIRMAN: But I am not sure that is the way ----

PROF: Mr. Hoskins, can I just refer you to para. 82 of the decision where it reads, "The parties overlap in the provision of retail pharmacy services. In terms of national competition, no concerns arise".

MR. HOSKINS: Sir, if you would just bear with me. There is another paragraph of the decision I want to refer you to. (After a pause): Madam, rather than doing this on my feet, I think it is probably more helpful if I consider it and I will deal with it in reply, because it is a point, obviously, that is important, and I would rather do it having considered the point properly rather than on the hoof. If that is satisfactory ----

THE CHAIRMAN: It may be something that over the short adjournment there might be some discussion about it.

MR. HOSKINS: I think that is probably the best way to deal with it. You have my understanding.

THE CHAIRMAN: You can see we were slightly confused about it.

MR. HOSKINS: I need to check it and make the point good.

THE CHAIRMAN: We need to know before everybody leaves this evening as to what the position is because I think it does make, or could make, a difference to the way one considers it.

MR. HOSKINS: I think we will need to look at what the actual situation was, but the finding on national competition was premised on the fact that there were not problems in four to three areas. It was also premised on the fact that one needs to take account of local problems. I am sorry. It was premised on the fact ---- Let me start the logic again ----

THE CHAIRMAN: I think you may need to think about it.

MR. HOSKINS: Certainly. I am probably going against myself.

THE CHAIRMAN: I think you might be better just to go away and think about it before you ----

MR. HOSKINS: -- put my foot in my mouth.

The skeleton argument at p.23. Miscellaneous points. The first point is the admissibility of the LECG evidence.

THE CHAIRMAN: As I understand it, you are only relying on the LECG evidence of the two matters that you have shown us.

MR. HOSKINS: Yes.

THE CHAIRMAN: And you say that those could have been dealt with by you in submissions which would have got the factual matters from your clients, and then you could have worked it out, and you did not need ----

MR. HOSKINS: It could have been dealt with that way, yes. That was partly because of time constraints and the nature of the team. That was the natural way to deal with it. But, I think, in reality, yes, that is what I ----

THE CHAIRMAN: Also because you had Issue 1.

MR. HOSKINS: Yes, that is certainly fair, yes.

There is a legal point here as well. There is a legal point and a practical point. The legal point is that it is clear from the case law that evidence post-decision is admissible in judicial review proceedings in order to support the proposition that the decision-maker failed to conduct proper inquiries, and therefore failed to take relevant material into account. I will take you to two cases that make that good, but there is a certain ineluctable logic to that as well. If the argument is that the OFT failed to take this matter into account, how do you introduce what the matter is, if it is a factual issue without evidence? So, one starts from the premise that it has the right feel about it, and this is one of the areas where the court has confirmed the logic. The first one, I am afraid, is not in the bundles. (Handed) This is **R –v- Rochford District Council, ex parte Ferdinando**. You will see from the headnote that it is a decision of Roger Henderson, QC, sitting as a Deputy Judge in the Queen's Bench Division. It relates to a judicial review relating to homelessness, and the dispute was whether a family had become intentionally homeless. The detailed facts are set out, but for our purposes what is important is that after the decision was taken that the family had become intentionally homeless, certain witness statements were produced which challenged that fact. There are a number of them, but, for example, on p.2 the penultimate paragraph indicates that an affidavit was obtained from a midwife called Mrs. Tinglin who gave evidence that the flat they were in was in an appalling condition. That was obviously relevant as to whether they became intentionally homeless because they walked out on somewhere that was perfectly suitable for them, or whether they were required to leave because it simply was not habitable. That was evidence that was introduced after the event.

Then, on p.3, in the second paragraph, certain of the matters which were now being relied on were not known to the District Council when it took its decision. Part of this background history and these matters became known to the respondents. Some responsibility for the gaps must lie with the Ferdinandos. But, the following three salient elements, including the opinion of the health worker, etc. were unknown to the respondents when they took the decision on 7 August, 1991, and such matters could, on reasonable enquiry, have been discovered. So, they were not known to the decision-maker. That was partly the fault of the claimants in the case, and they could, on reasonable discovery, have been discovered before the decision was taken.

At p.6 of twelve, in the paragraph slightly under half-way: "Then there was further advice. The basis upon which the applicants impugn the decision are the traditional Wednesbury grounds". Perhaps it would be appropriate here (because I will need to come back to it) to go to the summary of Lord Green, the Master of the Rolls, where he said, "The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into

account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may still be possible to say that although the local authority have kept to the four corners of the matters which they ought to consider, they have nevertheless come to conclusions so unreasonable that no reasonable authority could ever have come to it".

That is quite interesting, because, of course, Wednesbury is used as shorthand for the latter proposition – a decision that is so unreasonable that no authority could ever have reached it. What this quote shows is that also it has a different point which is a failure to take account of relevant information, or neglecting to take into account matters which they ought to take into account is also a ground of judicial review.

Counsel for the Ferdinandos – Mr. Ayer – says that the respondents took relevant matters into account: "They failed to make due inquiry into relevant matters and to take those into account", which is clearly part of our case here. Counsel for the Council (the first complete paragraph on p.7) in response said, "First, you have no jurisdiction to admit the further evidence contained in the second affidavit of Mr. Ferdinando and the affidavits of Mrs. Ferdinando, Mrs. Tinglin, Mr. Calder and Mrs. Sert ----" and then reference to various authorities. At p.8 of twelve, in the second paragraph up from the bottom, "It will be apparent from my reference to the facts … that I have found myself unable to accept the submission made by Mr. Campbell that the court has no jurisdiction to admit such evidence, and it is now right that I should give my reasons, i.e. later evidence is admissible".

Over the page, at p.9 of twelve, again just under half-way, "I would next turn to the **Prohoffer** decision ----" Can I ask you simply to read from there, through to p.10 up to and including the paragraph that begins, "Although it is not included in that note"? (Pause whilst read): Madam, the crucial paragraph really is a the bottom of p.9. There is an analysis of the **Powis** case, which, of course, is a case that the OFT relies upon. What this Judgment makes clear is that given what was said in Wednesbury itself, it must be implicit that if there be a question of fact not only where jurisdiction depends on it, but which should have been elicited in the public law inquiry, then that would be a case where evidence should be admitted for that purposes. That is the reason why we say that the LECG evidence upon which we rely should be admitted in this case. It complies with the logic I have described, and it complies with authority as set out in this case.

The same point is actually made in another, more recent, case which is **Harlow –v- South Cambridgeshire District Council**. That is in Bundle 5. This is the Judgment of Mr. Justice Richards in the context of a planning case. Can I ask you to read paras. 1 and then paras. 30 to

32? (Pause whilst read): Madam, you will see again, quite clearly an indication that where expert evidence here in this case is relied upon in order to enable the court properly to understand the argument that the committee took into account irrelevant factors, or failed to take into account relevant factors. Again, that is the basis upon which we rely on the LECG report in this case.

So, that is a reason why it is admissible – because of the nature of the reliance we have placed upon the authority. There is another. I have made a logical point. I have made a legal point. There is also a practical point which is also supported by the case law. One has to be aware of the context in which this material has come to be produced. Celesio was a third party in the OFT's investigation, and the flow of information as between us and the Office was all one way. The Office said, "Do you want to make submissions?" We said, "Yes, please", and provided information. We did not get anything back from the Office in terms of seeing other parties' submissions or having an indication of what the OFT's thinking was – for example, we did not see the issues letter. So, we do not know all of what the Office was looking at. We do not know what the Office was thinking during the process. Nor did the OFT come back to us and ask us any particular questions on our information. So, it is all one way.

Against that background, we say it is pretty unfair to say that when Celesio comes to put in some further evidence we are not allowed to do so, because what would the practical implication of that be? It would mean that whenever a third party such as Celesio is taking part in a merger investigation, and has concerns about the merger, if it wants to protect itself in case it subsequently appealed, it would have to put in detailed evidence, and indeed detailed expert economic evidence, on all the issues it thought might be an issue when the decision came to be adopted and when the appeal came up, because if, as the OFT suggests it is all or nothing, you either have to put it all in in an investigative procedure or you cannot put anything in. In order to protect yourself, that is what you would have to do.

Now, in our submission, that is unfair and an impractical suggestion in terms of what you can expect from a third party in a merger inquiry. But, it is also extremely unattractive from the Office's perspective because given the need for speed in dealing with merger issues, the last thing it wants is detailed economic reports from a number of third parties which it has to take account of. It is completely counter-intuitive to the process that is being adopted. There is again authority for saying that one has to look at the context when one is deciding these sorts of issues. That is the case of **E –v- Secretary of State for the Home Department**. That is in the authorities bundle, Bundle 5, Tab 7. If I could ask you to read, first of all, the factual part of the headnote. It is quite convoluted, but I do not think we need to get into the detail. It is sufficient to see the general context. (Pause whilst read): Basically, the position was an

asylum application was rejected. An appeal to the Immigration Appeal Tribunal. Between the hearing and the promulgation of the decision, further evidence was sought to be introduced, and the Immigration Appeal Tribunal refused to admit that evidence, followed by an appeal to the Court of Appeal on that basis – because of the refusal to look at the new evidence.

Then, the relevant paragraphs for this purpose are paras. 68 to 69. (Pause whilst read): The final sentence of para. 69 is obviously the point I am making here. "In such cases it inevitably overlaps the question of unfairness. A claimant who had the opportunity to produce evidence and failed to take it may not be able to say that he has not had a fair crack of the whip." But, in this context that was the position, and one sees that at para. 94. Here it is slightly odd because it is an appeal, and so we are looking at Ladd & Marshall principles rather than a straight JR – is new evidence admissible after a decision. But, what is clear from para. 94 is that you cannot ignore the practical realities. It is unrealistic to expect continuous monitoring of potential new evidence in the intervening periods. One also looks at administrative difficulty for the IAT in dealing with the evidence. So, the importance of practical realities; the importance not to be unrealistic; administrative burden. Then, at para. 98 – the conclusion, "We think it right for the appeals to be allowed in the narrow ground that in each case the IAT wrongly failed to consider the new evidence in the context ----"

THE CHAIRMAN: Do you make a distinction between the OFT and the CC on this point? As I understand it, you ----

MR. HOSKINS: I think it would be difficult to imagine the situation would arise in relation to the CC. So, this is probably particularly pertinent to the OFT, yes.

THE CHAIRMAN: Well, different considerations may arise in relation to the CC.

MR. HOSKINS: Yes. But, in a sense, the question of practical realities ---- It is a stronger argument at the level of the OFT than it would be for the CC certainly.

So, there are three reasons why we say the evidence is admissible: first, because really it is just fact; it is submission, albeit it comes in an expert's report; secondly, because we rely upon it to show what investigations the OFT could/should have done, but did not (and case law tells us it is admissible); and, thirdly, just looking at the practical realities of this, it should be admissible (and, again, case law supports this).

In terms of full and frank disclosure on our part in relation to Lloyds Cohen, we say there really is nothing in this point. I am actually quite surprised that it is even taken. But, Mr. Roth will no doubt disagree with that. Far from attempts to conceal the fact that we had been through a merger in the same markets fairly recently, we actually flagged it up. We put it in our application. We produced the decision. Our take on our submissions is that they are not inconsistent with anything we are running here. But, clearly, having flagged it up to the

Tribunal, if the OFT wanted to make a particular point about anything that happened in that procedure, it was obviously open to them to do so, and it has done so. There is no question of us concealing something that would not otherwise come to the Tribunal's attention. We flagged it up, and the OFT made its submissions, and that is what happened.

Part of the oddity here is that the OFT – and it would have been a shout very loudly – is inconsistent. What you are seeing now is inconsistent. But, there is nothing in their skeletons which actually point to any actual inconsistency. The only time one sees any suggestion of inconsistency is in Mr. Pritchard's witness statement. It is instructive to look at what he actually flags up. It is right at the end of Mr. Pritchard's witness statement, at para. 137. You will see there are three bullet points. This is apparently what makes the failure to disclose. First of all, in Lloyds Cohen School, Celesio argued that the relevant geographic market should have a one mile radius, except in relation to the single two to one overlap area … argued in favour of a three mile radius In this case Celesio has not argued that the scope of the geographic market in any of the local overlap areas should be extended beyond a one mile radius.

Well, our case here is that the proper radius is a one mile radius. That is the OFT's position. That is the intervening parties' position. The only reference to this three mile radius comes up ---- If I can ask you to look at our submissions in Cohen Scholl. It is the OFT bundle, Bundle 4, Tab 3, Tab C This our merger notice – what we submitted to the OFT. If I can ask you to look at paras. 4.2 to 4.4, which are at p.20 of this document ---- Madam, my Tab C is entitled 'Merger Notice under Section 96 of the Enterprise Act ----' At p.20 of that document ---- These are our submissions. If I can ask you to read paras. 4.2 to 4.4 ----

THE CHAIRMAN: (Pause whilst read): So, you say it is peculiar to that situation, do you?

MR. HOSKINS: If one turns back to p.17, para. 3.1, the general premise was that the proper radius is one mile.

THE CHAIRMAN: You just say in that particular situation.

MR. HOSKINS: Exactly. So, the idea that somehow there has been fundamental non-disclosure because we are inconsistent simply does not ---- There is not actually an inconsistency at all. The second point identified by Mr. Pritchard is, "In respect of its own transaction in Lloyds Cohen & School, Celesio argued that a facia test would provide an appropriate framework for the OFT's competition analysis. It argued that it would not be appropriate to … the particular facts of this case". Again, if one looks at our submission at Tab 3C ---- We have already looked at paras. 4.2 to 4.4, and if one reads on between 4.4 and 4.8 ---- (Pause whilst read): Madam, what Mr. Pritchard alleges ---- He says, "Celesio argued that a facia test would provide an appropriate framework for the competition analysis". Again, there is absolutely no

difference in Lloyds Cohen. A facia test was part of our analysis, along with lots of other elements of competition. When we actually made our application for appeal, the first ground -- -- Because the way we had understood the decision was that we were criticising the OFT for adopting only a facia test and not looking at other factors. So, again, far from being an inconsistency, there was complete consistency between what we say is the proper approach in Cohen Scholls and what we say is a proper approach here – a facia test as a starting point. But, you have to look at all the other factors. No inconsistency whatsoever.

Finally, Mr. Pritchard's third alleged inconsistency, "In Lloyds Cohen & School Celesio did not argue that different competitor types – for example, independent supermarket pharmacies - Boots should be treated differently or considered to offer differentiated degrees of competitive constraint, but has reversed its position in the Boots/UniChem merger". It is very odd to see how an inconsistency arises out of something we did not say. It is not that we said something and we now say something different. This issue did not arise in Scholl and Cohen because the nature of the merger was completely different. Except for Mexborough, the lowest facia reduction was five to four. Simply a different context. Again, no inconsistency whatsoever.

So, in terms of the alleged inconsistencies, there are not any. Mr. Pritchard does, very fairly, at 138, recognise, "These inconsistencies do not mean that Celesio's arguments should be rejected out of hand for it is possible for a party first to submit a poor argument, but later to submit an argument that is better, albeit inconsistent". That is fair as far as it goes … (inaudible) … factual substance in any sort of knock-out blow in terms of this appeal. So, there is no inconsistency. There is no failure to disclose. In any event, even if there were, where would it take us? As Mr. Pritchard accepts, it cannot realistically be suggested that because of what has been alleged somehow the Tribunal should not hear this appeal, or, if having heard this appeal, it finds that there is a problem with the OFT's decision but should nonetheless do something about it. I am not even sure if that is what is suggested by the OFT. It does not seem to be suggested by Mr. Pritchard. But, if that is correct, if they do not go that far, it is difficult to understand where this allegation takes them. Our submission is simply that the issue before the Tribunal is the legality of the decision and not the strength, or otherwise, of Celesio's submissions in a different, albeit related, matter.

The final point I do not need to dwell on. It is simply the intervener's attempt at prejudice point. They say, "You have an interest in stopping this". Of course we do – otherwise we would not be here. They have an interest in making sure it goes through. This really takes us nowhere.

