IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1062/1/1/06

Victoria House
Bloomsbury Place
London WC1A.2EB

28th June 2006

Before:
MARION SIMMONS QC
(Chairman)
PETER CLAYTON
DAVID SUMMERS

Sitting as a Tribunal in England and Wales

BETWEEN:

LONDON METAL EXCHANGE — Appellant

and

OFFICE OF FAIR TRADING — Respondent

Mr. Mark Hoskins (instructed by Mayer, Brown, Rowe & Maw LLP) appeared for the Appellant.

Mr. Daniel Beard (instructed by the Solicitor, Office of Fair Trading) appeared for the Respondent.

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HEARING (COSTS)

THE CHAIRMAN: Good morning. First, can I thank you all for your very helpful written submissions which have helped to clarify the points in our minds. We have some tentative comments which I think it might be helpful if we aired.

We wonder whether the real question we have to consider today is: "Was the OFT's conduct in giving the IMD in February 2006 (without previously carrying out the further investigations which the OFT did carry out in March and April 2006) conduct which no sensible authority ..." (I have used the word "sensible" instead of "reasonable",), "... sensible authority, acting with due appreciation of its responsibilities under s.35 would have decided to adopt?"

If the answer to that question is "yes", then the OFT would not, it seems to us, satisfy the requirements in s.35 because it did not properly consider whether it was necessary for it to act under s.35 for the purposes set out in (a) or (b) of s.35(2). In that event the OFT would have no statutory jurisdiction for giving the IMD, and the IMD would accordingly be set aside on Judicial Review grounds.

If the IMD was set aside on Judicial Review grounds in that way then it may be appropriate and that is the question we have to decide today (if that was the conclusion) that the OFT pays the costs of the LME which were thrown away by the appeal. On the other hand, if the OFT's conduct in this matter was not outside the conduct which a sensible authority would adopt in all the circumstances at the time, then it may not be appropriate for an order for costs to be made against a public body which has acted properly under (and in accordance with) its statutory powers.

We note that the OFT accept that approach in the second and third sentence of para.34 of its submissions of 23rd June. It also seems to us that there probably is no dispute that had the OFT known at the time what it knows now it could not and would not have issued the IMD.

The difficulty we have is to know whether, in all the circumstances, the information which the OFT now has and, on the basis of which it has withdrawn the IMD, should have been available to a sensible authority – I say "sensible" instead of "reasonable" – at the time it considered using its powers under s.35; and whether it could have considered that the information which the OFT did have when making the IMD was sufficient. So the question may be whether on the 27th February 2006 a sensible authority, on the basis of the information relied upon by the OFT could have properly considered that the necessary and urgency test in s.35 was met.

It seems to us that in considering that question evidence which the OFT relied on for each of the two criteria in s.35 preventing serious irreparable damage to Spectron and protecting the public interest has to be looked at separately. From what we have seen we have a concern that the OFT only asked customers after it made the IMD. In that regard could a sensible authority have considered that the criteria in s.35(2)(b) was satisfied without asking the customers first?

We note in para.56 of the OFT' submissions that it baldly states that "... it was not appropriate or feasible to approach customers prior to making the IMD ..." but no reasons are given and perhaps the OFT could assist us a little on that point.

As to the criteria in s.35(2)(a) we have identified certain documents in the Notice of Application bundles, and I think the LME have also identified these in their skeleton, which indicate the information of which the OFT was apprised at the time as to the serious irreparable damage claimed by Spectron. The documents we have noted in that regard are: divider 13, paras. 5 -7, divider 24, divider 25, divider 25, p.332, divider 27 and divider 31 at p.384-387 and 405.

We appreciate that that is only a selection of the information which the OFT must have had, having regard to the fact that it was investigating since the complaint was received on 1st July 2003, so we may only have a snapshot.

We note that the OFT, in its submissions rely on urgency. However, it seems to us – of course, subject to further submissions – that there are two questions. First, whether the OFT considers the IMD necessary for either or both of the purposes set out in the section; and secondly, that for those purposes it is necessary to act as a matter of urgency. Our preliminary view, subject, of course, to today's hearing, is that if the IMD decision was properly taken by the OFT then the conduct of the OFT thereafter probably does not of itself provide basis for a costs' order. Those are our preliminary comments if they are of use. I do not know if you would like to think about that?

MR. BEARD: Well, madam, yes. The point is it is a rather different set of issues than the ones that have been raised. Obviously my learned friend may say that the first question that is posed by the Tribunal is the wrong question but the question as posed by the Tribunal rather fits more closely with the way that the OFT has approached the analysis of this matter.

THE CHAIRMAN: Well I think it is bringing both submissions together.

MR. BEARD: Madam, it may be, however, there may be certain points upon which it is necessary – given the Tribunal's indications – for me to take further instructions.

THE CHAIRMAN: Yes.

MR. BEARD: I am not sure that it is going to be possible to take those instructions and deal with these points immediately. I can try to do that, but it may be that these are matters which OFT would want a further opportunity to comment on, particularly as you suggest, Madam, the particular documents that the Tribunal refer to may only be a snapshot of what is relevant.

THE CHAIRMAN: Yes, they are the documents that are, I think, all referred to in the skeleton by the LME as well, so you were apprised of the fact that they were relying on those.

MR. BEARD: That is right, but it is in a rather different context here that this point is being made, but I quite appreciate that, Madam.

THE CHAIRMAN: Do you want five or ten minutes or quarter of an hour?

MR. BEARD: I think that would be sensible, yes.

THE CHAIRMAN: A quarter of an hour?

MR. HOSKINS: Madam, yes, that is fine by me.

THE CHAIRMAN: Yes, 5 to 12.

(The hearing adjourned at 11.40 a.m. and resumed at 11.55 a.m.)

THE CHAIRMAN: Mr. Hoskins?

MR. HOSKINS: Madam, I will start slightly on the defensive and then immediately become more positive, I hope. I think it is important to remember that the Tribunal does have a complete discretion in relation to costs under Rule 55, and therefore none of us should be come to formulaic. However, having said that there probably is not too much between the way in which the Tribunal has tried to ask itself the relevant questions in order to exercise its discretion and where certainly my client is coming from.

THE CHAIRMAN: Or, I understood, the OFT was coming from?

MR. HOSKINS: Well I am sure we will find out whether that is the case or not. I think there are really two main headings for us that we suggest the Tribunal has to consider. First, did the Office conduct a reasonable investigation, a sensible investigation – whichever word we use – before adopting the IMD? There are a number of sub-questions tucked into that – I think there are three which immediately spring to mind. First, what information did the Office have? The Tribunal has identified the documents in the opening remarks. Secondly, what was the relevant time frame that was available to the Office? It seems as though that is very important when one comes to look at whether they were acting reasonably or not. Thirdly, what could (what reasonably should) the Office have done in that available time frame? That is the first main heading. The second main heading, and I am afraid I think this is where we do depart a bit from the opening remarks. We submit that the events after the adoption of the IMD are relevant, and the reason why I say that is because the Office accepts that it is under a continuing obligation to keep IMDs under review. Therefore we say there is a further relevant question which is "Did the Office act reasonably in keeping this IMD under review. If it did not act reasonably in that way, and if that caused the LME to incur costs then those costs should be recoverable.

What that means in practice in this case is that we submit that it is relevant to consider whether the Office acting reasonably would have withdrawn the IMD before 26th April.

THE CHAIRMAN: Yes, we understand that. The comment I made was that our preliminary view on what we had seen was that you were not going to be able to establish that on the facts.

MR. HOSKINS: I understand that Madam and I will address that.

THE CHAIRMAN: We were not saying there was not a principle.

MR. HOSKINS: I understand. Those are the two questions that I would like to address you on, and I would like to address you on things that happened after adoption and obviously you will then decide whether or not I have succeeded in ----

THE CHAIRMAN: Absolutely, that is why we put it so that you knew where you stood.

MR. HOSKINS: I hope there is not a huge amount between us in terms of phrasing the questions, it is always a complete discretion. I think the only caveat I probably would put forward is that we certainly would suggest that this should be seen as a pure jurisdictional issue. The reason I say that is that that is a legal quagmire, the question of the extent to which courts, the Administrative Court, the Tribunal can step into a jurisdictional area where the power is phrased in the sort of way it is in s.35. I do not think we need to get into that because the sort of language the Tribunal has used in the opening remarks is similar to the way that we suggest the Tribunal approaches it. That means one does not have to get into legal niceties of jurisdiction or not.

THE CHAIRMAN: You mean the appeal on the merits point?

MR. HOSKINS: Yes.

THE CHAIRMAN: I do not think we need to do it for this particular hearing because we can leave that open for whenever that happens, that it is an appeal on the merits and it may not be a Judicial Review in what the Tribunal does in a case, and then costs' issues may be different. On this basis I think it is accepted that had the information been there at the time the order would not have been made and therefore probably would have been JR-able, so we do not have to worry about the advice or the merits' test.

MR. HOSKINS: I understand, yes. So those are the two headings that I wanted to approach the question under. Just some introductory remarks – I am sorry, these may be old news given that obviously you have read my written submissions. This case is going to turn very largely chronology and that is why it is important I think just to set out even the most basic dates again at the start.

The Office notified the direction to the LME on 27th February 2006. The LME lodged its Appeal on 26th April 2006, and it is important to bear in mind that the absolute final date that that could have been done was 27th April. The LME waited as long as possible before lodging because it was in negotiations with the Office. We did everything we could to try and avoid having to lodge this Appeal. Then the final crucial date in the 'Holy Trinity' of dates – if I can

put it like that, but I will need to delve more deeply into the details – is that the OFT then investigated the matter as we have seen, and withdrew the direction on 15th May 2006.

Another important preliminary point is that the Office, both in the reasons that it gave and in the submissions for today states that it withdrew the Direction because it obtained significant new material. It is quite clear that none of that material was new in the sense that it was not available prior to the adoption of the Decision. It is simply that the Office did not actually seek to obtain that material until after it had already adopted the Direction and that is important when it comes to looking at how reasonable the Office was – the information was available, the Office just did not ask for it. Interestingly we made this point at para.12 of our initial costs' application and it has not been denied by the OFT – our analysis of the fact that this is not new material in the sense it was not available. So unless Mr. Beard changes tack that is common ground between the parties.

If I can start by looking at what the OFT actually did and how long it took it? If one looks at para.54 of the Office's costs' submissions (p.15), the Office states:

> "Before taking steps to consider whether the issuance of the IMD would be justified the OFT needed a reasoned submission with evidence from Spectron which it received on 2nd February 2006."

Our understanding of that is that what the Office is saying is that it did not take any steps to consider whether the issuance of interim measures would be justified until it received Spectron's formal request for interim measures on 2nd February 2006. It seems to follow inevitably from what they say in their submissions.

What we know then is that the total period between the commencement of the OFT's investigation on or after receipt of the Spectron submissions on 2nd April, up to the decision to withdraw the Direction on 15th May 2006 was therefore three and a half months.

THE CHAIRMAN: Although they say that in para.54, the matter was originally drawn to their attention on 5th January 2006.

MR. HOSKINS: That is correct, Madam, that is one of the points I am going to make. I am going to take you through the chronology because the point I want to establish is, even if it was reasonable to take three and a half months to deal with this and come to the conclusion that the Direction should not stand, they should and could have begun that investigation at a much earlier date and that is the crux of this first point.

I am going to submit later that the Office could reasonably have conducted the investigation more quickly but for this part of the submissions I am going to assume that it needed three and a half months to conduct a proper investigation.

We have set out a chronology of events leading up to the adoption of the IMD at para.37 of our costs' application, which is at the front of bundle 4. Of course, it is important to remember that this was not the start of the investigation. The first complaint – the first time this matter came to the Office's attention was when Spectron made a complaint in July 2003. But when one comes to look at the timetable particularly relevant to the adoption of IMD first of all we have on 16th August 2005 the Office learned about the possibility of the LME extending the trading hours for LME select, and also about the possible effect that that might have on Spectron's business. The relevant documents relating to that are in bundle 2A, first of all at tab 11. You will see at tab 11 there is a memo sent out to category 1 and category 2 members by the LME. The main features, no.2: "The intention to extend select hours to cover early morning trading provided that there is a worthwhile business case". So it is merely a possibility at that stage, it is not a definitive decision to extend the hours. That internal memo came into the public domain certainly, one sees, by 8th August 2005 in the next tab; essential reading for all concerned in the Industry: "Metal Bulletin Daily". The bottom right hand corner: "LME mulls extension to select trading hours" and then a story reflecting the memorandum that we have just seen.

Then tab 13, and this is one of the documents that the Tribunal has already noted as being before the Office took its decision. Paragraph 15 of this note of a meeting between the OFT and Spectron on 16th August 2005:

> "Can Spectron refocus its business on NYMEX. Spectron could refocus its business in that it could serve NYMEX (which also trades metals). However, NYMEX is not located in the UK. Spectron is also focusing on its overnight market where it picks up business from Asia. However, this aspect of Spectron's business may also be under threat as it is believed the LME will start to run trading overnight as well. Also Spectron is focusing on its voice trading. Spectron believes that once LME takes business away from the overnight trading Spectron eMetals will go out of business."

So at the moment this is merely a possibility, that Spectron has made it clear to the OFT that if the LME extends select trading hours then Spectron believes that Spectron eMetals will go out of business.

The other important point (I will come back to it) is you will see there already, at this meeting in August 2005, the statement that Spectron is "focusing on its voice trading" – I will come back to the significance of that later.

THE CHAIRMAN: Then you have para. 7 as well – "Spectron does not charge fees for this."

MR. HOSKINS: Spectron does not charge fees for voice trading – yes, reference to voice trading, absolutely, I am sorry, yes.

So that is where we were at 16th August 2005 and again, just to keep the chronology in our minds because it is crucial, that was more than six months before the adoption of the Direction, more than eight months before the lodging of our Appeal, and nine months before the withdrawal of the Direction.

The next significant thing that happened was on 23rd November 2005, because that is when the LME actually announced that it was going to extend the trading hours with effect from 1st March 2006. Those documents are in the same bundle (2A tab 20) and you will see the statement in the first paragraph. Again it is an internal memorandum from the LME to category 1 and category 2 members, announcing the intention to extend the trading hours. Again, one sees that it comes out in the public domain the next day (tab 21) Metal Bulletin, and this time it is the bottom left hand corner carries the story – so it was certainly in the public domain by then.

From our analysis of the documents it seems to us that the Office knew at the latest from the beginning of December 2005 that the LME had decided to extend select trading hours with effect from 1st March 2006. We get that from tab 23 of this bundle, and it is a number of emails which run reverse chronologically so the most recent one is first. If one goes to the very bottom of the first page behind tab 23, p.310, one sees an email from John Evans of the Spectron Group, to Frances Warburton of the Office on 1st December 2005.

> "Sorry, but I have been away. Hopefully you have received a reply from Robert in my absence."

Then going to the top of the page one sees the response from Frances Warburton – I say "response" it is going to John Holmes. I am sorry – Frances Warburton and John Holmes are both in the Office, so what Frances Warburton is doing is circulating her response to Spectron to John Holmes within the Office. So you will see "John for file, rest for info". Then Frances Warburton: "Dear John, thank you for your email ..." and that must be a reference to John Evans of Spectron. "I can confirm that I have received the reply from Robert Rawe in response to our inquiries." Then one sees discussion of matters arising from that Robert Rawe reply, email reply. Then three paragraphs down:

> "If Spectron considers that the expansion of LME into overnight trading seriously threatens your future ability to re-enter the main day time market, as well as being a serious threat to your overnight operations this might raise the question of the stability of interim measures."

So two points: it looks as if the Office was aware of the LME's decision to extend trading hours and of Spectron's concerns about the effect that that would have on its eMetals' business

as a result of the reply sent from Robert Rawe which must have been sent before 1st December because of the email I took you to at the bottom of the page.

THE CHAIRMAN: Is that right?

MR. HOSKINS: Well, madam, one has reference to Robert Rawe's reply on 1st December because the reply must have been pre-1st December, and then one has a reply to John Evans ----

THE CHAIRMAN: The only reason I question whether it is right is that if you look – it is from "Frances to John" dated 15th December, 5.03, forward "Re: further information. John – for file, Rest for info." Then, there is the thing with the arrows either side, and that is "Frances Warburton 15/12/05", etc. Then it says "Dear John". Now, that definitely was sent on 1st December? That was an enclosure.

MR. HOSKINS: I am sorry, the one at the bottom is "John Evans to Frances Warburton".

THE CHAIRMAN: Yes.

MR. HOSKINS: And that is 1st December. The second one – you were right to pick me up – although it looks as though it was sent internally on ----

THE CHAIRMAN: It was sent internally on 15th December.

MR. HOSKINS: It must be an American numbering style.

THE CHAIRMAN: Yes, that is 15th December.

MR. HOSKINS: Exactly, so they are both 15th December.

THE CHAIRMAN: ... the enclosure is a letter that was sent on 1st December or whether on 15th December the thing is picked up, replied to and enclosed from Frances to John.

MR. HOSKINS: It does not matter for the basis of my submission because the latest is 15th December. It just gets better for me if it is earlier.

THE CHAIRMAN: Yes, you were saying that it was definitely the 1st and I was not absolutely clear from the way that the email ----

MR. HOSKINS: Well the reason why I say it is definitely the 1st is because if the information comes from the Robert Rawe email must have been before 1st December because of the way that John Evans refers to it at the bottom of the page. So the Office must have received the Robert Rawe submission before 1st December.

THE CHAIRMAN: And did not do anything about it, possibly?

MR. HOSKINS: We do not know, we can only go on the documents that have been disclosed to us. Another (hopefully helpful) point is that we made this specific point about the dates and about the fact that the Office must have known at the beginning of December in para.37(b) of our costs' application and that is not being denied, contested by the OFT in its submissions. Obviously it is a matter of record when the Robert Rawe submission came in, the Office may be able to assist but for my purposes I am happy to assume it was clearly before 1st December.

THE CHAIRMAN: We do not have the Robert Rawe ----

MR. HOSKINS: It has not been disclosed, no. So by 1st December at the latest the Office knew about LME's plans. It knew that Spectron feared that would drive its eMetals business from the market. Again, just to keep the chronology ticking over that was three months before the adoption of the Direction, five months before the lodging of LME's appeal, five and a half months before the withdrawal of the Direction – three, five, five and a half.

This email of 15th December, the one we have just looked at from Frances Warburton, was the first time that the OFT raised the possibility of interim measures, and it is interesting. It is not Spectron saying "Please can we have interim measures?" It is the OFT being proactive, taking the initiative and saying "Oh, you should think about interim measures". That is very important because, of course, when it comes later the OFT tries to say "Oh well we were dependent upon things happening. We say that is blatantly not correct, but even as a matter of fact, if the OFT goes on the front foot and encourages someone to seek interim measures then the OFT has to stay on the front foot, it cannot then hide behind another party being slow.

THE CHAIRMAN: Well it could hide behind the other party being slow by saying to the other party "Well, you are too late."

MR. HOSKINS: Precisely, but it did not do that. But then, somewhat surprisingly, three weeks are allowed to elapse. An email sent to Spectron said: "LME is doing this, it will force us out of the market". OFT comes back and says "You should think about interim measures", nothing happens, three weeks. What happens next is that Spectron finally rouses itself (tab 24) an email from John Evans to Frances Warburton:

> "Dear Frances, let me clarify our position for you. Your understanding from our meeting in August was correct..."

so harking back to what happened in August, and there is a discussion about the screens. Then the third paragraph:

> "The LME have declared their intention to extend their trading hours as from 1st March 2006. As things stand I imagine we will be forced to close our screens soon after. Naturally, we would request that you use your powers under the interim measures to stop the LME from extending their hours until the OFT has completed its original investigations."

So the OFT has prompted Spectron. Three weeks later Spectron comes back and says "Yes, please, we would like interim measures." This is still – again to keep the chronology going – around two months before the adoption of the Direction, four months before the lodging of the Appeal, four and a half months before the withdrawal of the Direction.

That was 5th January. On 9th January there is a discussion between Frances Warburton and Julian Maitland-Walker, who is the solicitor instructed on behalf of Spectron (tab 25). Again we see an internal email, Frances Warburton to John Holmes of the OFT, recounting a conversation that Frances Warburton had had with Julian Maitland-Walker; general conversation about the process of the case and the substance of the case, and then finally the very last bullet point: "I asked if Julian Maitland-Walker were aware of the discussion about interim measures and he said he was not. I referred to the emails between Spectron and us and he said he would ask Spectron about it. So again the OFT is taking the initiative. It is prompting the request for interim measures.

Then over into tab 26, first of all, an internal email from Frances Warburton to the OFT team for information. That internal email encloses a letter that was sent to Spectron, but it is important to note the terms of the OFT's internal state of mind at that stage. "Dear John", (John Evans of Spectron) "... please find attached a letter in response to your email, a hard copy is in the post." We will look at that letter in a minute. "Please note the tight timescale that may exist here as the OFT would be required to consult LME in any proposals for interim measures." So the OFT is aware of time pressure. Frances Warburton is reminding Spectron of tight time pressure and that has been circulated to the team.

Then the letter that was sent to Spectron is at p.332 – maybe tab 26B in your bundles.

THE CHAIRMAN: The enclosed letter.

MR. HOSKINS: It is the enclosed letter, yes, thank you. A letter from the Office to John Evans, 10th January:

> "In order for the OFT to consider granting interim measures in this case we need further evidence. Here is the sort of thing you might wish to consider."

It is quite surprising, it is the Office under s.35 of the Act that has the power to adopt interim measures. It is the Office that has the obligation to collect the necessary evidence. This is a remarkable *laissez-faire* letter – 'we need some other evidence, these are the sorts of things you might like to think about'. Not, this is the information we require. That is the 10th January 2006, what happened next? Nothing for three weeks. The OFT is well aware of the need for urgency, well aware of the risk of unfairness to the LME and yet it sits on its hands for three weeks until Spectron chooses to come back, and that is tab 27, and that is the application for interim measures and the reasons put forward by Spectron. I will come back to that and look at the reasons later.

