IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1071/2/1/06

Victoria House
Bloomsbury Place
London WC1A.2EB

30 January 2007

Before:
MARION SIMMONS QC
(Chairman)

PROFESSOR PETER GRINYER
DAVID SUMMERS

Sitting as a Tribunal in England and Wales

BETWEEN:

CITYHOOK LIMITED Appellant

and

OFFICE OF FAIR TRADING Respondent

supported by

ALCATEL SUBMARINE NETWORKS LIMITED
BRITISH TELECOMMUNICATIONS PLC
CABLE & WIRELESS PLC
GC PAN EUROPEAN CROSSING UK LIMITED
GLOBAL CROSSING EUROPE LIMITED
GLOBAL MARINE SYSTEMS LIMITED
NTL GROUP LIMITED
TYCO TELECOMMUNICATIONS (US) INC Interveners

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HEARING

APPEARANCES

Mr. Kenny Shovell (assisted by Mr. David Greene of Edwin Coe) appeared for the Applicant.

Mr. Mark Hoskins (instructed by the Solicitor to the Office of Fair Trading) appeared for the Respondent.

Mr. Jon Turner QC and Mr. Meredith Pickford (instructed by Blake Lapthorne Linnell, Charles Russell, Bridgehouse Partners and Beachcroft Stanley) appeared for the Interveners: Alcatel Submarine Networks Limited, Cable & Wireless PLC, Global Marine Systems Limited and Tyco Telecommunications (US) Inc.

Mr. Fergus Randolph (instructed by Eversheds) appeared for the Intervener, NTL Group Limited.

Mr. Gerald Barling QC (instructed by BT Legal) appeared for the Intervener, British Telecommunications PLC

Miss Frances Murphy (of Mayer Brown Rowe & Maw) appeared for the Interveners, Global Crossing Europe Limited and GC Pan European Crossing UK Limited.

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THE CHAIRMAN: Good morning.

MR. TURNER: Madam, I hesitate to rise right at the outset, but we have just been served by Mr. Shovell with a new bundle.

THE CHAIRMAN: And you would like to read it.

MR. TURNER: There is only one copy here for everybody apart from Mr. Hoskins, so it is going to be logistically difficult to use it. If there is any chance at all so that we could photocopy that so there is at least one more copy that would be helpful, otherwise it might be a little cramped.

THE CHAIRMAN: The Tribunal will copy it for you, does that mean we can get on or do you still want 10 minutes now? Why do we not just start and we can have a little adjournment, if necessary, to read it.

MR. SHOVELL: If it assists, I think all but about three or four of the sheets of paper are already in with the existing documents and I have copies of those three or four sheets so that they all have the additional documents, so I do not think there is anything they do not already have a copy of.

THE CHAIRMAN: It is probably more convenient if it is all in one place, is it not. Do not worry about that, we will go and copy it and it will be back in a few moments.

Can I begin by thanking everyone for their written submissions which have been very useful. There is one matter on which the Tribunal would like some assistance from the OFT and that is in relation to the meaning attributed to "hardcore". We refer to para. 24(c) of the case closure letter, to paras. 20 and 29 of the annex, and to Mr. Vincent Smith's second witness statement para. 15. It would be helpful if the OFT gave us some guidance as to the sense in which hardcore is being used.

There is an application by Cityhook for further disclosure which probably we should deal with at the outset so that we can decide that before we get on to the substantive matters today.

The third matter which I was going to raise is the question of timetabling the hearing. We have two days, today and tomorrow. At the moment we do not know, although we hope you do know, who is going to make oral submissions and how that is being divided between the interveners. I do not know if you have given consideration to timetabling but perhaps we could work out a form so that we know we will finish when we will finish.

The only other matter that perhaps I should mention is the question of whether, for the sake of completeness of authorities, the *Pernod* decision and the *IWC* decision, which of course

was not available, are ones that might be referred to. If they are, then I do not know if Mr. Shovell has copies of them.

MR. HOSKINS: Madam, just for the housekeeping purposes, obviously I will need to take instructions on the hardcore, and we will do that at an appropriate moment during the day.

THE CHAIRMAN: It might be useful, if we are going to have a break, if we did that and sorted that out at the beginning so that we all understood what you meant.

MR. HOSKINS: As soon as we have a break, if you give me five minutes I can do it now or when a break comes up, I will obviously do it straight away. Disclosure, obviously it makes sense to deal with that first.

On timetable obviously I am slightly dependent upon how Cityhook presents its case. I must admit I was reasonably optimistic we could finish this within a day, but we will have to see what Mr. Shovell says about that. I am hoping it will not be necessary to have two days, but we will see.

THE CHAIRMAN: That depends, we do have quite a lot of counsel or advocates here today.

MR. HOSKINS: Well there is an encouragement certainly to my fellow members of the Bar.

THE CHAIRMAN: I am not trying to encourage more than a day, I just wanted to timetable to see how we are going to manage to do it in a day.

MR. HOSKINS: In relation to *Pernod* and the Water case, obviously they are cases which deal with admissibility. I must admit when I looked at them I did not think they added anything in terms of principle, they are just examples of application of principle to the facts of particular cases.