Unless you have any further questions – and I am sorry I have slightly overrun – those are our submissions.

THE CHAIRMAN: Thank you very much.

(Adjourned for a short time)

MR HOSKINS: Madam, at the risk of outstaying my welcome I have had a chance to consider the relationship between national issues and undertakings, and I can deal with it quite quickly. I have two points to make in relation to that. The first one is that our understanding was that the undertakings did also relate to national competition, and I have to say it was partly based on and certainly confirmed by Mr Pritchard's witness statement at paragraph 40. If one looks at the heading on page 16, this section is entitled "Relevance of local overlaps to national issues" and then paragraph 40: "As for the degree of competition concern in local areas, this goes to the heart of the local analysis conducted in this case. The OFT decided that local divestment in two to one and three to two areas addressed these concerns at the local level and, in turn, those that may arise at the national level through increased instance of problematic overlaps within the merging parties' national store portfolios."

The clear indication from Mr Pritchard seems to be that the undertakings are geared to national because there is a relationship between local and national. Mr Pritchard seems to share our understanding.

There is also a substantive point in relation to this ----

THE CHAIRMAN: That paragraph is not to do with undertakings, is it?

MR HOSKINS: It refers specifically to the two to one and three to two divestments and those are the undertakings. The undertakings are undertakings to divest.

THE CHAIRMAN: Yes, I see.

MR HOSKINS: If I could ask you to take up the Decision, bundle 1, tab 3, first of all one has at page 4, paragraph 14, the explicit recognition of a link between national concerns and local concerns. If I can then ask you to turn to the section on national issues, it begins at paragraph 26, there are a number of factors that are considered at the national level. I referred you specifically to paragraph 31 and there are two sub-issues if you like that go to national analysis in paragraph 31.

THE CHAIRMAN: You did refer us to paragraph 31 before.

MR HOSKINS: I did, exactly. There are two issues that come out of it: first of all, the extent to which there was sufficient investigation by the OFT to substantiate the claim that Boots and Alliance stores do not tend to be located close to each other, and I showed you the evidence relied upon for that. Also, very importantly, at the very bottom of paragraph 31, "Overall, the evidence suggests limited competition between the parties in respect of the pricing of P medicines. However, any pricing concerns which may arise on a local level will be addressed below" and then we have, of course, the local analysis beginning at paragraph 33 which goes

from a problem at two to one, a problem at three to two, no problem at four to three. So the point is that it is a material consideration in reaching a conclusion at the national level that Boots and Alliance stores do not tend to be located close to each other, and it is also a material consideration that the findings on local areas are material to the finding on the national area – I take that from paragraph 31.

It is against the backdrop of those findings, including paragraph 31, that one then finds the statement that I was referring to at paragraph 82 which is the final conclusion. The second sentence: "In terms of national competition no concerns arise."

Madam, on this point you asked me a question in relation to what happens if we win on the local, what happens in terms of the remittal. In our submission, if we establish that either or both of the two reasons given in paragraph 31 is flawed, then because they are both clearly material reasons because they are relied upon in the Decision, then the OFT would inevitably be required to reconsider first of all the local issues that have been remitted, and having come to a new conclusion on those issues, which may be the same as before or it may be different, they would then have to reconsider whether they still concluded that there is no concern at national level. For example, if the decision was quashed in relation to local areas, it went back to the OFT and they found actually they were concerned about 24 of the 48 areas of four to three, then we say it is inevitable because of the linkage in the decision that they would have to reconsider whether that change made a difference to their conclusion in the Decision, no concerns at national level. They would also, by definition, have to then consider what undertakings were appropriate, having come to a new conclusion on local issues, having come to a new conclusion on national issues, because that is the logic of the way the process works. We do say, therefore, if we win on local inevitably national has to go back, because although the finding in the Decision was no concerns, that may well change. I hope that deals with the concern.

THE CHAIRMAN: Thank you, Mr Roth?

MR ROTH: May I just enquire about the mundane matter of timetable because I see that I was scheduled to finish?

THE CHAIRMAN: You were scheduled to have an hour and a half.

MR ROTH: An hour and three-quarters, I think, but I would hope that I am not obliged to stop at 2.30 as in your original timetable, and I would not be very popular if I suggested we all give up our lunch. I am certainly not going to suggest that.

THE CHAIRMAN: What we suggest is that we go on to 1.15 and then probably start at 2.00 or five past, and then somebody can work out the maths from that.

MR ROTH: Yes. There is possibly a little slippage built into your timetable on the basis of stopping at 4.15.

THE CHAIRMAN: Absolutely.

MR ROTH: Thank you. Can I at the outset deal with three preliminary, yet potentially important matters, which involve the fundamental principles of judicial review and then make some brief observations about the statutory test for reference by the OFT under the Enterprise Act? The three issues are first the admissibility of expert evidence insofar as that is still relied on at all in his case; secondly, the use of a witness statement by a respondent as regards the reasons in the Decision; thirdly, the issue of disclosure.

First, expert reports. I have to say, having listened to Mr Hoskins and his responses to your questioning, it seems that they are now relied on only for a very limited purpose indeed. If it is, as it may be, only the fact that there are 48 four to three areas on the Celesio count, the table in Appendix B, which is the colour chart – in the original Appendix B we had a black and white bar chart – and, thirdly, the appendix to Mr Coombes' new report, which is just, again, a list of the 48 areas and that is it, then I am not going to object to those being put forward.

THE CHAIRMAN: Shall we just check that that is it?

MR HOSKINS: Yes, those are the references.

THE CHAIRMAN: So we do not have a problem as to the admissibility of that evidence.

MR ROTH: Of that evidence. There is of course a lot more, as you know, in the three reports, some of which has obviously gone with the first ground of appeal review, the challenge on the fascia test, but some of it, which does go very materially to some of the arguments and expressions of opinion by the experts as to whether the decision is convincing and so on, I will not get into. You will appreciate that I therefore park this for possibly another day because it does raise an important issue ---

THE CHAIRMAN: Park it for another case you mean.

MR ROTH: For another case, yes, exactly, not another day. There is a lot of case law in it, as you saw, and all the rest of it.

THE CHAIRMAN: As it normally turns out, these things can be resolved quite often on the facts.

MR ROTH: Absolutely, helped by the fact that of course the first round of challenge has been abandoned.

The second point, moving on swiftly, is the question of reasons and the respondent's evidence because Mr Hoskins contends that Mr Pritchard's witness statement is inadmissible, although when it suits him he certainly relies on it to support his case, as for example his points on national competition, so it has an evanescent quality in that it becomes important as the proceedings require.

The role of evidence from the decision-making was expressly conceded by the Court of Appeal in the *IBA Healthcare* case, concerning of course an appeal from a decision of this Tribunal of a judicial review of a decision on a matter of reference by the OFT. You were taken to that briefly, but may I ask you to look again at *IBA* which is in volume 2 at tab 6? It is in the judgment of Lord Justice Carnwath, beginning at paragraph 102.

"Adequacy of reasons

Finally, although inadequacy of reasons is not a ground of challenge as such [that is to say it was not in *IBA*, of course it is very much here] it may be helpful to comment briefly on the Tribunal's observations on this aspect.

The Tribunal expressed concern at having to consider material outside the decision letter. It noted that the OFT was under a statutory duty to give it reasons, and referred to what is called the ' well-known principle' that –

'the Court should at the very least be circumspect about allowing material gaps to be filled by affidavit evidence or otherwise' (… *Ermakov* …)

It commented: 'If a material element is not set out in the decision it is very difficult for the reviewing court or tribunal to be satisfied that the matter was properly investigated or that the supplementary reasons did in fact form part of the decision-making process.'

In other parts of the judgment the Tribunal criticised the failure of the OFT to set out all the underlying material.

With respect, I think this concern, and the associated criticisms, were misplaced. The statutory duty to give reasons is an important one, but it is not the same as a duty to give a 'judgment' (such as that of a court) or a duty to make a 'report' (such as that of an inquiry inspector). Again reference to the textbooks might have assisted. The numerous cases on the subject lay down no general test other than the requirement that reasons must be 'intelligible and must adequately meet the substance of the arguments advanced' …."

Moving on to the next paragraph:

"In such a case as the present, where the subject matter is complex and the supporting material voluminous, there is no statutory requirement for all the evidence to be set out in the decision letter. However when a challenge is made, there is, as the Tribunal noted, an obligation on the respondent public authority to put before the Court the material necessary to deal with the relevant issues; 'all the cards' should be 'face upwards on the table' …

There is certainly nothing unusual, particularly in a case which has to be dealt with in a relatively short timescale, for the stated reasons to be amplified by evidence before the court. While in some areas of the law, the Court may need to be circumspect to ensure that this is not used as a means of concealing or altering the true grounds of the decision, that does not arise in

this case. As I understand it, no objection has been taken to any of the evidence being put before the Tribunal (or to the additional evidence adduced in the Court of Appeal). The question for the Tribunal was not whether the reasoning was adequately expressed in the decision, but whether the material ultimately before it, taken as a whole, disclosed grounds on which the Tribunal could reasonably have reached the decision it did."

That is the context in which amplification evidence can be put in.

Somewhat surprisingly, Mr Hoskins relies on *Somerfield* as demonstrating that the *Ermakov* principle applies, much like a statute, to a section 120 judicial review of an OFT decision. It is in his skeleton argument to which he took you at paragraph 10 of Celesio's skeleton, where he sets out what he says are the two key paragraphs from the *Somerfield* decision of this Tribunal. Of course, that leaves out the crucial paragraph 66, the paragraph to which you, ma'am, referred when Mr Hoskins was addressing you, which draws a very clear distinction between the situation that arises on a traditional view of the Competition Commission, producing a very full report over a much more extended timetable, and a judicial review of the OFT on a merger reference. It is that paragraph., paragraph 66, in *Somerfield* which is the crucial paragraph, and not paragraphs 64 and 67 which Mr Hoskins, somewhat surprisingly, isolates in his skeleton.

Of course, one cannot by a witness statement put forward reasoning inconsistent with a decision, but I will address that when I deal with the substance of the arguments that are being put. Mr Hoskins' main point seems to be that it is inconsistent, but that is a different point from amplification of the reasoning in the decision.

THE CHAIRMAN: What about new reasons?

MR ROTH: It should be really by way of amplification or explanation of the reasoning process, but way reasons may be expressed in an OFT decision under section 33 may, we say, quite understandably be somewhat abbreviated and concise.

The third limb of the preliminary matters is disclosure by the OFT of third party evidence. I have to say I had a little difficulty following Mr Hoskins' case on this now. Much has fallen away because the fascia test is no longer under challenge by the third parties, in so far as they take issue with it, much of it related to the fact that nobody else objected to the fascia test.

I refer, with respect to the very pertinent question, if I may say so, from Professor Bain: what actually is being contested in the third party evidence? As I understood it, it is being said the evidence that there was limited competition in local markets and the national market. Among the third party evidence that we managed to rely on that is what Celesio, a third party in this case, said to the OFT in its own acquisition of Cohen and Scholl. I will come to it in due course, but they said quite a bit about how limited competition is between retail pharmacies, and I do not think that has been contested by Mr Hoskins, they were his clients. Beyond that, I

really did not see that it goes to anything that is actually in issue here. Nonetheless, the skeleton argument, even at the stage where the challenge to the fascia test has been abandoned, seeks to criticise the OFT very strongly for not producing the third party evidence and says it is impossible to judge the case properly without such disclosure.

At page 14 in his skeleton argument there is a section just above paragraph 42 headed "Problems in the evidential approach adopted by the OFT" and you see what is said over the page at paragraph 43. "Mr Pritchard refers to third party materials insofar as they support the OFT's case. However, it is inevitable that not all of the third party materials will support the OFT's case. Some will undermine [it]. However, neither the Tribunal nor Celesio is in a position to evaluate all relevant evidence, because the OFT has not sought to have all that evidence admitted before the Tribunal." We have not sought to and there is no application that it should be. "The evidence made available to the Tribunal is skewed towards that which supports the OFT's case. It is not the whole picture."

It then goes on, as you see, to refer to *Ex parte Huddleston* the passage cited in Lord Justice Carnwath's judgment that I just read, and then at paragraph 46 there is a long recitation of what this Tribunal said in *IBA* before it went to the Court of Appeal, sub-paragraphs (a) to (d) of the skeleton argument.

There seem, therefore, to be three grounds for saying there are problems. It is not suggested that Mr Pritchard, not to mince words, is lying, but it seems to be said that he is being deliberately misleading by selective reference to the evidence, skewing the evidence. That is a serious allegation, it is wholly unfounded, it is wholly unsustained and it is unworthy of those representing the applicant.

Secondly, it is said that the OFT fails to meet its duty under *Ex parte Huddleston.* With respect, one needs to read that dictum in the context of the case as a whole, and I can ask you to look at our supplementary skeleton, the note that was served yesterday, at paragraph 4, so far as submissions of third parties or other material may be relevant to a decision under challenge, the duty of the decision-maker is to ensure the court has a full and fair picture of the basis for the decision and the procedure of the decision-making process insofar as it involves interested parties. It is to that duty that Lord Justice Parker was referring in *Ex parte Huddleston* and we set out the quotation which I would ask you to read.

Just for reference *Ex Parte Huddleston* is in your bundle 6 at tab 7, which was a challenge to the refusal of a local authority grant to a student. That simply made a bald statement saying "We have taken everything relevant into account" and the Court of Appeal said that will not do … (inaudible) … being challenged you have got to have concern to the particulars. If one looks at that report at tab 7 of bundle 6, page 946, just below letter J, Lord Justice Parker:

"Having said this, I should make it plain that it is the special circumstances of this case which in my view render the bare statement that all the circumstances were taken into account an adequate answer. No one should suppose that, where leave has been given by the Divisional Court to apply for judicial review on the ground that an authority has taken into account irrelevant considerations or has failed to take into account relevant considerations or had made an 'irrational' decision, it can be regarded as sufficient to say 'We took into account all relevant considerations and took no account of any irrelevant considerations'. Where leave has been given on any such ground the authority would normally have to explain what it did and did not take into account. I say 'normally', for applications for leave and on the grounds on which they are granted vary enormously. So too do the answers which an authority may properly make.

"If, for example, the allegation on which leave is given is that consideration A was not taken into account, the authority's answer may be merely: (i) 'We admit it was not taken into account but it was not relevant'; or (ii) 'We did take it into account'.

Depending on the basis of the attack, it may however have to go further. If the applicant's case is that the particular consideration was not taken into account and that, if it had been, no reasonable authority properly directing itself could have refused the application, the authority will almost certainly have to go further and say, 'We did take it into account, but we also took into account considerations B, C and D which were equally relevant and, having regard to A, B, C and D together, our refusal was not one which no reasonable authority could reach.' I say 'almost certainly' for I do not myself consider it possible to generalise."

Then below that there are the paragraphs which are quoted in our skeleton argument, except as you see, just above letter F, the words "so far as is necessary fully and fairly to meet the challenge" are actually emphasised by Lord Justice Parker, something we failed to do when quoting it in our skeleton argument.

That is even in the context when there is no statutory restriction on disclosure, such as the restrictions that apply to the OFT under part 9 of the Enterprise Act such that we could not simply disclose. That is as regards the second basis of criticism, that we are somehow not complying with *Ex Parte Huddleston,* we say we clearly are.

The third ground of criticism, based on those passages from the Tribunal in *IBA,* the passages set out and paraphrased at length in all the sub-paragraphs of paragraph 46 of Celesio's skeleton argument, are the very passages which Lord Justice Carnwath criticises in the Court of Appeal in the section of the judgment that I read to you. As for a right to disclosure, even if it is asked for or specially applied for, that has been discussed in two cases at senior level, the two cases that we refer to in our supplementary note. At paragraph 6 we refer to the case,

usually more popularly known as the London Lesbian and Gay Centre case and we have provided this in a small clip to go into bundle 5.

THE CHAIRMAN: Yes.