Even at this stage there are still three and half months to go before the withdrawal of the Direction and, indeed, we know because we have seen the submissions that the Office has made in this hearing that actually when it started its investigation it said: "Paragraph 54, we

could not start an investigation until we had had reasoned submissions from Spectron." These are the reasoned submissions, this is finally what set the clock ticking for the Office on the investigation.

We do say that the Office cannot hide behind any dilatory approach that Spectron showed in seeking interim measures and providing information. If the Office believed the interim measures way might be appropriate, it was for the Office to take the initiative to obtain the necessary information and that is quite clear from s.35 of the Act itself. The power to adopt interim measures lies on the Office and it is not dependent in any way on the making of an application by a third party. There is no trigger. The initiative, the power the obligation all lies on the Office.

Where does this take us when we are looking at the reasonableness of the way the Office behaved. It takes us here: if the Office had carried out its investigation with any urgency whatsoever, it would have had ample time to complete its investigation before the LME was obliged to lodge its appeal, because even if one assumes that three and a half months were necessary to investigate this matter, if the Office had commenced its investigation at any time before mid-January 2006 the direction would have been withdrawn before my clients incurred the costs of an appeal. So if the key date is mid-January 2006, one of course immediately alights on the fact that the Office itself first raised the possibility of interim measures on 15th December 2005 and Spectron first request interim measures on 5th January 2006. We say that it is entirely due to the Office's dilatoriness, it is an unreasonable approach to this investigation that we have been obliged to expend significant resources, both financial and management time in challenging the Direction, and that is all unnecessary. That is the first way I want to look at it.

The second way I want to look at it is this: even if it was correct that the Office was not obliged to commence an investigation until it received Spectron's reasoned submissions on 2nd February 2006, that still left the Office around three months before it became necessary for us to lodge our appeal, even if it was entitled to say "We do not have to start investigating until 2nd February". Our submission is quite clearly there is no reason why the Office could not have completed its investigation before 26th April, which is when we lodged the Appeal, as opposed to 15th May.

THE CHAIRMAN: That is not the test, is it? It is the other way around. No reasonable or no sensible ... "could have" rather than whether it was reasonable for the OFT to do something. I am not sure whether it is the other side of the coin. I think the test is slightly different.

MR. HOSKINS: Madam, the point I am making is this: if I have lost on the first point it was reasonable for the OFT to sit on its hands until 2nd February.

THE CHAIRMAN: No, "... if a reasonable regulator could have sat on its hands", that is it.

MR. HOSKINS: If a reasonable regulator could have sat on its hands, no reasonable regulator could then have taken over three months to conduct a reasonable review of the Direction, so it is still a question of reasonableness, because it is common ground that the Office was under an obligation to carry on reviewing. I appreciate that the two issues merge into each other to a certain extent in the sense of what information did the Office get before it adopted the Direction and what did it do afterwards? But in a sense that is inevitable in a case like this where the whole point is that the Office carried out the bulk of its investigation after the adoption of the Direction. That is the oddity. So in a sense I am giving the Office the benefit of the doubt. I am saying even if it is right that you needed all this information to come to the proper conclusion, what I am saying is that you could reasonably have done it long before we had to incur any legal costs.

The Direction itself, I do not want to go through it in any detail, but what I do want to note is what it was primarily based on. The Direction (bundle 1, tab A) The Tribunal will be aware there were two heads on which it was said that the IMD was necessary – public interest and harm to Spectron. Public interest begins on p.6 at para. 25. The heart of the analysis really is to be found in para.34.

> "In this regard, Spectron has indicated in its application that if it is forced out to provide an electronic trading platform in the market it would be extremely difficult, if not impossible, for it to re-establish a viable electronic trading platform at some time in the future. There are a number of factors to support this including reputational damage to Spectron, the cost and difficulty of reintroducing an additional trading screen to brokers' desks and the overall difficulty of overcoming the reputational effects of the alleged predatory behaviour."

We see, when we come to look at the withdrawal reasons, it is stated that although the Office still believes that Spectron may have to leave the market it does not believe that it will be impossible or so difficult for it to re-enter. That is the crux of the issue before the Tribunal. The reference for the information, of course, in para.34 is Spectron has indicated in its application, that is what the Office is relying upon.

Then in relation to serious irreparable damage to Spectron, that begins at p.9, para.40.

Paragraph 41, again we see the source of the information the Office is relying on:

> "As outlined above the Office considers that if it does not give a direction to prevent LME from extending LME Select's trading hours the likely consequence will be the elimination of Spectron. Spectron has stated this expressly in its application to the OFT."

Then footnote 19 refers to para.2.7 of Spectron's submission. Then over the page, paras. 43 to 44. Paragraph 43 is the same point that we have seen before in a sense albeit directed expressly at Spectron rather than the public interest. "Spectron will be forced out of the market and will find it impossible/extremely difficult to come back in." 44 – reputational damage, etc. So again, it is the same sort of factual issues put under a different head (paras. 43 and 44). It appears, certainly from the reasoning given for the Direction, that the assumption that eMetals would be forced out of the market and that Spectron would find it difficult, impossible, to re-enter the market, was based on what Spectron had told the Office in its submissions of 2nd February. That is what the Direction tells us.

THE CHAIRMAN: In its application?

MR. HOSKINS: Whatever one calls it – the reason I do not use the word "application" is that I say it applied already on 5th January. The first time it actually gave any information, detailed information was 2nd February.

I think it is now time to look at what Spectron gave the Office – what information was the Office relying on? That is at bundle 2A, tab 27. The Tribunal will remember that the specific paragraph referred to in the IMD reasons is para.2.7, which is at p.337. 2.7 is simply a statement: "If this happens we will have to come out of the market; it will be very difficult, much more difficult for us to go back into the market", but no reasoning, simply an assertion. Then one finds a degree of development of the reasons why this might be so in paras. 2.9 to 2.13. There is a reference to "loss of credibility", "reputation". There is a reference to the problem with monitors (para.2.9) and it comes up again in 2.11, and that is just about it.

MR. BEARD: It might assist, in order to avoid going back to this document again, if the Tribunal could just read from 2.9 through to 2.13 since there are other points there.

MR. HOSKINS: I am sorry, I had drawn attention and hoped the Tribunal would do that, I am sorry if I did not make myself clear.

THE CHAIRMAN: (After a pause) Yes. We were told there were two streams, and that is not now the correct information?

MR. HOSKINS: Well the Office has now taken a position that it does not accept that that is necessarily the case.

THE CHAIRMAN: Or necessarily needs to be the case.

MR. HOSKINS: Yes. Some more information on screens was given at tab 24, it is a document we have already seen, but I think we should look at it again in this context, tab 24. It is the first couple of paragraphs there, if I could ask you to read those?

THE CHAIRMAN: (After a pause) Yes.

MR. HOSKINS: But that is it. That is what the OFT had when it decided to adopt the Direction. It had our submissions, but I have made the point in our written reply. We first time we were given any reasons as to why the OFT was minded to adopt this Direction was on 13th February 2006, and we were given until 20th February to respond, in fact it was then extended to the 22nd, but we had minimal time, and it does not lie in the Office's mouth to say "Well it is the LME's fault for not giving us all the relevant information." The point is the Office is the one that had the obligation to investigate properly, to satisfy itself that a Direction was appropriate. It sat on its hands; that was my first point. When it did spring into action the information was hopelessly inadequate, because all it was were assertions by the Body whose commercial interests would best be served by the adoption of the Direction. The Office did not take any steps to investigate the soundness of the assertions made by Spectron. It did not go back to Spectron and ask questions, it did not call a meeting.

THE CHAIRMAN: Do we need to look and see what they asked you, what information you had before they did it?

MR. HOSKINS: I do not intend to go through that, except for one ----

THE CHAIRMAN: Mr. Beard will later!

MR. BEARD: It is up to the Tribunal. One point that is obvious is that the document at tab 30, which sets out the proposed interim measures direction that was sent to LME on 13th February, to which they had already been alerted, and to which LME then responded, as my learned friend had said ----

THE CHAIRMAN: In quite a lot of detail, or quite a lot of words, anyway.

MR. BEARD: Yes. I am not quite sure to whose words you are referring. The OFT's view was that LME's response had a lot of words and not a lot of detail. The OFT thinks that the material it put forward in its proposals made pretty clear what it was thinking about in that regard. It may be something that could be read over the short adjournment, it is tab 30.

THE CHAIRMAN: I think we have read most of the documents.

MR. HOSKINS: The Tribunal has the document, Mr. Beard can obviously make detailed submissions if he wants. The point is the LME did not have detailed knowledge of Spectron's business. So it is simply not good enough for the Office to say "It is the LME's fault that we did not know enough about Spectron's business." If Spectron wanted the Office to make this Interim Measures' Direction all the Office had to do was to ask for information to substantiate the assertions. It could have called a meeting for the next day, it could have sent a letter with a very short timescale. The point is that it did absolutely nothing. Now, when asking whether that was reasonable, one only has to think of what happened next. If the Office believed that it had sufficient information to justify the IMD, why did it immediately following its adoption

begin a train of investigation to seek out information, all of which was available prior to the adoption of the Direction. The Office's own conduct in this case demonstrates the unreasonableness of its decision to adopt the IMD on the incredibly limited information it had.

THE CHAIRMAN: If, for example, in the draft IMD notice that you get sent it says that it is relying on the fact that houses are red in the street; they send that to you and you know that all the houses are painted blue, and if the houses are painted blue then it is not relevant, and the IMD notice should not have been issued. Would it be right for you to sit back and not say anything?

MR. HOSKINS: Madam that is not the position. The crux of the draft put forward to us as then appeared in the Direction, was that the reason both in the public interest and because of serious and irreparable harm to Spectron, was that Spectron would be eliminated from the eMetals' market and it would not be able to re-enter. We specifically denied that and ----

THE CHAIRMAN: And the reasons for that?

MR. HOSKINS: We did give reasons for that, yes.

THE CHAIRMAN: The reasons that they gave for that, did you meet those reasons?

MR. HOSKINS: My submission is that we are not in a position to give detailed information about Spectron's business. We are the wrong person to ask.

THE CHAIRMAN: Well the question is whether it is the sort of information which you would have known, or you would not have known. There are certain things about their business you would not have known. There may be things that you would have known.

MR. HOSKINS: With respect, this turns the obligation on the Office on its head – and I do say that respectfully. We were given ----

THE CHAIRMAN: Why is it necessary under the Section to provide you with a draft?

MR. HOSKINS: Because that is required by the Section.

THE CHAIRMAN: Yes, but why is it necessary? The answer is in order that you can answer it.

MR. HOSKINS: In order that we can protect our interests.

THE CHAIRMAN: Whatever information you have that shows that the information that the OFT is relying on is wrong you can correct.

MR. HOSKINS: Yes, and that is what we attempted to do.

THE CHAIRMAN: My question is: was there anything in the detail that was being relied on which you could have answered, and either did answer and was ignored by the OFT, or you did not answer?

MR. HOSKINS: I am not in a position to answer, I have not conducted that detailed analysis. However, what we did say, for example, this is tab 31, para.36.

THE CHAIRMAN: That is a rather bold, bald statement.

MR. HOSKINS: Well, that is the submission I am making now. "Spectron provides no real evidence that extended trading hours for LME Select will be such that the very existence of Spectron's business is threatened." We are putting the OFT on notice exactly what I am saying now that it is not good enough for you to adopt an Interim Measures Direction without a proper investigation.

The question of whether the very existence of Spectron's eMetals' business is threatened is something that only Spectron can actually give information to deal with. If one turns through to para.49, another point where we expressly put the OFT on notice that this was an issue.

> "It is to be assumed that Spectron is able to maintain its electronic platform, eMetals, in operation despite the fact it has been running at a loss for at least 12 months because Spectron is able to subsidise it from the revenue Spectron derives from its other business activities. Spectron is Europe's largest independent energy and commodity programme."

Spectron is saying: "Our eMetals' business is going to be ruined, we will never get it going again." We are saying: "What we know about Spectron's business is that they are Europe's largest independent energy and commodity broker." It is not credible from where we are that they are going to be driven out of the market and never come back. What should then have happened is that should have put the OFT on notice that it was necessary to ask Spectron some hard questions to substantiate the assertion that it made. As we will see that is what the OFT did, but it did not do that – as we will see – until actually April 2006. I think it would be very unfair, we are given notice of these reasons, we are given a matter of days to respond, to say that because we failed to give detailed information about Spectron's business that somehow lays the blame at our door for the OFT adopting an IMD that it should not have adopted.

THE CHAIRMAN: Well possibly not laying the blame at your door, but if that was the case in my blue and red situation, a very clear situation, then it might be said that you cannot complain abut the OFT – not that you are blamed, but you cannot ....

MR. BEARD: If it assists, the OFT is not 'blaming' LME, it is not the right characterisation. It has made the observation in its submissions that where LME have talked about how obvious certain pieces of information were that it is noticeable that LME had not drawn those to the OFT's attention although it did so subsequently. That is a very much narrower point.

MR. HOSKINS: Well, madam, my response is that in relation to effect on Spectron's business, in effect on its reputation, on its ability to re-enter the market they are not within our knowledge, so it is not a red and blue situation. I think what we can fairly say about the LME and what it did in responding was it did the best it could to avoid an Interim Measures Direction being made against it. There is no question of it being in the LME's interests not to fight its corner

as hard as it could. There is nothing in the LME's interest of holding back information so we find ourselves X months later in a costs' application with the Office saying "Ah, hah!". This was done in the utmost good faith in the time available to defend the LME's position. I think if there are any 'houses that are red in the street and in fact they are blue' I think it is for Mr. Beard to pick them up rather than for me to show that there are none.

THE CHAIRMAN: What is going through my head, and I do not know what the answer is, is in relation to the two screens.

MR. HOSKINS: That may be in there, I simply do not know whether that was picked up, but given that we are going to go over the adjournment that is something we can certainly check on later on.

MR. BEARD: It might be wise for my learned friend to take instructions as to LME's position on that, that was made clear to the OFT on a number of occasions.

THE CHAIRMAN: You can deal with it over the adjournment. There may be something around there that you might want to know.

MR. HOSKINS: I know that the LME certainly had a position because that is recorded in the withdrawal reasons, I am simply not sure whether it was put forward in this document.

THE CHAIRMAN: Let us leave it and deal with it after the adjournment.

MR. HOSKINS: Exactly, it is a practical check. I have got to the stage where I have said that the Office adopted a Direction. I have shown you the evidence that was available when it adopted the Direction, I have said it was not efficient; no reasonable authority would have adopted a Direction on that basis. I have also made the point that inevitably because the OFT immediately goes and starts a proper investigation that itself indicates that the Office was not acting reasonably.

The next port of call we have to go to are the full reasons for withdrawal, which are in bundle 4, tab C9. Again, the easy way at this point is to look at the conclusions for withdrawal under each of the headings, and the first one "The Conclusion on Serious Irreparable Damage" is at para.54 on p.15.

> "For the reasons given above the Office considers that it is no longer necessary as a matter of urgency to maintain the Direction to prevent serious or irreparable damage to Spectron. This would hold even if Spectron were eliminated from the electronic trading statement of the market which the OFT accepts is a possibility on the basis that it is no longer clear that it would be very difficult or impossible for it to re-enter."

So the Office changes its mind in relation to the possibility of Spectron re-entering. Then para.61 is a similar conclusion in relation to the public interest. 61(a) is the same point.

"Although it still appears likely that Spectron may be eliminated from the electronic trading segment of the market, its position in metals' voice broking suggests that it remains uniquely well placed to re-enter the electronic trading segment."

Then (b):

"The weight of evidence suggesting a negative impact on the development of the market as a result of the Direction is not countered by expressions of concern from customers about the loss of Spectron's electronic trading platform and no longer countered by evidence of the serious irreparable damage to competition that was suggested by the evidence in front of the OFT when the Direction was given."

i.e. "We have gone and spoken to LME customers and they are not really very worried about eMetals coming out of the market."

Focusing first of all on the possibility for Spectron to re-enter the market, the fact that Spectron was a 'significant business' – if I can put it like that – of which eMetals formed only a small part, was not new information in any sense of the word. It was something the Office had already been made aware of. I will just give some examples of that. First, in Spectron's initial complaint way back in July 2003 it made the Office aware of this (bundle 2A, tab 1). If I can ask you simply to read the first paragraph, it is on p.2 (internal numbering) it is para.1.1.

THE CHAIRMAN: (After a pause) Yes.

MR. HOSKINS: Crucially in that paragraph are the sentences: "Spectron is a leading provider of services to the energy trading industry", and then a few lines down: "The Group operates Europe's largest independent energy market place which clients may access either via a screen-based electronic system, or by telephone." The very first paragraph of the Spectron complaint tells the Office "We are major players, and we provide a market both through an electronic platform and by telephone, i.e. voice broking."

THE CHAIRMAN: That is not the eMetals business?

MR. HOSKINS: It includes the eMetals, yes.

THE CHAIRMAN: The energy market place includes the eMetals' business?

MR. HOSKINS: I am sorry. I am not sure about that, that may be my mistake, I will need to check. I will take instructions on that.

THE CHAIRMAN: But it seems to have kept separate in other documents.

MR. BEARD: It is separate.

MR. HOSKINS: It may be my mistake, madam, I am sorry for that.

THE CHAIRMAN: You can check that over lunch, but ----

MR. HOSKINS: Certainly.

THE CHAIRMAN: -- other documents indicated to me that there were two separate businesses.

MR. HOSKINS: Certainly. It does leave the point that Spectron is a leading provider of services to the energy trading industry. It is a major player.

The second example of how the Office was alerted to this issue come in the LME's submissions in response to the draft IMD, and I have already taken you to that (para.49) we can nip back to it, it is at bundle 2A, tab 31.

THE CHAIRMAN: It says; "... other business activities" there, and that is one indication that the eMetals' business was separate.

MR. HOSKINS: Yes, I am sorry if that is my mistake, but again that does not detract from this point which is that eMetals is a significant business which is clearly able to subsidise its metals' trading from other resources. "Spectron is Europe's largest independent energy and commodity broker", and a reference to the OFT bundle of documentary evidence for that. So there one does see the distinction between energy and commodity, but "... one of the largest energy and commodity brokers". One sees that in the documents when one reads through that Spectron trumpets that.

Still in bundle 2A, going back to tab 13 – again this is something we have looked at before, I will take you back to it quickly – p.258.

THE CHAIRMAN: You showed us before?

MR. HOSKINS: Exactly. "Spectron is focusing on its voice trading". So during that meeting on 16th August 2005, Spectron expressly informed OFT that it was concentrating on its voice trading, voice broking telephone services, however one wants to describe it. It is not something that came out of the blue after the Direction had been adopted.

Madam, what we say about those example is this, what it shows is that the Office had been on notice since an early stage, and certainly well before the adoption of the IMD, that Spectron was a significant player. It therefore, we say, should not have been too difficult to work out that when Spectron asserted that it was going to driven from the electronic trading market and never come back, that that was worth testing with a few well chosen questions. However, the fact is, as we know, that no such questions were asked until after the adoption of the Direction.

Madam, I am going to be a bit longer and it is now 1 o'clock I am in your hands as to how you wish to proceed.

THE CHAIRMAN: I was just reading from para.11 down to 15 because I think the reasons for the conclusion in 15 are in paras. 11 to 14, and reading 15 in isolation is out of context.

MR. HOSKINS: The reasons for 15 are given in?

THE CHAIRMAN: 11 to 14.

MR. HOSKINS: The reason why I refer to 15 is to point out that Spectron is focussing on its voice trading.

THE CHAIRMAN: Yes. "Spectron believes that once LME takes business away from the overnight trading Spectron eMetals will go out of business."

MR. HOSKINS: Yes.

THE CHAIRMAN: So there are two parts to the voice trading, there is voice trading itself, and the benefits that the company gets from voice trading.

MR. HOSKINS: In terms of remaining in the market, yes.

THE CHAIRMAN: And here it is said well there is voice trading but in fact they will have to come out of voice trading if LME extends its business, and therefore will not get those benefits.

MR. HOSKINS: I had not read it as Spectron eMetals will "go out of business", because eMetals I think is only the electronic platform, not the voice trading.

MR. BEARD: It may assist just to clarify, the significance of voice trading is undoubtedly in relation to the possibility of re-entry, that is clearly what the OFT was focusing on in relation to the full reasons. The significance of voice trading for the OFT in its full reasons is that it left a bridgehead of contacts within the industry that would mean that you could re-enter the electronic platform trading because you would have enough contact with that particular metals' industry trading environment.

THE CHAIRMAN: Shall we say 5 past 2?

MR. HOSKINS: Certainly, madam.

(The hearing adjourned at 1.05 p.m. and resumed at 2.05 p.m.)

MR. HOSKINS: Good afternoon. I had stopped in the middle of dealing with my second headline issue which was "Did the OFT conduct its ongoing review of the IMD reasonably?"

The next point I wanted to come on to was to highlight that there was a particular need for expedition in this case, because as we know the Direction was adopted and notified to LME on 27th February 2006, and almost immediately after its adoption, Spectron turned around and said "We would like it withdrawn." That is bundle 2B, tab 35. This is a notice that was issued by Spectron to LME members, that is the way it is described. It sets out the background about what has happened, but the crucial paragraph is the penultimate one on p.448:

> "As the OFT had not completed its investigations it decided to introduce interim measures to prevent LME extending Select's activity into evening trading. However, given the negative publicity that the market is attracting and the restrictions on liquidity, Spectron has requested the OFT to withdraw the Interim Measures order."

So what happens, what one sees is there is then too-ing and fro-ing between the Office and Spectron, at the end of which Spectron says "No, actually, we will keep the interim measures thank you very much." The point I am making is that if you adopt interim measures at the request of a particular company, and a couple of days after its adoption that company turns

around and says actually we would like you to withdraw it. That should set an alarm bell ringing that something is not quite right here, and we had better review what we have done as quickly as possible.