THE CHAIRMAN: But of course Mr. Shovell is doing it himself, so it is important that we make sure that he has available to him all the material ----

MR. HOSKINS: This is something we actually directed our mind to and we actually thought it probably was not particularly useful for a litigant in person to be given lots of cases necessary it did not advance the law, but obviously perhaps the Registry can help if Mr. Shovell needs copies of those cases.

THE CHAIRMAN: I have raised it, Mr. Shovell may have already looked at them, I do not know.

MR. HOSKINS: That is all I had on the housekeeping matters, thank you.

THE CHAIRMAN: What about the timetabling, have you worked out how you are going to do it within a day?

MR. HOSKINS: In a sense I hope I have a relatively free hand. It depends on how long Mr. Shovell is going to be. At the moment I am anticipating I will probably be about an hour, but that depends on how Cityhook puts its case.

THE CHAIRMAN: Mr. Barling

MR. BARLING: We are very much dependent on the way it goes, and we are mindful on the way it goes. We are mindful obviously that we do not want to be repeating anyone else's submissions. I have had the opportunity to chat to the Interveners' representatives so we know roughly where we are all coming from, and therefore it is probably not helpful for me to give a timing except that I am going to be as short as possible. I cannot imagine any circumstances in which I will be more than about 20 minutes at the most.

THE CHAIRMAN: Yes, that is what I would have thought

MR. BARLING: Maybe less.

MR. RANDOLPH: And I can just mirror that.

THE CHAIRMAN: No more than 20 minutes?

MR. RANDOLPH: No more than 20 minutes.

THE CHAIRMAN: Right.

MISS MURPHY: Likewise for Global Crossing, we can mirror that.

MR. TURNER: And for us.

THE CHAIRMAN: So the likelihood is that between all the interveners it is not going to be more than an hour – I have just knocked off 20 minutes, if you see what I mean, but I suspect that is what you were really indicating

MR. BARLING: Yes.

THE CHAIRMAN: So we are talking probably about two, two and a half hours. How long do you think you are going to be, not in relation to disclosure because we will deal with that and then we will see.

MR. SHOVELL: We thought we could best assist the Tribunal by putting facts before it and our understanding of the facts and we thought it might be helpful for that to happen before we started discussing how those facts should be applied to the disclosure. So we have put forward a bundle which summarises our thoughts.

THE CHAIRMAN: That is the purple bundle?

MR. SHOVELL: The purple bundle, which is 70 sheets of paper each one of which has got about a paragraph highlighted, so our intention was to race through those 70 paragraphs. We would then have given the Tribunal the factual background, and we thought it would then

be open to the Tribunal to be better informed to make its decision on disclosure, so we were hoping to do that first.

THE CHAIRMAN: That is fine, we are going to do disclosure first.

MR. SHOVELL: We were hoping to go through our bundle first.

THE CHAIRMAN: That is fine, if you want to present it that way I can understand that.

MR. SHOVELL: But how long to go through 70 paragraphs ----

THE CHAIRMAN: Yes, but then we get on to the main part of the case on admissibility, have you any idea how long that is going to take you?

MR. SHOVELL: I was hoping, the bundle has a tab at the back dealing with OFT case law and admissibility, so we were hoping that our initial submission would be of the order of an hour and a half-ish, depending on questions and then we expected the other parties to say what they had to say and then we do not know how long our reply would be.

THE CHAIRMAN: Yes. Has that come back now? Why do we not adjourn? You can take instructions on hard core. Hopefully the bundle will come back. We will have a look at the bundle. You can all have a look at the bundle, and then Mr. Shovell, you can take us through as you want to. Then we will deal with the disclosure application first - after you have taken us through the evidence. It is appropriate to allow you to do it the way you have prepared it.

MR. HOSKINS: Can I raise two further points before we break? First of all, my understanding from your opening remarks - indeed, from the letter that was sent - is that the disclosure application is only for the new items in the skeleton for today; we are not going back over old ground. I just wanted to make sure that I had understood that correctly?

THE CHAIRMAN: That is what I had understood. Mr. Shovell, it is the three items that you have raised?

MR. SHOVELL: Would it be possible to pick that up after we have gone through the facts, because this is a technical legal matter and we would be grateful for the Tribunal's guidance on it at the time.

THE CHAIRMAN: Mr. Hoskins, let us hear the application.

MR. HOSKINS: Madam, you understand my concern.

THE CHAIRMAN: We made a ruling on disclosure, and I think there may be a question ---- In relation to the Chief Executive we have already made a ruling. Therefore that is not open to be re-litigated. But, I think we ought to hear what Mr. Shovell says. So, it is much easier just to deal with that as part of the application.

MR. HOSKINS: Certainly. That is very helpful to me to know that we are not going back over old ground. The other one ---- I hope this is an appropriate question. I am not quite sure about the legal representation, because we were sent a notice that Edwin Coe were not longer acting. I notice that Mr. Green is here. He may be simply here as an observer, but obviously there is some confusion on our side about legal representation. There has been an issue throughout this case about exactly what is happening. It may just be useful for that to be clarified. It may become important - for example, if costs become an issue at the end of the day.

THE CHAIRMAN: What I suggest we do is, during the adjournment you can try and see if you can sort that out. Is that all right?

MR. HOSKINS: Certainly.

THE CHAIRMAN: I have now noticed that Mr. Green is here. I had not noticed he was here. Perhaps you can have a conversation about that.