MR ROTH: If we go to bundle 5 at tab 17 we see the Court of Appeal judgment where a challenge was brought by the London Borough of Islington and the London Lesbian and Gay Centre to a decision of the Secretary of State which disapproved of a scheme regarding the premises that they occupied. On the interlocutory hearing Mr Justice Rose (as he then was) ordered the Crown to give discovery of documents and the Secretary of State appealed. Picking up the second page:

"Held: allowing the appeal, Mr Justice Rose had misdirected himself in ordering discovery. The previous authorities on discovery are not altogether easy to reconcile with each other and each depended to a large extent on the actual circumstances of the case. It was well established that it was not right in any litigation to order discovery by way of a 'fishing expedition'. An applicant was not entitled to go behind an affidavit in order to ascertain whether it was correct or not unless there was some material available outside that contained in the affidavit to suggest that in some material respect the affidavit was not accurate. Without some prima facie case for suggesting that the affidavit was in some respects incorrect, it was improper to allow discovery of documents, the only purpose of which would be to act as a challenge to the accuracy of the affidavit. If, however, an affidavit only dealt partially, and not sufficiently adequately, with an issue it may be appropriate to order discovery to supplement the affidavit, rather than to challenge its accuracy. That must depend on the nature of the issue.

In view of the history of attitudes to homosexuality in this country, it was perhaps understandable that there was a suspicion that the real reason for the refusal of consent on the sale of the LLGC premises was disapproval of homosexual activities. Insofar as it was founded on such suspicion, the application for discovery was a fishing expedition. It was deposed that the Minister had no bias for any kind against the carrying out of the services offered by the centre. There was no prima facie case disclosed of inaccuracy, much less falsehood, in any evidence put before the court by the Secretary of State. There was no basis for going behind his statements."

That is a very robust judgment in a case where the Centre thought there might be something there.

Moving on to the next tab, in 1994 the Divisional Court, here Lord Justice Rose, by now in the Court of Appeal and perhaps somewhat chastened by the experience of being overturned in the previous case, this is the well-known case of the Pergau Dam where the World Development Movement, you may recall, brought a challenge to the government's decision to

give a grant of aid to Malaysia for the construction of the dam. A major issue was whether the World Development Movement had standing in the court. An important judgment held that they did and indeed they quashed the decision, but they also considered disclosure and one sees that at the bottom. I will not read the whole head note, but on the second page, 387 at the bottom, letter H, per Lord Justice Rose:

"Whilst discovery in judicial review proceedings can be made under Order 24, Rule 3, which will, by virtue … be refused if it is not necessary fos* disposing of the case fairly, the Secretary of State's letter to the Foreign Affairs Committee in conjunction with the summaries of the departmental minutes exhibited in evidence provided an effective answer to the claim for discovery and as there was no basis for questioning the accuracy of the summaries, which was a necessary prerequisite for obtaining discovery of original documents, discovery of the minutes was not necessary."

That is quite a strong case because it was found in fact in that case that the affidavits put before the court in the first instance were incomplete and the court was critical of the affidavits, but even so there was no duty to make further disclosure and the application for general disclosure was refused.

I think that probably deals with the third of my three points because we say there is no failure by the OFT to provide information here. Even if disclosure had been applied for, which it was not, despite the express invitation to make such an application if it was thought appropriate, it would in our respectful submission properly have been refused within established principles. There is no difficulty for this Tribunal to carry out its traditional function under the statute, with which it is entrusted under section 120. The criticism in this part of Celesio's skeleton argument is completely misplaced. That bell tells me, perhaps appropriately, that it is five past one.

THE CHAIRMAN: I am not sure what that bell was telling you.

MR ROTH: It was deceiving me into thinking it is time for me to stop; it was not set by me. In that case I can deal with the other preliminary matter which is the test for reference under the Enterprise Act. I will just say a few words, without wanting to retread well-trodden ground, about what is said there. It is in your bundle 2 at tab 6. In the pages we have here, the Vice-Chancellor, in paragraph 33 of his judgment (at the bottom of the left hand column) quotes in full from the judgment of the CAT. I will not read the whole quote, but picking it up within the quotation at 191 (the right hand column), the Tribunal said:

"In other words, putting the matter less technically, if there is genuinely 'room for two views' on the question whether there is at least a significant prospect that the merger may be expected

to lead to a SLC, then in our opinion the requirement in section 33(1) that 'it may be the case' that … [the merger] may be expected to lead to a SLC, is satisfied.

"[192]. In our opinion, in such circumstances, the statutory duty of the OFT under section 33(1) is not to decide, definitively, which of those two views, it, the OFT, prefers. Under the scheme of the Act, the definitive decision maker, in a case where there is room for two views, is not the OFT but the Commission. If there is room for two views, the statutory duty of the OFT is to refer the matter to the Commission, whose duty is to *decide* on the question whether the merger may be expected to lead to a SLC, as section 36(1) expressly provides."

Then if I can take you over the page, please, still within the quotation, to the left hand column at paragraph 197, after referring to the fact that there will be some cases which are clearly likely to create an SLC and some clearly will not, the sort of black of white cases, there is a grey area where they may be room for more than one view. That is referred to at the bottom of the previous page in paragraph 195. Then paragraph 197:

"What is the correct approach in cases in the 'grey area' in between? In a case where real issues as to SLC potentially arise, it seems to us that the words 'it may be the case' imply a two-part test. In our view, the decision makers(s) at the OFT must satisfy themselves (i) that as far as the OFT is concerned there is no significant prospect of SLC and (ii) there is no significant prospect of an alternative view being taken in the context of a fuller investigation by the Commission. These two elements may resemble two sides of the same coin, but in our view they are analytically distinct."

That analysis was challenged, as you know, in the appeal as being the wrong interpretation of the statute, challenged by the OFT, and on the next page, paragraph 38, the Vice-Chancellor says this:

"I have no hesitation in preferring the submissions of the Appellants [the OFT] on this issue. The statutory test, so far as relevant, imposed by section 33(1) is 'whether the OFT believes that it is or may be the case that the [merger] may be expected to result in SLC …'

Thus the relevant belief is that the merger may be expected to result in SLC, not that the Commission may in due course decide that the merger may be expected to result in SLC. Further, the body which is to hold that belief is OFT not the Commission."

He then explains how, by construction, he reaches that view, and then paragraph 42 in the next column:

"For all these reasons I would reject the two part test formulated by CAT in paragraph 197 of their judgment and applied in paragraph 228 and 232."

So it is not a question of whether there is room for two views or an alternative is credible.

He then goes on to consider what is the test that should be applied given that the CAT's formulation is disapproved? He does that through a series of propositions and I would ask you to go to paragraphs 47 and 48 of the judgment, in particular at paragraph 48:

"At the other end of the scale it is clear that the words 'may be the case' exclude the purely fanciful because the OFT acting reasonably is not going to believe that the fanciful may be the case. In between the fanciful and a degree of likelihood less than 50% there is a wide margin in which the OFT is required to exercise its judgment. I do not consider that it is possible or appropriate to attempt any more exact mathematical formulation of the degree of likelihood which the OFT acting reasonably must require. As Lord Mustill observed in [the South Yorkshire case] 'The courts have repeatedly wanted against the danger of taking an inherently imprecise word, and by redefining it thrusting on it a spurious degree of precision'."

He then comments on the OFT's published advice. With great respect to Mr Hoskins he does not say, as was attributed to him, that if it is more than fanciful the OFT must refer, that is quite clearly not so. He is saying that there is margin between the fanciful and more than 50% as to the degree of likelihood, and that is a matter of judgment for the OFT whether there is sufficient likelihood of substantial lessening of competition as to warrant investigation by the Competition Commission. The degree of likelihood of SLC will vary with the circumstances, to adopt the phraseology of this Tribunal in the UniChem case, and that is something that we strongly rely upon, given the way the application is put. I think it now is 1.15 and that is indeed a convenient moment because that concludes the preliminary matters. Thank you.

THE CHAIRMAN: Five past two.

(The luncheon adjournment).

MR. ROTH: Good afternoon. The substance of the judicial review challenge. This is, of course, as you appreciate, judicial review – not a Competition Act appeal on the merits. So, it is not a question of whether the Tribunal agrees or disagrees with the decision, but whether it is within the range of reasonable decisions that the OFT can take – whether, put colloquially, it stacks up. This is a case where the OFT, working within the statutory deadline that arises on a reference back from the European Commission (because unlike a purely domestic case where there is just an internal published working guideline, here there is a statutory guideline under Section 34A of the Enterprise Act of forty-five working days), the OFT in fact gathered a very great deal of material, and, we submit, conducted a careful assessment. There is a helpful chronology which is at the end of the intervenor's bundle – that is, Bundle 3. If I can just ask you to look at the very last tab? There is a two-page chronology, I think at the very end. You see there that there are some initial meetings – both with the OFT and with the European Commission in Brussels. This is, of course, Alliance/UniChem and Boots. Then, on 30 November the European Commission make the decision referring back to the UK authorities under the EC Merger Regulations, and that really then starts the thing rolling. As you see, just going down there, there are meetings, and repeatedly the OFT sends information requests on 7 December ---- They get some information back. They digest it. 21 December – another information request. That is considered. There is then a break for Christmas. But, information comes in on 30 December, 6 January. Another information request sent back on 10 January. Another information request. There is then a meeting on 11 January. Further information request. Still on 18 January the OFT is sending information requests to the parties.

So, it is an ongoing process, and the information requests, of course, develop and become refined according to the information that is provided in response to the previous request – as one would expect. Subsequent requests follow on, digesting that, and what is said in meetings. So, the fact that they do not at the outset – or early on – ask for information about four to three areas (the point that Mr. Hoskins made), but they start with certain request, then look at them and see where does it take them, and then ask for further information is entirely natural, and, indeed, accords with common-sense and how an investigation should be conducted. If they come to a point where they thought, "Well, we need detailed maps on four to three areas", they would have asked for it. But, if they come to a point where they say, for reasons that I come to, "We don't", they do not ask for it. No conclusion can be drawn from that simply by looking at the earlier request and saying, "Well, what was asked for, and what was not?"

So, that takes me to, really, the substance of what this case is really about, which is the finding that a reduction of four to three fascia in local retail markets would not be expected to give rise to SLC. The reasoning in the decision, I have to say, has been really quite

fundamentally mis-characterised by Celesio on several key points. It is, as everyone appreciates, a process of reasoning. I think Mr. Pritchard describes it as an iterative process. I would tend to say an incremental process. That means the same thing. Those paragraphs at 43 to 46 – of the decision. I know one gets to the point of almost knowing it by heart, but could I ask you to open the decision at paras. 43 to 46? What is going on here? The OFT starts at the case that is likely to cause most concern – a two to one fascia reduction. That is the starting point in para. 43. They conclude that it is likely to result in SLC – not that it will result in SLC (that is the test for the Commission under Section 36 of the Act) but that it is likely to. It could lead to a reduction in the incentives. It is expected to result in SLC. I will come on in a moment to para. 82 (not now) where that is picked up again. There is no criticism about that – not only as regarding the conclusion, but also that this is a sensible starting point. Then they go to the next level up – three to two fascia reduction. They look in detail at those areas. They find that when stores are the closest competitors in those three to areas, then it is similar to a two to one area. That is, of course, at para. 44, and one sees how closely they looked at the three to two areas from the maps that were provided to them. If, perhaps, you could keep the decision open, and if you could go to the OFT bundle, Bundle 4, at the first tab at 1A. As pointed out before, it is a bit hard to find because there is no continuous pagination. But, about two-thirds of the way in, one comes to that p.54, Annex 4, and then you have the three to two local areas, one mile radius, and a separate map for each one so that they can be analysed. If, for example, you go to Map 2, one sees the situation there. You have the blue dot at Boots. You have the red triangle in the middle of an Alliance pharmacy, and you have two white dots – one right next to Boots; one about probably 100 yards away – which are the other two. One notices, incidentally, if you go just outside the one mile radius you have what looks like Ashby Common Road ---- Ashby Lane. There is another white dot just outside. There is another one a bit further away. That is that area. One can see the position going through.

If we go on a couple of pages to Map 4 – Cambridge (it may be that some members of the Tribunal are familiar with Cambridge) – you will see there the red triangle right in the middle; there is a blue dot to the left (that is Boots); and there is a white dot (I cannot quite read it), which is the other one inside; then there are a lot of other white dots around. Down at Cherry Hinton at the bottom, and up towards Chesterton at the top ---- Indeed, all over the place. But, that is outside the perimeter. That is the level of detail which the consideration got to. One can work through all the different maps.

So, that was the analysis that they did in looking at it, and saying, well, in some cases the merging parties' pharmacies are located close together. In those cases it may not differ from that in a two to one area.

Then they go on at para. 45 – you have got to consider also what is said in the parties' internal documents about how they monitor competitors. Then they conclude that on balance ---- on balance, the OFT believes an SLC may go beyond the two to one areas, and may also arise where fascia are reduced from three to two within a one mile radius. Then they go to the next level up and they confront the question about any higher fascia reduction. It is not ignored or forgotten about. They conclude, as explained in the first sentence of para. 46, "Any higher reduction in fascia number than this – for example, four to three, or higher – five to four – could also give rise to a lessening of competition, but on the basis of the evidence before the OFT it believes that this cannot be expected to be substantial". That has been criticised – that sentence – as being no reason at all, or else ---- also, illogical. But, with great respect, this first sentence is not to be read in isolation of what has gone just before. It is in the context of discussion of the evidence in the decision as a whole and the findings in the previous paragraphs. It is entirely logical.

First, it is now accepted that the fascia test is a valid basis for assessing competitive constraint based on the number of competing … (inaudible) … The challenge saying that that was unreasonable has been abandoned. Secondly, one is looking at a very small geographical area – a one mile radius around these stores. Thirdly, this is a very regulated market with limited scope for competition anyway. So, that is the counter-factual against which the effect of the merger is being assessed. Fourthly, when a three to two fascia reduction is only just a candidate for SLC – on balance, a candidate for SLC having regard to all the evidence – although not at all conclusive that it creates SLC ---- Indeed, the OFT tried to see if it could segregate those three to two areas where there might be a problem from the rest of the three to two areas, but it could not come up with a sufficiently robust method of doing so. Mr. Pritchard explains that in his witness statement at paras. 107 to 114. Nothing there is inconsistent with the decision at all. Fifthly, on that basis they could readily conclude, on the same evidence, that four to three is not a concern. Well, Mr. Pritchard explains that in his witness statement at para. 117. I just ask you to look at 117 of his statement. "The OFT's conclusion in respect of four to three areas was, as in the case of other areas, reached after detailed consideration of all the evidence in the case. In short, the OFT was already concerned … a finding of SLC, even on the lower … was marginal in respect of those limited number of three to two areas that arguably resemble two to one areas felt obliged to extend this lower level of belief across the entirety of the sixty-one three to two overlaps … Once an additional effective competitor of choice for consumers within one mile of the merged firm was added to the competitive assessment, the merged firm would be disciplined by two effective competitors within one mile of its operations. Any protection that harm would occur in the circumstances

of local competition among pharmacies became, in our judgment, plainly speculative and fanciful because it was unsupportable on the evidence. Hence the OFT's reference to its positive belief on the basis of the evidence before the OFT. Having established lack of concern of four to three, there was no need to proceed further with the literative approach".

Is that inconsistent with the decision, or seeking to gloss it, or give it a different meaning? We say, "Not in the least". Indeed, the OFT was careful in the three to two case because it did not find that SLC is likely to result, but that it may be the case that it may result. That is what Mr. Pritchard here says, applying the lower standard stipulated by the Court of Appeal in **IBA**, and made clear in the decision, in para. 82 ---- If you could please look at para. 82 of the decision, which is the assessment section of the decision – because the decision, as you will have noticed, has various capitalised sub-headings ---- Right from the beginning the transaction, jurisdiction, relevant market, and so on ---- horizontal issues, vertical issues, third parties, and then assessment. This is the assessment section. There, in para. 82, starting at the second sentence, on a local level on the basis of a one mile radius around both Boots and UniChem pharmacies, a thirty-eight areas merger will result in two to one reduction … and a further sixty-one areas where it would result in a reduction in the number of fascias from three to two. The evidence considered during this assessment clearly shows a reduction in pharmacy fascia from two to one in a local area is, despite the restrictive terms of the NHS concept, expected to result in an SLC. Such an SLC could take the form … There may be also an impact on pricing, particular of P medicines".