MR. SUMMERS: Mr. Hoskins, can you remind me, the date of that document?

MR. HOSKINS: The date of the document is 1st March 2006.

MR. SUMMERS: Thank you.

MR. HOSKINS: What then happened, as we know, is that an investigation was carried out after the adoption of the IMD, and one can see what was done. First of all, one sees it at paras. 28 and 29 of the Office's reasons for withdrawal, but we have actually provided a more detailed list based on the documents that were disclosed to us, and that is at para.44 of our application for costs, it is at the front of bundle 4. If you would like it for the record the Office's list is at bundle 4, tab C9, p.6,paras. 28 to 29 of its full reasons for withdrawal.

I would ask you to look at para.44 of our application for costs. What I would like to do is to focus on how the OFT dealt with Spectron, what questions it put to Spectron and what investigations did it carry out in relation to Spectron and when did it do it? At para.44A one sees the first approach to Spectron: 1st March 2006 an informal information request to Spectron". That request is to be found at bundle 2B, tab 37. It is a two page letter and I think the quickest way is if I ask you to read the first page which is the particularly important one.

THE CHAIRMAN: (After a pause) Yes, and in the last paragraph they say it is a matter priority.

MR. HOSKINS: Yes. There are two other points to come out of this: first, it is very interesting that what happened was that when the Direction was adopted immediately third parties were up in arms, and of course none of the customers had been asked prior to the adoption whether this was a good idea or not. As soon as it comes out, bang, customers are up in arms.

The second point is that this, as a request, is still in pretty general terms – I will take you through how the degree of specificity of the requests builds up, but at this stage it is a very general request.

Somewhat oddly we have this on 1st March and, a day later, on 2nd March the Office sends a s.26 request to Spectron, the difference being this was an informal request by letter, a s.26 request you have to respond to otherwise there are sanctions imposed. That is at the same bundle 2B, tab 40. That asks for, first, on p.457 – production of specified documents: "Please supply all documents containing or referring to any representations made by any of Spectron's customers concerning the IMD. Please supply all documents referring to any communication between Spectron and the LME". So the Office is thinking "The customer is responding, we had better find out what they are saying." Then over the page, "Provision of specified information". This falls into various categories, but again it is rather general in terms by

comparison with where the OFT finally gets to. Questions 1, 2, and 3 again talk about representations made by customers, and the effect that those representations may have had on Spectron, that is questions 1, 2, and 3. Question 4 is a question about trading volume on eMetals, no questions about Spectron's other businesses in there. "5. Details of communication between LME and Spectron". 6 and 7 ask for details of trading volumes on eMetals prior to the adoption of the Direction. 8 and 9 is the first sign that the Office is taking an interest in Spectron's other businesses because there is a request for trading volumes in relation to additional trading platforms. But there is no obvious question there about Spectron's ability to re-enter the market if it is eliminated from that market by Select extending its trading hours.

The next contact between the Office and Spectron is 7th March when there was a meeting, and that is at tab 48 of this bundle, 2B 48. It is interesting, this is the meeting that the Office says in its reasons for withdrawal was the first time that the Office had an indication that Spectron's voice broking business was more significant than the Office – I am sorry, have I given you the wrong reference? I am sorry, let me double check my notes.

THE CHAIRMAN: It is a meeting, is it?

MR. HOSKINS: I have at 2B 40 something that is headed "Note of meeting with Spectron"

THE CHAIRMAN: "Note of meeting with Spectron"?

MR. HOSKINS: Exactly.

THE CHAIRMAN: 7th March 2006.

MR. HOSKINS: That is the one thank you very much. I am sorry, the point I was making was that the Office has said that this was the first time that it realised the Spectron's voice broking business was more significant than it had previously thought, and that comes from the full reasons, para.40A. I am sorry to jump about – I am going to come back to this meeting note, but if you could turn briefly to bundle 4, tab C9, para.40(a). It is p.9 of the reasons. The reasons refer to key pieces of new information concerning Spectron's voice broking business.

> "The information provided indicated to the OFT that Spectron's voice broking business was more significant, including in financial terms, than it had previously appreciated."

Then footnote 18 refers to the meeting notes that I have just asked you to turn to. So this is when the OFT says that the light first started to dawn upon it. Unfortunately, the note of this meeting is heavily redacted, so we do not know the details about what was said about the voice broking business, but it is interesting that we do have at p.559 a comment from AS – Andrew Stephens of Spectron, one sees that from the guide on the first page:

"It is not clear that Spectron will not be able to enter the market. There is potentially more serious harm to Spectron if the OFT maintains the IM ..." etc.

Here we see the continuing theme because the statement "It is not clear that Spectron will not be able to re-enter the market", should have set the alarm bell, which was already ringing, pounding because, of course, the primary basis for the IMD was that eMetals would be forced out of the market, and they would not be able to re-enter. Yet here you have Spectron themselves saying that it is not clear that Spectron will not be able to re-enter the market. It is surprising that this did not come up before. This, I think I am correct in saying, was the first meeting that the Office had with Spectron after the adoption of the IMD, and immediately one sees the problems with the IMD.

THE CHAIRMAN: Do we not have to look at the next page?

MR. HOSKINS: Sorry, "AS" at the top of p.560?

THE CHAIRMAN: "Also, it must be assumed that Spectron have first decided whether the harm to Spectron is greater or less with the IMD. Spectron's relationship with its clients and volume liquidity ..."

MR. HOSKINS: Yes, as I have already said ---

THE CHAIRMAN: Do we know what has been taken up on that?

MR. HOSKINS: Yes, Spectron came back and then changed its mind again and said "No, we do not want it withdrawn." My point here is that in terms of the adequacy of the review carried out by the Office, and particularly the speed with which it was carried out it was clear from Spectron's statement on 5th March saying "Please withdraw it" that there was a serious problem with the IMD – and remember the only information that the Office had relied upon in adopting the Direction in relation to ability to re-enter the market came from Spectron, and yet here it is equivocating and pulling back from what it previously said. The only point I want to make is that alarm bells should be ringing very loudly now, 7th March 2006, what are we going to do, there is a problem with the Direction?" Remarkably nothing happens in relation to Spectron for two weeks.

The next thing that happens on 23rd March 2006, when there was another meeting between Spectron and the Office, and I am afraid we have to go back to bundle 4, and tab C1. At that meeting one sees at paras. 9 and 10 information was sought and obtained about screens. Then at paras. 26 to 29 there was discussion about Spectron's ability to re-enter the market. So the alarm bells are ringing, the Office sits for two weeks, has a meeting, gets some information about screens and re-entry.

What happens next? You think this is picking up speed, this is looking better. Nothing happened again for over two and a half weeks. It was not until 11th April 2006 that the Office

sent a s.26 notice to Spectron which actually asked detailed questions about Spectron's ability to re-enter the market. That s.26 notice is at tab 2 of this bundle. I said I would come and show how the OFT finally asked the sorts of questions it should have been asking right at the outset, by that I mean before the adoption of the IMD in, for example, paras. 8 to 11. "Spectron's ability to re-enter day time electronic trading of contracts." You will remember that the Direction itself said that Spectron will find it very difficult to re-enter because of reputational difficulties, because of screen difficulties, and the very first time that any direct questions are asked about those issues is 11th April (paras. 8 to 11).

Paragraphs 12 to 14 refer to a proposed re-entry plan. It appears that Spectron at some stage had intended to re-enter the market, and those questions relate to those but are redacted. Then one sees again detailed questions for the first time in relation to voice trading (paras. 20 to 22). It is surprising when the Direction was based on reputation, screens, ability to re-enter, the OFT only starts asking direct questions at this stage, and certainly issue like reputation and screens were not new issues, because they were in the Direction itself, and that is not new information. Then, of course, we know that ultimately the Direction was withdrawn.

What we say comes out of that chronology is it shows that the Office should have asked detailed questions about Spectron's business, and its ability to re-enter the electronic platforms' trading market at the outset, i.e. before the adoption of the IMD. But even if one accepts the Office's excuse that it was not aware of the significance of voice broking until 7th March 2006 it still wasted over a month in following up the issue because of the two week period and the two and a half weeks' period were nothing happened. Why did it not ask detailed questions about voice broking and the other issues until 11th April 2006. If it had done all that before adoption we would never have had the direction. If it had done it reasonably quickly after adoption the withdrawal would have happened before the Appeal was launched.

The other aspect of the direction and the withdrawal decisions is the public interest, the effect on competition. In its full reasons (bundle 4, tab C9, p.17, para.60(b)) you see in para.60 there is a general description of the "new information" received from third parties, and 60(b) finishes with the sentence:

> "While the OFT recognises that these third parties may be influenced to some extent by the status as members of LME, their views must nevertheless be given weight on the basis that they are also Spectron's customers and are therefore also best placed to comment on the consequences of Spectron eMetals' elimination as an electronic trading platform."

So you have an express recognition that the people who are best placed to comment on the effect on competition – and competition ultimately has an effect on consumers – were third

parties, were the LME members. In spite of that recognition there was no attempt to canvas LME members before the adoption of the Direction and, indeed, the first time that they were canvassed after the adoption of the Direction was not until 10th March. Even on the OFT's own timetable, you remember they said they did not have to start investigating until 2nd February, it is pretty astonishing that they still did not turn their mind to this until 10th March – over a month after they started investigating. The reference for that inquiry is bundle 2B, tab 54.

What happened was that that was an informal request. A response was asked for by 15th March and then again nothing happened in relation to third parties until 30th March, so again a two week delay in dealing with the information that has been obtained. Then some s.26 notices were sent out to LME members. An example of one of those is at 2B, 74, and if I could ask you to look at that s.26 notice? This is a month after the adoption of the Direction. What does the OFT do? Does it go out and say to LME members: "What is your opinion on this?" Would you prefer LME Select to extend its trading hours, even if that means Spectron will exit the market and very probably never come back? Or, would you prefer that Select is prevented from extending its trading hours, which you will know from the written documents is exactly what the LME did with its members, and it got answers in a matter of days. That is not what the OFT did. Extraordinarily, given that this investigation had been going since July 2003, it put out a s.26 notice which had 35 questions in it, the majority of which related to the substantive investigation. If I can ask you to turn to p.636 you will see where it begins. "Provision of Specified Information", and then in bold: "**The answers are requested by 21st April 2006**". This is a matter of urgency, this is sent out on 30th March and an answer is requested three weeks' later. The reason why they need to get three weeks is because they ask so many general questions about the underlying disputes. Turn to p.638. "The market", this of course we see again from the documents. The OFT had not yet firmly established what the relevant product market was in order to decide whether LME was committing an abuse. There are lots of detailed questions about the market. In fact, the only specific questions directed at the IMD appear to be questions 33 to 35 on p.643 where they finally ask customers what the think the effect would be if Spectron had to exit the market. But it is extraordinary in the context of an investigation where an IMD is adopted without any recourse to third parties and then alarm bells are ringing because of Spectron's equivocation about the desirability of the IMD against the background of the OFT recognising the need for urgency rather than sending out a s.26 notice with questions 33 to 35 and saying "We need an answer in a week", they send out this hugely detailed document seeking general information relating to the underlying investigation and give a timescale of three weeks. It makes no sense whatsoever.

There is a large number of issues raised by the Office in its submissions, but I have dealt with them in writing and I think I can simply say that they are there in writing, if I need to I can pick them up orally in reply, which brings me, I am glad to say, finally to my conclusion.

At the outset I suggested there were two main heads of questions that had to be asked in order to decide whether my client should be entitled to its costs. The first head was "Did the Office conduct its investigation reasonably before adopting the IMD, and I identified three sub-questions?"

The first sub-question was what information did the Office act on? The answer is: "very little" – we have seen what it was. The point about the information was that it was all from Spectron, and the Office did not test that and it did not go out to third parties to test that.

The second point – and this is a crucial one – is what was the relevant time frame? We know, because the Office has told us that it did not begin to investigate this until 2nd February but we know again, because we have seen it from the documents and because of the Office's silence, it has not counted this as a proposition. The Office knew about LME's plans to extend its trading hours and about the possible effects that that would have on Spectron before 1st December. If the investigation had started then the Direction would never have been adopted. The problem was because it did not begin until 2nd February and because the extension of trading hours was coming into effect on 1st March the OFT had put itself in a difficult position. That was of the Office's own creating.

If the Office had started an investigation on 1st December, what reasonably could, should it have done? It should have tested Spectron's assurances in the way it finally did with the s. 26 Notice in April – "tell us a bit more about screens; tell us a bit more about your business to see whether you are really saying you can never come back into this. Tell us more about the effect on reputation. Tell us more about staff." None of that was done, and it could have and should have canvassed third party opinion. Competition law is all about protecting the consumer. It seems mad then to adopt something to protect the consumer without going out and asking the consumer what they want. Of course, as we know once the consumer was asked the answer was resounding: "We do not want the IMD". It was all one way. So, we say, if the Office had conducted its investigation reasonably it would never have adopted the IMD, and we would not have had to lodge an Appeal and incur costs.

The second headline point is "Did the Office act reasonably in keeping the IMD under review?" It accepts that it is under that sort of obligation, again, we say the answer is "no", particularly for two reasons – again the timing point is crucial – if the Office had begun the investigation before 2nd February it could have withdrawn the IMD before the relevant appeal date, 27th April, that is quite clear. But even if the Office was entitled to begin investigating

on 2nd February it could still have withdrawn the IMD before the due appeal date if it had acted with proper expedition. I have pointed out the dead time in the review, even after the alarm bells were ringing four and a half weeks, nothing happening in relation to Spectron; two weeks, nothing happening in relation to third parties. It is not excusable. A body such as the OFT has claims on its resources, but here it had adopted an IMD that had very serious consequences for the LME and its members. It was under an obligation to investigate the position, to put the position right – let us be honest – as quickly as reasonably possible, and it did not do that.

This has been a fairly technical trawl – I have tried to make it as simple as possible – through what happened, but let me ask a perhaps naïve question at the end. Put yourself in the LME's shoes. The LME has been put to considerable expense to protect its position. At the end of the day it turns out that IMD should never have been adopted. Would a reasonable business man expect the LME to be entitled to its costs? I know I am biased, but I submit the answer is clearly "yes".

Unless you have any further questions, those are our submissions.

THE CHAIRMAN: What are we doing about the summary cost issue?

MR. HOSKINS: I am sorry, it is my fault, I had intended that we would hear from Mr. Beard and then you could say whether you wanted to hear submissions. In a sense, we have put in a schedule as requested. The Office has made comments in the schedule in its written submissions, I have responded to them. There is probably not much more I can say at this stage unless and until Mr. Beard develops his submissions or the Tribunal raises particular concerns with me, but it is probably best if we leave that over until we have heard on the question of principle.

MR. BEARD: I am perfectly content for the love that dare not speak its name of quantum to be left over for a separate discussion, although it is clearly something that the OFT considers extreme practical importance in these matters, and more generally the levels of costs need debating.

THE CHAIRMAN: If we get to that stage then we are going to have to look at it a bit more carefully.

MR. BEARD: Quite so. Madam, members of the Tribunal, it was my intention to take my submissions in broadly three parts. First, to make general submissions on the legal approach and why the detailed analysis, that we have been treated to by my learned friend, is not necessary in these circumstances as a matter of principle. Secondly, I will deal with the issues of how this Tribunal, if it wishes to become seized of the more detailed principles, and bearing in mind the Tribunal's initial indications – I recognise that there is some predilection at least for that – how those matters should be dealt with and, in particular, I will comment on the

OFT's behalf on one or two of the points raised by the Tribunal at the outset, but I will not turn to that first since logically it is the second stage. Then I will deal with some of the rather more specific points that have been raised, the chronologies, the alarm bells that should or should not have been ringing and what should and should not have been done at different times, and the impact? I will leave over what was going to be the fourth point, which is issues to do with quantum, to see how the Tribunal wishes to proceed with those matters.

Starting with the first point, issues of general principle, obviously we are seized here with a costs' application and, in many Tribunals, there are two possible rules that can be adopted, either costs follow the event, or costs lie where they fall. Now, the CAT in its various Judgments has adopted a somewhat different, more flexible approach that lies somewhere between those two possibilities.

THE CHAIRMAN: Costs in the discretion of the Tribunal, that is what the Rule says.

MR. BEARD: Undoubtedly that is what the Rule says, but clearly there have been various Judgments which have set out principles, considerations, relevant matters, such that even if you succeed you do not necessarily get all your costs. Equally, if you are not successful you cannot assume that you are going to be immune from a costs application. I put it no higher than that, you lie somewhere between those two parameters in operating your discretion. It is, however, worth stressing that in no Judgment of this Tribunal has there ever been a case where an Appeal has not been successful either in the sense that it has been lost or there has been no hearing, and somehow a more favourable Judgment than costs following the event has been provided. That is, of course, important here, because there has been no successful Appeal. It is worth emphasising, and it is a point I will reiterate, that what is under appeal here is the Decision to adopt the IMD; it is not the investigation. I will come on and deal with the Tribunal's particular points and how issues to do with the investigation might impact upon how one considers the Appeal against a Decision, but it is undoubtedly the Decision that is under Appeal here. There has, as I have said, been no successful Appeal.

This is one of the rare circumstances where, when an Appeal is being withdrawn, as is the case here, the Tribunal has actually opined in terms of setting out particular principles, and it did so in the *Hasbro* case which has been cited in the written submissions provided to the Tribunal, paras. 8 and 9.

The Office of course accepts that the *Hasbro* was a different case.

THE CHAIRMAN: Wholly different.

MR. BEARD: Well, madam, of course it was a different case, absolutely. It was a case dealing with a final infringement decision, in fact, two final infringement decisions. An appeal was lodged against the first, pending the outcome in the second. No issue was taken against that.

THE CHAIRMAN: The appellant withdrew.

MR. BEARD: And the appellant withdrew.

THE CHAIRMAN: It is very different, is it not?

MR. BEARD: Well, madam, with respect the situation is stressed by my learned friend that here the distinction is that in *Hasbro* the OFT stood by its decision. That is not a distinction here. The OFT stands by the Interim Measures Decision that it adopted on 27th February. What it has done is subsequently lift that Decision. At the end of his submissions, my learned friend posed the rhetorical question: "Should we not get our costs where this IMD should not have been made?" That is a question begging submission.

THE CHAIRMAN: But that was why I put it the way I put it at the beginning ----

MR. BEARD: Well I understand that, madam, I quite understand, but it is nonetheless important to stress that here you have a situation where the OFT stands by its Interim Measures' Decision of 27th February. It maintains that it properly applied the s.35 test. It is worth reminding ourselves precisely what that test involves. First, in 35(1) it requires a situation where the Office has begun an investigation under s.25, in other words that it has a reasonable suspicion, in this case, that the party in question is engaged in an abuse of a dominant position – a serious matter under the Chapter II prohibition.

Then it is a situation where the OFT considers that it is necessary for it to act as a matter of urgency to prevent serious or irreparable harm, or protect the public interest by giving such decisions as it considers appropriate for that purpose. Then elsewhere in the section particular specific statutory procedural steps are set out. But that is the matter that was under Appeal whether or not that statutory test was fulfilled by the IMD that was put in place on 27th February. The fact that the OFT kept the matter under review and it is an issue to which I will come back does not alter that. The fact that it got more information subsequently does not alter the way in which this Appeal is being brought and the way in which that Appeal should be considered.

It is important to bear in mind what is going on here. The LME is still under suspicion that it has acted in abuse of a dominant position and that it will drive out its nearest competitor, but that after those further inquiries the OFT has reached the conclusion that even if that closest competitor is driven out of the market it will be able to re-enter and therefore the serious and irreparable harm, and the public interest can be recognised as not being irreparably damaged in the case of the particular person in question, or the protection of the public interest continuing with that IMD being maintained in place.

It also illustrates the importance of the role of the IMD, the nature of the IMD, it is a preventative, or protective measure. It is being used in the public interest, this is the first time

the Office has used this power since this Act came into force in the past six years. It does not use this power loosely. Whilst the Office can, of course, understand the frustration of LME having to be subject to the IMD, it must be noted that the effect of it was effectively to maintain a *status quo* for an extra period of just over two months. It was not a punitive measure and that is material to the way in which this Tribunal should consider the way in which the principles that it has previously articulated in relation to cost matters, and the way that it exercises its discretion should be dealt with here.

THE CHAIRMAN: But it deprives the LME of two months' profits, or two months' income.

MR. BEARD: Well it certainly prevents them exercising their business in the way that they wished to, that is without doubt. If that would have been profitable business then, yes, they will lose profit, that is undoubtedly the case. But that does not suggest that it is the intrusive measure that, for instance a decision imposing a fine would be. It is a preventative or protective measure. It is a measure put in place in the course of a continuing investigation. It has to be seen in that light. It is a predicate of an IMD being put in place that that investigation is continuing.

THE CHAIRMAN: You would accept that you have to fulfil the requirements of subsection 2?

MR. BEARD: Of course.

THE CHAIRMAN: And the question is what you took into account in order to fulfil those requirements, and if a reasonable regulator could have made the decision that you did there is not a problem. Now, what happened here is that immediately afterwards you made some inquiries and LME says "Well actually those are the sort of inquiries that ought to have been made before and that without making those inquiries a reasonable, competent regulator would not have been satisfied with that test".

MR. BEARD: Certainly, madam.

THE CHAIRMAN: Now that is the real question and that is what you need to direct yourself to.

MR. BEARD: Well, madam, in the OFT's submission there is a prior question. This Tribunal has articulated a principle that should apply in relation to circumstances where an Appeal is withdrawn. This is *a fortiori* the position.

THE CHAIRMAN: Sorry, which principle?

MR. BEARD: The principle articulated in the *Hasbro* case.

THE CHAIRMAN: But it is a completely different case.

MR. BEARD: Well, madam, in the OFT's submission that principle still obtains. I think you have the OFT's submission on the point.