MR. SHOVELL: In fact, Madam Chairman, I am happy to clarify that on the record now. Cityhook are here as litigants in person, just as at the first hearing we thought from the procedural point of view that it would be helpful to the Tribunal if we could take some legal advice on those matters. Mr. Green has kindly attended in precisely that capacity. So, he is not on record. He is here to assist, if he is able to do so. But, he is not formally on the record.

THE CHAIRMAN: I am not sure if it is a technical term, but a jargon term, he is a McKenzie Friend.

MR. SHOVELL: A very well qualified McKenzie Friend, yes.

MR. HOSKINS: Obviously the ratio of 28:1 is not enough for the OFT when it comes to ----

(Adjourned for a short time)

THE CHAIRMAN: I understand everybody has had an opportunity to look at the file.

MR. TURNER: Madam, I again hesitate to rise, but I have now had the opportunity to look at the file - I do not know whether the Tribunal has also done so - and certainly on behalf of the interveners who I represent (my friend will make submissions for themselves), we do strongly resist this course of action for three reasons, essentially. First of all the proposal, as I understand it, is to take the Tribunal through a fairly extensive series of documents without any stated relevance to the matters to be determined by the Tribunal today. So, we are essentially adrift on an endless ocean of prejudice. It is not the right way to proceed.

Mr. Shovell declined the opportunity, prior to the short adjournment just now to state why he was taking us through these documents. He should give a reason. That way we will be able to assess whether, in the usual way he is addressing something of relevance to the Tribunal's decision.

The second point is that having looked at these documents it will potentially take a very long time to go through them, to explain them, some of them are manuscript, all of them are taken out of context and what their significance is. The time point is significant. All of the parties will be put to significant extra cost as a result of the prolongation of these proceedings and that is unreasonable.

The third point which I would emphasise most strongly is that it is wholly unfair to the Interveners to proceed in this way. There was no signalling in advance of the intention to proceed in this way in the skeleton. We were served with this bundle of documents today. The documents relate in large part directly to Interveners. Some of them are Interveners' documents, and without having been given any prior notice we cannot address them. We therefore are unable to address any prejudice that might wrongly be given to the Tribunal by way of impression and to correct that. As I say, none of this was in the skeleton or was signalled in advance, and for those three reasons we would urge the Tribunal to resist this course of the hearing, and to ask Mr. Shovell to clarify prior to embarking upon it precisely why we are doing so

MR. BARLING: We support that for very much the same reasons. No doubt the Tribunal will be keen to give Mr. Shovell a certain amount of leeway as someone in person, one understands that but there are limits. We note that Mr. Shovell did not put anything in reply by way of skeleton, although there was a slot in the timetable, 24th I think it was of January or something in reply. This could easily have been signalled and provided to the parties and an indication given of what it was and obviously Mr. Shovell, from what one infers, is going to use this as an opportunity, as it were, to look at the underlying allegations which are already set out in his notice of appeal, and certainly as fully set out as they need to be for the purposes of the admissibility decision. So in our submission this is not a good use of the Tribunal's time.

MR. HOSKINS: I am quite happy to leave it in the Tribunal's hands as to the best way to proceed, but perhaps I can make a suggestion as to whether it might be helpful to make sure that we proceed in a focused way which is for me to identify what the requests for further disclosure are. I have tried to do that certainly in our supplemental skeleton on further disclosure, and I think I had five items – this is p.3 of that skeleton.

MR. SHOVELL: Sorry, madam Chairman, as mentioned earlier, we were hoping to go through the facts and discuss with the Tribunal ----

THE CHAIRMAN: I understood that.

MR. SHOVELL: Apologies.

THE CHAIRMAN: Let Mr. Hoskins finish and then we will – yes?

MR. HOSKINS: The first item arises out of Mr. Smith's first witness statement where he refers to the fact that the views were expressed by a senior legal adviser about the relevance to the Tribunal's case law in this area, i.e. in what is an appealable decision and Cityhook seeks disclosure of that legal advice and we have made our points: we say it is legally privileged, it was provided orally there is no document – that is, as I understand it, no.1 on the wish list. The second matter on the wish list is a reference to the fact that the case team had said to a representative of Cityhook, I think in a telephone conversation, the old Chairman was very supportive of one argument not always made, and the request that is made is not one for disclosure, it is more a request for further information, what was the one argument that was not always made, to which again we have made the point it is simply not relevant, it is so long ago in the history. Mr. Smith has given the more recent history but there is no.2 a request for information.

Number 3 is again really a request for information/clarification, which is the hardcore point, which you asked me to take instructions on, I have, and we can deal with that when we come to it, but that is no.3

Number 4 is confirmation of whether the Office contacted the Duchy of Cornwall in the cases prior to 14th November 2005. Again, we have said we do not actually see how that can be relevant to whether there is an appealable decision here. But if it helps, again I have taken instructions on that, we have not gone through every item of paper because that would be disproportionate, but my instructions are that there was no official contact either in writing or in person by the private office with the Duchy of Cornwall in the period September 2005 to April 2006. Hopefully that clarification simply answers the question; that is no.4.

Number 5 sought disclosure of the CEO's views which, madam, you have already indicated has previously bee dealt with in the disclosure request and therefore falls away. Those re the four things that seem to me to be outstanding and I hope it may help to come up with a system to make sure that we stay focused on what the requests are when we deal with them.