Then it goes on, "The evidence of whether an SLC would arise in the case of three to two overlaps is less conclusive. But, on balance, the OFT takes the view that it may be the case that the merger may be expected to result in an SLC within these three to two overlap areas, given the high barriers to entry present in this market as a result of the control of entry regulations". That is their finding regarding the three to two areas.

I ask you to compare the way the decision is characterised by Celesio in para. 26 of my friend's skeleton argument where they set up their foundation for what they say is the illogic in the OFT's approach. Paragraph 26. "Having concluded that there have been sufficiently significant changes in the competitive environment so that an SLC will now arise in relation to two to one and three to two reductions. The OFT cannot then seek to argue any such changes should have been small, let alone so small as to justify itself finding no SLC would arise in the four to three areas".

Well, if that is what they had found – and one can see some force in the point ---- But, of course, it is not what they found. They did not find that SLC will arise in three to two areas. They did not even find that it will arise in two to one areas. They found it likely in two to one,

and, on balance, it may be the case in three to two, but they cannot be conclusive. That is the fundamental mis-characterisation of the approach that the OFT took. Of course, the decision has to be read as a whole, and para. 82 has to be read with paras. 43 to 46. This is not to be construed as though each paragraph of the decision is a section of the statute that one pours over and looks at fine grammatical distinction. I take Professor Bains' forceful point – "Well, if it was slightly differently worded, you get a different view". One takes a sensible analysis of what is the logic of what is being said.

Celesio then say, "Well, they might be a Boots and Alliance UniChem pharmacy, in closest proximity geographically in a four to three case". Well, so they might. So, also, in a five to four case, or a six to five case. But, they do not suggest that we had to look at all six to five or even five to four cases. Why is it not relevant in a five to four case if the Boots and the Alliance UniChem pharmacy are the two that are closest together, because, very obviously, when you are looking at a very small local area there is a point when the other fascia, albeit 800 yards away/1000 yards away, provide sufficient constraint, particularly when the scope for competition is so limited in the first place. Opening hours on service seems to be the main form of competition, and then you are into qualitative things like friendliness of staff, or a home delivery service, or whatever.

Celesio says, "Well, the line should be drawn at four to three". Someone else might say, "The line should be drawn at five to four". Celesio, of course, cannot say that because in its Cohen and Scholls merger it was contending that the five to four case raises no worries at all; indeed, there, even in a two to one case, they said there were reasons why the OFT should not be concerned. But, the judgment to draw the line at three to two, based on a detailed examination of what happens in three to two areas – to what extent is there any concern – is exactly what falls within what the Court of Appeal in IBA Healthcare described as 'the margin of assessment' of the OFT in determining whether the lessening of competition is substantial. The likelihood of SLC which is appropriate for the OFT's judgment. That is exactly what they did. They did not say that the loss of a fourth choice in this very local area when three remain means that there is no lessening of competition. They have been very careful not to say that. They say, "Yes, there is some lessening, but on the evidence we have had, and in our judgment, it will not be substantial".

Has the OFT acted irrationally in exercising that judgment here? It is now said, "Well, it's irrational because when competition is weak, one should be more, not less, concerned about any reduction". But, with respect, the assessment the OFT has to conduct is not quite so simple. SLC is purely an effects test. It is asking, "How much competition is lost?" –not, "How much was there in the first place?" It is a point, if I may say so, which was made in

Professor Bain's very pertinent question. A merger could create a big loss of competition in what was a highly competitive market, or it could have negligible effect in a market where there was barely any competition at all because it was highly regulated in what the parties can do. SLC is a measure of change by reference to material harm to consumers. The point is made very clearly in the OFT's substantive assessment guidance, which you have in Bundle 5, Tab 2. On p.15 at para. 3.7, "A merger may be expected to lead to a substantial lessening of competition when it is expected to weaken rivalry to such an extent that customers would be harmed. This may come about, for example, through reduced product choice or because prices could be raised profitably; output could be reduced and/or product quality or innovation could be ---" etc.

It is said also that the last sentence of para. 46 – the second sentence to be disregarded, but the last sentence – about the MMC report is inconsistent with what has been said before, the sentence saying that the report considered only two to one fascia reductions while there had been small changes in the market since then, primarily the removal of resale price maintenance on over-the-counter medicines which might suggest some small increase in the scope for potential competition. These changes do not support an argument that a reduction of four to three might give rise to competition concerns. There is nothing inconsistent with what has been said in para. 43 above. The Monopolies & Mergers Commission said that a two to one reduction in fascia down to monopoly, in other words, would produce some small reduction in competition, but that is outweighed by customer benefit. The OFT considers that at para. 43, and says, "Well, now some more competition developed. So, that is not a basis for saying there is no concern about two to one". But, when they get two levels up in the incremental process, to considering four to three, they say, "Well, it's still relevant in that context that even in two to one at that time they thought there was no problem, and the changes which now lead us to re-visit the matter on two to one, and just, on balance on three to two ---- But, once you get up to the level of four to three, it ceases to be so significant". That is all that is being said.

Then, although Celesio, initially, in its grounds of challenge said that the fascia test should not be applied, and argued in favour of a market share test by outlet numbers – the first ground of challenge now abandoned – they now seek effectively to resurrect it with regard to the four to three areas in the second stage of analysis which they say the OFT should have carried out. That is the coloured bar chart which was explained this morning, where what is done is to take four to three areas and then look at market shares by outlet numbers. I think it was produced in the new bundle, but it actually belongs to Dr. Pedilia's report. But, we have got a coloured copy. I think that is the way it came in. It is the one with the coloured bars. I am told it is Tab 2 of Bundle 6. As you see, it is p.30 of 35, which is a reference back to Dr. Pedilia's

report. What that is doing is counting up the number of stores and then showing market shares by outlet … (indistinguishable) … That is the approach that has been adopted.

I would say by way of observation that reliance on this document ---- That is not a recent challenge at all. I am not saying, therefore, that the thing is inadequately reasoned. This is a substantive challenge, saying, "It is irrational because we did not conduct an outlet market share examination". That is what this point goes to. Whether that is technically there on the new grounds of judicial review put forward, I am not sure, but I do not take a technical point on that. That is what it is saying.

The illogicality here lies with Celesio, because if that is the correct approach – that you look within the individual local areas at market share by outlets – well, that should be applied equally on five to four areas, because you could certainly get more than 50 percent resulting ---- or, even on six to five areas. And it should be used as a filter to exclude from concern some of the three to two areas. One has to be consistent when applying that approach. It is explained by Mr. Pritchard in para. 78 of his witness statement – the problems that it causes and how it would work. If you do that, it could be under-inclusive. He gives the example that a third party has four outlets, while the parties have one each in a densely populated one mile area. Market share by number of outlets approach, which would suggest the third party is by far the leading player with 67 percent compared with the market merged firms' more modest 33 percent. In other words, they would exclude that area. The decisive point, however, from the OFT's perspective is that the better measure for this market is the fascia test which emphasises the question best calculated to capture the merger effect – how many rival suppliers, and how many competitive consumer choices will remain in the area post-merger. For this example, the answer is only two, such that the area is classified as the three to two area, and thus worthy of further consideration.

Secondly, it could be over-inclusive with potential local problem areas where the merging parties operate more than one pharmacy outlet apiece between them within a one mile radius. Assuming it is a densely populated area, the parties' own two stores each, compared to only one apiece by four other rivals. These are not fanciful examples. One just thinks of a densely populated town. The parties' market share might prompt initial concern at 50 percent, despite the fact that the merger is a six to five, i.e. consumers can choose from no less than five rival suppliers. The OFT notes … who did not contend in the Lloyds Cohen and Scholl, and does not contend now, six to five merger prima facie raises competition concerns here. That is precisely what a market share by store number test would suggest in such a case.

So, once one accepts, as Celesio now does, that a fascia test is the appropriate starting point as the rough and ready first indicator, the next stage is to look in more detail at location – not

to apply another basis of concentration analysis which is less appropriate. That is why there is nothing wrong or inadequately reasoned, or inconsistent, in the approach taken by the OFT in working out one to two, two to three, and then saying, "We need not be concerned, given what we have found about four to three, or higher".

That it the local area of the four to three.

I move on to the national market assessment, because Celesio contends that the unreasonable exclusion of four to three reductions in the OFT's assessment of local competition so infected the OFT's separate analysis of national competition that the conclusion in the decision regarding competition at national level is vitiated. That is, I think, I hope, a fair summary of what their new ground are, as set out in their skeleton argument at, I think, para. 1(b): "This error of assessment in relation to local retail markets necessarily vitiates the OFT's conclusion relating to the national retail market". That is their skeleton argument at para. 1(b).

That really is, with respect, an extraordinary contention. This is a merger of Boots (which has 1,350 retail pharmacies) with Alliance UniChem (which has 958 retail pharmacies). How many local areas with a four to three reduction is one talking about? Forty-eight, say Celesio in their Notice of Application at para. 99. In fact, now that one can look at the list of those forty-eight in the appendix to the new expert report of Celesio served on Friday, one can see that actually within that forty-eight, which Celesio counts as a four to three (in Bundle 6 at Tab 5, the last page), headed 'Four to Three Areas' with the orange and blue colouring ---- Well, the blue colouring, in fact (and these are the forty-eight areas) ---- Incidentally, I asked for clarification of the last but one, and last but two columns on the right. I am told they can be deleted – they survived from an earlier draft and tell us nothing. The blue ones, as explained in the legend at the top, are in fact areas that have been identified as three to two areas by the OFT. There are seven of those. So, the forty-eight now go down to forty-one, because they have already been caught by the findings in the decision.

So, one is talking about forty-one areas overall. Under 5 percent of either party's estate. They involve, if one counts them up, forty-four Boots pharmacies and 52 Moss pharmacies (Alliance/UniChem pharmacies). In fact, they are not saying, as they made clear, that all of these forty-one should be subject ---- should give rise to a possibility ---- It may be the case of SLC ---- They say one ought to look at them more carefully to distinguish which do and which do not. But, even if it is all forty-one, to say that an error of assessment of that number of cases vitiates the OFT's conclusion that the position at national level of 1,000 plus stores is really quite preposterous.

In a sense, I could leave it there, but one can see very clearly from the decision the basis for the OFT's conclusion regarding competition at national level. Again, one goes back, as always,

to the decision at para. 26. Horizontal issues; retail pharmacy; provision of services to consumer; national overlap. First, they look at the increase in overall market share nationally, and find that there is no particular cause for concern in that – an increment of 8 percent to 19 percent. However, then they look more closely at different product categories – the three product categories that have been identified. What does that show? That shoes UniChem is much more dependent on sales from dispensing than Boots (para. 27 – the figures (the exact figures are confidential, but a huge difference, almost the opposite ends of the spectrum)). So, that is dispensing. They then look at GSL medicines at para. 28. Little significance for UniChem. Boots - the main competitors, are Tesco and SuperDrug. They then look rather more carefully at P medicines, and note that Boots has a much higher share, and sees supermarkets as the price-setters here too. They rely on internal documents from Boots which are referred to in the confidential part of that paragraph. But, an internal document – not something created for the merger, like an expert's report, but something that Boots had, and on which it was running its business.

They note further, in para. 30, that 40 percent approximately of P medicines have HESL alternative. For example, the one that comes out from the papers that caught my eyes is Ibuprofen, because a twelve-pack of pills of 200mg, painkiller, is a GSL medicine, but a twenty-four pack of 200mg Ibuprofen is a P medicine. So, you can go to the supermarket with a pharmacy there and you can buy two packs of twelve each as opposed to one pack with twenty-four. The point being made is, well, obviously then the packs of twelve are going to constrain the price of the packs of twelve in Boots, because that is GSL, and it is going to constrain the price of the pack of twenty-four, even though that is a P medicine. You cannot sell it for more than twice the price of two packs of twelve.

Similarly, the 400mg strength of Ibuprofen is a P medicine. A pack of twelve – any strength. But, as I explained, the 200mg pack of twelve is a GSL medicine, but you can take two pills at once and you get exactly what you get if you swallow one pill at 400mg. That is the point that is being made. There is a huge amount of overlap, and therefore the pricing of one constrains across a large range of the pricing of the other. Not all, but 40 percent.

Then they find that pricing policies are set nationally. That is something that was referred to back in para. 14. It is picked up in para. 31. They refer to third parties – not, I think, one that Celesio quarrel with – and that competition is, in the main, driven by local competition (in respect of para. 14), but local competition influencing national policies .Then they look – and criticism is made of this paragraph, though actual figures are confidential – and what they are saying here is, I suggest, absolutely clear: that while local competition can feed in to national competition, Boots and Alliance UniChem basically have different business concepts, or a

different spread of their portfolio stores. Boots is primarily a High Street store, while Alliance UniChem fits more the community pharmacy model, generally in residential areas, health centres and smaller shopping centres. But, their breakdown by areas does suggest that both have a relatively high frequency in rural towns. So, they do not dismiss local competition between them. They do not say, "We don't worry about it in considering national price competition on P medicines". They say, "On the contrary, overall evidence suggests limited competition between the parties in respect of the pricing of P medicines, and any pricing concerns which may arise on a local level will be addressed below". So, they say, "Yes, we do need to look at P medicine pricing, but it is appropriate doing it locally where we can actually see where is it that they are within the same local area, and do not face significant competitive constraints from a competing fascia".

Then they note that there are many other major players operating nationally – not just the top chains (Boots, Lloyds and UniChem) – but also SuperDrug, the Co-Op, Rowlands, and of course supermarkets and then there are regional chains and independents, and that is para.32.

So, what they say is that overall there is no national concern at national level, and once you remedy those local areas where the merger might lead to a lack of competitive constraint, that deals with any concern at national level regarding pricing of P medicines. On any fair reading of that section I suggest that is entirely clear.

That takes me, I think, to the issue of the undertakings. Of course, we accept that if you say they were wrong to exclude a finding of SLC potential ---- maybe the case of SLC in four to three areas ---- the undertakings cannot be adequate. They made that clear from the outset. But, if we are wrong on four to three for not considering, and applying, a market share test, as in the bar chart, or applying the geographical proximity test also being suggested, well, then the OFT would need on a reference back, on a remittal, to apply that objective test and assess, on the basis of that test all local areas. It could not just do it for the four to three areas. We would have to apply it fairly to the three to two areas as well. Can they be segregated out?

So, if you were to remit, we would say it cannot just be, on those grounds, circumscribing four to threes. It would have to cover three to twos, because it may be we would find then, yes, some four to threes – if there is some new test we have to develop – would, and some three to twos would not. We say all the reasons are set out, that the approach the OFT adopted is well within its margin of judgment of assessing, "When is a lessening of competition substantial?"

As regards national competition as a whole, I say that if we are right on the four to three areas, and therefore there is no problem with what we did, well, now that the fascia test has been abandoned as a basis of challenge, then the challenge to the national assessment falls away. That is the converse.

Finally – and I will finish within time – I come to the question of reasoning in the decision and the Tribunal's discretion. I have dealt with the process of reasoning and elucidation by a witness statement already, and I am not going to repeat what I have said. I hope that that will resolve the matter. But, if the Tribunal should be against us on that point, and say, "Well, the reasoning is not adequate. It should have been fuller", that does not in itself mean that the decision should be quashed, because being judicial review, the remedy is a matter for the discretion of the Tribunal. Here we say there are several reasons why your discretion should be exercised not to quash the decision for inadequate reasoning – in other words, even if you find the reasoning is inadequate, it should not lead to a remedy of quashing. I make this submission, you appreciate, out of an abundance of caution.