THE CHAIRMAN: We have your submission on that, we will have a look at it and we will consider it when we are considering it, but I think the real point to address is the worry you say that you

have fulfilled s.35(2) as at the time that you made the Decision. If you can get over that hurdle you do not have a problem at all ----

MR. BEARD: No, no, I quite accept that, notwithstanding the primary submission, if the Appeal is not going to succeed, in other words that the IMD was taken and can and could have been maintained, then there is no issue as to costs. But it is logically a second argument to the argument of principle put forward.

THE CHAIRMAN: Well we will look at the argument of principle ----

MR. BEARD: I understand, madam.

THE CHAIRMAN: -- it is a very different case. If you want to address us on why it is not a different case we are very happy to hear you.

MR. BEARD: Well perhaps I will come back to it. I am certainly happy to do that, because it recognised that the particular factual circumstances are different, but it does not weaken, it actually strengthens the principle that was specifically articulated there, that in that case you had a situation where a party withdrew its first Appeal when the OFT had taken a second decision. It was not in relation to that first Decision, so it was not a lifting of the first Decision, but it was a further Decision by the Office that was the relevant trigger for the withdrawal by Hasbro of the Appeal. So it was Oft action in circumstances when there was a continuing investigation into price fixing cartels in the toys' industry.

THE CHAIRMAN: But you did not withdraw in that case the first Decision.

MR. BEARD: No, the first Decision was not lifted.

THE CHAIRMAN: No, of course, therefore the OFT had made two Decisions and Hasbro decided that they were going to concentrate on the Appeal on the second Decision and not on the first.

MR. BEARD: I understand that, madam. The point that is made by OFT here is, here the OFT has made two Decisions. It made a first Decision to impose an IMD ----

THE CHAIRMAN: And it made a second Decision to withdraw the first Decision.

MR. BEARD: And then it made a second Decision to lift the first Decision.

THE CHAIRMAN: That is not the same as making two Decisions, one I think on the retail market and one on the wholesale market, which was very different.

MR. BEARD: Well, madam, it is the OFT's submission that the principle articulated there, that when a withdrawal occurs by a party that ordinarily there will not be costs imposed on the OFT in relation to that withdrawal indeed it goes further and suggests that the ordinary situation is that the OFT would receive costs in relation to any steps it took in respect of the Appeal, must apply generally in circumstances where withdrawals of Appeals occur. That is a principle articulated by the Tribunal and when one is considering the context of an interim measures

decision, which is necessarily taken with a degree of urgency, then in those circumstances there is no reason to diverge from that basic principle that has been articulated.

There are still two Decisions and the ----

THE CHAIRMAN: Well we have heard your submissions on that. Is that your only point on your first ground? If you fail on the *Hasbro* ground you fall into the second?

MR. BEARD: The point about the *Hasbro* ground is simply that this Tribunal has articulated a principle ----

THE CHAIRMAN: No, I understand that.

MR. BEARD: -- that covers its discretion, but if it ----

THE CHAIRMAN: If you fail on that ----

MR. BEARD: But more generally the OFT entirely recognises that there is a discretion here, but considers that the reasoning that informed the Decision and the articulation of principle in Hasbro must apply here and it is that reasoning that should shape your discretion; and, furthermore, it is that reasoning – when it is applied to decisions that are made attendant upon a continuing investigation – that where an Appeal is withdrawn in that context in relation to an interim measures' protective, preventative measure, then those principles, and the reasoning behind those principles must apply *a fortiori*.

THE CHAIRMAN: I understand that. Assuming that we are not with you on the *Hasbro* point.

MR. BEARD: Yes, madam.

THE CHAIRMAN: Right, let us put *Hasbro* to one side.

MR. BEARD: I understand.

THE CHAIRMAN: Maybe we will be with you but let us just assume for the time being we are not with you. If we are not with you on the *Hasbro* approach, then do you have a legal approach to costs on interim measures?

MR. BEARD: Yes.

THE CHAIRMAN: If you are looking at interim measures, and you are not looking at *Hasbro*, do you have submissions on the basis on which costs ought to be awarded?

MR. BEARD: Yes, madam, it must be right that, in any event it is only if the Appeal would have succeeded, in other words that the IMD could not have been sustained, that you should be entitled to your costs. I say "entitled", that would only be the first part of the process, there may be a whole range of circumstances which might then come into play, but I will leave that to one side. It would be only if you could have succeeded that you should be entitled to obtain your costs. Now, at the outset the Tribunal, by you madam Chairman, articulated a test which referred to whether the real question was whether the OFT's conduct in carrying out the investigation was such that no reasonable – or "sensible" was the word, madam, you used ----

THE CHAIRMAN: Which ever way one puts it, I was trying not to use ----

MR. BEARD: I am not taking any point on that for the moment – regulator acting would have done. Now, there are two preliminary points to take on this. First, that is a phraseology that is trying to encapsulate a ground of Appeal. Now, as has been set out in the written submissions it is the OFT's position that where you have a withdrawal of an Appeal you should not go through the detailed analysis of whether or not that Appeal would have succeeded. That must apply to any particular ground of Appeal when you are only dealing with a costs' application.

In those circumstances the test one should be carrying out is whether or not the Appeal would succeed on the particular ground in question clearly and obviously.

THE CHAIRMAN: But if you go down this line then it is not going to be very encouraging to appellants to withdraw the Appeal when the OFT withdraws its Decision, because the appellant is going to say "The OFT have realised that the Decision was wrongly taken, and we have incurred the costs, but we are going to have to prove and go down the whole ... basis and incur all those costs in order to get any costs.

MR. BEARD: I am sorry, we are going to have to "go down ...."?

THE CHAIRMAN: If what happens is that the OFT withdraws its Decision and the appellant cannot withdraw its Appeal at that stage and recover costs, then what the appellant is going to say is "We are not going to withdraw the Appeal, we are going to fight it".

MR. BEARD: I am sorry, madam, I am not sure I fully understand. If the position is that an Interim Measures Direction has been put in place, and an appellant comes along and says "We do not like the interim measures that have been adopted in respect of us, we are going to appeal ----"

THE CHAIRMAN: Yes, and then the OFT has a look and, as happened here, decides that they should withdraw the Interim Measures Direction, so it makes, as you have called it, a "second Decision".

MR. BEARD: Yes.

THE CHAIRMAN: Then the appellant has to decide what to do.

MR. BEARD: Yes.

THE CHAIRMAN: The appellant can do two things. It can either continue with its appeal in order to show that it would have succeeded on the Appeal, and then if it shows it would have succeeded on the Appeal it will be able to claim costs. Or, what you are saying is that it can withdraw the Appeal, but if it withdraws the Appeal it cannot get any costs.

MR. BEARD: Well no, the position is not as stark as that. What is being said is that it recognises the fact that you do have a conundrum in the sense that if an appellant has lodged an Appeal and then does not wish to pursue it, such as in circumstances as occurred here.

THE CHAIRMAN: No, occurred in *Hasbro*. I can understand that in *Hasbro*, it decides voluntarily it is only pursuing one of the two Appeals.

MR. BEARD: Sorry, no, madam, as occurred in **this** case, the appellant wishes to withdraw its Appeal, the OFT accepts that it would be both wrong and bizarre for there to be a full hearing of the Appeal or for there to be a need for a full hearing of the Appeal in order to resolve an outstanding costs' issue. But the OFT does not then accept that you can simply ignore whether or not the Appeal would have succeeded, and the question you are then faced with is "How does the Tribunal square that circle?" The OFT says that the only way you can do that is by having an assessment of whether or not that Appeal would have succeeded on a broad brush basis, that is the best you can do. That is the only way you can sensibly deal with this sort of matter. It is not keeping people out of costs if they have a clear case, but it is saying essentially that the costs will broadly lie where they fall unless you have got a clear case. So, yes, the broad brush approach is more likely overall to mean that costs do lie where they fall, but it is the only fair way of resolving that particular conundrum.

MR. CLAYTON: But in effect that means hearing the Appeal.

MR. BEARD: No.

MR. CLAYTON: It means basically ----

MR. BEARD: No, with respect not. It means that one approaches this on the basis of assessing whether or not it is clear and obvious that the Appeal would have succeeded.

THE CHAIRMAN: Mr. Hoskins says it is clear and obvious, and it is for you to show us that it is not clear and obvious. I understand your broad brush, rather than your ----

MR. BEARD: I am sorry, I am not trying to deal with Mr. Hoskins' specific submissions on this, I am saying what is the relevant legal test here? I can understand that there is constantly a temptation when one is dealing with an assessment of a claim, as to whether or not it is clear and obvious, further and further to penetrate the detail. But this Tribunal, just as other courts have to, has to resist the temptation to do that. I do not particularly want to get into analogies with other proceedings where this sort of thing occurs, but it is clearly the case that other courts and other Tribunals dealing with matters recognise that where it would be wholly disproportionate and wrong for Appeal grounds to be analysed to their fullest extent, because the only extant issue is in relation to costs, you have to find some surrogate methodology to avoid that detailed forensic analysis and the only way you can do that is sensibly putting in place that sort of threshold test. That will then constrain the sorts of material and the extent of material and the level of detail and the level of what is sometimes referred to as, I suppose, 'granularity' of submissions that should be made in this context. It is not saying that you are precluded from raising the specific legal grounds of appeal that you have put forward, although

it will be much harder if you have evidential grounds to make those out on that basis. But again, the Office does not shy away from that conclusion. Some compromise has to be reached in dealing with these matters when one is dealing with a costs' hearing. So whilst I can understand the Tribunal's concerns about using such a test the Office does not see any possible alternative, because the other alternative is to descend into a level of detail that will be entirely inappropriate, given that the Appeal itself has lapsed and all agree that there is no point in pursuing it further.

In this case, of course, we are only dealing effectively with one ground of appeal – I will leave aside the second ground that my learned friend has referred to which is the post-IMD analysis, and the speed with which that should have been dealt with and so on, and the extent that that had an impact. I will just focus on the allegation that there was an insufficient investigation beforehand. Now, as I say the approach for this Tribunal has to be that one must approach that on a broad brush basis, but one must also be cautious correctly to characterise what the legal question is and I realise that the Tribunal was endeavouring to do that with its initial comments and, as I say, the comment made initially was that if the previous investigation was unreasonable or conducted unreasonably such that no sensible reasonable regulator could have conducted such an investigation then there was a basis for awarding costs.

THE CHAIRMAN: Yes, but I put it that way particularly because it is not the flipside of the coin "reasonable conduct", it is different. "No reasonable regulator" does not mean that if they show that it was not reasonable conduct, it is not quite the same thing. They do not have to show that you reasonably conducted yourself, they have to show that no reasonable regulator would have done what you did.

MR. BEARD: Yes, although I can see a situation where, if they can show that what we did was not reasonable, it may be rather difficult to have the mental facility to think of another reasonable regulator that might do it, but perhaps that does not matter for these purposes. The focus of my observations on the articulation of the test that the Tribunal posited initially was somewhat different. It was not to focus on "reasonable", "sensible", "rational" or whatever synonym we wish to use – it is perhaps to focus on the fact once again that here we are not scrutinising the investigation.

THE CHAIRMAN: When you say "the investigation" what investigation?

MR. BEARD: The investigation, the steps taken to reach the Decision, not directly, because what is important here is a assessing what the basis of impugning that first IMD would be.

THE CHAIRMAN: It is what information you had. It is not how you did it, it is what information you had at the time that you took the IMD, not how you did it or how you got there. It is if the

OFT considers that it is necessary for it to act as a matter of urgency for the purpose of preventing serious irreparable damage or for protecting the public interest.

MR. BEARD: If I can take it in stages? First, if the OFT would not have satisfied the s.35(2) test, then the Appeal would succeed.

THE CHAIRMAN: Yes, and that is the question, that is how I put it. It is nothing to do with how you did it, or whatever.

MR. BEARD: Yes.

THE CHAIRMAN: But what Mr. Hoskins has been saying is that because you entered into doing things afterwards, and it was so near, and you did not do those before, he uses that as evidence to show that you did not have the right information.

MR. BEARD: Yes, I understand where he is going with that. I am just trying to tease out the legal points. First, it is quite correct that if the s.35(2) test had not been fulfilled then in those circumstances an Appeal would be fulfilled, and I place the parenthetical caveat 'for the purposes of a costs' submission that should only be done on a broad brush basis.'

The second point that I think there is no difference between the office and the Tribunal in relation to its initial comments is that it is quite right that one can consider 35(2)(a) and 35(2)(b) separately, although as is clear in this case, in may circumstances ----

THE CHAIRMAN: The evidence is the same.

MR. BEARD: -- the evidence is the same and so they may well often stand or fall together. But there is another point to be made there, that even if an Appeal were to succeed on one of those limbs, that is not the success of the whole Appeal, of course, and the IMD would still be, on this hypothetical basis, in place, because you only have to succeed on one of them.

THE CHAIRMAN: That is why I said you have to look at them separately.

MR. BEARD: Yes, I am sorry, I may be stating the obvious. I am just re-emphasising because I think there then comes a point of understanding on what basis my learned friend is saying his discussion of chronology and the role of what he probably will refer to as 'evidence of inadequacy of investigation', i.e. what happened after the IMD was put in place, how that goes to impugn this statutory decision that was taken? If one thinks of this in terms of rationality or taking into account irrelevant considerations this was not a matter of us taking into account irrelevant considerations, really what is being suggested as far as I can understand it is that there was an inadequacy of evidence to support the IMD.

Looking at it that way is important because if what is being said is "Well you got all this information later; if you had had it earlier you would not have taken your Decision and therefore the Decision you took was inherently on an inadequate evidential basis", then I can see that if my learned friend can make out that basis then he succeeds, but that is different from

saying that the investigative steps you took along the way should have been taken faster, should have been taken slower, should have been taken in a different order and so on.

THE CHAIRMAN: That does not get you all the way, or does not get the appellant the whole way. What they have to show is that the information on which you took the Decision was information which you should have known was in appropriate to rely on.

MR. BEARD: Yes, in other words we had inadequate basis and you must consider that question in the context, of course, of what we are dealing with here, which is Interim Measures Direction ----

THE CHAIRMAN: Urgency, all of those things.

MR. BEARD: Yes, all of those matters taken into account.

THE CHAIRMAN: Yes.

MR. BEARD: But it is accepted in those circumstances then if the appellant were to succeed in making that out then on that broad brush basis it is clear and obvious that that is the case then the Office accepts in alternative to its primary argument, that there would be a basis on which a claim for costs could proceed.

THE CHAIRMAN: Yes, as we understand it, or as I understand it, the OFT received information from Spectron and on that basis it relied.

MR. BEARD: Yes.

THE CHAIRMAN: One of the issues that is going through our mind is whether the information which it received it ought to have accepted or ought to have questioned, and if it is obvious that it ought to have questioned it then it may fall on one side of the line. If it is something which it might or might not have questioned, then on the broad brush approach it falls on the other side of the line.

MR. BEARD: If the information that was received from Spectron and the steps taken in relation to that information ----

THE CHAIRMAN: Well what steps were taken?

MR. BEARD: The primary step was the compliance with the statutory requirement to consult LME, and consider LME's representations because, after all, that is the key step that is required of us. My learned friend has gone on about all sorts of obligations that are upon the OFT and it is perhaps worth just re-emphasising the OFT does not have any obligation to put in place an Interim Measures Direction. It does not have any obligation set out in statute as to how it considers these matters. There is no obligation as to the timing of these matters, indeed, that would be perverse if there were any constraints, it would undermine the capacity to take urgent action. Furthermore, my learned friend is quite wrong, there is no obligation ----

THE CHAIRMAN: You have to give your reasons for wishing to do that though, there is an obligation to do that.

MR. BEARD: Oh yes I am sorry, but that is not an issue today. The LME did not like those reasons, we quite understand that, but it is not an issue that there were no reasons given, there were. The only statutory obligation in relation to gathering information is not actually a statutory obligation to gather information, it is to alert the affected party so that they can spell out to you on the basis of what reasons and what evidence it is that you should not put in place the proposed interim measures.

THE CHAIRMAN: Yes, but you have to be a bit careful with that because they are competitors, are they not? If you are doing it because of the business of one party the other party is not going to know to be able to challenge you on the internal business of that party.

MR. BEARD: Well that is the nature of the internal business of companies in the main ----

THE CHAIRMAN: Therefore, that is why the OFT ----

MR. BEARD: No, madam, there is a danger that one can get too far down this line too fast, in circumstances where one is dealing with Interim Measures Directions. If the OFT receives a request and receives reasons and evidence as to why it is an IMD would be sensibly and appropriately adopted, consistently with the statutory obligations in s.35, it is then under a duty to ensure that that proposal – if it is proposing on the basis of that material – is put forward to the parties affected. Now, if the material that is provided to the OFT simply provides no basis, it just does not stack up as a reason for putting in place an IMD then you might say that putting in place an IMD on that basis was simply irrational, it is quite accepted. What is said here is not that, it s that you received this evidence and you should have tested it further. Now, the primary test that is put forward is that we received this material, this reasoning, this evidence and on the basis of it we set out what we proposed to do by way of IMD and why, and we do that rather fully. If one looks at bundle 2A, tab 30 here we have the notice of proposed IMD that was sent on 13th February. This was the receipt by LME of the formal step required under s.35, and all the explanations are set out as to what you do in response to this. It says "respond by 20th February", in fact there was an extension of time of two days.

THE CHAIRMAN: Are you going to point out to us in **here** what the evidence, or what the reasons which you were relying on, which you think the LME ought to have come back to you on?

MR. BEARD: The LME ought to have come back ----

THE CHAIRMAN: Ought to; it within their knowledge that they should have said to you that these particular things that you are relying on are matters which you should not rely on because they are wrong.

MR. BEARD: I think, as was indicated earlier in an intervention, we are not here blaming LME in relation to what they did and did not say. What we are saying is that as OFT we received the submissions of Spectron, the reasoned submissions, on 2nd February; we considered those matters, we looked at them. In light of the investigation into the abuse the extension of the trading hours, which would be an extension of the abusive behaviour, would create a real risk that the nearest competitor, Spectron, would exit the market for the provision of electronic trading of metals. None of that is at issue here because LME is not contesting that anything there was wrong. The only issue that it focuses upon is what became the core consideration subsequently, which is whether or not Spectron could re-enter.

There are a number of submissions that have been made by my learned friend referring to various documents have highlighted the fact that LME had stressed during the course of its submissions that it did not think that Spectron would exit the market, it would not have a catastrophic effect on Spectron's business. That submission, with respect, is beside the point, because it is clear that that issue is one upon which the OFT does not accept that the new information changes its perspective, it still thinks that Spectron will exit the electronic trading in metals. The issue that it is concerned with is whether or not Spectron should be able to re-enter. We accept that that is the sort of information that it is not going to be primarily for a third party business to be able to assist on, it may well have comments about it. The point that we have made in submissions about this is that it is rather rich for LME to come along and say how obvious all these matters are now, when it did not raise them at all at the time.

THE CHAIRMAN: That seems to be two contradictory statements. First, you would not expect them to know and now it is rich ----

MR. BEARD: It is not that they would know, they could not provide all the details of these matters, we accept that.

THE CHAIRMAN: What should they have done so that it would not be 'rather rich'?

MR. BEARD: Well the submission is set out in the skeleton argument that has been put forward or the submissions put forward in this connection and it really is something of a coda that has rather come take on an importance that it does not have in relation to the analysis of these matters.

THE CHAIRMAN: What paragraph are you saying that explains this?

MR. BEARD: I have lost my place in the submissions – if you would bear with me for a moment? (After a pause) In passing 49 deals with the points about energy trading which I think you already have in mind that LME has emphasised that it was clear and plain and obvious that Spectron had an enormous business – I will come back to why it is that a subsidy from one part of the business to another does not add anything to the submissions that are being made.

Madam, can I come back to this? It is undoubtedly in there, I simply cannot find it.

THE CHAIRMAN: It often happens.

MR. BEARD: As we go through the particular provisions ----

THE CHAIRMAN: You will find it.

MR. BEARD: -- it will bob up, I am not trying to avoid it.

THE CHAIRMAN: Well it was you who said it was there.

MR. BEARD: No, no, it is undoubtedly there, I will not live in denial about it. The point here is that it is not primarily what LME should have said to us that is crucial, the Appeal is against the OFT's Decision. The OFT took the material it had, put out the proposed IMD document pursuant to s.35, received LME's submissions on it. It did not consider that LME's submissions were such that they justified deferring the IMD in circumstances where the practical step, which was effectively targeted by the IMD, was going to occur on 1st March, that those submissions received on 22nd February were quite insufficient – they dealt in large part with the substantive case but they did not do anything to cause us to consider that in fact Spectron was going to be able to stay in the market.

THE CHAIRMAN: I quite appreciate that, but it is the starting point. OFT took the material it had. Now, the question is what for our mind, just so that we understand where we are going what material do you say you had that you made the Decision on? Mr. Hoskins has shown us, and I have highlighted the list of documents, the material which we thought is the material you had. Now, is that the material that you rely on?

MR. BEARD: It is impossible simply to identify all the information or knowledge that might be germane to carrying out the IMD, given that you have had a case team that has been involved in a prior investigation in relation to the field. But what is crucial is the material that was received from Spectron in this context on 2nd February. That is the crucial material because it is not until that point that the OFT has a reasoned case as to why an IMD should be put in place, but it would be wrong for me to say that is the only matter ----

THE CHAIRMAN: This is why I put it ----

MR. BEARD: -- I quite understand but it is not a matter that is capable of adumbration in some exhaustive way.

THE CHAIRMAN: So we start off with the Spectron material?

MR. BEARD: Yes.

THE CHAIRMAN: I have forgotten which divider it is.

MR. BEARD: We start off with the Spectron material given the background that the case team must have in relation to these matters, and so that is clearly of great significance. The OFT makes

no bones about it, it is that reasoned submission and the material put in from Spectron that meant that it took steps to consider whether an IMD should be put in place.