THE CHAIRMAN: As I understood it, and I think Mr. Shovell was getting up to say that a moment ago, the bundle does not only go to disclosure, it goes to the admissibility as well.

The way that Mr. Shovell has prepared it for today is that he was going to open the disclosure and the admissibility and the bundle goes to both, and since that is the way he has prepared it, it would probably be unfair to ask him to re-prepare it a different way.

MR. HOSKINS: Certainly.

THE CHAIRMAN: So that was my understanding. As I understand it that is what you were about to tell us, was it not?

MR. SHOVELL: Yes, I was going to reply to the Interveners' point.

THE CHAIRMAN: Yes.

MR. HOSKINS: I am fully aware there is a litigant in person that is why I say we are in the Tribunal's hands as to how it wants to proceed, to be fair to a litigant in person. I just wanted to focus on the disclosure issue in case that was helpful.

THE CHAIRMAN: That is very helpful. All I was doing, Mr. Shovell was saying we understood that you wanted to open the whole admissibility including the disclosure, because it was somewhat intertwined, and you had done it that way. Is there anything else you want to say in answer to what you have heard from Mr. Turner and the other parties.

MR. SHOVELL: Yes it is more about etiquette points. I thank the Tribunal for allowing us to proceed on the basis we prepared. Mr. Turner's points in reverse order: he talks about how unfair it is to the Interveners and they cannot possibly comment. Well, all of the documents have been in files 1 to 12 for the last few months, **this** is a core bundle. The only documents that I recollect are not are one document that we received yesterday, so we brought it here today which is reasonably prompt, and the other two or three documents are a couple of things just taken off the internet which are more sort of guidance and I do not think are in any way prejudicial – in fact, they are not in any way prejudicial to the interveners, so it is false for him to suggest that this is somehow flagrant new material, it is not. His second point was 'out of control and concerned about costs', well we spent about 15 minutes discussing this, we are trying to present our case as best we can, I do not think that is a reasonable comment, and his first point stating relevance – well, again I think it is reasonable for a party to have discretion as to how they present their case and the relevance will emerge. We are going through the facts as we see them, how they should be applied, what inferences we think should be made based on those facts. We are then going to start discussing the law and then we are going to pass it to the Tribunal. That is, as I understand it, the primary agenda today. I am happy to now proceed, if that is appropriate.

THE CHAIRMAN: One moment.

MR. SHOVELL: Sorry, the hardcore point that you have asked the OFT about.

(The Tribunal confer)

THE CHAIRMAN: Mr. Shovell, the Tribunal will allow you to proceed in the way that you want to proceed, but can I just make one caveat, which is that this is an admissibility application, it is not the hearing of the substantive matters, so that insofar as we are dealing with documents which go to the substantive matters you are going to have to explain why they are relevant to the admissibility application.

MR. SHOVELL: Understood.

THE CHAIRMAN: Yes?

MR. TURNER: Madam, I was going to make precisely the same point. If he is to proceed in this way he must appreciate that there is a difference between documents which, in Mr. Shovell's view, evidence the existence of an infringement, as opposed to documents which evidence that Mr. Smith and the OFT decided that there was not an infringement.

THE CHAIRMAN: Yes. Mr. Shovell, you understand the point?

MR. SHOVELL: Yes, I understand.

THE CHAIRMAN: You have prepared it on one way, I am not going to take you off course.

MR. SHOVELL: Thank you, madam Chairman.

THE CHAIRMAN: Mr. Hoskins, do you want to deal with the hardcore point, or shall we listen to Mr. Shovell and then you deal with it? I just wonder if you should deal with the hardcore point so it is in our minds?

MR. HOSKINS: Certainly. Obviously we have made submissions on this in our skeleton argument on admissibility at paras.39 to 40 and obviously, madam, you are aware that our primary contention is that it is not relevant to the question of whether or not there is a non-infringement decision; one only gets to the question of what was the potential quality of an infringement once one is looking at how the discretion was exercised to close the file on administrative convenience – I am sorry, I have not put that very well.

THE CHAIRMAN: I think that is why we wonder whether there is a confusion.

MR. HOSKINS: I am glad I started it badly then because that brought the Tribunal to stare at me and I will try and do it better. The issue is, or the issue that is put by Cityhook is, "Why was this said not to be clearly a hardcore infringement?" The issue before the Tribunal today is whether the Office adopted an express or implied decision that there was not an infringement. The gravity of any potential infringement - be it hardcore, not clearly hardcore, whatever - is irrelevant to the legal question of whether the Office decided that there was not an infringement, or not.

THE CHAIRMAN: What I was asking you was what was meant by hardcore infringement?

MR. HOSKINS: Certainly, Madam. That is why, when I introduced it, I said ----

THE CHAIRMAN: It is referred to all the way through, and seems to be referring to it could be, using a different meaning.

MR. HOSKINS: The primary point is the question of whether this was, or was not, clearly hardcore infringement. Our primary point is that it is not relevant to admissibility. But, I appreciate your question is different - which is: 'Assume it were relevant to admissibility, tell me more about it'.

THE CHAIRMAN: Well, you have used the term. What do you mean by it?