There are three reasons. First if you find the reasoning in the decision was inadequate, it has now been fully explained by Mr. Pritchard, and there is absolutely no point sending it back for, effectively, a redrafting process to produce a better document when the outcome would be the same. Authority for that is in the more striking case, an **ultra vires** decision, is **ex parte Argylle**, and that is in authorities Bundle 5 at Tab 19. This, indeed, arose in the context of a contested merger where acquisition by Guinness of Distillers – I say 'contested'; there was another suitor ---- The jilted suitor, Argylle, had failed to get Distillers, but the Guinness bid for Distillers had been referred to the Monopolies Commission for inquiry. Then, as a result of, I think, some divestitures, the reference was set aside by the Chairman of the Commission. That setting-aside was challenged by Argylle. The Court of Appeal held that, indeed, the Chairman had no jurisdiction to set aside the reference. So, it was **ultra vires**, but they did not quash the decision. It is in the headnote at para. 2 on the second page ---- The Commission then approved what the Chairman had done. Sir John Donaldson, M.R., Lord Justice Neale: "Although the Commission had tacitly accepted an approved the practice of the Chairman himself deciding in an interval before a group of members had been formed to investigate a reference, whether a particular proposal had been abandoned, there was no power under the Act for the Commission to do so, and the Chairman could not be said to derive any independent authority from the Act to take such decisions".

"3. But that there was little doubt that a properly constituted group of members of the Commission would reach the same conclusion as had the Chairman, that in view of the purpose of the Act, and the fact that third parties might have acted in reliance on the decision to lay aside the reference, and taking into account the needs of good public administration, the court would, in the exercise of its discretion refuse to grant relief".

Then, if one goes to the Judgment of the Master of the Rolls at p.774C – discretion – the Judge accepted that the Chairman derives authority to act as he did from the Act ---- The Judge

accepted because the Judge had found he had the power to do what he did. "The Judge therefore did not have to consider the issue of discretion. As I respectfully disagree with the Judge on this aspect, I do therefore have to consider how discretion should be exercised. We are sitting as a public law court concerned to review an administrative decision, albeit one which has to be reached by the application of judicial or quasi-judicial principles. We have to approach our duties with a proper awareness of the needs of public administration. I cannot catalogue them all, but in the present context would draw attention to a few which are relevant: good public administration is concerned with substance rather than form. Difficult although the decision upon the fact of abandonment may, or may not, have been, I have little doubt that the Commission, or a group of members charged with the conduct of the reference, would now reach the same conclusion as did their experienced Chairman. Good public administration concerned with speed of decision, particularly in the financial field. The decision to lay aside the reference was reached on 20 February, 1086. If relief is granted, it must be some days before a new decision is reached. Good public administration requires a proper consideration of the public interest. In this context, the Secretary of State is the guardian of the public interest. He consented to the reference being laid aside, although he need not have done so if he considered it to be in the public interest that the original proposal should be further investigated. He could have made a further reference for the new proposals, if such they be, but he has not done so.

"Good public administration requires a proper consideration of the legitimate interests of individual citizens, however rich and powerful they may be, and whether they are natural or juridical persons. But, in judging the relevance of an interest, however, legitimate, regard has to be had to the purpose of the administrative process concerned. Argylle has a strong and legitimate interest in putting Guinness … but this is not the purpose of the administrative process under the Fair Trading Act 1973. To that extent, their interest is not therefore of any great, or possibly any, weight.

"Lastly, good public administration requires decisiveness and finality. Unless there are compelling reasons to the contrary, the financial public has been entitled to rely upon the finality of the announced decision to set aside the reference and upon the consequence that subject to any further reference, Guinness were back in the ring from 20 February until at least 25 February when leave to apply for judicial review was granted, and possibly longer in the light of the Judge's decision. This is a very long time – five days – in terms of a volatile market, and account must be taken that probability deals have been done in reliance upon the validity of the decisions now impugned.

"Taking account of all these factors, I do not consider that this is a case in which judicial review should be granted. Accordingly, I would dismiss the appeal" and the other two Lords Justices agreed. I do not think I need read their decisions on that basis.

We say here that on the basis of Mr. Pritchard's explanation ---- if you say, "It's not fully reasoned. More of that could have been in the decision itself", yes, it could have been ---- It does not make sense, frankly, to quash for that on those grounds. That is the first under Discretion.

The second point under Discretion is material non-disclosure regarding the position adopted by Celesio; the fact of Lloyds' bid for Cohen and Scholl pharmacies. We do not say that is a ground to refuse leave in isolation. I make that very clear. But, we say it is a factor that the Tribunal can, and should take into account on a matter of discretion. We do say, with great respect that it is quite serious. The Notice of Application refers to the Cohen and Scholls case, but it dismisses it as irrelevant. That is in para. 67(b) Can I ask you please to look at that? That starts, "No useful comparison may be made with the previous cases relating to mergers in pharmacy markets. As explained in (b) above, two of the cases concerned only the wholesale market. Of the other two cases in which the retail market has been considered in detail; (b) as for Lloyds, Cohen and Schools, as set out in para. 25(b) above, the merger resulted in, at its narrowest, a reduction from five to four fascia which neither the OFT, nor any third parties considered gave rise to any competition concerns. At its narrowest, a reduction from five to four fascia ----"

Well, on a technical reading, that is correct. But, it is very misleading, because in fact the transaction, as notified to the OFT, included in one area a reduction which Lloyds first thought was two to three, and then, on re-checking found was two to one. That was Mexborough. You see how that was addressed by Lloyds in the merger notice which is in the OFT's bundle, Bundle 4, Tab 3C. That is the merger notice under Section 96 of the Enterprise Act. If you turn to p.11 of the Notice, you see that it has been signed by Mr. Justin Ash, who is the deponent, and is the further witness statement in the present case. He pens a detailed account on competition, and the issues, and at p.20 the impact of the transaction on competition in retail pharmacies. You see how it is addressed at paras. 4.2, and 4.6 with the discussion of the two to one case, which was Mexborough, and at paras. 4.3 and 4.4 he explains why Lloyds was arguing that although there is two to one in Mexborough, it will not lead to an SLC (para. 4.4). Local conditions in 4.6. Perhaps 4.4 is interesting because it says that there are a number of other independent pharmacies on all the main routes into and out of Mexborough which could be convenient for patients, particularly in relation to repeat prescriptions, for example, going to and from work. "Lloyds therefore considers the three mile radius is a valid geographic market

for a location .. in respect of additional introduction of services, many of which are free ---" The next paragraph talks about the PCT. At 4.6, "Lloyds does not consider that any of these levels of local concentration will lead to a reduction in price or non-price competition ... to maintain competition".

What then happened was this: because the OFT expressed concerns about this locality, because it is a two to one, the Mexborough pharmacy was removed from the transaction, and that is why the statement in the Notice of Application is technically correct. But, the process of assessment in that case, as Celesio and Mr. Ash know only too well, did indeed involve a case in excess of a five to four reduction, and one which the pharmacy contended did not cause SLC. It really is no good saying that there is no need to disclose because the OFT knew this. That cannot excuse a statement such as appears in the Notice of Application which the respondent (though quite possibly not their counsel or their solicitors - because they were different solicitors in the Cohen and Scholls case, and so it is not a criticism of the lawyers as they are acting on instructions, and would have known very well what the position was) ---- Of course, the relevance of some of the material - because it said it is not relevant ---- That is the material for non-disclosure. But, then Mr. Hoskins and Miss Bacon say in their skeleton, "Well, beyond the fact of the acquisition which is dealt with, the rest of the submissions were not relevant".

Well, they are clearly relevant to one of the main points of Mr. Hoskins' argument, saying, "Well, on what basis is it said that competition is rather limited in pharmacy markets?" Well, that is all dealt with rather effectively at Lloyds' own submissions that you find at Tab D of this same section. Parts of this are confidential, but not the part that I am about to read. This is a paper dated 5 October which was put into the OFT. If you could cast your eye down para. 18 (a) to (e), you will see there is set out in great detail various points as to why competition between retail pharmacies is limited. The effect, indeed, on pharmacies outside the one mile radius has a pricing constraint on pharmacies within a one mile radius.

The third of the three points regard discretion, which we say is, here, very relevant when deciding whether or not to quash and remit to the OFT, is the interest of Celesio when looked at in an objective sense regarding this merger. The OFT has the responsibility to guard against the possibility of SLC for the benefit of customers and consumers. That is the purpose of merger control, and the purpose of the statutory regime. Celesio is not complaining about the vertical aspect of the merger. It is not saying that its pharmacies, or customers, are foreclosed from access to wholesale supplies from UniChem as a major wholesaler, and therefore that it would have trouble competing with other pharmacies. It is complaining only about horizontal aspects of the merger, and complaining as a competitor. Celesio states at the end of its

skeleton argument that it has brought this appeal as it has a commercial interest in preventing the merger which it believes is both anti-competitive and against its interests. It is in the skeleton argument at para. 85. The second sentence: "Of course, Celesio has a commercial interest in preventing a merger that it believes to be both anti-competitive and against its interests".

I would invite you just to pause and consider that statement for just a moment. What does it mean if the merger is anti-competitive? It means that there may be higher prices or reduced quality of service in Boots and Alliance UniChem stores. How can that possibly be against Celesio's commercial interests? On the contrary, if Boots, Alliance UniChem are a less effective competitor, that is to Celesio's benefit as more custom diverts to its Lloyds pharmacies. You will recall that it now has some 1500 Lloyds pharmacies all over Britain. There are only two possible ways, they suggest, that preventing the merger can be in Celesio's commercial interests, either because it would create a more effective competitor to Lloyds in various localities and/or if sustaining the objection to the four to three areas would lead to a requirement, or an undertaking, for further disposals of pharmacies that Lloyds could then hope to purchase. You have seen some evidence - and, indeed, Cohen and Scholls shows it itself: Lloyds has been increasing its estate in acquiring pharmacies. We say it is relevant when one is concerned - in the words of Sir John Donaldson - with public administration, and when the statutory context is effective merger control, to have regard to the interests of the applicant when deciding not whether a decision is impeachable (it is not suggesting that), but when deciding what is the appropriate relief in your discretion that you should grant.

Those are our submissions.

MR. GREEN: I am not going to a deal with a number of issues which Mr. Roth has very comprehensively dealt with - such as the admissibility of experts, the admissibility of the witness statement, and judicial review principles. Nor am I going to deal with a detailed review of evidence. Mr. Roth has dealt with a number of documents, and where those are relevant to my submissions I will simply refer you to the relevant paragraph numbers or document.

What I would like to do is to address five issues relatively briefly from the perspective of the merging parties in this case. Let me tell you first of all what the issues are and then I will just go through them. The first issue concerns the four to three issue from the perspective of the merging parties. We submit this is quite important. The importance of this Tribunal not allowing, or tolerating, Celesio's approach, again, from the perspective of the merging parties. So, Issue 1 concerns the four to three issue, but with a particular optic that we are going to examine the issue from. The second issue concerns the test for an SLC, as applied in this case, and what is meant by the counter-factual in this case. The third issue that I am going to

address concerns the essence of this decision, again from the perspective of evidence submitted by Boots and Alliance UniChem. The fourth issue, which I will deal with briefly because Mr. Roth has largely covered the territory I wish to address you on, concerns the national market. Then, fifthly and finally, I want to show you how Celesio's submissions in Lloyds Cohen not only were, in a sense, identical to the submissions made by Boots and Alliance UniChem in this case, but in terms of time overlapped. Almost wholly at the same time as they were making submissions in relation to this case, they were making submissions in relation to their own case. Let me deal with those five issues then.

First of all, the issue of four to three from our perspective. Why is this important? From the perspective of the merging parties, para. 46 - and in particular the first sentence of para. 46 in the decision is a very important one, and it has wider repercussions. As you will recollect, para. 46 - a key paragraph in this case - is the paragraph which addresses the reduction in fascias, and gives us an example of four to three. I would like to just concentrate for a moment on that first sentence. Mr. Roth has made a number of contextual points about its position in the decision as a whole, but there are a number of important points to make. The first sentence says, "Any higher reduction in fascia number than this, e.g. four to three or higher [so they were not talking about four to three particularly; they are giving that as an illustration] could also give rise to a lessening of competition". But, then you get these critical words, "But on the basis of the evidence before the OFT it believes that this cannot be expected to be substantial".

So, the Office of Fair Trading, as Mr. Roth has emphasised, was making a point about the state of the evidence. Mr. Hoskins seeks to persuade you that the next two sentences are the full content of the first sentence - in other words, the first sentence is not a freestanding reference to the evidence as a whole, but in some way, shape or form is simply the conclusion it arrives at from the next two sentences, as Mr. Roth has shown you. By reference to the decision as a whole, that is utterly unsustainable, particularly in the light of para. 82 of the decision, and, indeed, the first thirty or so paragraphs which address relevant matters which I will briefly allude to in a moment.

But you also have Mr. Pritchard's statement - in particular, paras. 115 and 117, which make any such ambiguity which might theoretically arise completely transparent. Mr. Pritchard, in para. 115, makes the point that that first sentence is the decisive point so far as the OFT is concerned. He refers to the fact in para. 115 of his statement (p.44 of the witness statement) that this, to them, was 'decisive'. That is the language he uses. In para. 117 he says that the conclusion about four to three was, as in the case of other areas, reached after a detailed consideration of all the evidence in the case. He says (and I am jumping to the last sentence

on this page), "Any prediction that harm would occur in the circumstances of local competition among pharmacies became, in our judgment, plainly speculative and fanciful" because it was unsupportable on the evidence. So, what Mr. Pritchard says is entirely consistent with the decision. The decision says that there was insufficient evidence.

Now, why is this important from the perspective of the merging parties? It is this: that in our submission a complainant against a merger should - and, indeed, should be required as a matter of principle - submit all of its relevant evidence before the decision is adopted. Merging parties have very important procedural rights which are not, and cannot be, respective if the complainant does not put in its evidence before the decision is taken. Can I show you a point made by the OFT in its guidance? This is the joint authorities' Tab 1. It is the OFT's procedural guide in merger cases.. Paragraph 5.6 concerns the position of third parties in relation to mergers. It is at p.29 on the internal numbering of the document. In para. 5.5 the OFT state that they will invite comments from third parties. In 5.6 they say as follows: "The OFT may also wish to target consultations more specifically, and so asks merging parties to provide contact details for their main customers, suppliers and/or competitors. Customers' views may be of value in assessing the degree of substitutability between different products or services, and therefore in defining the relevant market. In addition, the OFT seeks to estimate the degree of buyer power exercised by major customers which may act as a constraint on any market power resulting from the merger.

"Competitors, as well as customers, may be asked for their opinions on such matters as the degree of substitutability between their product and those of the merged company, and whether they believe that the merged company might behave anti-competitively. Generally, the OFT may give more weight to the views of customers and competitors, though this partly depends on the quality of the opinions.

"Where adverse views raise significant competition issues, the parties proposing the merger are told of the nature of the concerns expressed, but not the identity of the persons involved, and are given the opportunity to respond to them. It has become part of the procedure adopted by the OFT that they will ferry backwards and forwards adverse comments to the merging parties so that they have an opportunity to address them, and the OFT can then take a decision based upon the fullest possible analysis and information".

If a company such as Celesio in this case can raise new evidence or lines of attack, this undermines the robustness and integrity of the OFT's procedure plainly. It undermines the merging parties' procedural rights because they do not have an opportunity to address the criticisms made about their conduct or their merger. Perhaps very importantly, it creates a new, but not statutorily contemplated procedure, such as Celesio wishes to adopt in this case.

The procedure which is now being pursued, and which is a twisting of the statutory procedure, is as follows: that before the OFT, rivals keep their powder dry; before the Competition Appeals Tribunals, rivals launch new attacks with new evidence or new lines of argument. Before the Tribunal, the complainant, the third party rival invites the Tribunal to remit upon the basis of a failure to address facts (which is Mr. Hoskins' submission this morning). It is said that these are matters which the OFT failed to address, even though of course, the third party failed to bring those matters to the OFT's attention. If the Tribunal succumbs to such an invitation, it remits it back to the OFT, and so we have a third stage. Then, possibly a fourth stage with a reference to the Competition Commission.

Now, that is not the structure contemplated by the Act, and it is contrary to public policy. It permits and encourages game-playing such as we have in this case. It adds to the risk of mergers in the United Kingdom market. It is thorough undesirable. In the present case, Celesio has failed to raise matters in front of the OFT which it now seeks to raise. Indeed - and I will show you this in a moment - in this present case it expressly invited the OFT not to address certain matters which it now says to you the OFT has failed miserably in because it did not address. In this case it expressly invited the OFT not to address the fascia issue, for example.