THE CHAIRMAN: Right, now using the broad brush approach ----

MR. BEARD: You do not actually even need to go to the Spectron material in order to make out the broad brush approach here because, assuming you have a situation where (a) you have a suspected abuse of a dominant position; and (b) the closest competitor is going to be wiped out of the market, in those circumstances you are going to need very compelling evidence in the other direction to reach a conclusion that notwithstanding that that party is going to be wiped out of the market nonetheless, they are going to be easily able to re-enter, or it is not going to be impossible or excessively difficult to re-enter in those circumstances. Spectron does comment on that – LME does not – in its response, but it does not take ----

THE CHAIRMAN: Spectron says that they will not be able to re-enter, and you rely on that?

MR. BEARD: Yes.

THE CHAIRMAN: Right, and make the order?

MR. BEARD: Well we rely on it, we consider what LME say about the whole case, there is no point taken about re-entry ----

THE CHAIRMAN: I think no criticism is made?

MR. BEARD: Well there is criticism made in the sense that that is a point that can be raised. It is not a point which LME can give detailed submissions about the nature of the business.

THE CHAIRMAN: But you are sitting there, you get no response on the point from LME, and you decide that the test in s.35 is fulfilled. Taking it hypothetically, if a competitor comes to you and says that these are the facts, one of the questions is whether you should accept those facts, or whether you should question them.

MR. BEARD: Yes.

THE CHAIRMAN: It may be that it is appropriate to accept them in some cases ----

MR. BEARD: Yes.

THE CHAIRMAN: -- it maybe that it is not appropriate to accept them in other cases?

MR. BEARD: Yes.

THE CHAIRMAN: And when one is looking on the broad brush approach one would be looking to see where it lies in this particular case.

MR. BEARD: Yes.

THE CHAIRMAN: Mr. Hoskins says that you should not have accepted it.

MR. BEARD: Yes.

THE CHAIRMAN: You say you should have accepted it.

MR. BEARD: Yes, we do. We say that it is clear that it was entirely reasonable to accept evidence in relation to – what must be remembered – is this point on re-entry. It was clear that there was an issue about a party being removed from the market. At the time there were real concerns about on what basis it could be suggested that you be able to build this business. There were concerns about the need for there to be two screens on a desk and once one screen had gone you would not have a second screen, the opportunity to run the material on a second screen, you would lose your potential customer base. There was a real concern that once liquidity had moved away from your platform that, in those circumstances, you were not going to be able to re-enter and provide an attractive enough proposition for potential traders, because after all we are talking here about a market place. In order to attract people in, indeed this is the very essence of the broader problem, the allegation is that LME was using a pricing mechanism to draw people into its market in order to generate liquidity because then both buyers and sellers had a significantly greater incentive to trade on that platform rather than the eMetals' platform. Once you have left the market, clearly liquidity migrates entirely to the extant platform. So all of the substantive analysis clearly points away from the ease with which you can re-enter.

In those circumstances when a competitor says: "I am going to be wiped out of the market by what is going on here because of the extension of the abusive conduct". We say: "Okay, we accept what you say for these purposes about the abusive conduct, because we have got this reasonable suspicion. We also accept what you say about you being removed from the market. Again no issue is taken with that – well, I am sorry, I want to be precise, of course LME say that is all wrong, but that is not the focus of today's basis. We have all of that information and then we are told that Spectron will have grave difficulty re-entering, in those circumstances, given the nature of the mischief that we are dealing with there is nothing unreasonable, improper, wrong or irrational about accepting that conclusion.

As I have said, actually because of the nature of the mischief and the concern that we had you need rather compelling evidence in the other direction in order to get to a point where you think, well the closest competitor is going to be entirely wiped out of the market but we think they can bob back in relatively easily. As it was it was only when there had been substantially more information provided that indicated that you had this bridgehead of experienced personnel with contacts in the metals' markets that would be remaining with Spectron, that in fact the submissions about two screens were probably not correct, although it must be said that there were indications when this matter was being considered that two screens were needed and it would be interesting to see what instructions Mr. Hoskins had got on that on LME's position in that regard.

There were still concerns about reputational matters, but those were all considered in the round in the light of the further information that was obtained. None of that impugns the rationality, the coherence, the sense of accepting the representation that is made to you in the first instance. So when one turns to look at both Spectron's submission to us setting out these points, and our proposal to put in place an IMD which is dealing with these sorts of issues, again there is nothing wrong with the way we are approaching it, there is nothing to be impugned in the way that we have dealt with the matter.

So I am sorry if it sounded glib to say "yes" to all your questions but in fact that is the case and on this broad brush basis there is no way I which this could be impugned, and we would go further and say that even if you were to carry on we will still maintain that even if you go into this at a level of much greater forensic detail, we were still entirely justified in concluding that Spectron would find it excessively difficult or impossible to re-enter and compete again with LME's electronic platform.

MR. SUMMERS: Mr. Beard, can I just raise an issue here? In the meeting that was held in August 2005, which I think is 2A, tab 13, the question arose about the voice trading, and the fees ----

MR. BEARD: Yes.

MR. SUMMERS: -- in connection with the voice trading, and at that point in time a statement was made that in fact there were no fees for voice trading.

MR. BEARD: Yes.

MR. SUMMERS: There had previously been a statement mad that in fact there was a fairly low level of turnover for business at $200,000, and that meeting was minuted. Do you have any evidence that the minutes of those meetings were then seen and approved by the other side? What was the standing of these minutes?

MR. BEARD: I would have to take instructions – these are purely internal.

MR. SUMMERS: They are purely internal minutes ----

MR. BEARD: I am instructed that is ----

MR. SUMMERS: -- which would have been sent to Spectron?

MR. BEARD: No, I believe not.

MR. SUMMERS: So the statement at the end that Spectron will need to keep the case team up to date with developments at 20 on p.2 ----

MR. BEARD: Yes, that was not a communication necessarily.

MR. SUMMERS: -- was purely a statement that was kept, as it were, within the Office and was not actually binding, the minute was not binding on Spectron in any way?

MR. BEARD: No, but I do not want to overstate the position. I think this minute would reflect what we would have said to Spectron ----

MR. SUMMERS: Yes.

MR. BEARD: So point 20 would be a suggestion that someone at that meeting from OFT had said you will need to keep the team up to date with any developments.

MR. SUMMERS: Yes. So if what we are then being told is that by really the turn of the next year a fairly substantial business was being generated by way of fee income within Spectron, might that not have been a development that they would have been expecting to keep you in touch with? Might you not have been policing it?

MR. BEARD: I think there are two questions. One is the extent to which that can be relevant to the knock-on analysis ----

MR. SUMMERS: Yes.

MR. BEARD: -- because let us assume that it was a matter that they should have kept us informed about the significance of it, if you are simply passing on to us information about levels of fees generated by different components of business, it is not clear quite how that fits into the legal analysis.

The second and perhaps more important point to take is that when you have a situation where the voice trading is extraordinarily limited in these circumstances, what you have is a situation where this was not the focus of the case, and the developments in the case at that stage. Now, one can see with hindsight that those are matters that took on greater importance, but it would be interpolating a great deal in terms of an obligation on Spectron in those circumstances to say that it was supposed to have told us about all of those particular matters that were going on in terms of its business more generally at that stage. Certainly, as is clear, and I assume from the question that the references to the fuller reasons at para.39 the OFT had noted that there had been some voice broking activities that had raised total revenues of a negligible amount. In financial terms it is a non-existent business at that stage earlier on in the process – 2003. Later in August 2005, as is evidenced by this minute, the OFT had understood that Spectron did not charge fees or derive revenue from the voice broking business. So in those circumstances that is not something that OFT would particularly have been focusing on in the context of its investigation more generally, nor at the time when one was considering immediately whether or not the IMD should be put in place whether or not that had developed and had provided this sort of bridgehead. To suggest that there was a legal obligation on any party to have done that such that failing to do so was plainly and obviously undermining the basis on which the OFT reached its decision with respect I would suggest is something of a quantum leap.

MR. SUMMERS: Yes, but it would be fair to say, as you have indicated, this is purely an internal memo, it is not a meeting that leads to a series of action points which are then policed?

MR. BEARD: No, that is not my understanding of it. This is part of the ongoing, general investigation in to the allegations of what are primarily predatory pricing allegations in relation to LME. In other words, LME was using incentive structures and pricing to draw liquidity to its system, and that this was part of the ongoing investigation.

MR. SUMMERS: At this point in time these fees were seen as almost incidental. This was not an area of business that was attracting a great deal of attention?

MR. BEARD: No.

MR. SUMMERS: Although you note in that internal memo that Spectron is "focussing" on its voice training.

MR. BEARD: Yes.

MR. SUMMERS: So therefore it is an area that you might expect to be growing.

MR. BEARD: You might.

MR. SUMMERS: And no doubt it was that expectation that then led you to ask the more detailed questions about the development of the voice broking business in the s.26.

MR. BEARD: Yes, I think it is important in those circumstances though to note that there have been informal contacts as well with Spectron and LME – my learned friend has already referred to the post-IMD chronology – there is not magic about the fact that there are informal inquiries made and then s.26 questions posed. The s.26 process is obviously more cumbersome than informal inquiries and it brings with it rather more significant sanctions. So I would have to take specific instructions as to the genesis of the particular questions and when the possibility that the voice broking teams were of such a scale and nature that they might be material to the question of whether or not they acted as a bridgehead for the purpose of Spectron being able to re-enter with its electronic platform. I can certainly do that. Whether or not it is possible to identify these things I do not know because of course this is the sort of issue that becomes very clear with hindsight. It is also the sort of matter that when one is in discussions, when one is getting information, when one is revisiting information that one has had in the light of further information you think: "Well, hang on a second, maybe this is more significant than I thought first time around."

MR. SUMMERS: The boundary between foresight and hindsight is a very fine one.

MR. BEARD: Well no, unfortunately I think it may be a very stark one (laughter) and this may be a case which illustrates it rather clearly. It is all very well with the benefit of hindsight saying that we should have had that foresight and we say that that is not fair. Does that deal with the question?

MR. SUMMERS: Thank you.

(The Tribunal confers)

THE CHAIRMAN: Can we just take a short adjournment? We will be back in 15 minutes or less.

MR. BEARD: I am most grateful, madam.

(The hearing adjourned at 3.45 p.m. and resumed at 4.00 p.m.)

THE CHAIRMAN: Something was going through my mind and I needed to sort it out. Do you think you can turn to file 4, tab 2, which is the s.26 notice which you served on Spectron.

MR. BEARD: Yes, well 11th April, yes.

THE CHAIRMAN: On 11th April, unfortunately the pages are not numbered, but if you turn six pages in, it is p.4, you get the question: "Spectron's ability to re-enter daytime electronic trading contracts 8 to 11", and their proposed re-entry plan. Then the next page, "Voice trading", 22(2).

MR. BEARD: Yes.

THE CHAIRMAN: So for some reason on 11th April the OFT decided that it was appropriate to ask these questions of Spectron.

MR. BEARD: Yes.

THE CHAIRMAN: Is that because they learned something in the intervening period?

MR. BEARD: Yes.

THE CHAIRMAN: Or was it because these questions were relevant to their original decision and they should have thought about those questions first?

MR. BEARD: Well I think you have the OFT's position in relation to the first decision, that in relation to the key question of re-entry it had sufficient material at the time, and it may be informative perhaps to go back to tab 27 in 2A and look at Spectron's material. But just dealing with these points I was going to take the Tribunal to the fuller reasons which I recognise of course that the Tribunal has read. But it is perhaps worth emphasising that, for example, the re-entry plans that were described only came to the attention of the OFT after the IMD had been put in place.

THE CHAIRMAN: Was that because of the answers to the ----

MR. BEARD: No, I believe not.

THE CHAIRMAN: I probably ought to take you to the next documents that I was going to refer you to.

MR. BEARD: Certainly, madam, but the answer is 'no', it was on 7th March that the OFT learned for the first time that in November 2005 Spectron was planning to re-enter trading in London day time hours. Now, that is significant because the position was obviously that the concerns about the abuse that was suspected by LME had led to a situation where Spectron had effectively exited daytime hours trading and the concern was that if this trading by LME was

permitted to go into Asian trading hours that would be the end of Spectron in relation to metals' trading. But we have a natural experiment, as it were, of what was going to happen to Spectron in relation to that Asian hours trading because of what had happened in relation to day time trades. What had been said by Spectron to us was that we will be forced out of the market, it will be impossible, or extraordinarily difficult for us to re-enter.

We had not been told about this sort of material even though that was something that Spectron had specifically put in issue with us about the difficulties of re-entry. Now, one might speculate that that was a partial response that Spectron had provided to us, but that was a particular issue that had been put in play with Spectron, in other words these are matters that had been the subject of active consideration and it was only subsequently that under further, more intense questioning that these matters came out.

THE CHAIRMAN: So you say that none of these matters are relevant to your justification of the decision you took in February, they are only relevant to the change of position and the new decision to withdraw?

MR. BEARD: Yes. "Relevant" is a slightly funny way of phrasing it – I do not mean to sound impertinent, madam.

THE CHAIRMAN: It is all right. I may not have used my words very well.

MR. BEARD: Given the way in which the OFT later recognised that this sort of information was germane to whether or not the IMD should stay in place, I would be somewhat loathe to say it was not in any way relevant.

THE CHAIRMAN: No, no, but what I am saying is this information was not something which ought to have been known in order to justify the first system. It is because you became aware of the information that you ----

MR. BEARD: Yes.

THE CHAIRMAN: -- all right, now I think I had better show you the other document

MR. BEARD: Yes, please.

THE CHAIRMAN: Also in the same bundle at tab 3?

MR. BEARD: Yes.

THE CHAIRMAN: That is an email to Spectron, from the OFT – is that right?

MR. BEARD: Yes.

THE CHAIRMAN:

> "LME has until 27th April to appeal the OFT's decision to give an Interim Measures Direction. There is a significant risk that LME will appeal this decision. Although we have some sympathy, given the circumstances you outline, it is critical that the OFT has an opportunity to consider its position in light of the information and

documents requested before any appeal is made. We will be unable to do so if we accede to your request for an extension by about a week, which I understand to mean 28th April rather than 21st April. Accordingly, I suggest that Spectron make best endeavours to provide the information and documents that we have requested by the deadline set out in the s.26 notice, with you yesterday, by 5 p.m. on Thursday 20th April."

MR. BEARD: Yes.

THE CHAIRMAN:

"I suggest you contact me on 20th April to suggest an extension if Spectron is ultimately unable to provide specific items of information and documents requested by this deadline. The OFT is likely to consider favourably any such request supported by good reasons. I appreciate that this response may not be entirely satisfactory, that as stated the information and documents we have requested are critical to the OFT's ability to respond to any Appeal by LME."

Now, that on first sight looks as if it is saying that the information that you were going to get was relevant to whether or not the original decision had been appropriately taken. Have I used the right words?

MR. BEARD: Well I understand the interpretation, madam, that you are placing on that document. The reference to response "to any Appeal by LME" is one that frankly does not quite make sense in the context of a s.26 Notice, because it is not being suggested that we misused our powers of making requests under s.26. Clearly we did it in the context of the review. I do not understand it to be any part of my learned friend's submission that we were misusing the s.26 process somehow to bolster our position in the face of a likely appeal. We were, in good faith, carrying out a review of the IMD and obtaining the material that we requested under the s.26 notice in the light of the information that we had gathered both before we put the IMD in place and subsequently. In those circumstances the extent to which it enables OFT to respond to the Appeal is not quite in point because ----

THE CHAIRMAN: That is what it says.

MR. BEARD: I understand that, there is nothing more I can say about it. It is not an allegation that the s.26 Notices were wrong and given I think it is rather my learned friend's position that we should have made them ----

THE CHAIRMAN: You should have served them originally, yes.

MR. BEARD: It is not suggested that we have asked the wrong or improper questions.

THE CHAIRMAN: These particular questions in the s.26.

MR. BEARD: Yes, and so to some extent it does not in any way tally with anything that is at issue in these proceedings.

THE CHAIRMAN: Well no, it does because he says this information should have been obtained earlier. If you put it on the test that I put forward originally that no reasonable regulator would have made the decision without that information. What happened was you made the decision, you went out and then asked for the information and you knew that you needed that information in order to support the decision that you had made without it, and that is what that sentence says.

MR. BEARD: Well yes, I can see that one can read it like that, I am not trying to deny the words of it at all, but that is not the position in relation to the s.26, it is not the OFT's position. After all, madam, you would be implicitly saying that this related to the particular elements of questioning relating to the particular points that have now been raised in the context of this appeal relating to voice trading and ability to re-enter. But obviously the questions raised in the s.26 are much wider than that.

THE CHAIRMAN: Yes, but those questions were expressly included.

MR. BEARD: Well yes, they were expressly included, and the OFT makes no bones about that. It says that those were relevant questions that it subsequently asked in the process of its review in the light of the further material it had and in light of the further time it had to deal with these matters, and so there is no further point to be made about it. If that representation is read as suggesting that these documents are such that they need to be provided so that we can gird our loins to maintain the position in the face of an appeal it is just plain wrong because, of course, at the stage there was not a decision to lift the IMD. This is not dealing with the situation as it is now. This is the IMD being in place and at that point the matter is under full review, and so if the IMD is to be defended in those circumstances what Mr. Thursby may well be saying is that if we are going to be defending this then we want further material.

THE CHAIRMAN: But you should be able to defend it on the material that you have because that is the only material you can defend it on.

MR. BEARD: We say we can, but we are also not naïve – I am not trying to defend the particular wording, but I think one can apply too fine a forensic magnifying glass to this sort of situation. If you are faced with a threat of an appeal against a decision you have made, then in those circumstances you may well try to seek to get further information that may support what you did initially. It does not mean that one can extrapolate from that backwards and say "If you did not have that material then your decision was initially wrong."

THE CHAIRMAN: In fact you cannot support the decision on further material. As a legal matter you cannot support the decision that was taken on day one ----

MR. BEARD: No.

THE CHAIRMAN: -- with material you receive on day four.

MR. BEARD: I agree, that is why it is difficult to understand what is being said here. It does not really make sense is the answer, because if you try and place upon it the grand conspiracy theory that here we have the situation where you have a smoking gun, the case officer has written in an email that he wants this material because otherwise the IMD is just unsupportable. Well, if that is how it is to be read then the OFT says "I am sorry, that is just not correct." The OFT says "We had the information we had. We had perfectly good reason to conclude that re-entry was going to be impossible or excessively difficult on the basis of the material in question that we had already received. In those circumstances the decision is entirely sustainable. If a case officer comes along and says "I would like more" then that does not undermine that central conclusion. The justifiability of that IMD cannot vary in those circumstances depending on whether or not this case officer asked particular questions. Again, it may be placing too great a forensic weight on this because here you have a situation where we are talking about deadlines and what is being said is that you should really make sure that you put in any material that you think is germane given what is going on here. I cannot take it further than that. I quite understand why it is that the Tribunal places weight on it. My learned friend did not place any weight on it – I am sure he will.

THE CHAIRMAN: He will do now!

MR. BEARD: I am sorry, I am not trying to keep him out of placing weight on it.

MR. HOSKINS: It is in our application.

MR. BEARD: Well I realise it is in your application; all I meant was that no weight was placed on it in the initial submissions.

THE CHAIRMAN: Anyway, that is why I needed to point it out to you. What worries me is that you make a decision on which one assumes that you have proper evidence to make the decision.

MR. BEARD: Yes.

THE CHAIRMAN: That you have fulfilled whatever criteria is required by s.35.

MR. BEARD: Yes, 35, yes.

THE CHAIRMAN: So at that point you should say "We have done that, we can sit back and unless during some investigation we discover something which is different, we know we are right." So that should be the end of it. Why, as soon as you make the decision, the IMD, you then go off and start asking customers, Spectron, LME, questions?

MR. BEARD: Actually, madam, my learned friend has already provided the answer to that. The answer lies in what Spectron did next, because after the IMD had been put in place, Spectron

then turned around and made a public statement saying we do not want the IMD on 1st March. My learned friend was quite right when he said alarm bells should have rung, alarm bells did ring. That is what happened. That was the problem. We put in place an IMD, and the person for whom it is put in place to their benefit, because they are the closest competitor, and they are the one we are worried about coming out of the market, turn round in public and say "Oh no, we do not want it any more." We are somewhat astonished in those circumstances. That is not something that previous questioning could have elicited because we have previously questioned and they had emphasised on a number of occasions that they wanted it. The perversity was that we had numerous discussions with them thereafter and they resiled from their public position and said "No, actually, we do not want the IMD lifted." It is not impossible for that sort of thing to happen, because if you are a competitor in a market where reputation matters, and the big player in the market is trying to squeeze you out, in those circumstances being seen as the person who has gone running off to the OFT that does something that customers may not like. My learned friend has made great play of the fact that customers came out of the woodwork, they did not want this, they wanted the extension of trading hours. Well, forgive the Oft, but if the allegation is of predatory pricing in the short term you would expect customers to do that sort of thing, because they are going to get, in the short term, potentially perfectly good results from the predator extending their business. So again, the OFT looked at this and went "Hang on a minute, what on earth is going on here?" and that is why, rather than sitting back and saying "Well, we have made the IMD, we can leave it in place and carry on with the substantive investigation", which is broadly the normal course of things. I say "the normal course" we are dealing here with the first time this has occurred ----

THE CHAIRMAN: Yes.

MR. BEARD: -- so I do not want to pretend.

THE CHAIRMAN: That is why it is so important as well, not having done it for six years.