MR. HOSKINS: Yes, I understand. That is why I want to make sure what our primary position was, which is 'not relevant'. If we can look at the case closure letter which is in the core bundle at Tab 2 ---- Madam, you identified that the notion comes up in a number of places. It comes up in 24C in relation to the six prioritisation criteria. One of the criteria is the type of case. So, when deciding whether something is a matter that should be taken forward as a matter of administrative economy, the type of case is relevant. That includes the seriousness of the alleged infringement and whether it is one of the priority areas. The statement here is that neither the collective boycott case, nor the selective setting case is clearly a hardcore infringement. That is the language that is used. It is not clearly a hardcore infringement.

THE CHAIRMAN: But how are they using hardcore infringement there?

MR. HOSKINS: I am going to come to that, Madam. One sees the same language reflected in the annexe. It p.24 of the numbering of the core bundle (p.11 of the internal numbering of the document). At para. 18 you see again that this is the annexe that picks up all the responses that were received from the provisional closure letter. So, we are dealing again with type of case. Then we come to the question of hardcore infringement again. At para. 20: "Based on the evidence seen by the Office, the alleged collective boycott does not constitute a hardcore infringement of the Act". Then, at Footnote 13: "Sale price fixing, output restrictions, bid rigging and market sharing". Footnote 13 are all examples of matters that would clearly be hardcore infringements. The crucial thing to note is that whilst sale price fixing - that is, price fixing by sellers - is considered to be a hardcore infringement, price fixing by purchasers is not considered to be clearly a hardcore infringement.

THE CHAIRMAN: Now, when the OFT originally decides whether or not to investigate a complaint, one of the factors which it takes into account is whether there is potentially - if the evidence came out to substantiate what complaint says ---- There would be a hardcore infringement.

MR. HOSKINS: Yes.

THE CHAIRMAN: So, it opens the gates at that stage. What is being said here ---- Is that the closing of the gate? In other words, after the investigation. That is why it seemed to me I did not quite understand how it was being used.

MR. HOSKINS: I think it is the same way in which you have put it, Madam. What the Office is considering at each stage when it considers the administrative priority question is whether, if proved, would the infringement be a hardcore infringement?

THE CHAIRMAN: Yes. So, I assume that when it opened the gate originally, it was saying, "Yes, it would be a hardcore infringement if the evidence came out". So, to say now, in para. 20, that it does not constitute a hardcore infringement because it is purchase price fixing, that is a change of principle.

MR. HOSKINS: Madam, as is explained in Mr. Smith's witness statement, the way in which the Office approaches administrative priority has changed over the course of this investigation.

THE CHAIRMAN: That depends on whether originally there was no gate on hardcore.

MR. HOSKINS: That is precisely the point, Madam - there was not.

THE CHAIRMAN: There was not a gate?

MR. HOSKINS: No.

THE CHAIRMAN: Right.

MR. HOSKINS: When this was opened. It is not the case that the Office, when it opened this investigation, could only open investigations into potential hardcore infringements. Indeed, my understanding - and I will be corrected if I am wrong by those behind me - is that it is still not the case that you have to be a potential hardcore infringement. It is something that goes to discretion, but it is not a necessary element of opening an investigation or continuing an investigation. So, when you see the phrase here, what is being said is that during the course of this investigation, prioritisation has been finessed; it has been developed. The six criteria are now there. We are told by Mr. Smith that they are not a scientific application. It is not simply one plus one, plus one and you get an answer. It is still a matter of impression. One of the elements of impression is that, "If proved, would it be a hardcore infringement?" The simple point that is being made here is that even if proved, these would not clearly be hardcore infringements.

THE CHAIRMAN: Because it is a purchase price infringement and not a sale price infringement.

MR. HOSKINS: Because it is purchase price rather than sales price. Absolutely. So, this is simply a matter that goes to the discretion that was exercised.

THE CHAIRMAN: Why, in para. 20, does it say 'based on the evidence seen by the OFT', because that looks as if they thought it was a hardcore infringement, but having seen the evidence they have decided it is not?

MR. HOSKINS: Madam, that goes to the question of the dispute that took place within the Office. You will remember there were two different points of view. Two might even be under-selling it. There were a number of different points of view. Now, I think Mr. Smith's second witness statement tells us that the case team had a certain view of this alleged infringement whereas the case review panel - and, indeed, the case review meeting - took a different view which was of a less serious potential infringement. So, that is why, as one sees throughout the case closure letter, based on the evidence seen by the OFT, at this stage of the investigation, this is not clearly a hardcore infringement, because if, for example, the matter had proceeded and the case teams ... then it might have been a hardcore infringement.

THE CHAIRMAN: So, it might have been a hardcore infringement when they opened the gate to start with - the first gate you enter.

MR. HOSKINS: It might have been, but nobody addressed their mind to it because it was not relevant to the decision to open the investigation at that stage. Paragraph 20 is probably not the best example because it does not use the word ---- It says 'does not constitute a hardcore infringement', but you will see elsewhere in the letter - and, indeed, I showed you para. 24(c) and also in Mr. Smith's witness statement - the phrase that is generally used is 'not clearly a hardcore infringement' and that just simply recognises the fact that the investigation had not been completed -----

THE CHAIRMAN: Yes, but the annexe says 'does not constitute ----'

MR. HOSKINS: That is right. It is a difference in language. But, if you contrast that with 24(c) which is the paragraph we have just looked at, in the body ----

THE CHAIRMAN: You see, if you look at para. 29 ----

MR. HOSKINS: Well that is ----

THE CHAIRMAN: It is one of its more – which suggests that it was a hardcore.