What we have in this case is a company, an aggressive rival of the merging parties, who made a series of submissions to the Office of Fair Trading, virtually all of which side-stepped the issues that we are concerned with today. What I would like to do very briefly is to just take you through the documents. I can do it quite briefly by identifying the references and really the contents without reading them to you. But, you will see very quickly that Celesio made none of the points that it makes in the appeal in the course of its submissions to the Office of Fair Trading. Again, as I will show you later, not only was it ---- It was running two horses at the same time, because it actually had the first Boots questionnaire before it started to make its own submissions in is Lloyds Cohen merger to the OFT. So, it was running two horses at the same time, and you will see the nature of the arguments.

I would like you, if you will, to take the Notice of Application. You will see from the references that I am going to skim quite quickly through that Celesio barely referred to the four to three issue at all. The concentration in these documents was on the issues which Celesio has now abandoned, or which they do not appeal on. Starting with Bundle 1, Tab 6, a document of 13 December, 2005, this was a briefing paper from Celesio to the Office of Fair Trading. You can see the nature of the submissions without having to read the detail. In Section 3 of this document on p.2 of the internal numbering ---- This is a confidential document, and so ---- In fact, I am not certain how much of it is confidential, but I am not

going to read it to you. I will just ask you to cast your eye over it. You will see the first part, Section 3.1, entitled 'Strength of Merged Entity'. A number of points are made. These are not points which are now pursued. Section 3.2. If you read the first paragraph you will see there is the first, and just about the only, reference to four competitors anywhere in Celesio's submissions. They say they have not had an opportunity to carry out an full analysis 'yet'. They never, of course, did. It is all very hypothetical. It is very abstract. There is no analysis, but that is just about the only reference we see to a four area and anything below a four. That is what we see in that document. Nothing which addresses the issues in this appeal.

If you turn over to Tab 7, this was a questionnaire sent to Celesio. If you jump to 11 and 12 on p.4 of the internal numbering, again one sees a reference to four - this is the height of it - in the last sentence. You will see in the first paragraph there is a downplaying of the importance of fascias, but in the last sentence you will see the reference to, "The total number of competitors depends on the nature of the community, but the average is, say [which sounds very much like guesswork] four or more within a one mile radius". Now, the questioned posed was a very direct question and there was ample opportunity for Celesio to put in direct, detailed evidence from an economist, or an expert of whatever nature in response to this question. One of the questions was, "How many competitors might you expect to face within a one mile radius?"

If you turn over to Tab 8, a document of 19 December, 2005, Section 2.1, as you will see, addresses the question of whether or not the OFT should use fascias as a method of analysis. Celesio says, on 19 December, that in principle fascias can be a useful starting point, but on the facts of this case 'it should not be used'. That is in the second sentence. Then they go on to identify a number of what they describe as 'specific features' as to why fascias should not be used. Well, it is pretty rum for Celesio to say that the failure of the OFT to conduct a fascia analysis of four to three is fundamental, key, and critical when they themselves, in the course of this procedure, invited the OFT not to pursue a fascia analysis. Why can it not pursue a fascia analysis? Because, on their case, it cannot capture and cure the national issues or the competitive issues arising. That text follows on into the second page of this document, in particular at the top.

Elsewhere in this document you will see that Celesio addresses a variety of matters, but none of which concern local retail competition. They are predominantly pricing issues, levering issues, general market implications, and so on. But, it is all very broad brush.

You will see also, in para. 2.1.3 of this document on p.7, that it is certainly not the case that the OFT was not relaying its concerns back to Celesio, because Celesio says in the first two lines, "The OFT has indicated it has concerns that the risks we have raised are speculative

only". That is an invitation to put in evidence when the OFT is telling you that they consider your position to be speculative. They had plenty of additional opportunities to put in evidence. Indeed, right at the very end, the OFT invited them to put in further evidence if there was any issue which they felt they had not adequately address. But, if you jump to Tab 9, one sees the level to which they were prepared to descend - and they had, embarrassingly, to retract this shortly afterwards: an allegation of market-sharing in the e-mail, as a precursor to some further submissions, none of which actually address the question of four to three local areas. The allegation made in the e-mail was withdrawn in the e-mail which is at Tab 10. You only have to look at the e-mails and the sorts of things that were being submitted in Tabs 9, 10, 11, and 12, and you will see that there was an air of desperation about it to say the very least.

Indeed, on 16 January (and I think this is Bundle 4, Tab 3B) there is a note of a telephone conversation between the Office of Fair Trading and Celesio's legal advisors. It is a one-page handwritten manuscript note in which the Office of Fair Trading invite Celesio to put in any further submissions that they would wish to do.

So, where does all this lead to? The applicant's analysis of four to three is an after-the-event trumped-up submission. It is an argument of convenience. It is inconsistent with the arguments which Celesio itself advanced to the OFT during the course of this procedure, and it supports the OFT's comment in para. 46 that there was no evidence submitted that a four to three area gave rise to a problem. When they said there was no evidence, they meant it. There was no evidence. This was not like some markets where you get a groundswell, a rumbling about a particular issue for years. The OFT had been examining the pharmacy market for a long time. MMC reports had occurred. It had its own internal deregulation review. There was no evidence, over many years, that markets in which there were three operators gave rise to a problem. That is what it said in the decision. So, there was a deafening silence, if you like.

There was also the point made by Mr. Pritchard in para. 101 of his statement. Not only was there a deafening silence about there being a problem, but there was positive evidence that threes were not a problem. He makes the point explicitly. It cannot be said that this is not reflected in the decision, because the decision refers to the absence of evidence. It refers to internal UniChem documents. It refers to the OFT's study. This talks about positive evidence, suggesting ---- He says in the second sentence, "For example, there was no statistical support for a proposition that prices were higher, or service levels lower, in an area with three pharmacies than in areas with four. This was the conclusion of the OFT study which tended to be supported by UniChem's internal econometric analysis provided in this case". My clients had provided evidence - and it is referred to at IB1, at Tabs 14 and 21 - and the documents are there.

So, the OFT had, on the one hand, as they say in para. 46 no evidence, and they also had some evidence suggesting the contrary.

Now, Celesio's evidence and explanation in para. 73 of their skeleton as to why they failed to adduce full evidence is that they did not want to over-burden the OFT, which is jolly nice of them, but, frankly, is an embarrassing explanation. That is Issue 1. That is the four to three.

But, there is an important point for merging parties, which is my client's perspective - namely, that it has rights in the OFT procedure, and if complainants do not put their full case forward in the course of that procedure, my client's rights are trampled upon. Merging parties, as a matter of policy, have to have the opportunity to address the complaints made about their merger, and it is quite wrong for them to surface for the first time on appeal.

Issue 2 - the counter-factual. It is apparent from my friend's submissions this morning that their entire case turns on a misunderstanding of the law about the relevant counter-factual. Mr. Hoskins says that if there is a merger where there is absolutely no competition in the market - for example, because they are statutory monopolies, then there cannot be an SLC if two statutory monopolists merge. There was no competition before, and there is no competition afterwards. There is therefore no SLC. That is absolutely right. There is not. We have cited a recent Judgment of the court of first instance, called **EDP**, in our skeleton, which makes that point specifically. But, he then says that if there is a little bit of residual competition, then the opposite rule applies, and a merger which has no impact on the key parameters of competition, but has a small impact on the residual competition does create an SLC.

Well, this is simply not the law. Under Section 33 of the Act, the OFT's task is to determine what element of competition is taken away by the merger. You must compare the before with the after. If it just so happens that the 'before' involves a highly regulated market, and the market will remain highly regulated afterwards, then that is highly relevant to whether there is both a lessening of competition, and, more particularly, whether it is substantial.. So, the wording of the Act has two ingredients to it - lessening and substantial. They are deliberately included as different creatures. My learned friend's submission would involve the proposition that even a **de minimis** miniscule lessening of a piece of residual competition would become substantial, even though the merger had virtually no impact upon the market in any real common-sense perspective.

What I would like to do, just to demonstrate the falsity of their proposition, and to provide you with a bit of jurisprudential context, is to show you the OFT's guidelines, and the CC's guidelines, and very briefly identify the relevant paragraphs in the CFI's recent judgment in **EDP** which makes the same point. Again, I can do this quite briefly. The joint authorities bundle, Bundle 5, Tab 2 is the starting point. I think I pick up a few points first of all in the

OFT's document at Tab 2, starting at para. 3.6 on p.15. You will see that in relation to four to three the OFT has said in its decision that theoretically there could be an LC, but it cannot be S. I think the important point is that that is not at all, in the OFT's experience, uncommon because in para. 3.6 the OFT says, "Not all mergers give rise to the competition issues. First, some mergers are either pro-competitive because they positively enhance levels of rivalry, or are competitively neutral; secondly, many mergers may lessen competition, but not substantially because sufficient post-merger competitive constraints will remain to ensure that competition, or the process of rivalry continues to discipline the commercial behaviour of the merged firm". So, the OFT is recognising that in many cases there may well be a theoretical LC, but the LC is quite different to the substantiality, and what you have got to examine is whether, post merger, there are sufficient constraints. In the present case, we have many constraints, as the Office of Fair Trading recognise in the decision, through regulation. Mr. Roth has gone into it, and I will not go back over it. But, for example, in relation to POM(?) medicines, they were on the NHS contracts which govern quality. Well, POM medicines are sold side-by-side with P medicines. So, there is almost complete control over quality by reference to the POM contracts. 40 percent of P medicines are subject to constraints from unregulated medicines - again as Mr. Roth has explained. There are whole host of other regulatory constraints which apply.

Paragraph 3.7 of the document: "A merger may be expected to lead to a substantial lessening of competition when it is expected to weaken rivalry to such an extent that customers would be harmed". In the present case no-one is suggesting customers would be harmed as a result of the merger either before or after - not again because of the proper analysis of the counter-factual; that regulation largely governs substantial swathes of the supply of drugs through pharmacies and it is exactly the same before as afterwards.

The Competition Commission guidance is in similar vein. For your reference really, rather than anything else, that is to be found at para. 1.22. There is an illustrative example in 3.61 about failing firms, which is quite helpful. At 1.22 - this is Tab 3 of the same bundle - "In applying the SLC test the Commission will evaluate the competitive constraints on firms with the merger compared to the situation that would have been expected to prevail without the merger, sometimes referred to as the counter-factual. The counter-factual will be that situation which the Commission expects to arise in the absence of the merger under consideration and will, in many cases, relate to the existing pre-merger competitive conditions. However, in certain circumstances the Commission may need to take account of other factors such as expected changes in the structure of the market, or, alternative developments that ma be

expected in the absence of the merger. This is in order to reflect as accurately as possible the Commission's expectation of the rivalry which will occur in the absence of the merger".

Now, regulatory context pre. and post plainly plays a part in the test within the scope of that definition. I have referred to para. 3.61 because it is simply an illustration - the failing firm example - of where there is no difference before and after. It really is just an illustration of the point. I do not think I need to take you to it in any detail.

Briefly at Tab 5 we have referred to the **EDP** case - the Judgment of the court of first instance on 21 September of last year. I think it suffices if I simply give you the references rather than read you the relevant paragraphs. The relevant references are paras. 116 through 120 where the court of first instance makes essentially the same points - that regulation can be a critical context.

That is all I want to say about the counter-factual. The third issue is the essence of the decision and how it relates to evidence submitted by Boots and Alliance UniChem. We have provided you with witness statements from Mr. Oliver and Mr. Duncan, which deal with all the evidence which was put to the OFT. We have done that to demonstrate that this was an extremely exhaustive analysis. One would put it in the top 5 percent of analyses conducted by the OFT in terms of its detail, number of information requests, and so on. We have provided a detailed chronology to make that point good. You will see that the parties put in evidence on all relevant matters relating to competitiveness at the retail level - levels of regulation, prices, scope of competition, etc. I do not propose to go into that evidence simply to take you through it. It is there to be read.

What I would simply like to do - and I will do this, if I may, by cross-referencing rather than taking you to the documents, and so you will have it in your note - is to show to you that the information put to the OFT was reflected in the decision. One has to remember in this regard that the merging parties are subject to statutory sanctions if they provide inadequate information, and they are subject to the Section 34B procedure in the Act (which came into force a couple of years ago) under which any submission you make can be road-tested by the OFT demanding internal documents. So, there is no point in over-egging the pudding because the OFT will simply say, "Well, let's see how the board though about it", or, "Let's see your strategy documents". That is precisely what happened in this case.

When those arguments are reflected in the decision, you know they have been thoroughly reviewed, and the OFT's process with a merging party, or merging parties, is far more vigorous than it would be with the twenty-eight-odd third parties, or complainants. But, what I would like to do is just give you a structure ---- the structure that one finds in the decision, because

we say that this actually is reflective of the submissions we made. It is actually reflective of the submissions that Celesio made in their own merger.

First of all, Point 1 - the OFT applies the standard counter-factual test. You will find this in the following paragraphs of the decision: para. 18, in which the OFT says that the merger has to be assessed within the framework of the regulatory reference for the NHS. We will find it also in para. 36, where the OFT makes the point that the existence of NHS contracts which govern the quality of the service provision (and I am quoting from para. 36) 'serve to limit the parameters of competition'. Then one finds it again in para. 39 where the OFT refers to the limited nature of competition in an area, meaning that there is no realistic prospect of an SLC. That was an argument put by the parties, but apparently with approval, at least in principle. The OFT went on to examine the scope of residual competition.

So, the starting point is that the OFT examine the counter-factual, the before and after. The second point is that the OFT examine the dynamics of competition. This takes one straight back to para. 46 and the reference to evidence. What was the evidence? Well, the OFT say that the only competition that matters is P competition. One finds that in paras. 10, 36, and 38. In relation to P competition the OFT refers to the fact that 40 percent of P is directly competitive with GSL in relation to price. That is para. 11 (and, for your reference, Pritchard at para. 29(1)). The OFT in the decision also says that price competition, pre-merger, in Ps is limited. That is para. 31. The explanation for that given by Mr. Pritchard is para. 47. In relation to service quality, in the decision one finds a reference to the fact that quality is largely governed by POM and NHS contracts. At para. 11 the decision refers to the fact that some 99 percent of pharmacists are on PCT contracts (Pritchard, para. 31).

The OFT refers to Boots' internal documents which show that the most vibrant of competition comes from supermarkets. You will find this in paras. 15, 29 and 32. Road-tested against internal documentation - Mr. Pritchard addresses that in para. 29. You will find reference to the fact in the decision that Boots and Alliance UniChem are substantially complimentary - one is High Street based; the other is more surgery-based in terms of their proximity and their focus. We find that in paras. 29, 31, and 33.

So, one finds all the evidence concerning the structure of the market, which would apply to two to ones, three to twos, and four to threes, and so on, in the decision. I will not go into the analysis of the decision that Mr. Roth has taken you to - the OFT's analysis of two to ones, three to twos, and four to threes in paras. 46 and 82 - but those are dealt with in Mr. Pritchard's statement at paras. 107 and 117 in particular. I would add to that para. 101.

So, conclusions: that the OFT addressed the right evidence. It addressed the structure of the local retail market. It did so on the basis of extremely detailed evidence from the merging

parties and no contrary evidence from the likes of Celesio. No-one suggested to the OFT that they should conduct a fascia review on four to three, but the OFT did, however, conduct a fascia analysis on two to one and three to two. Common-sense, as Mr. Roth submitted, dictates that when you have got three competing companies in a one mile radius, and evidence that consumers are prepared to walk up to a mile, that you are not going to have a severe problem within a single one mile radius, but you have all the other factors which mean that service quality cannot serious deteriorate, and price competition is either irrelevant for POMs and GCLs, or is largely unaffected by the merger for Ps.

So, that is the decision. It certainly reflects the evidence my clients have put in, and as I will show in a moment it reflects the evidence which Celesio put in in respect of their own merger.