MR. BEARD: No, not having done it for six years, we put the first one in place and then the person who has requested it has put forward the material, has put forward a coherent case turns round two days later and says "We do not want it". At that point we are in a difficult position. We are in a difficult position because just because Spectron make a public statement that they do not want it, that is not good enough justification for lifting the IMD. There was all sorts of traffic, as might perfectly well be expected from LME saying "Look, look, Spectron have said they do not want this any more. In those circumstances you must immediately lift the IMD", to which the OFT said: "No, we are not going to do that." There may be perfectly good reasons – we are not saying they are appealing reasons but there might be good reasons – why

Spectron have decided to behave as they have done. But I am not pretending that OFT were not concerned about it. My learned friend was quite right about the concerns that were then generated and why we then piled back into further considering whether or not this IMD should be kept in place.

My learned friend has emphasised some notional duty to keep IMDs under review. We do not accept that. The OFT is not under a duty and it is not an obligation that subsists in the Act. We recognise if people come to us and say "You should reconsider the maintenance of an Interim Measures Direction that you have in place" then there might be all sorts of public law duties that are imposed upon us, but it is not some sort of subsisting, watching brief, and actually my learned friend's submissions did have a slight bifurcation here, because on the one hand he said the fact that we came back in and we investigated the matter is illustrative of the flaws in the prior investigation, but on the other hand "you are under an obligation to do so", which did not fully tally. It is neither here nor there because we say that is just not the appropriate ----

THE CHAIRMAN: That is his second point, is it not? That is because he says you did not do it quickly enough. That is his second point.

MR. BEARD: Well, yes. He ran both points, they cannot both be right. In dealing with the key point that you are raising, "why is it?" We recognise that we do not expect this to be the normal course of events in relation to an Interim Measures' Direction being put in place. We expect quite the contrary. We expect the Interim Measures Direction to be put in place and then we will continue with the substantive investigation and we do not want to commit the resources that would otherwise be committed to the investigation to re-assessing Interim Measures Directions. That is not all the OFT wants to do in these matters. But here we had no choice, we are alerted to this. We then probe it more deeply and we recognise that there is information coming out of the woodwork that is of significant concern to us, in particular, in relation to this possibility of re-entry.

Again, my learned friend has placed great weight on "you should have questioned customers", but again in relation to the issues to do with re-entry questions to customers are much less important than either the underlying analysis to which I have already referred, or further interrogation of the person in question you are looking at and their possibility of re-entry, and so the focus was inevitably going to be looking at what on earth was Spectron talking about and probing them further, and that is what happened. It is clear from the full reasons that we did engage very closely with the process of interrogating Spectron, involving LME, trying to elicit more information from LME, and LME were sending vast numbers of documents to OFT throughout this period – emails, letters – we had meetings with LME, the saga continued. It is

somewhat disingenuous for my learned friend to be saying that we somehow downed tools at any point, we did not.

THE CHAIRMAN: The other point that Mr. Hoskins made – and I may be putting this not quite as Mr. Hoskins said it so you might correct me – is that you got this information from a competitor.

MR. BEARD: Yes.

THE CHAIRMAN: And you relied on it.

MR. BEARD: Yes.

THE CHAIRMAN: And I think he was saying that you ought to have checked it and not just relied on it. Is that right, Mr. Hoskins?

MR. HOSKINS: It is.

THE CHAIRMAN: What is your answer to that?

MR. BEARD: Well, there are two parts to the answer. The first is that we say the process we followed between 2nd February, the receipt of the reasoned application, consideration of that, proposal of IMD to LME to put them on formal notice and explain the basis of it, considering their response since they were going to be the party impacted upon by it, then in those circumstances we were effectively ensuring that we got the most direct check on information.

THE CHAIRMAN: Can we just explore that a moment?

MR. BEARD: Of course.

THE CHAIRMAN: For whatever reason you investigated in more detail afterwards.

MR. BEARD: Yes.

THE CHAIRMAN: And that was not inquiring from the LME, that was inquiring in more detail from Spectron, and from the customers.

MR. BEARD: Yes.

THE CHAIRMAN: I know that the section says that you have to tell the person who is going to be the victim of it.

MR. BEARD: Yes.

THE CHAIRMAN: But there has to be a threshold before you tell the victim?

MR. BEARD: Yes.

THE CHAIRMAN: So "victim" only in the IMD sense, right?

MR. BEARD: Yes, yes, yes, sorry I did not take it as anything else.

THE CHAIRMAN: He may be the perpetrator in another sense but becomes the victim ----

MR. BEARD: No, no, I quite understand. I think the Tribunal has the point about the general context and perspective.

THE CHAIRMAN: So one has to reach a threshold ----

MR. BEARD: Yes.

THE CHAIRMAN: -- and say, "Oh well we told the LME, and the response was weak, or very wordy but did not actually have any substance in it", does not actually get over the first hurdle which is: "Did you have enough information to make the decision in the first place?"

MR. BEARD: Yes.

THE CHAIRMAN: I think what Mr. Hoskins says is "No, you did not, because you ought to have done what you did afterwards". Now, it may well be that you did that for another reason.

MR. BEARD: Yes.

THE CHAIRMAN: I quite accept that, we can see that ----

MR. BEARD: It is an important contextual point.

THE CHAIRMAN: It goes within the time line.

MR. BEARD: Yes, absolutely.

THE CHAIRMAN: But the question is whether a sensible regulator would have accepted what the competitor says of this sort of information, or whether a sensible regulator would have questioned the information that was coming into them before it made an IMD?

MR. BEARD: I think one needs perhaps to look at the ingredients for the IMD decision, that here you had a situation where you had the suspicion of abuse of dominance. You had the natural experiment about the exiting of day time trading. You had a submission saying that if that trading is allowed to be extended then that is the end of us because that is the full extent of trading for these purposes as I understand it.

In those circumstances the first point to assess is did the OFT have enough information to reach the conclusion that Spectron was going to exit the market?

THE CHAIRMAN: I think the question is: should it have relied on the information it was receiving from Spectron in relation to the existing of day time trading and that that would come to an end – those points. Or, should it have got some more evidence from Spectron and not just the assertion?

MR. CLAYTON: And also from other people than Spectron; rather than just going to Spectron should the OFT have consulted more widely?

MR. BEARD: Sure. Well I will perhaps take the points in turn.

THE CHAIRMAN: There must be a reason why they accepted that as sufficient evidence.

MR. BEARD: Well yes.

THE CHAIRMAN: And that is really, I think, what we are trying to get at?

MR. BEARD: I understand. The answer is that the information provided by Spectron stacked up, it cohered with what we knew about the market such as it was. It is perhaps worth emphasising

that our conclusions on exit from the market are not the points at issue here. LME is not contending in this context that we got that wrong.

THE CHAIRMAN: It is whether they could re-enter.

MR. BEARD: And then it is the question of re-entry.

THE CHAIRMAN: If I come along to you and say to you "I will not be able to re-enter the market", and of course that is something which, in my circumstances, being similar to Spectron would be of advantage to tell you in order to stop my competitor entering this new business. I have just turned it on its head – right?

MR. BEARD: Yes.

THE CHAIRMAN: I do not know if it is right or wrong, I am putting it to you – is it right at that stage that a regulator just accepts that from the competitor in those circumstances, or should the regulator say to himself "Wait a minute, that statement is in the interests of the person giving it, and is not in the interests of the person we are investigating and although at the moment we think that there is a reasonable prospect that we are going to find the person we are investigating to be a perpetrator in the future, but we do not know that. Normally we hold the *status quo* in the sense of not doing anything, we do not have these draconian orders against somebody and stop their business, we let the whole thing go. So should we just accept that from the competitor or should we ask him for some evidence to substantiate it before we accept it?

MR. BEARD: Perhaps it is worth going to tab 27 in 2A, which is Spectron's application.

THE CHAIRMAN: Yes.

MR. BEARD: Really the only points I am making by referring to this is (a) that we were getting relevant evidence; and (b) that the Spectron case, as it was put forward stacked up ----

THE CHAIRMAN: Well, where is the evidence? There is assertion – there is a difference between assertion and evidence.

MR. BEARD: If you will perhaps bear with me, madam. 2.1 "Concerns about the predatory pricing behaviour", and then p.2 provides details of total revenues, costs and operating profits for eMetals. That is confidential information to eMetals, that LME ----

THE CHAIRMAN: We are not talking about eMetals, we are talking about the voice, are we not?

MR. BEARD: No.

THE CHAIRMAN: We are talking about eMetals at this point?

MR. BEARD: This is eMetals, yes, because the primary case that was being put forward by Spectron was the way in which LME price has wiped out eMetals from day trading ----

THE CHAIRMAN: Right.

MR. BEARD: -- if you extend that into Asian Trading you are going to wipe us out of Asian Trading. If we are going to be wiped out of Asian Trading that is us out. If we are out we are going to struggle to get back in again. The primary piece of evidence was we are being wiped out of day trading because of the way that LME are conducting themselves.

MR. CLAYTON: But that is the electronic trading?

MR. BEARD: Yes, this is all electronic trading we are dealing with here, because that is what the concern is, and that is what the IMD was focused on. The IMD has nothing to do with voice training, telephone broking, anything of that sort. The IMD is only to do with the electronic trading.

THE CHAIRMAN: So there were figures behind this document?

MR. BEARD: Yes, in fact, LME do have one of the sheets that appear behind that document, it is rather poorly copied but it is in their application bundle, file 1, right at the back of tab A, and it is a table that is rather difficult to read because of the photocopying.

THE CHAIRMAN: Impossible.

MR. BEARD: I have two spare copies; I will pass a copy up to the Tribunal just for reference.

THE CHAIRMAN: (Documents handed to the Tribunal) Thank you.

MR. BEARD: I am sorry we do not have a clearer copy, but this is the material at tab A. This is showing Metals Commissions on eMetals during days and nights. First, you can see that the day business is far, far more significant at the start of this period and then – although this is the contentious issue, which goes to the substantive investigation, it is around that period where the metals day trading begins to decline where it is alleged and suspected that LME engaged in abusive pricing behaviour. As you can see, the day trading commissions tail off to practically nothing. It is completely destroying the business. Now, LME says what we do is perfectly legitimate. If that is the case, this is just the consequences of competition, we entirely accept that, but that is not the hypothesis on which we proceed for the purposes of s.35. We look at this and we see the closest competitor completely being wiped out of day trading. You can also see the little dark columns which do not vary enormously, they vary a little bit, and that is night trading. As you can see, by the end rather than compared to January 2004 where night trading is a tiny percentage of the overall income of eMetals by the end day trading is a negligible amount, and night trading is the only extant business. We have the clearest possible natural experiment here on the basis of our suspicion. I do not want to pre-judge the outcome of our suspicion we have the clearest example of someone exiting a market on the basis of another party's behaviour, because you have only got two players here, it is not that we have another variable to play with.

In those circumstances we have very good reason to consider that if the same pricing practices are extended to cover night trading ----

THE CHAIRMAN: Then the same thing will happen ----

MR. BEARD: The same thing will happen, and we will not just have one negligible column, we will have two negligible columns, and we will have no Spectron business. That is not an unreasonable conclusion – indeed, on the basis of the suspicion about abuse of dominance, not only is it not unreasonable it is the only reasonable conclusion that you can properly come to on the basis of this material. One does not even have to take a broad brush approach – broad brush is clear – we have very clear reason on the basis of material provided by Spectron (some of which LME has had, some of which it has not had) because it is sensitive commercial information and LME and Spectron are close competitors. We recognise, of course, that competitors have incentives to gain regulatory systems. We are not naïve in the ways of these things, and we do recognise that you need some material to be provided but it really could not be clearer.

That sort of information telling us about the impact of the day time pricing practices of LME, which we then have represented to us by Spectron, who say: "This is going to happen to us at night time, and then we will have nothing" then it is not very difficult for us to reach a conclusion that this creates significant concern. Furthermore, when we come to consider whether or not they are going to be able to re-enter, again we have this serious problem that I have referred to earlier in submissions that if someone is wiped out of the market by a particular practice in circumstances where they have built up a business and it has been destroyed effectively then the starting position is always going to be "Well we have a degree of scepticism about whether or not it is sufficient justification not to put in place the IMD, that actually notwithstanding the destruction of their business now they are going to have an incentive to come back in later.

THE CHAIRMAN: Let us take the next stage.

MR. BEARD: Certainly.

THE CHAIRMAN: The next stage is that now – I am going forward so that you understand where we are going.

MR. BEARD: Certainly.

THE CHAIRMAN: Now we have ascertained that they had the voice business, and that the voice business will allow them to re-enter – or may allow them to re-enter the market.

MR. BEARD: "May", yes.

THE CHAIRMAN: May, may allow them to re-enter the market.

MR. BEARD: Well it is not that alone, it is the combination of factors that are set out in the full reasons. It is not just voice broking. Voice broking is an important issue that is dealt with in the further reasons because it acts as a bridgehead, but there are other observations made about further information about impacts on reputation and, in particular to do with screens that are talked about in those further reasons that were also taken into account.

THE CHAIRMAN: But you do not remove the screens, yes. Now, in relation to those matters if we go back to what the OFT knew on 2nd February (the application) if we go back to that document (2nd February document) you have shown us that in relation to getting out of the market you have evidence, not just assertions – what evidence did you have about not being able to come back into the market?

MR. BEARD: As I have said, the position on re-entry is more complicated in a way because the position in relation to re-entry is that there is a logical progression from the position on the basis of the material we had, that in those circumstances you are going to need to have something pretty compelling on the other side to convince you that actually this party in question is going to be able to re-enter. What Spectron says at 3.1 onwards is that its main business is as an energy broker, and it is distinguishing the two. It developed ETP for energy trades.

THE CHAIRMAN: Well what Mr. Hoskins relies on is paras. 2.7 and 2.9.

MR. BEARD: 2.7 ... yes.

THE CHAIRMAN: At the end of 2.7 it says:

> "If Spectron was forced to close down eMetal this would make it much more difficult for Spectron to re-enter the market if and when LME is required to bring an end to the abuse of its dominant position."

MR. BEARD: Yes.

THE CHAIRMAN: Then 2.9 is the removal of the screens.

MR. BEARD: Yes, which is a relevant and important issue.

THE CHAIRMAN: Yes.

MR. BEARD: And then when we come on to "Serious and Irreparable Damage", it talks about:

> "... the anti-competitive conduct has already resulted in serious damage. It is likely to force Spectron out of the market for metals entirely. Credibility in close business relationships is of critical importance in the development of the ETPs. If Spectron is forced out it will close. This will certainly occur if the predatory pricing behaviour extends to evening trades. It will be extremely difficult, if not impossible, for Spectron to re-enter the market."

That is not anything like an implausible comment, nor is it something that would put the OFT on notice that it should be raising specific questions about the extent to which other parts of the business may or may not have certain relationships that would be sufficient to allow re-entry.

THE CHAIRMAN: What you say is effectively that statement is what one would expect from the previous evidence ----

MR. BEARD: Yes.

THE CHAIRMAN: -- and on that basis you do not need to go further.

MR. BEARD: No, you do not.

THE CHAIRMAN: You can accept that, and it is only thereafter if somebody tells you that that is wrong and you get evidence the other way that you need to re-investigate.

MR. BEARD: Well that is the position.

THE CHAIRMAN: And the decision is good enough on that evidence?

MR. BEARD: It is good enough on that evidence. It must be borne in mind that, although my learned friend has stressed that the OFT supposedly knew about the putative extension of markets back in August and the thing had been firmed up in November it was not until this submission was received that the OFT really had anything to go on that could justify putting in place an IMD.

My learned friend has said that the OFT encouraged, prompted Spectron to seek interim measures as if this is some kind of unilateral action by the OFT to take out some sort of grand vengeance on LME. It is not the case at all.

THE CHAIRMAN: Well the answer to that really is that nowadays public Bodies are under a duty to tell those that they are investigating or dealing with or whatever ----

MR. BEARD: Quite so.

THE CHAIRMAN: -- what powers you have and what steps they can take.

MR. BEARD: Madam, you have the point. It is clear, and my learned friend referred to various documents as he was going through, but in particular he referred to the email from Frances Warbuton in December that was sent to John Evans, and said:

> "If Spectron considers the expansion of the LME into overnight trading seriously threatens your future, then this might raise the question of interim measures."

Well there is nothing wrong with OFT saying that, that is an entirely responsible comment by the OFT, but it does go on to say:

> "Your consideration of how to proceed should take into account the level of evidence in terms of harm to Spectron and the public interest that you would have to make out."

So it is not saying "This is entirely straight forward", it is saying "You have got to put something to us."

THE CHAIRMAN: Right, so then we turn to what the LME told you?

MR. BEARD: Well ----

THE CHAIRMAN: There is something before that?

MR. BEARD: Before that I suppose properly one should turn to the s.35 proposed IMD notice that we sent to LME in strict chronological order.

THE CHAIRMAN: Absolutely.

MR. BEARD: Because it is important – 2nd February we get this; we do alert LME to the fact that we are likely to propose putting in place an IMD, and we did that earlier on in February, but we have to fulfil the statutory requirements. We do so with this notice on 13th February, so this document has been prepared and is sent out asking for details, complying with the statutory duty but even if there was not the statutory duty LME is clearly the primary person, if anyone is to be consulted, LME is the party to be consulted. I do not wish to re-read it all ----

THE CHAIRMAN: 25 is it?

MR. BEARD: Yes, well 23 going through to 25. It is stating what its concerns are, why those concerns arise and why it thinks a prophylactic and protective measure should be put in place, so it is not just a matter of complying with the formalities. The primary person that needs consultation – if there is time for consultation – and under this statutory scheme there has to be, because of course if this came before a court the situation might be different because, of course, theoretically you can go and get an injunction and there would not be any consultation requirements. But here you have a statutory scheme where there is a consultation requirement – it has been criticised.

THE CHAIRMAN: Well once you get before the court you then get all these arguments before the court and so it all comes out in the witness statements – it is the same sort of process, it is just done under the court administration rather than the ----

MR. BEARD: It might be, it depends on the timing. The reason that this process has been criticised, and one of the reasons that it has been hypothesised why there have not been that many applications for interim measures is because you have this process that involves having to go and consult the possible "victim", as it were, of the interim measures and actually it is notable that there have been two occasions where injunctions have been granted in competition law cases which theoretically could have been interim measures and they have not been and they have just been granted by the courts.

THE CHAIRMAN: Or *inter partes*?

MR. BEARD: Yes, well the first one started off, they did it without notice which perhaps was not, in retrospect, that clever.

THE CHAIRMAN: Yes, but it is between the parties rather than involving the OFT?

MR. BEARD: Of course, yes, absolutely. I am sorry, yes, when I say an injunction before the High Court I mean it will be the equivalent of Spectron going along to the High Court and saying "Can we have an injunction stopping LME opening this?" But this statutory scheme has been put in place, there are particular requirements, they have been fulfilled here. They have been fulfilled and a response was sought, and the response was given. It was given on 22nd February, and that was from the primary consultee if I can put it that way. To some extent that answers the question that was posed earlier, why were we not going off and questioning customers and so on? Well, we get our initial submission (and it makes sense) we think this stacks up, we think we have enough information here to justify giving an IMD, but we must fulfil the requirements of the statutory consultation and, furthermore, that is the person who we consider is going to be most likely to give us useful information about all of these elements of the case, not just the re-entry point.

THE CHAIRMAN: Yes. Mr. Beard, why I am cautious with that submission is that by the time you tell the victim of the IMD you are saying to the victim: "I have considered the material and on that basis I consider that it is necessary for s.35 purposes to make the order."

MR. BEARD: Yes.

THE CHAIRMAN: So by that time you should have the evidence on which you are relying for the IMD. It is only a check effectively that you then send it to I call him "the victim", and say to him "We are going to make this order which is going to affect you, do you have anything to say? But it is not to provide evidence for the purpose of your decision whether you should take it because you have already decided that?

MR. BEARD: We proposed it, it is our intention.

THE CHAIRMAN: You have already got to a stage where you think that is the right thing to do and the only thing that will stop you doing it is if the victim ----

MR. BEARD: Yes, I do not have any difficulty with that but that actually creates further time pressure ----

THE CHAIRMAN: I appreciate that.

MR. BEARD: -- when you have the situation where 1st March is the deadline when this event is going to occur because you effectively have to reach this conclusion very quickly there is not a great deal of scope in those circumstances.

THE CHAIRMAN: And that must be implicit within s.35 because s.35 only applies if it is urgent.

MR. BEARD: Well that is right, it is.

THE CHAIRMAN: What is the answer to para.23 to 25 – unless you want to point out anything else?

MR. BEARD: No, I do not want to re-read all this material, the Tribunal has clearly seen it. I am just very concerned ----

THE CHAIRMAN: What is the answer to 23 to 25, or the non-answer to 23 to 25?

MR. BEARD: Well the conclusion the OFT drew was that there is not an answer to 23 to 25.

THE CHAIRMAN: Well I think Mr. Hoskins says it may be paras. 48 and 49 – is that fair?

MR. HOSKINS: Those were the principal ones, the other one I referred to was 36.

THE CHAIRMAN: May be we ought to just look at – 36?

MR. BEARD: Certainly.

MR. HOSKINS: There was no detailed response I said because we did not feel in a position to give one.

THE CHAIRMAN: Well 36 really does not get us very much further.

MR. BEARD: No. One point to make about 36 is again my learned friend has relied upon it, that is not at issue today because this is about the threatening Spectron's business, Spectron being driven out of the market. Then if we turn to 48 and 49 – I am sorry, madam, if you want to read through in more detail?

THE CHAIRMAN: No, no, I do not. I just want to make sure we get your submissions on the relevant points.

MR. BEARD: Yes, certainly.

THE CHAIRMAN: I thought you had a point about cross-subsidising?

MR. BEARD: I was going to come to that, I am sorry, I was going to deal with it in connection with para.49, I am sorry I was just waiting – I did not know whether it was the moment to speak or you were still reading, I am sorry.

Paragraph 48, not until January Spectron takes up correspondence, short email, it is interested. We accept that Spectron did make this vague request and we said "That is not good enough". That is not a basis for making the IMD. We got the request on 2nd February, there is only so much we can do about that sort of thing. There is a flavour in my learned friend's submissions of asking an idiot for directions – "Well, you should not start from here". There is nothing the OFT can do but start from where it is when it receives an application it is properly bound by principles of good administration if nothing else to consider that. It received that application it thought it stacked up, it thought it made sense. In those circumstances it did as it did thereafter.