MR. HOSKINS: Well no, madam, what that is doing is it is saying that if we carried on with the Cityhook investigation it might mean that we would have to close another of our investigations, which was more hardcore. So, for example, there might be ----

THE CHAIRMAN: More hardcore, which suggested this is hardcore but the others are more hardcore.

MR. HOSKINS: Certainly. The way this works is that you see from the footnote there are four examples given of things that are clearly hardcore infringements. There is no definition in legislation or indeed in published OFT guidance as to what is hardcore, you do not pick it up when you find it.

There are four examples, I think, which most competition lawyers think "yes, those are definitely hardcore." What then happens is that it is a matter of judgment for the Office in each case to decide if something is to be treated as hardcore or how hardcore it is to be.

One can see the way the Office approached this particular case, if one looks at Mr. Smith's first witness statement, (tab.4 in the same bundle) p.54, para.53(c) of the witness statement.

THE CHAIRMAN: Yes.

MR. HOSKINS: So we are in the realms of the type of case. So what this paragraph is doing is summarising the memorandum that Mr. Priddis prepared. Mr. Priddis was the Office official who looked at the question of administrative priority specifically, so he indicated what he thought his view was of the six criteria, and on type of case Mr. Smith tells us there was, in Mr. Priddis's view, nothing specific about the type of case. It was not clearly a hardcore infringement, nor did the cases fall within one of the OFT's priority areas.

THE CHAIRMAN: And you say that not clearly a hardcore infringement because it was a purchase and not a sale?

MR. HOSKINS: That is right. So it was not clearly a hardcore infringement – for a competition lawyer obviously a seller's price fixing agreement is one of the worst tings you can do, market sharing is one of the worst things that you can do. The point here is because this is an alleged purchaser's price fixing agreement, and given the debate within the Office about precisely that should be dealt with legally, was it an object case or was it just an effect case, and then also the question of how hardcore, how serious this was, that is what this all reflects. That is why you see the word "clearly" in the witness statement here, and that is why you see it in the closure letter; I appreciate it is perhaps unfortunate it is not completely consistent when one reads through.

THE CHAIRMAN: Then you come to the other one I pointed out to be complete is Mr. Smith's second witness statement at para.15, it is the last sentence, or the penultimate sentence.

MR. HOSKINS: That affects the legal submission that I made rather clumsily at the start of this and I hope I have now made it better, which is the question before the Tribunal is: did the Office make an implied non-infringement decision, and the point is the quality of the infringement that might have been found if the investigation had been continued is not relevant to that legal question.

THE CHAIRMAN: The question is whether it came to a decision ----

MR. HOSKINS: Absolutely, a decision of non-infringement, not a decision of non-infringement in relation to something that may have been a hardcore infringement, if it had continued the investigation. The quality of the infringement is irrelevant to the question of whether the Office decided that there was not an infringement. The quality of the potential infringement is relevant to the exercise of the discretion of the Office when deciding whether to close the file for administrative priority reasons.

THE CHAIRMAN: I understand that, but whether it made a decision that there was no infringement may depend on what evidence was before it and that is why what is meant by "hardcore" in this context may be relevant to that consideration.

MR. HOSKINS: I hope, on the basis of the description I have given ----

THE CHAIRMAN: No, I understand what you say.

MR. HOSKINS: -- makes the point that certainly on the facts of this case the question of how hardcore or whether this was hardcore or not is not relevant to the decision before the Tribunal, and we have been through the relevant evidence where that word appears and obviously I have taken you to the case closure letter, and I have given you the instructions we have, but our primary submission is the quality of the potential infringement is not relevant to the question of whether a decision of non-infringement ----

THE CHAIRMAN: I understand where you are coming from is that you say that everything you did was in relation to the priority decision, the administrative decision, and therefore your consideration of whether it was hardcore was in that context.

MR. HOSKINS: Absolutely.

THE CHAIRMAN: That is what you are saying.

MR. HOSKINS: Absolutely, that is another way of putting it, madam, and probably a better way of putting it, but yes. One only gets, of course to ----

THE CHAIRMAN: I only got there from what you were saying so I am just rehearsing what you have just said.

MR. HOSKINS: The point being that one only gets to consideration of how did the Office apply its six prioritisation criteria if the Tribunal has jurisdiction? It is a question for further down the road, whether for here or for the Administrative Court office.

THE CHAIRMAN: Of course, if Cityhook are right then it may be that hardcore becomes relevant in a different context, it depends which side you are looking at it from.

MR. HOSKINS: In my submission it will come up later ----

THE CHAIRMAN: I understand that.