Issue 4. National market. I will deal with this very briefly because Mr. Roth has comprehensively made the point, which is really the central point, which is that Boots has 1,350 pharmacies nationally; Alliance UniChem has 958. So, approximately 2,300. Celesio's argument, whether we are dealing with forty-one stores or forty-eight stores rests upon the proposition that those forty-one to forty-eight stores will be sufficient to affect materially the analysis and the strategy of the merged company in respect of the totality of its national estate.

Now, that is so remote and so improbable a consequence that for Celesio to substantiate it would require a very great deal of evidence. It is not a self-evident proposition or a truism. It will require evidence because otherwise it is simply barmy. As you know, Celesio did not address this in evidence, and the evidence submitted now does no more than skirt around the edges. Mr. Hoskins has abandoned reliance upon his expert's reports as evidence of fact, but LECG did address this in paras. 5.56 to 5.63 of their report, and this was comprehensively challenged by RBB in Chapter 5 of their report. Celesio has nothing to say about this class of evidence. Plainly the Tribunal cannot resolve it. If it was an issue, it was an issue which had to be resolved by the OFT long before the decision was taken. So, Celesio simply does not engage with this issue.

You have seen the decision - and I will not take you back to the decision on that. I want to just take you to one point in the LECG report, which is in the Notice of Application at Tab 5. In paras. 5.57 and 5.58, Dr. Pedilia - who has skipped the country and gone to Spain apparently - says as follows in the latter half of para. 5.57: "However, some elements of competition, such as an individual store's opening hours, might be affected by local competition. In addition, when chains such as Boots, UniChem and Lloyds determine their national policies, they will take account of the extent of competition they face at a local level across the country as a whole. In this way, there is an indirect link between the extent of local competition and national policies, such as pricing policies. I should also note that even when firms have

national policies, at present they may change their strategies and adopt more local variation in prices and quality of service in the future. This provides a further reason for assessing the potential impact of the merger at both national and local levels".

So, the highest it is put is that there may be some influence from local to national and the impact is indirect. What does this really mean? It means it is a question of fact and degree. If you are not willing to put forward evidence to demonstrate the fact and the degree of that indirect influence, then you are never going to get home, and certainly not in a judicial review when the matter is not raised before the decision-maker in any material sense.

Mr. Roth dealt with the decision and the relevant paragraphs. He pointed out that the decision analysed the national market, its fragmented level, and so on. I will not go back to that.

The final matter I wish to address, and take just a few moments on, is the fact that there are three parties who agree on the proper analysis of this case: there is Boots UniChem (which I count as one party), there is the OFT, and there is in fact Celesio. If you go to Bundle 4, Tab 3, you will see that in the course of its own case Celesio made very much the same points as the OFT makes now, and my clients made to the OFT. Mr. Roth has taken you to one document which I shall not take you back to. But, there are one or two other documents I would like to alert you to. I am starting at Tab C of 3, which is a document entitled 'Merger Notice'. If you go to p.11 of that document, after the declaration, there is a statement about the characteristics of the retail pharmacy sector. It is appended to the merger notice - Nature of Competition and Relevant Market. It is one page after the declaration. It is 1.2. If you would just scan your eye down that list of characteristics of the UK market, you will see that they bear a strong resemblance to the submissions which my client made, and which the OFT accepted. I do not know if this is a confidential document. I rather doubt it, but ----

So, all the points which are made there are points which my clients had been making. There is no suggestion that there is a big problem in relation to the retail market. They accept that regulation governs a very large number of facets of competition. They accept that there is no suggestion that P medicines are in fact substantially problematic, or at all. You may want to just cast your eye over Section 3 of this same document - 'Market Shares - Local Levels' (p.17). If you turn over, there is various factual information given. Then, in Section 4, which follows on from that factual information, you will see that they submit that there is no material problem at the local level. Indeed, local retail competition is sufficiently strong so that two to ones, five to fours, etc. are simply unproblematic. If you look at the conclusion in 4.6, "Lloyds does not consider that any of these levels of local concentration will lead to a

reduction in price or non-price competition. There are more than enough competing pharmacies in each location and surrounding areas to maintain competition".

Then there was the document which Mr. Roth took you to at Section D - another briefing paper. He asked you to look at para. 18.

So, three parties making the same submissions, but I believe Mr. Roth made the point about Celesio's position being inconsistent between the two cases. What is the relevance to this case? Well, it is highly relevant to the weight to be attached ---- the probative value to be attached to evidence, particularly the evidence submitted to the OFT. The OFT had all these submissions before it from Celesio at the time, and it had Celesio's submissions in this case which did nothing to contradict those points. How can it possibly be suggested that the OFT was not mainstream when it arrived at a reasonable conclusion to accept the submissions of all of these parties, all of whom are subject to strict statutory sanctions. They know the rules. There are criminal sanctions for misleading the OFT. Submissions can be road-tested by demands for documents under Section 34B. It emphasises the importance of third party complainants putting in all of their evidence to the OFT before the decision is made, and it emphasises the importance of this Tribunal not permitting parties to use its procedures to play games.

It is clearly correct, as Mr Hoskins says, that most if not all merger appeals will be by competitors – against OFT decisions that is. That seems to be inevitable and the Act contemplates that possibility; indeed, complainant's appeals, one would imagine, are going to be the means by which this Tribunal exercises supervisory control over the laws and procedures which govern mergers in future years. However, that being said, certain standards have to be maintained and the Tribunal is pivotal in enforcing those standards; the Tribunal should decry parties who play fast and loose between sets of submissions, or play fast and loose in the same proceedings. Merging parties – my client is entitled to expect this because otherwise are procedural rights are not protected. The OFT is entitled to expect this because otherwise the integrity of the system is undermined and the market, as a whole – and that is an incredibly important point – is entitled to expect that the system operates smoothly because mergers are obviously of such critical importance generally.

That is the fifth point, raised finally simply by way of conclusion. This is a judicial review; what the Tribunal has to ask itself is whether it has power or jurisdiction to intervene. The Tribunal only has power or jurisdiction to intervene in certain limited circumstances. This case is very unlike either the *IBA* case or the *EAP Phoenix* case which turned on very narrow factual circumstances.

The final point I wish to make is that there is a strong policy element in cases such as this. This is a clear case where, simply, a third party complainant wishes to disagree with the OFT on merits and, as has been made clear in the jurisprudence, there is room for two views, but that does not make those two views judiciable by way of judicial review, and in those circumstances we invite you to reject this application. Unless I can assist further, those are my submissions.

MR HOSKINS: Madam, we are due for a break and it is probably wise just to see where we are on timing. There is a certain irony in the fact that of course my clients have been accused of non-disclosure when substantial parts of Mr Green's at least three submissions were not trailed in the skeleton, but that is for me to deal with. Could we have a break for 20 minutes because that will give me a chance to gather my thoughts, and then I imagine this will finish, hopefully, around five o'clock, quarter past five?

THE CHAIRMAN: Do you think you will be 20 minutes?

MR HOSKINS: Can we have a pause of 20 minutes and then I imagine I will finish by about five o'clock.

THE CHAIRMAN: Twenty past, is that all right?

MR HOSKINS: I would be very grateful for that, yes.

(Short adjournment).

MR HOSKINS: I am simply going to deal with the points as they arose, first in Mr Roth's submissions and then in Mr Green's submissions, though obviously I will not try and deal with every point and I will try and avoid repeating myself.

The first point I want to pick up in relation to Mr Roth's submissions is that he accepted that on the law it is not open to the OFT to put forward inconsistent reasoning; he clearly made that statement. I made detailed submissions as to why there is an inconsistency, as to why there are inconsistencies between Mr Pritchard's witness statement and the decision, and I do not need to repeat them. It is noticeable and it is important that Mr Roth did not descend to that level of detail in trying to defend the alleged inconsistency, according to him, and I will deal with the one point that he did make in relation to consistency, but what he did not deal with is telling in this case.

If we turn to the question of the analysis of local markets, again it is very telling the way Mr Roth approached the decision. I took you through it in a great deal of detail, I showed you how paragraphs 43, 44 and 45 in relation to 221 and 322 reached conclusions on the basis of what had gone before, and I showed you what those conclusions were. Mr Roth did not attempt to disagree with that analysis, what he did was he approached it at a very high level and he

glossed it; he referred to paragraphs but he did not actually give an explanation as to why the submissions that I had made were incorrect. He did no more than gloss the decision.

Mr Green was the same, again there was no attempt to deal with the substance of our case, which had been fully set out, at the very least in the skeleton argument, before an application. I am tempted to ask the rhetorical question why, but that is probably too much.

Mr Roth's defence was that our approach was logical, and he made five points. He said to an extent a fascia test is a starting point; that is right, that was always our position, and that is why we dropped the first ground when it became clear that that in fact was the OFT's position, that is not what we had understood from the decision. That does not take us anywhere in terms of analysis of the decision, we all agree that fascia is a relevant starting point. He then said we are looking at a small geographical area, full stop. So what? We are looking at a small geographical area in relation to two to one and three to two, yet real problems were found. There is no logical reason, there is no reason in principle, why a four to three area could not also be a problem because it is the same geographical area as three to two and two to one.

The third point was that he said it is a regulated market, there is limited scope for competition, but that does not help him because I showed you how the structure of the decision makes that point, but then reaches specific conclusions in relation to two to one and three to two in paragraphs 43 to 45, and those conclusions take account of the fact that the market is regulated, and yet still finds there is a clearly a problem in relation to two to one and a large proportion of customers affected, high switching etc, in relation to three to two. That simple reference to a regulated market does not help them, because it is already taken care of in the decision.

The fourth point he made was that when looking at three to twos not all three to twos were candidates for SLC and we were trying to segregate them, and he could not find a sufficiently robust methodology to do so. There are two points in relation to that: that is not what the decision says, I have made that point, the problem there was identified in relation to all three to two areas, and the other point is that just because certain three to two areas may have had a problem does not mean that all four to three areas did not have a problem. The logic simply does not follow.

His fifth reason of the five was that on that basis the OFT could readily conclude that four to three was not a concern, and this is the only time that he referred to consistency. He referred to Pritchard's witness statement, paragraph 117, and said is that inconsistent with the decision? Not in the least. It is all very well for the OFT to say not in the least, but they have not actually explained why they say they are consistent. The first sentence of para 46 is abstract, it is glib. It is not a reason, it simply does not stack up when one compares the section in Mr Pritchard's

witness statement on four to threes to relevant parts of the decision. That is what I attempted to do and that is what my learned friends have not even attempted to deal with.

There was reliance on paragraph 82 of the decision. Throughout the decision what one has is a number of issues dealt with and a number of conclusions reached about the decision. For example, in relation to local markets I have shown you the conclusion paragraphs – paragraphs 43, 4, 45 and 46 – and then at 82 everything is drawn together, and this is a summary of the conclusion that has gone before. Mr Roth very fairly said you have to read the decision as a whole, you have to read paragraph 42 with paragraphs 43 to 46; that is absolutely right, of course you do, and when one does that 82 is not a get out jail card. In relation to three to twos, what paragraph 82 says is: "The evidence on whether an SLC would arise in the case of three to two overlaps is less conclusive."

It is less conclusive than two to one, but it does not mean it is not based on high levels of switching a large number of consumers affected, but on balance the OFT takes the view that "it may be the case" – and that is so imply the statutory language – "that the merger may be expected to result in an SLC within these three to two overlap areas", not within "some" three to two overlap areas, but with "these three to two overlap areas", i.e. all three to two overlap areas. So 82 cannot detract from the detailed conclusions in 43 to 46, they have to be read together, as Mr Roth accepts, and 82 in any event shows that there was a general concern in relation to three to two overlap areas, and it does not say that the concern was limited or marginal.

Mr Roth said that the judgment on where to draw the line in the iterative process is exactly what falls within the margin of assessment the OFT has, but the OFT is not immune from judicial reviews and at the outset of my submissions I showed the Tribunal the particular passages we rely upon as to the nature of review. I stick with them, there is no immunity and, again, it is simply not good enough to say it is within our margin of assessment. The OFT has to justify that and it has not.

There is a point that has kept coming up which is our contention that where there is reduced competition you have to be at least as careful as where there is a lot of competition – we actually say you have to be more careful, and I have made that point. We say that SLC has to be contextual, and I have explained why logically that must be the case.

Mr Roth also made the point that we initially said that the fascia test should not be applied in this case, that we should market shares, or the OFT should use market shares to resolve the problem. He referred to the colour bar charts we have produced and I think he was suggesting that we were saying that the OFT had acted unlawfully because it did not use an outlets test instead of a fascia test. But that is certainly not what our case is, our case is that a fascia test is

a suitable starting point, but in relation to four to three areas in this case on the OFT's own approach, the iterative approach, and given the conclusions of the decision in relation to two ti one and three to two, it is not good enough then simply to stop in the context of the fascia test and say we do not have to look at four to threes.

MR ROTH: If I may interrupt, I think what I said was perhaps not quite clear. I said originally the first ground of challenge had been that we should not have used a fascia test, we should have used an outlet test; that has been abandoned, but now it is being said that having used a fascia test we should then also use an outlet market share test. That is how the bar chart comes in.

MR HOSKINS: The evidence about the outlet test, appendix B, is not put in to say "this was the right way to do it, this was the way the OFT must have done". The reason we put it in was to show that the OFT had failed properly to investigate four to three areas, and that is an example of why there is a concern in relation to that, but it was not intended to be didactic: we must win this case because the OFT failed to do this. I hope that clarifies the position.

Mr Roth actually said – and this may have been a slip – that once one accepts that the fascia test is the starting point, one must then look at the local areas in more detail. Exactly: that is our case. He adopts the fascia test as a starting point, you look at the local areas in detail and the OFT failed to do that at all for four to three areas. That is all I need to say in relation to what Mr Roth submitted about the local market analysis.

If I could turn to the national analysis, both he and Mr Green took a very short point. They said there are only 48 areas affected so you can discount it. With respect, that is precisely what the Tribunal is not supposed to do, it is not the Tribunal's function. If the OFT has made a material error in local areas and that may have an impact on national areas, it has to go back to the OFT for them to consider the question. We have seen all the skeleton arguments from the OFT and the interveners because they want a narrow judicial review: the Tribunal must not get involved in the merits. That is precisely right and that is why, if we are right on this question it goes back and the OFT considers the point.

I should say, just a small point of detail, Mr Roth said on our list of 48, seven of them were three to two areas in the OFT analysis, and I explained that was because we do not have access to all their evidence. We do not know whether the final number is going to be more or less than 48; it may well be more, it may well be less, we simply do not know, but that is not a reason why the Tribunal cannot assume it is in a position to take a decision on this matter, it has to go back to the Office.

There is another aspect though in relation to the national market. It is not just simply the failure to look at the four to three areas because I also made submissions on the other aspects of paragraph 31 of the decision, which is the suggestion that Boots and Alliance/UniChem

stores do not tend to be located close to each other. I made my submission as to why the evidence relied upon by the OFT is not sufficient for them simply to rely on Boots and UniChem say-so and I do not need to repeat that point, but it is important in terms of the national market. There are two elements to it: it is the failure to look at four to three areas and also insufficient evidence when assuming there is a degree of competition between Boots and Alliance/UniChem in local markets.

Again, I think this probably deals with the question I dealt with at the end of my submissions: Mr Roth said that the approach that was adopted was that overall there was no national concern, and once a remedy had been adopted into those local areas where there was a concern, that remedies the national issues – i.e. the local divestments are necessary to address the national issues, and that is exactly what Mr Pritchard said in his witness statement and I have also explained the logic of our argument, how that must follow also from the decision.

If I can come then to the miscellaneous points at the end, the first one was that relief is discretionary. With respect, the denial of relief when an applicant has proved its case is exceptional. Mr Roth identified this as an authority he wanted to rely on last night; I was not entirely sure how he was going to rely upon it and it may be I would like to reserve our position to put in a very short note later today if there is anything else that occurs to us immediately after the hearing, but we can certainly do it today or first thing tomorrow.