Paragraph 49:

> "It is assumed that Spectron is able to maintain its electronic platform, despite the fact that it has been running at a loss for at least 12 months because Spectron is able to

subsidise it. Spectron is the largest independent energy and commodity broker. It followed from this that even if Spectron were to suffer damage:

(a) the loss would be purely financial

(b) could be compensated for if Spectron succeeds in its main complaint; and

(c) would not threaten the existence of Spectron and its eMetals' business."

Now, dealing in reverse order (c) – we are not saying that it threatens the very existence of Spectron, we are concerned about the eMetals' business. Could it be compensated for if Spectron succeeds in its main complaint? We do not think that that is correct. We think, at the time we make the IMD that if you are pushed out of this market you are going to struggle to re-enter. Those are the sorts of circumstances where financial compensation is not going to be adequate because it is not that there was a simple period where you did not operate and therefore you can perhaps quantify profits by tracking back across a period of time or looking forward and looking at your prospective profits and therefore assessing that, we do not consider that that is right, we think there is a more substantial issue there. We do not think it is purely financial. We think you are being wiped out of the market, it is causing irreparable damage to you and it is causing damage to the public interest by wiping out you as the primary competitor.

Working further backwards, "you would not be driven out because you could cross-subsidise". Well that is not a rational basis upon which the OFT should ever operate. The idea that someone is a victim of anti-competitive behaviour but because they happen to have other profitable businesses they should sink their profits into the business that is being victimised is simply no basis upon which it should be suggested that an interim measures' decision is precluded. It makes no sense. It would be like suggesting that Spectron made Vodka and spirits, and it made an awful lot of money on that; it happened to have an electronic trading platform that was going to be driven out of the market because of the behaviour of LME, but it could sink that profit from its other business into the trading platform. Well that is not a good reason for the situation to militate in favour of no Interim Measures Direction and it is not a good argument. If you are putting place an Interim Measures Direction you are thinking about rational operators who are there in the market to make a profit. If they are going to sustain long term losses because they are being driven out of the market by the behaviour of a predator, in those circumstances you have to look at what would happen thereafter – not will they send good money after bad in relation to that business? It is simply not rational.

To be fair to my learned friend he has not placed great weight on that point but he has identified this paragraph as being one that justifies the LME's response and being a sufficient response in this regard. We say this just does not stack up. The overall view taken by the OFT

in relation to the material put in here – and as you can tell from the fact that we are jumping around picking at odd paragraphs – actually the majority of this submission is to do with completely other matters, notwithstanding that these issues were raised, notwithstanding the fact that LME is a market participant and therefore can talk about participation in the market, it cannot talk about Spectron's business itself, but it can talk about operations in the market – it is the closest to that market, and yet this is all we have and it just does not stack up.

That is on a close forensic analysis, if one takes a broad brush approach. Well it is clear that it was entirely reasonable for the OFT to say "Well this just is not enough to rebut the notion that they are going to get driven out of the market and they are not going to be able to re-enter here." So this is the response of the primary market participant who has been put on notice by the statutory procedure and this is what they have produced and the OFT says 'That is not good enough. It was open to us to reach that conclusion."

Later, we looked at other factors and we realised that actually there was further evidence that would justify a conclusion that Spectron eMetals could re-enter the market, but at the time, on 22nd or 23rd February, when we get **this** and we read **this** we have nothing that undermines the conclusions that we quite properly and reasonably reached on the basis of the material.

THE CHAIRMAN: And you say that had Spectron not tried to withdraw you would never have done the other investigations and ----

MR. BEARD: I am sorry, I am not going quite that far, I do not know what the hypothetical situation would have been – who knows what LME would have done? Who knows what other things would have come in? It would be wrong for me to presume that I have a sufficiently sophisticated crystal ball that can look both backwards and forwards simultaneously from the 27th February. I cannot. All I can say is that what acted as the trigger for all the activity in this case was the behaviour of Spectron in relation to its position on the IMD, when it stated publicly on 1st March that actually it did not want the IMD. It thought the IMD should not be put in place. It maintains in that notice, and it is perhaps just worth turning it up. It is in 2B, tab 35.

It sets out the background and on the second page, 448 ----

THE CHAIRMAN: Yes, that is the bit that we saw before.

MR. BEARD: Yes. Well if you are in the OFT's position you have had the submission by Spectron setting out good, clear reasons why it is that the IMD should be put in place. You have had a response from LME, which you do not think is sufficient; it does not deal with the points and that is a perfectly reasonable conclusion to reach. You put in place the IMD, two days after you receive **this**. Well obviously you are extraordinarily concerned about that, and you do take steps effectively to reopen what is going on here. Yes, you do take further steps and yes,

you do look at things differently, and yes, you do ask further questions, but that is all perfectly understandable. The fact that we conscientiously do that – my learned friend's second point, of course, is that we were not conscientious, we were very slow and we did not do anything fast enough for him, I quite understand but that really is not a realistic appraisal of the way in which the OFT conducted itself. He says, in his submissions, that the OFT has been rather high handed in not providing a detailed witness statement of every step along the way that we took between 1st March and the withdrawal of the Interim Measures Directions. With respect, the OFT is not trying to be in any way high handed about these matters. The OFT is simply saying: "This is a costs' application. It is a costs application in relation to a decision by that point which had passed". Can it possibly be right that in the context of that costs' application the Tribunal should need (or the OFT should have to) provide a detailed chronology setting out each step along the way dealing with various emails, letters, meetings, and the formal requests for information that were put in? After all, it has set out in summary key steps along the way in its full reasons. It has not ducked the issue. Paragraph 28 of its full reasons for the second decision, as soon as it receives information from Spectron about what it is doing publicly, it is talking to Spectron, asking it about these matters. It sends specific formal request both to LME and to Spectron because it is concerned that what happened is a *volte face* by Spectron and in those circumstances the s.26 system is useful and important because it does hold the Damaclean sword over somebody who is flip-flopping in the statements they are making, and what comes out of that process? Confirmation that Spectron actually does want the IMD to be maintained. I am sorry madam, I am conscious of the time.

THE CHAIRMAN: It was partly our fault. But it is 5 o'clock, I just wonder what our timetable is? Have you answered all the points you were going to answer in relation to Mr. Hoskins' submissions, or have you still ----

MR. BEARD: I think, depending on questions from the Tribunal I have probably got at least 10 or 15 minutes more because I have not dealt with anything to do with the second ground and unless, madam, you do not wish me to deal with those matters in the light of what you have heard so far I would need to turn to deal with those.

THE CHAIRMAN: No, I think you have to deal with the second ground. Mr. Hoskins, how long are you going to be? I do not want to tie your hand.

MR. HOSKINS: I imagine I am going to be about 30 minutes.

MR. BEARD: I may have a degree of difficulty if we are going to be going on until a quarter to six, I may need a moment to make a phone call.

THE CHAIRMAN: Should we make the phone calls now, or at the end of your 15 minutes?

MR. BEARD: I would be grateful if I could make the phone call now.

THE CHAIRMAN: So shall we rise for five minutes?

MR. BEARD: I am sorry, madam.

THE CHAIRMAN: That is all right.

(The hearing adjourned at 5.05 p.m. and resumed at 5.15 p.m.)

MR. BEARD: Madam, I am most grateful.

THE CHAIRMAN: Is that all right?

MR. BEARD: Yes, it is. I am sorry, I did not envisage at the start of the day that this was going to happen.

THE CHAIRMAN: I do not think any of us did.

MR. BEARD: No. I will try to be as swift as possible in the circumstances and crash through ground 2.

THE CHAIRMAN: This is very important, so I do not want anybody to hurry.

MR. BEARD: On reflection ----

THE CHAIRMAN: We could come back but it is another day of costs.

MR. BEARD: I think there is probably certain mutuality of interests on both sides here that that would not be desirable.

THE CHAIRMAN: More on the Tribunal's part.

MR. BEARD: Well I am sure that is true as well, but I meant that there may be a rare coincidence of views on this side of the Bench.

Madam, if you will forgive me, I was at para.28 in the full reasons for the decision dealing with the points about the manner in which OFT proceeded after ----

THE CHAIRMAN: 17.

MR. BEARD: Yes, it is at B4, tab C9.

THE CHAIRMAN: Paragraph 28.

MR. BEARD: Yes, and I am hoping that by referring to this now it will work for both ground 1 insofar as it is post-decision investigation process is said to evidence what we should have done previously and my primary submission is the OFT's approach, which we have tracked through, was perfectly appropriate, adequate – more than adequate – compliant with the statutory material and provided a perfectly sound basis for the decision, certainly not one that can be impugned on a broad brush basis and that this subsequent set of events which stems from the remarkable occurrences in relation to Spectron's public *volte face* is not relevant to that matter. But, in any event, it is worth perhaps just looking at the range of just information requests that are specified there. It is clear that there was a serial process of development of information requests, considering information, making further requests. Now, my learned friend has placed weight on the late dates on which s.26 notices were sent to category 1 and 2

LME members. As already indicated it is difficult to understand why that particular issue is germane or material. It is difficult to understand on what basis it could be suggested that that step should have been taken earlier. Indeed, it is notable that that request was not one that was made immediately afterwards. It was one that was made following some other specific steps having being taken in relation to clarifying positions with LME and Spectron. Obviously, there was a 10th March informal request for information from customers and members but that is a further matter that was one that sprung from the concerns that were arising more generally about the IMD in the light of what was happening. The process that is referred to there of a request for information of course does not capture what is going on in the background with the assimilation and consideration of those matters.

Paragraph 29 refers to the fact that there were a range of meetings being undertaken at the same time, so it was not just formal distant information request being sent out from some ivory tower, this was OFT making sure that it got its hands dirty in relation to these further issues that had to be dealt with. In relation to 30th March there are two further points to be made about that s.26 notice. First, there is nothing wrong with the period of time taken to prepare the s.26 notice. Secondly, it is a s.26 notice which is not just dealing with IMD matters. My learned friend has actually stressed the fact that that s.26 notice only had three questions that might be seen as relating to the IMD. In fact, they were relevant to the broader investigation and this s.26 was part of that broader investigation. Indeed, that is clear if one looks at the range of questions that are actually asked in the s.26 notice. That again was a perfectly sensible step for the OFT to take. It recognises if it goes out to third parties that there is a risk. If it keeps going back to people with formal notices that have these threats of sanctions attached to them it is going to create disruptions for those organisations; it wants to sweep these matters up. Yes, that meant that there was a range of question asked but, as I say, that was a perfectly sensible step to take. Actually what it reveals to some extent is the limitations on the material that could be expected to be provided by customers in relation to the matters that were particularly germane to whether or not the IMD should be maintained. The issue t do with re-entry was not a matter on which it was anticipated that customers would be able to provide wide ranging information.

It is recognised that third party customer information may be very important in competition investigations and, indeed, in relation to Interim Measures Directions, but that does not place a duty on us to approach customers at any particular point in the process. We have to consider all the circumstances of the case, the material before us, and what it is that we are relying upon and what is important. In this case there was not time to engage in this sort of exercise prior to 1st March and the Interim Measures Direction given the timetable we have already referred to

and the request of 30th March was a perfectly reasonable time at which to deal with these matters. But it would be wrong just to emphasise these information requests. This schedule does not reflect things like the meeting with Spectron on 23rd March to which my learned friend has already referred. That is a note that is exhibited in the appeal bundle at tab C1.

THE CHAIRMAN: This is file 4, is it?

MR. BEARD: I am sorry, file 4, yes. I refer to this for two reasons. First, just to illustrate that there was detailed discussion going on, inquiries being made, that do not appear on this schedule of activity because it is only concerned with information requests and 29 is just wrapping all of the activities up in summary and furthermore, it indicates the extent to which the process of gathering information from parties in markets such as those with which we are concerned is a complex exercise and it is not immediately obvious what bits of information are germane where, and how they might impact upon the way in which we will develop our thinking. Furthermore, it illustrates the fact that, even at this stage there were issues being mentioned, information being provided that was changing the way that the OFT considered the situation relating to Spectron that informed the way in which it phrased future questions and the way that it dealt with the parties and with customers. It is not necessary to go through all of the information provided, but it is a meeting note that it is worth reading in its entirety for these matters. It talks about screens, it talks about remedies, it talks about the role and benefits of eMetals. It talks about transparency, it talks about re-entry. It talks about the ways in which Spectron had been trying to re-enter market. Here we have indications of the importance of voice services being raised, these matters being discussed, more information being provided. But again, it would be wrong, with the benefit of hindsight to say "This sort of information should all have come out".

My learned friend made a submission at the beginning of his opening that there was no disagreement, that none of the information in question that was dealt with in the second decision was new, in the sense that it was always previously available. The OFT cannot possibly disagree with that proposition, but it is also the sort of submission that the police, I imagine, would find very galling if they took time to solve any crime because, of course, it is obviously the case that at any moment in time past information ----

THE CHAIRMAN: They may find the clue to ....

MR. BEARD: -- is always available. But that, to some extent, reflects on the unreality of this approach. No, it is not new, but the fact that it existed, the fact that it was held by certain people does not tell us a great deal about it. We have to look at this from a very different perspective, whether or not it was the sort of information that absented our conclusion was unreasonable.

THE CHAIRMAN: The test is not whether it was available, the test is whether you ought to have had it.

MR. BEARD: It is not just whether we ought to have had it, whether we were obliged to get it and it was pertinent to our decision such that our decision could not have been maintained, and that is a test which, as I have already submitted, is one that has to be dealt with on a clear and obvious basis. It is a very high threshold in all the circumstances, and dealing with *ex post facto* reviews that are carried out in the light of quite remarkable circumstances occurring after the imposition of the IMD do little or nothing to assist in that process.

Now, having talked about that in the context of ground 1, in relation to ground 2 my learned friend has suggested that we should have moved faster because if we had moved faster what we would have done was reached our conclusions in plenty of time so they did not need to appeal and we caused them to appeal by imposing the Interim Measures Direction. Well, first of all it is right to just pause and look at the central fallacy in that proposition. We did not cause LME to appeal. We put in place an Interim Measures Direction. They are entirely entitled to appeal, but the notion that the OFT caused the LME to appeal is quite wrong.

It is open to a party to appeal or not to appeal a decision. The notion of causation is just inappropriate in these circumstances. Obviously, without the decision if you took a strict 'but for causation' test then one would have to accept that 'but for' the decision there was nothing to appeal and it is causative in the same way that the existence of computers, typewriters and air are causative in that they are predicates to being able to bring an appeal but nonetheless they do not think that its the relevant test of causation that one is talking about here.

What is important is not the question of causation however, but what it is that the OFT is obliged to do in these circumstances, and how that goes to impugn an appeal. The issue is that none of those subsequent steps impugn the decision under appeal and for all the sophistry that my learned friend can marshal to try and draw future events back to impugn a past decision it does not take him any further than those submissions do in relation to ground 1. It cannot possibly be right that what we did subsequently somehow makes us liable for costs in relation to the appeal. Obviously we are conscious of the time limits that have been laid down in statute for all appeals, not just for IMDs but in relation to all appeals, in relation to all reviews. Those deadlines laid down for appeals by third parties do not constrain the way in which the OFT goes about its business in reviewing matters. It does not constrain the way in which an investigation must be carried out.

Now, there may come a point at which a public law duty to act with some sort of expedition comes to bite, but that is a very, very long way away from the sort of two month deadline that we are talking about here. It is entirely possible that the review that needed to be carried out

here would need to be a much more sophisticated and a much longer review. It might have taken months in order to review the IMD, if the issues in question were different. It cannot be said that that would somehow bind the OFT at the time it could take on the review.

THE CHAIRMAN: It might have turned out that you were satisfied you made the right decision.

MR. BEARD: Absolutely, it is simply irrelevant.

THE CHAIRMAN: It was not something that you ought to ... and then the appeal would have been effective.

MR. BEARD: Quite so. The OFT do not deal with the world blindly, however. The OFT, conscious of the fact that it was reconsidering this decision, and by the point at which the appeal was lodged it recognised that there was every likelihood that the IMD was going to be lifted and the OFT communicated with the Tribunal saying "Perhaps we do not need the CMC because you are going to have this information", and LME did not want any of that, they wanted the CMC brought on as soon as possible. That is no criticism ----

MR. HOSKINS: I think we were prepared for that to happen.

MR. BEARD: I apologise ----

THE CHAIRMAN: I think it may have been the Tribunal that said we wanted the CMC. I think it was the Tribunal.

MR. BEARD: I am sorry. I am grateful to my learned friend. But in any event the point is that the OFT was clearly conscious of the realities of the process in question. It was not blind to these things, but there is a difference between the OFT being conscious of those matters, and seeking not to create undue inconvenience to people, not to create undue costs, and there being a legal duty such that if it does not comply with that notional legal duty it becomes liable in costs as to the appeal that is brought against it. That simply cannot be right, there is no legal foundation for that submission.

To make it good in any event my learned friend has to approach the process of analysis, the system that was undertaken of making information requests, considering those information requests, digesting them, preparing the decision to lift the IMD, and indeed it is notable that although there is not a statutory duty because the notion of lifting an IMD is not contemplated on the face of the statute. In fact in this case the IMD notified that it was proposing to do so in order to get the views both of LME and of Spectron. That was an entirely reasonable and proper step to take. Of course, yes, it did add some time but relatively strict deadlines were imposed on that process and it was to ensure that a similar sense of fairness that obtains in relation to the statutory decision would obtain in relation to this decision making albeit on a non-statutory basis.

Nothing in that process can possibly be impugned as to the conduct of the investigation. But, in any event, it does not take the matter any further forward for the reason I have already set out. It does not give the appellant any traction in relation to the appeal as it was brought. In the circumstances that second ground takes my learned friend no further. If it were necessary the OFT could provide a vast amount of detail on who was doing what in the case during this period, whether it was to do with the substantive investigation, whether it was to do with the IMD, what information was collected at which meeting and how it was dealt with. But, with respect, the OFT considers that that is not possibly the right approach for this Tribunal to take, and in those circumstances it has not provided any such additional witness statement in support of its submission. It stands by its full reasoned decisions and the indications therein, and frankly the common sense of how these matters must be conducted.

In the circumstances that disposes of the OFT's submissions on legal tests and grounds 1 and 2. There is one matter I wanted to pick up. I never want it to be said that I just managed to distract the Tribunal by saying I would deal with something later and never coming back to it. It is a trivial point, but the point that was raised about LME not saying something in their submissions in February is in para.49 of the submissions made by the OFT. But, as I stressed at the time, this is not a significant point, it is a coda to the submissions.

Obviously there are submissions to be made on quantum. In dealing with these matters I have not ----

THE CHAIRMAN: We are not going to manage to deal with quantum to day.

MR. BEARD: I assumed that would be the case.

THE CHAIRMAN: So I am going to say something about it at the end.

MR. BEARD: I am grateful.

THE CHAIRMAN: And we will see where we go from there, but I do not want to spend time saying something about it now.

MR. BEARD: Unless I can assist the Tribunal further?

THE CHAIRMAN: No, thank you.

MR. HOSKINS: Madam, I will be as brief and concise as possible, I am somewhat constrained ----

THE CHAIRMAN: It is important that you say what you want to say.

MR. HOSKINS: I am somewhat constrained by reading my own handwriting which may make me slower than I would like.

THE CHAIRMAN: You are not constrained by the clock.

MR. HOSKINS: I will do my best. Just to revisit briefly where Mr. Beard started, which was the notion of general principle. I do not intend to take this line by line but I think it does reveal certain central flaws to the Office's approach. We know certain things in this case that one

might not know in similar cases. We know that the decision challenged had to be unilaterally withdrawn by the Office. We know, and Mr. Beard accepts that the information that led to that withdrawal was all available prior to the adoption of the Direction. We also know – and this is absolutely fundamental, that the Office did not commence is investigation until 2nd February, even although it was aware of the LME's intention to extend its opening hours and of the possible effect on Spectron's business since 1st December. It is noticeable that Mr. Beard has not really confronted that point because it is a fundamental point, and it is a point which the OFT does not have a real answer to.

I have listened to the submissions about how the Tribunal should approach the matter. I must admit theology was never my strong point, I prefer a practical approach. Our case is, as I have always said, we have seen it repeatedly in the written statements that this is very straight forward. If a proper investigation had been carried out at the appropriate time, by which I mean starting in December, this IMD would never have been adopted, or it would have been withdrawn before our appeal was made. Generally speaking, the exercise of costs' discretion is a practical one. This Tribunal takes a practical view of whether it is fair where one party – here, the Office – has caused another party – my client – to incur costs the first party should pay those costs. To decide this case there is no need to look at the substantive merits of the appeal that we ended up lodging, the simple point is that the appeal would never have been made if the OFT had investigated properly and in good time. I do not need to put it any higher than that, it is a straight forward case.

Mr. Beard relies heavily on the need to take a broad brush approach – I know the attraction of that having acted for regulators on a fairly regular basis myself – but we do not agree that we have to show that it is obvious that our appeal would have succeeded. I think (as I have submitted) that the merits of our appeal are completely irrelevant the way that we put our case. Nor does the quality of the investigation have to be looked at by the Tribunal on a broad brush basis. Why is that? The investigation, as we have seen this afternoon, is a purely factual matter. We have seen what information the OFT had, we have seen what steps it took, we have seen when it took them. It is not like a Judicial Review context where you have a specialist body and the court has to step back and recognise the specialism and interfere only when something has gone badly wrong. This is a purely factual issue which is before the Tribunal. When should the investigation have been commenced? What was the information available? We know when the information became available the decision was withdrawn, if that had happened earlier would the appeal ever have been made? Answer: no. It is 'smoking mirrors' to suggest that this is something that the Tribunal cannot just grab by the neck and say "In our view this is the answer."