MR. HOSKINS: -- if the Tribunal has jurisdiction, that will be what the appeal will be about.
THE CHAIRMAN: No, I understand that.
MR. HOSKINS: But I think it is more likely it would come up on Judicial Review, because if it was a true administrative priority decision the Tribunal will not have jurisdiction, it is slightly circular.
THE CHAIRMAN: That is a difficulty with this case.
MR. HOSKINS: You sort of chase your tail sometimes.
THE CHAIRMAN: Thank you very much.
(The Tribunal confer)
THE CHAIRMAN: Mr. Shovell, I do not know if that helped in understanding how the OFT were putting their submissions, anyway?
MR. SHOVELL: Not an enormous amount, but it is in our bundle, "hardcore" is tab 5, so I will probably pick it up then.
THE CHAIRMAN: Get into it.
MR. SHOVELL: Yes, based on the contemporaneous documents rather than the argument.
THE CHAIRMAN: Mr. Shovell, I think now is the time you are going to start.
MR. SHOVELL: Thank you, madam Chairman, members of the Tribunal. You asked to discuss the relevance of these documents. First, they are a small extraction of 12 files of facts, but the primary relevance is very similar to what ----
THE CHAIRMAN: Mr. Shovell, do you think you could keep you voice up a bit?
MR. SHOVELL: Sorry. The primary relevance is whether the decision maker made a non-infringement decision and part of that matrix is the facts before them of infringement and how those facts were understood, and therefore I propose to do a very quick summary of those facts, how the case team summarised those facts to the decision maker – that is tab.1 – and then to move on to some points of principle as to how that was then interpreted by the OFT, that is the basis on which they are included in tab 1. As mentioned earlier, they are already part of the documents that all the parties have seen before. Should I proceed?
THE CHAIRMAN: Yes.
MR. SHOVELL: I understand the Tribunal has had an opportunity to at least skim through these but it is just a chronological summary of what the cartel looked like. I should probably say in relation to something Mr. Hoskins said earlier about the OFT not requiring this to be considered as hardcore, or not hardcore, up front. The only factual clarification I can give to that is that we met the branch director at an early stage of the investigation and they viewed Annexe 8.4 as effectively an invitation to commit a cartel boycott, and at the time

the discussion was, "Would the OFT be able to uncover sufficient evidence to prove that that invitation for a cartel boycott was accepted?" So, at the start of the investigation we understood that that was a cartel position, and the word 'cartel' was used, and therefore, in the jargon that we now understand, we thought that the OFT did consider this to be potentially hardcore cartel activity. Unfortunately, three years after the event, that is about as much clarification as I can give.

Very briefly then, skimming through ----

THE CHAIRMAN: So, the first document ----

MR. SHOVELL: The first document is a telephone note of a conversation ----

THE CHAIRMAN: Whose telephone note? Sorry?

MR. SHOVELL: This is my telephone note. This is a conference call between Tom Casey (who was the Head of M&A at Global Crossing), Justin O'Neill (who was an in-house lawyer at Global Crossing) ---- They were both, I think, in west coast USA ---- My initials are highlighted as KS. I was in London. MW - Mike Wilson. JS - John Sinclair, were both in Scotland. The reason why the note is as messy as it is is that I suspect this call was made from my home in order to accommodate west coast USA. It was probably fairly late, and this note, as can be seen by its spidery nature, is jottings that were made as people were speaking. The highlighted passage was extremely relevant to Cityhook commercially. Our invention was intended to be facilitating ---- to make it easier and quicker to lay sub-sea cables. So we approached Global Crossing with a view to them becoming a client. So, when they told us that they want to be the only sub-sea player to control the economics by making it expensive, that was fairly fundamental commercial view which meant that we would not be able to sell them our technology because they did not want it to be available to their competitors. That is part of the commercial background as to why Cityhook then felt it was necessary to try and seek agreements with landowners because owners of Foreshore*** could decide what they thought was best use of their land and good for the economy as a whole. It was a possibility to re-table the invention in a different way. So, this was material to Cityhook's understanding of how the incumbent's, Telecoms operators, would behave. I note from Global Crossing's submissions that they do not accept that Mr. Tom Casey made those remarks. I believe that is the language that they use. They do not deny that he made those remarks. All I can say is that at the time I was a partner at a leading international accounting firm. That is my contemporaneous note. There was no litigation or dispute. This is November 1999. We were just trying to explore a business relationship. To the extent that it is relevant, it is a contemporaneous note. No more than that.

THE CHAIRMAN: Do you say that has any relevance to the question of admissibility or to the question of disclosure?

MR. SHOVELL: I would say collectively all of these are relevant because it explains what the case team thought there was on the basis of infringement and we pleaded from the outset that our confusion with the OFT's handling of this is that we did not understand how they went from apparently proceeding to an SO, to then making a non-infringement decision, or, as they say, an administrative decision. Therefore, having an understanding of the facts that were before Mr. Smith (if he was the decision maker) is extremely relevant to understanding how he decided not to proceed with the case. (After a pause): You sound slightly unpersuaded.

Can I reflect for a few moments if there is another way to express why we see this as relevant and maybe make it clearer? (After a pause): I guess I cannot put it more simply than: the decision whether to close a file, or not, is based on your understanding of the case. We propose basically to run through half a dozen documents that show what Mr. Smith's understanding of the case was at the time, and therefore that is relevant to how and why he made his decision. We then go on to this being particularly important in relation to the objects case. We say that it was an objects infringement, and that that is evidenced from the documents. The OFT say that you should not infer that there was an objects decision made. We will be saying later on in the submission that an objects decision should be inferred and therefore I wanted to present a selection of the documents that cause me to think that an objects decision, one way or the other, was the rational thing for a decision maker to be thinking about at the time - if that helps with why we thought they were relevant.