There are three points that spring to find, as well as my opening point that this is a highly exceptional that this is highly exception. First of all, it is important to understand that in this particular statutory context the decision of the OFT sets a precedent. One can see that from the OFT's own approach to this case, because it went back, for example, to the 1996 MMC report. Mr Pritchard referred back and said the reason we approached this case in the way we did was because of our experience in other cases. That is not just for the OFT but for everyone, for the world at large there is a publicly stated view of the market by the OFT, it is published. Mr Pritchard's witness statement is not publicly available, so it is not good enough to say if you find the decision is defective but you think Mr Pritchard is actually all right you do not have to do anything, because that will leave the public record defective and that, we submit, is not attractive.

The other point – and this is a statutory judicial review point – is that one simply does not know what will happen on a remittal. Mr Roth cannot and fairly did not say that necessarily if the matter went back to the OFT the result would be the same; we do not know that. The OFT may feel it needs to look again at four to threes if the matter is remitted to it, it may feel that its own iterative process was not actually followed properly in this case, it may not, it may turn round and it may rewrite the decision on the basis of Mr Pritchard's witness statement. The

point is we cannot know. That is the point of judicial review, it always has to go back to the decision maker. If we are correct in our arguments, we should not be denied relief on that basis.

The third point – and again, I apologise, I have not had time to look at the *Argyll* case in any detail, but there the timescale is incredibly short, it looked like five days was going to be very significant. That is not the case here as I understand it. I am not clear as to when exactly this merger has to be concluded on the terms of its documents, but it is certainly not in five days time and there has been no suggestion that if there was issue that would necessarily derail the merger. If that is an issue then obviously we can investigate the matter further; I simply draw the contrast between *Argyll* where five days were crucial and here, where there is certainly no suggestion that five days is crucial.

Can I come then to the material non-disclosure point which both Mr Roth and Mr Green made a lot of noise about? There is nothing in it. Mr Roth took you to the Notice of Application, paragraph 67(b) and even Mr Roth had to accept that it was technically correct. It is correct because we describe the decision in the Notice of Application and paragraph 67(b) describes what the decision was about. By the time the decision was adopted, Mexborough had dropped out of the picture because when the OFT said they had a concern about it we said, fine, we will drop it out of the deal. It is important because it has been suggested somehow that we have behaved – improperly may be too strong a word, but it is a strong allegation, material non-disclosure, that what we have submitted here is different from what we submitted to the OFT, and Mr Green also made great play of this. It is simply not correct. I will tell you why it is not correct and then I will take you to the documents very quickly.

In this case the merging parties' case as put to the OFT was that competition was so limited that there was no problem with the merger. The OFT's case – not in the decision but in Mr Pritchard's witness statement – was competition is so limited that there is not a problem. Celesio's position before this Tribunal, and indeed in the Cohen/Scholl merger, was the opposite of that. We were saying that there was sufficient competition to mean that the merger between Lloyds and Cohen/Scholl would not have a sufficiently significant effect on competition is the opposite; it is not there is so much competition because that is going so far, but there is a sufficient degree of competition for there not to be a competition concern.

I can show you that by taking you quickly to the documents. They are in the OFT bundle, which is bundle 4 and they are behind tab 3. The first document we need to look at is tab C, the merger notice. If I can ask you to turn to page 12 of that document – Mr Green can turn to page 11, or not, as the case may be – paragraph 1.2: "The retail pharmacy market in the UK has the following characteristics", and it sets out certain of the characteristics. 1.2(d) is very

important, one of the characteristics is "non-price competition in terms of quality of service", so it is not saying a lack of competition, it is saying the existence of competition, and in 1.3 it explains that in more detail. Broadly, non-price competition takes place around quality of advice provided, range of services offered, convenience and then some more details in 1.4. "Typical services which are offered include various diagnostic services, testing services …" etc etc. Then: "Pharmacies therefore compete in terms of the availability and quality of their consulting rooms. Other services that are offered include the direct delivery of prescriptions and repeat prescription services." So it is not that there is so little competition, do not worry about it, but because there is competition do not worry about this merger.

At page 14, paragraph 1.15, the second sentence:

"A number of factors influence the consumer's choice of retail pharmacy. These factors depend on the nature of the product or service required as well as the degree of urgency with which a consumer requires a product or service."

Then (a) and (b) deal with proximity and then (c):

"Where an OTC medicine or service is required the quality of the service offered by the pharmacist may be more important than the location of a pharmacy."

Again, there is emphasis on quality of service as being a factor which influences a consumer's choice of retail pharmacy and, again, the emphasis is on the existence of competition.

Turning over to the bottom of page 16, "Control of entry" you will see the heading at the bottom and then on to page 17, it deals with the change in the control of entry regulations and at paragraph 1.30 Celesio concludes:

"It is too early to determine the effect these changes will have on the market, but the exemption for wholly mail order or internet-based services may provide additional competition beyond the traditional local markets."

Then over to page 20, this is where Lloyds deals with its conclusions on the impact of the transaction on competition in retail pharmacy. At 4.1 it says it does not believe it will lead to a substantial lessening of competition. 4.2. to 4.5 deal with Mexborough; I have dealt with that already, it is a very particular point, it was dropped, it does not appear in the decision. Then 4.6:

"Lloyds does not consider that any of these levels of local concentration will lead to a reduction in price or non-price competition. There are more than enough competing pharmacies in each location and surrounding areas to maintain competition. Non-price competition can cover a number of factors, with two of the key drivers being location and

convenience. In its report on the control of entry regulations, the OFT nevertheless identified three indicators that would allow them to measure the level of service provided …"

At 4.7 I have to be careful because part of it is confidential, but the first sentence is not:

"Measured against these indicators, the proposed merger will in turn increase the level of service received by the consumer."

I am afraid both Mr Roth and Mr Green have simply got this wrong. It is simply glib to suggest either that what we are saying now is inconsistent with what we said then, or to suggest somehow that what we said then is consistent with what the OFT and the merging parties are saying now. They simply have not read the documents.

They also referred to the document behind tab D, the briefing paper. If I can look first of all at paragraph 50, local level:

"Previous inquiries into the retail pharmacy market have concluded that competition occurs at a local level …" so again reliance on the existence of competition.

Then over the page paragraph 18 is the one that both Mr Roth and Mr Green particularly relied upon, and again it sets out certain details about the nature of competition in retail pharmacy. It is important to note what 18(b) says about price competition.

"Other P medicines can be sold only under the supervision of pharmacist and may be subject to price competition. In relation to these medicines, however, local pharmacies are not the only other alternative suppliers. As these are not prescription medicines Lloyds find that pharmacies outside the immediate neighbourhood location could exert price pressure on a local pharmacy."

Again, therefore, what is being said is that there is competition and this time it is in relation to the pricing of P medicines. Then 19:

"Accordingly, what conclusion is drawn from the above? Lloyds does not consider that the acquisition of Sabre will lead to any lessening of competition in the supply of retail pharmacy products or services in any of the locations where the parties overlap. There are sufficient pharmacy and/or non-pharmacy outlets in close proximity to the overlapping Sabre or Lloyds pharmacies and regulate incentives to maintain service quality so as to ensure competition affects local markets."

They have simply got the wrong end of the stick, they have not read the documents carefully.

The final point made by Mr Roth comes back to you have a commercial interest in this so what are you doing here? We did make specific competition concerns clear to the OFT during the process. For example, we raised a concern that the merger might give rise to a degree of market power on the part of Boots that would affect us, but really this is a smokescreen. Yes, we have a commercial interest, but if the OFT has got this wrong, given that we are a major

player in the market we are fully entitled to come before the Tribunal and say they have got it wrong and we are entitled to relief if the Tribunal agrees with us.

If I can move on to deal with Mr Green's submissions, he began with what he called an analysis of the four to three areas, but in our submission this was really, again, just an attempt to deflect attention from the real issue in the case which is the legality of the decision. His thesis was that all third parties should submit all the evidence they might want to delay on before the decision is adopted, because if you do not it affects his clients procedural rights. But our case has to be a challenge to the decision. Our case challenges the reasoning and logic of the decision which, by definition, we cannot have raised before because it is only once one gets the decision that one knows what the reasoning is and the logic is. We are not running a substantive challenge on the merits; I hope that was clear in my submissions this morning. This is a red herring on the part of Mr Green; when one is challenging the logic and reasoning of the decision you are allowed to raise arguments after the event which go to that. Where does this take us? He says that we failed to raise matters relating to four to three before the OFT, but that is simply not correct. Mr Green showed you the relevant document, it is our first bundle, tab 6. At 3.2:

We believe that many competitors would be sufficiently weakened by the proposed merger so as to be significantly less effective in constraining Alliance/Boots. We have not yet had the opportunity to carry out a full local analysis across the UK, but are concerned that there may be areas where, even if there were four or more competitors remaining after the merger, some of these would provide a very weak constraint on AB. We also believe there are a number of areas with fewer than four competitors where, as indicated above, we believe there would be a risk of market exit in a number of cases."

The paragraph Mr Green did not read:

"Given the step change that the proposed merger would bring about at the retail level as described above, Celesio submits that it is incumbent upon the OFT to undertake a detailed appraisal of the impact of competition at a local level."

That is what we asked the OFT to do and that is our case that we are putting forward now. It is not the job of a third party in a merger procedure to do the whole analysis the OFT would do and say here you are. It is for the OFT to investigate where concerns are raised, and our case is a simple one, the OFT has not sufficiently investigated the local areas in relation to four to three.

In relation to the next document at tab 7, which a questionnaire that was sent out generally to pharmacies, Mr Green referred to question 11 on the last page, the question "How many competitors might you expect to face within a one mile radius?" He suggests that that was an

invitation to us to put in detail economist evidence. Imagine the OFT's face – it is not a rubbish point as Mr Green suggests – if every response to this question which was sent out to a number of pharmacies, we do not know how many, produced detailed economist evidence in relation to every point? The approach that Mr Green is suggesting is simply not realistic.

Tab 8. He then, in relation to section 2.1 drew attention to the fact that "In this specific case we do not believe that the number of fascia tests could capture or cure the merger's effects on competition in the retail market because there are a number of specific features in the case that also have to be considered." Mr Green says there is an inconsistency between what we were saying then and what we are saying now. Of course there is an inconsistency, because we made the submission and the OFT rejected it, but the idea that when you put forward a submission and the OFT rejects it you cannot say anything then about what the OFT does instead, again is unrealistic.

2.1.3 at page 7, Mr Green's point, the first sentence: "The OFT has indicated it has concerns that risks we have raised are speculative only." This is in relation to a particular point about possible behaviour on the part of Boots and using its retail strength in P medicines to influence customer choice to the detriment of its competitors, but one cannot read from that that there was a continuous complete dialogue between us and the OFT. All the documents that we have received from the OFT are attached to our Notice of Application, it was pretty much a one-way process – if you want to call it 99% fine, but one cannot read from that sentence that somehow we were fully aware of what the OFT was considering. That is simply not the reality.

Finally, he referred to a note of a telephone conference in bundle 4 at tab 3(b). It was a telephone call from the OFT to my instructing solicitor. "Called Paula Readle and said that if there was anything else which they wanted to submit they were quite welcome to." That does not mean that we were involved in an integrated process with the OFT, it is saying if you want to tell us something else you can, but it is not saying we are particularly concerned about these issues, we would like you to add to this issue. It really does not take us very much further.

In relation to Mr Green's first point he says that our analysis of the four to three areas is after the event and trumped-up. It was not; we raised it with the OFT and I make the point that we are now challenging the decision and our challenge is based on the reasoning, the logic, the rationality of the decision. It is Mr Green's approach which is illogical and unrealistic. He also made the point that what we are saying now is inconsistent with the arguments we advanced to the OFT; i.e. you should rely solely on fascia tests. I have explained that that was rejected and we are where we are, we are now challenging the decision.

The second point that Mr Green raised related to the counterfactual and, again, it is the same point, we however come back to this point of principle which is what is the position where the

starting point is that there is allegedly limited competition in the market? I have made my point about the logicality of that, that it means that there should be at least as rigorous a review as where there is a lot of competition because otherwise mergers that really stripped out anything that was left would get through, and that does not make sense.

What does Mr Green rely on to support his counter-argument? He said on the logic of my submission that even if competition is minuscule that will mean there is going to be an SLC. With respect, that is not right, my submission was that it was contextual and what one has to do is look at the level of competition, look at the effect the merger will have and decide whether it is an SLC. It is too simplistic to put it as Mr Green seeks to do.

He referred to the OFT guidance, this is bundle 5 tab 2 and he referred to paragraph 3.6, page 15. It certainly does not help him and it is actually probably against him because what it says is "Not all mergers may give rise to competition issues. First, some mergers are pro-competitive or completely neutral; secondly, many mergers may lessen competition but not substantially because sufficient post-merger competitive constraints will remain to ensure that competition or the process of rivalry continues to discipline the commercial behaviour of the merged firm."

The focus, therefore, is on the constraints that are left, and our submission is that if the constraints are limited to start with and become more limited, certainly this guidance does not suggest that that is not an appropriate consideration. In 3.7:

"A merger may be expected to lead to a substantial lessening of competition when it is expected to weaken rivalry to such an extent that customers would be harmed. This may come about, for example, through reduced product choice, because prices could be raised profitably, output could be reduced and/or product quality or innovation could be reduced."

Mr Green suggests there is no danger here of harm to consumers because we have regulations, but with respect this is an argument that was put to the OFT. The OFT that the merging parties put to the OFT initially was there are no competition concerns at all because competition in this market is so limited, and one of the reasons is because there is regulation. The decision rejected that. The decision takes account of the fact that there is regulation and comes to the conclusion that nonetheless there is a problem with two to ones and a problem with three to twos, so Mr Green here is simply rehearing an argument that is put to the OFT and rejected in the decision, there is not really any merit in trying to go back on that, that battle has been fought and lost by his findings.

He referred to the Competition Commission guidance, that is at tab 3, and he referred in particular to particular to paragraph 1.22: "In applying the SLC test the Commission will evaluate the competitive constraints on firms with the merger compared to the situation that

would have been expected to prevail without the merger." That is perfectly consistent with my submission, it is certainly not counter to my submissions what Mr Green suggests, and again he says that it goes on to indicate that regulatory context plays a part: absolutely, but the mere fact that there is regulation does not mean there cannot be a competition concern, and the decision comes to that conclusion.

He then referred to the *EDP* case but he did not take you to it. When you do come to look at it, if you look carefully at particularly paragraph 180 *EDP* is about a situation where regulation means that there is no competition. It is not this case and it does not take us anywhere.

Mr Green's third point was what he called the essence of the decision, in which he gave you references to the submissions put forward by his clients to the OFT and made some references to the decision. As I have just explained, the merging parties' initial submission to the OFT was that there are no competition concerns at all and that was rejected by the OFT, so I am not sure how it helps us to go back and trawl through what Mr Green's clients nay have said. The end point for this particular judicial review is the decision.

In relation to the national market, Mr Green's fourth point, I do not think he added anything to what Mr Roth says and therefore I do not need to deal with that. Finally, in relation to the Scholl/Cohen point, Mr Green made the same point but for a different end as Mr Roth made. He said we all agree on the proper analysis that there is limited competition; I have taken you through the documents, that is simply not factually correct.

Unless there are any further questions, those are our submissions.

THE CHAIRMAN: Nobody wants to say anything else?

MR GREEN: If I may say something about timing, if this is an appropriate moment.

THE CHAIRMAN: Yes.

MR GREEN: We have made you aware of the timing of the transaction. If I can just update you slightly, without being presumptuous, we would be exceedingly grateful for a judgment before the end of the first week of May, we would be quite grateful for one before the end of the second week and we would begin sweating in the third week. If it is at all possible the 5th would be wonderful; if that became problematic for you the 12th would be not quite a good but okay, but we do get nervous after that. We understand, obviously, that you need time to think about it.

THE CHAIRMAN: We will do our best to meet your best deadline.

MR GREEN: That is very kind of you, thank you.

THE CHAIRMAN: We are grateful for your understanding about it. Can I thank everyone for managing to deal with it in a day and giving us very full submissions in a very succinct way?

We appreciate that and we will do our best to meet your earliest deadline, but I do not promise that we will do. Thank you very much.

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