There is also an air of unreality in the suggestion there has to be a broad brush approach, that we have to look at the merits of the appeal. It does not work because if, standing here and now on this costs' basis, I have to satisfy the Tribunal on a broad brush approach, or on a Wednesbury case on irrationality, as the Chairman pointed out there would be absolutely no point in me withdrawing my appeal because if I simply continued with my appeal the Tribunal has a full merits' jurisdiction under. s.46, there is no magic to it. The nature of review of an IMD is exactly the same as an infringement decision, it is merits' based, so why on earth would I abandon my appeal simply to come for costs and have to satisfy irrationality broad brush? It does not make any sense and that I why it is wrong. This is simply a factual question: was the OFT reasonable in the way it conducted its investigation and the timing of that investigation.

Mr. Beard said that the only statutory obligation on the Office was to consult the LME; that is right, but there is clearly a general public law obligation to conduct a proper investigation. It is perfectly open for any other client to come to the Tribunal and say this decision cannot stand because it has not been properly investigated and to also say it has not been properly investigated because the Office has not conducted a full enough investigation. There is no magic in that, it happens all the time in the Tribunal. The Tribunal will look at whether a proper investigation has occurred or not. An example of that is the *Floe* case where the Ofcom was sent back to look at particular matters that it had not investigated fully enough. Nothing unusual about that. So again, no magic about broad brush approach irrationality. Failure to investigate properly is a matter that the Tribunal deals with on a regular basis and it is something that does not require a margin of appreciation to be given to the Office.

On the question of general approach, turning to the detail – particularly the responses to the questions the Tribunal put to Mr. Beard after the short pause we had this afternoon – Mr. Thursby's email was put to Mr. Beard, and that of course stated that the information was critical to the appeal. Mr. Beard – nimble as ever – said "Ah, there is an answer to that, and the answer is that we were caused to come back to the matter because of what Spectron did." But, with respect that is not actually brought out by the evidence and I need to show you just a few bits of the evidence to make that good.

Spectron's announcement to LME members that it wished the IMD to be withdrawn and that it had asked the Office to withdraw the IMD was made on 1st March. If I can ask you to go to bundle 2B at tab 50. What happened following the 1st March was that the OFT looks like it took various steps to find out what was happening, and again probably the easiest place to go to is in our application for costs at the front of bundle 4 – if I can ask you to have both open at the same time, it is para. 44 of our application for costs.

On 1st March we have Spectron's announcement: "We have asked the OFT to withdraw the IMD." Then one has 44A, B, C and D, an informal information request from Spectron under s.26 ... and then a meeting between Spectron and the OFT on 7th March.

Then at tab 50, which I have just asked you to turn up in bundle 2B one finds out on 8th March where the OFT had got to. The letter says: "Dear Frances ..." that is Frances Murphy the solicitor instructing me:

> "Dear Frances. Frances Warburton has asked me to provide you with an update of our next steps and the timing of our consideration of the IMD. We have sent a s.26 information request to both LME and Spectron and now have received responses to these. We have also met Spectron to obtain further information from them as regards to the current situation and whether there is any material change to the circumstances that led the OFT to impose interim measures on LME. Nothing in the responses from the LME and Spectron to our request for information currently leads the case team to a conclusion that there has been a material change in circumstances since the OFT's decision to give LME an Interim Measures Direction, or ..."

I am sorry, the wording has gone. "...on the part of the Office to take into account matters relevant to that decision." One has the declaration by Spectron that we do not want the IMD any more. One has steps taken by the OFT to get to the bottom of that and then 8th March we have done our steps and that is it.

THE CHAIRMAN: Well I think you had better read on.

MR. HOSKINS: I certainly am going to read on, but as at 8th March you can draw a line in relation to LME and Spectron it has contacted them and it has not changed its mind. What then happens is that it then refers to third parties.

> "It is plain that the OFT must consider the situation objectively in order to understand the likely consequences and undertakings of the imposition and withdrawal of an Interim Measures Direction and the OFT is doing this. Those undertakings are not limited to the LME and Spectron but include third parties. We intend some further information request to third parties towards the end of this week."

Our point: exactly, that is what should have been done at the outset. Then it is interesting because we have this at the 8th March ----

THE CHAIRMAN: Well hold on, they then go on and say that that is the reason why "... the OFT met with Spectron yesterday and why we are ready to meet with the LME", so they are still getting the information from Spectron and the LME.

MR. HOSKINS: Exactly in relation to what third parties were saying.

MR. BEARD: No, it does not say that at all.

THE CHAIRMAN: "The most reliable information".

MR. BEARD: Yes it was setting out our current thinking at that time. It does not tell anyone anything about why it was that these steps were taken, or indeed what we were going to do next.

MR. HOSKINS: Madam, that is precisely my point. Mr. Beard's response to the question put was all of this was occasioned by Spectron's statement that it wished to withdraw. The 8th March letter shows that following that it was taken up with Spectron and the LME, and then the conclusion was reached on 8th March "We do not consider anything has happened to cause us to change our mind about the IMD". It is then said that we recognise that we need to consult with third parties as to what the effect of the IMD is. Our point is that that can and should have been done at the outset. When it says that that is the reason why the OFT met with Spectron yesterday, well that has been dealt with in the first few paragraphs – they met with Spectron on 7th March and on 8th March they concluded that that did not cause them to change their mind. This letter does not say: "We met with Spectron and, as a result, we are undertaking further inquiries as to re-entry, screens ..." whatever. They closed the book on Spectron in respect of what had happened in relation to withdrawal. But of course the truth of the matter is, and we know what happened from para.44, is they carried on seeking the information that they needed to support the IMD, and the reason why that point holds good is Mr. Thursby's email – we should turn it up, it is 4C, tab 3. It says: "The information sought is critical to the OFT's ability to respond to any appeal by LME against the original IMD." It is dated 12th April 2006. So as at 12th April 2006 the OFT is still seeking information that is critical to its ability to defend its original IMD. The point made to Mr. Beard by the Tribunal is a good one: if the Office was satisfied with the original IMD why make that statement?

MR. BEARD: I am sorry, Madam, I know that this is my learned friend's reply, but if it was in any way suggested in my submissions that as soon as that event happened on 1st March the OFT changed its mind as to the propriety or otherwise of imposing the IMD ----

THE CHAIRMAN: That is not what you suggested.

MR. BEARD: No.

THE CHAIRMAN: That caused you to think that you needed to investigate in more detail.

MR. BEARD: That is all – I am sorry if I ----

THE CHAIRMAN: We have got the point.

MR. BEARD: Thank you.

MR. HOSKINS: That, I hope, was the basis of my submission. That is how I understood Mr. Beard's submission and that is what I was attempting to deal with. Mr. Thursby's email does lead one to the conclusion that it is not simply because of what Spectron did that the Office

carried out all those further investigations identified in our para.44. The reason why it carried out those investigations was because it knew its IMD did not stand up and it needed further information to defend an appeal.

THE CHAIRMAN: Who is Mr. Thursby?

MR. HOSKINS: He is someone within the Office.

MR. BEARD: He is a principal case officer.

THE CHAIRMAN: Is he legally qualified?

MR. BEARD: I believe he is legally qualified. I believe he is part-time on the case, but I think, madam, with respect I would not want issues to do with his CV to be appearing in any Judgment. I think Mr. Thursby should be given an opportunity to comment if that was going to be material.

MR. HOSKINS: I am informed that Mr. Thursby has been working on the case for two or three years certainly to our knowledge, so he is ----

MR. BEARD: I am sorry, that is not right.

MR. HOSKINS: I am sorry, that is wrong information from our side.

MR. BEARD: I am not sure it matters.

THE CHAIRMAN: There we are again.

MR. HOSKINS: The next point that was put by the Tribunal, Mr. Beard was asked: "Should the Office have relied on information from Spectron, or should it have got evidence from Spectron, not just assertion?" Mr. Beard in response to that referred to Spectron's submissions – bundle 2A, tab 27, and took us to the particular spreadsheet and very kindly handed us up a cleaner copy of that.

THE CHAIRMAN: Which was the spreadsheet that was exhibited to one of your ----

MR. HOSKINS: That is correct, and so I have put it at the back of our file 1A, at the back of the Direction. The problem with this spreadsheet, and it is a point that Mr. Beard kept making, was that the reason for withdrawal was nothing to do with the possibility of eMetals being eliminated from the market. It was to do with its ability to re-enter the market. So this shows that in relation to the day time market eMetals exited the market, but it does not tell you anything about its ability to re-enter, save that the highest it can be put by Mr. Beard is that one might assume that when someone goes out it might be difficult for them to come back.

In relation to re-entry, in response to the question the only passage that Mr Beard referred to was para.2.7 of the Spectron response, and 2.7 is, as I have submitted and indeed as LME submitted in its response to the draft proposal, pure assertion, it does not contain any evidence. When one asks the question was it right for the Office to take at face value what the LME's principal competitor said in support of its application for interim measures at face value one

only has to look at two other aspects to see that of course it should have done something else. First, it did not take very long for Spectron's assertion to unravel as soon as it was put under any pressure. It went like that.

The other point is, of course, in relation to the screens it was very simple to find out what the position in relation to screens was, all you had to do was to go and ask one of the dealers, one of the brokers, and that is what the Office finally did. Again, that could have been done immediately; it was not done.

The second point, and it comes back to one of the central themes, is of course if the Office had begun the investigation earlier, i.e. when it should have, it would have got to the bottom of this earlier. Even if Mr. Beard is right that the Office followed an iterative process, or it got a bit of information, followed it up, etc., that would not have been a problem if it started in December. The problem of having only one month to deal with this was entirely of the Office's own making because it sat on its hands until 2nd February. So in relation to re-entry, should the Office have taken what Spectron said at f ace value? Clearly not because Spectron was self-interested and because it was very easy to start asking third parties, for example, brokers, and indeed Spectron itself to flesh out that matter. It is something that could have been done in the matter of a day or two days.

In relation to the second ground, that all that information was sought in order to defend an appeal, according to Mr. Thursby, shows that the Office was well aware that it knew it should have had it in the first place. I need to deal with one point, Mr. Beard says that there were lots of other things going on in the Office but, with respect, the Tribunal and the LME can only deal on the facts that are before it, and it is not good enough for the Office – it gave us disclosure of documents, in para. 44 we drew out the documents, we even made the chronology, the list that the Office had provided in its reasons bigger because we saw some documents were relevant, but the Office cannot turn up to the Tribunal and say "There is stuff that you do not know about but it would be all right if you did know about it." That is simply not how litigation works, even litigation involving public bodies. If they want to suggest that there are factors which excuse them, they have to bring them before the Tribunal.

THE CHAIRMAN: I do not think he was saying that though. I think he was saying that he is relying on the information that was received and was in that document.

MR. HOSKINS: Certainly, if that is the basis it is put there is no problem, but then I ask the question why raise the point that there is lots of stuff behind the scenes? I simply put down that marker, it is something that is strictly irrelevant.

THE CHAIRMAN: On the basis of context that that is not just alone, it is in the context, but that what he is relying on is any information that is contained in **that** document is right.

MR. BEARD: In relation to the first document, yes. I think my learned friend's point is that I have made the point that post-27th February OFT was doing more than merely asking for specific information requests. There is a paragraph in the full reasons. No, we have not provided a full witness statement. My learned friend said that is wholly inadequate. I do not have anything more to say. We say that is not the case.

MR. HOSKINS: As long as he is not asking the Tribunal to take account of things that the Tribunal does not know about ----

THE CHAIRMAN: Tribunal is not going to take account of things that it does not have before it.

MR. HOSKINS: That is the point. Can I just take instructions to see that I have covered everything?

THE CHAIRMAN: Yes.

MR. BEARD: (After a pause) Madam, before my learned friend concludes there is one matter, if I may, I would like to raise with him. (Counsel confer)

MR. HOSKINS: Madam, those are my replies. I think Mr. Beard wants to mention something and I think I may have to say something in response to it I am afraid.

MR. BEARD: I think it is a relatively minor point but it relates to what was said about screens.

THE CHAIRMAN: It has been raised during this and you were waiting for Mr. Hoskins to say something. You have given him bait but he did not take it.

MR. BEARD: It is not so much bait it is the fact that the point in question is confidential and so it was to do with whatever LME had said and I do not want to raise these issues.

THE CHAIRMAN: Well is the right way to deal with it that you should deal with it between yourselves and then write to us?

MR. BEARD: Well I think there might be an easier way of dealing with it. I think it is referred to in the confidential version of the full reasons document, but I will double check that.

THE CHAIRMAN: If it is only a bit of information that you think we ought to have and there are no submissions ----

MR. BEARD: I do not want to blow it out of proportion because it is clearly not of great significance, but it is material. I am concerned that the Tribunal should not be under a misapprehension as to the position, but equally I do not want to breach any confidences.

(The Tribunal confer)

THE CHAIRMAN: We think we may be able to help you – just one moment.

MR. BEARD: I am most grateful.

THE CHAIRMAN: It may have crept into our documents.

MR. BEARD: It matters not it has crept into your documents, the concern was because I am working off a redacted document I do not make a mistake and blurt something out inadvertently.

THE CHAIRMAN: If you look at the document we have.

MR. BEARD: Yes, that is fine.

THE CHAIRMAN: And it is para. 50(b)?

MR. BEARD: That is exactly the point. There is nothing else.

MR. HOSKINS: I do not think I need to add anything.

THE CHAIRMAN: Well thank you very much. I think all the submissions were very useful. Now, in relation to the quantum, clearly we are going to have to consider quantum in a little more detail than is provided to us in the written materials if we decide that any costs should be awarded. Our present view about the summary schedule is: first, I do not think we have a signed copy yet? Oh, we do – I am sorry I have not seen it. I apologise.

It seems to us that the total figure is, on face value, disproportionate to the work that should be done for the purposes of the Notice of Appeal and what would happen afterwards in the circumstances of what happened in this case. Therefore, we would want a little more detail about actually was going on. The points that the OFT raise in relation to duplication and in relation to other matters appear on the face of them possibly to require a little more investigation It may be that is not so but we do not know that, and it does look that way because of the figure.

MR. HOSKINS: Madam, it may be my faulty memory, I was not sure that there was a point of duplication of other matters.

THE CHAIRMAN: it might go to other things – not duplication of other things.

MR. BEARD: There might be a number of points on duplication.

THE CHAIRMAN: We do not want to go through it, you have raised it and those points that have been raised by the OFT. Also in relation to counsel's figures, one appreciate that a notice of application, if drafted by counsel and I do not know who drafted the notice of application, would have taken some time to do, but it is not clear to us how that was done between the two counsel. It is quite appropriate for the fact that there are costs which have to be incurred, which are paid for but that is another matter as to whether the OFT ought to pay them, and so that will need to be looked at. It does seem that there are other matters that will need to be considered, but I suggest that we cannot deal with it today. We have to leave it over today, and I think that probably the best thing is that either that is trying to be resolved between you, and see whether we can get a little bit further down the line before it has to come back to us – if it has to come back to us – or we reserve it over to when we give our decision.

MR. BEARD: Madam, I have not spoken to my learned friend, or indeed taken instructions ----

THE CHAIRMAN: I am thinking aloud as well.

MR. BEARD: -- but just thinking aloud, depending on the outcome of your Judgment, the extent and nature of this discussion as to quantum might be coloured at the very least, indeed, it might become entirely otiose. Might it be sensible in the circumstances, if the Tribunal were thinking of dealing with this, for there to be some indication, or is it envisaged that the Tribunal wants a further round of written submissions effectively on this point before reaching its Judgment. The OFT can obviously take either tack.

THE CHAIRMAN: Let me just make sure.

(The Tribunal confer)

THE CHAIRMAN: Can I suggest this: We will decide the matter on the basis of the submissions today, i.e. the principle. You will receive that decision in draft, or not handed down, at a period before we hand it down. At that stage we can decide what the appropriate course is. If we decide that there is going to be some order as to costs, then it would be helpful if the parties could resolve some of the issues which have been mentioned in Mr. Beard's submissions that I have just mentioned, so that we only have to deal with those that are still in dispute. At that stage we can decide precisely how we are going to deal with that, but at the moment our inclination is that we will do it ourselves and if we can do it in writing then that would be the best thing. It may be that there will not be too many issues, I do not know.

MR. BEARD: One would hope so, but it is a question of dealing with these things in abstract outwith the Judgment.

THE CHAIRMAN: Well we do not want to incur the costs of dealing with them in abstract if the decision goes one particular way, that is why I am saying it could be left over until you have the draft Judgment.

MR. BEARD: And I am sure there is interest on both sides in narrowing the issues as far as possible so far as quantum is concerned.

THE CHAIRMAN: Yes, and having had the indications it is either that there is material behind the schedule which makes it clear, or it needs to be rethought.

MR. BEARD: Well I am sure those on the other side have heard those comments and seen the outline submissions. The OFT will reserve its position until it sees (a) the outcome of the decision is; and (b) what is then said thereafter, if it is relevant, on quantum.

THE CHAIRMAN: One of the things I was saying today was about proportionality and about a public body, and if there is an order for costs one has to consider those two things in assessing the amount.

MR. HOSKINS: I just wanted to raise one point for clarification, because I want to be helpful to the Tribunal rather than providing something that is not wanted. In relation to counsels' fees

obviously we can look at that, we can break it down. In relation to points raised by the Office in their submissions in para.69 they say they were to be nominal, £1000.

THE CHAIRMAN: That is just out of the air, I assume.

MR. HOSKINS: At para.70 they say "Extortionate" which is ----

THE CHAIRMAN: That might be "disproportionate".

MR. HOSKINS: "Disproportionate, exactly. The final sentence of 70: "In circumstances where the party and its legal team have been involved in dealing with the continuing investigation into the conduct in question, the time spent in preparation appears wholly disproportionate ..."

THE CHAIRMAN: That is my duplication point.

MR. HOSKINS: The point we have made in our reply is that whilst obviously the client has been involved, the legal team was only instructed in relation to the investigation ----

THE CHAIRMAN: Ah, but you have to divide up the investigation. The IMD, I assume you were involved before you were instructed to do the notice of application?

MR. HOSKINS: We were instructed purely to do the interim measures' issue. So there is no pre-learning on the legal team's side, and my understanding is that in preparing the schedule we filleted between time spent on IMD, and time spent on the substantive investigation. I only raise that because ----

THE CHAIRMAN: When did you first get instructed, what date?

MR. HOSKINS: I got instructed after the adoption of the IMD.

THE CHAIRMAN: Yes, but that is February?

MR. HOSKINS: That is right, I was instructed during February.

THE CHAIRMAN: But there is a question about whether the costs from February are chargeable or whether it is only the costs from the notice of application and the drafting of the notice of application.

MR. HOSKINS: The only work I have done has been in relation to the IMD, I have not done any work in relation to the substantive investigation.

THE CHAIRMAN: No, no, no, but that is from February, not from ----

MR. HOSKINS: The only work I have done has been in relation to appealing the IMD in relation to that process.

THE CHAIRMAN: Yes, but if you are advising in relation to appealing the IMD then that may not be appropriate costs to be charging the OFT.

MR. HOSKINS: Normally one would get the costs of the action – I am simply trying to understand what information the Tribunal wants from me.

THE CHAIRMAN: There is one thing advising your clients in relation to the IMD, and what you are going to do in relation to it. It is another matter in relation to the costs of preparing a notice

of application and issuing it, and the other matters that come from the issuing of it and having to come here for the CMC and having to come here today.

MR. BEARD: If it assists there were other points that I would ----

THE CHAIRMAN: Well if you could make them in correspondence.

MR. BEARD: Yes, I think that might be sensible because duplication may fall on the solicitors' side as well. There are a range of issues between counsel and solicitor – what solicitors were doing at various times?

THE CHAIRMAN: Well why do you not make them now in correspondence so that they have an opportunity to consider them, so we do not have too much delay at the end if necessary.

MR. BEARD: We can certainly give some indications, as long as the OFT has leave to respond thereafter I cannot see that there is any difficulty.

THE CHAIRMAN: No, we have not considered the quantum.

MR. BEARD: No, I am simply concerned I should not be bound by just what was set out by the OFT in the grounds today because there were further points that needed to be made.

THE CHAIRMAN: No, I understand that.

MR. HOSKINS: Well that is very helpful if the Office tells us what they want we can do our best to provide it.

THE CHAIRMAN: What was in my mind at least was that the advisory work that one does from the time one is instructed, to the time that you do the notice of application may be something that would have to be considered as to whether that is something which should be charged to the OFT; whether or not it might be something which is charged with costs in the case. One of your submissions is that had they got on with it you would not have had to issue the notice, and so really it may well be if we came out on that basis, or thought about that basis that is how the costs would be divided. I am just thinking aloud.

MR. BEARD: Even with the OFT writing to the other side, rather than expending further time and effort at this stage perhaps that is a step that could be taken after the decision and it can be dealt with in that way.

THE CHAIRMAN: Yes, I was only thinking it is fresh in your minds.

MR. BEARD: Yes, I think these things as soon as they have to be put on paper tend to take a disproportionate amount of time and effort in my experience. So if we could be spared that for the moment and perhaps hold it over for another day.

THE CHAIRMAN: Is that all right?

MR. HOSKINS: That is absolutely fine.

THE CHAIRMAN: Yes, are you happy with that?

MR. HOSKINS: I am sorry, my instructing solicitor was looking a bit unhappy at my enthusiasm. (After a pause) We are happy to do it now if it helps the Tribunal, but if the Tribunal does not want it done that way ----

THE CHAIRMAN: Well I think the OFT says that they will incur time and cost when they could be incurring time and costs on matters that may be more productive – they do not want to do it if it is going to be unproductive. I suspect if they do it now, and then however long goes by, even six weeks, four weeks or whatever, and they will then think of other points, so we may as well just do it once.

MR. HOSKINS: Certainly.

THE CHAIRMAN: Right, we will leave it like that. Thank you both very much, and we will have a decision in due course.

(The hearing concluded at 6.15 p.m.)