THE CHAIRMAN: I think I understand where you are coming from.

MR. SHOVELL: That sounds like progress at least. (After a pause): Should I proceed? The second document is discussing a meeting that took place in Level 3 on 29 March. By this time the telecoms operators know that we have an agreement with the Duchy of Cornwall and they have been told that they have to discuss how to land their cables in Cornwall with Cityhook. On 29 March we have been told by Level 3's representative on the CPC - which is the organisation that the OFT centred its cartel investigation into ----- We have been told that he was told he would not be coming to the meeting with Cityhook the following morning; that Level 3 did not want the industry to lose control to an authority - and by that they mean the Duchy, as someone who owns Foreshore over which they have landing rights. They did not want Cityhook getting in first with its technology and signing up a customer. They would have known at that stage that we were talking to the various other

parties, and it is factually the case at the time that we were talking to Global Crossing about landing their Irish cable. So, Level; 3 would have been close discussion with Global Crossing because Global Crossing had just bought a 50 percent share in Level 3's cable. So, it is logical that they would have understood what they were doing in Cornwall.

It is a matter that is referred to later. Just to be clear, the Level 3 representative on the CPC was promoted four months after this. So, there can be no discussion that Level 3 are in some way disappointed or unhappy with the fact that he sent out an e-mail which is about three tabs further on in the bundle. It is relevant to the building of the cartel perhaps that Level 3's representative was at BT up until just before January 2000, and we say that Level 3 and BT built the cartel initially together. It is relevant evidence that he was previously at BT two or three months earlier.

The final piece on this page: when we made a complaint to the CEO of Level 3, which we come to later, suggesting it was anti-trust and that the behaviour ought to be stopped the reaction of Level 3 was not one of contrition and corporate governance - it was one of, "Let's put them back in their box. Let's get rid of these people". We will explain in about four documents' time what they did to 'get rid of these people'. Their ambition at the time was to corner the market.

So, that was on 29th. We roll forward to a meeting that started on the morning of 30th. If I recollect, it started at 11.00 a.m. This document is Mike Wilson's contemporaneous file note of that meeting. In the bundle is his handwritten note. This is a verbatim type-up of that handwritten note. That may explain to you why it is jotted all over the place. He has tried to mirror, as closely as possible, exactly what the handwritten note looks like.

In that note BT explain that the reason why they operate with the UK CPC - because we said, "Well, you've signed a non-disclosure agreement. You should be acting individually" ---- He said, "Well, the UK CPC - we act against what we see on the other side of the fence. The Duchy and Crown are cartels of one". That is the note that he said. The next page is my note of that meeting which I sent to the Duchy. It mirrors Mr. Wilson's note. It includes a quote which is elsewhere evidenced: "If one member of the UK CPC took a public stance on the issue, the other CPC members would not undermine them by opposing it." The reason why BT told me that is that I suggested to him that one of the other CPC members was in negotiations with us, and he suggested, "Well, that's not going to be the case because the UPC will obstruct that". The second piece was his justification: "We see the Crown and Duchy each as cartels of one. So we have to stand together and operate that way to face up to them." That mirrors the note on the previous page. We had a meeting with Level 3 in the

afternoon of 30th March and as we now understand Level 3's plan hatched on 29th March was that the sender of this email from Level 3 not attend the meeting, instead he says out an email to the entire industry which includes the highlighted language:

> "The real danger it may quickly spread to other beach landings, which is a concern that BT had expressed to us shortly before. If approached by the Cityhook please resist any attempts to be persuaded by them, until such time as we can discuss at a UKCPC meeting. On no account should any deal be struck."

Mr. Osborne of BT confirmed that he would speak to the UKCPC after the meeting with us finished on the morning. The person who sent this email has confirmed that he was indeed telephone by BT before sending this email, and therefore it is not a surprise that this email mirrors BT's intentions

MR. BARLING: Mr. Shovell is now glossing these documents. There is nothing in the documents that actually revealed what he just said and there is a limit. Obviously what he has been saying now is broadly what BT submitted that the only thing that is actually recorded about BT in writing is that BT is complaining about an arrangement between the Duchy and the Crown. But Mr. Shovell has just been making remarks about a document – I do not know the number, but the one headed "3rd April 2000 briefing to the Duchy", we do not know who is making these assertions in the document under the heading "Reaction of cable companies to the Duchy notification, because it is not attributed to anyone, although there are quotations, we do not know who the quotations are from and he has now just said something about BT that is not revealed in the document. There must be a limit to the leeway that he needs to be given.

THE CHAIRMAN: Well, as I understood **this** document, which is p.5, I am page numbering it so we know which document is which, the one that is headed "Annex 8.4", it is an email from level 3, and it is to all the people there of which one is Mike Osborne BT Com

MR. BARLING: And then Mr. Shovell has given some narrative that you do not read from this document, as it were in passing, he is not drawing the document to your attention, he is actually giving evidence at the moment, as I see it, about other matters, that you cannot deduce from the document, but which he asserts. It is very unhelpful, because we have had no warning of this and we are not in a position to deal with it. We would invite the Tribunal actually, whether one lets him carry on a bit or not, to indicate that it is not a satisfactory way of proceeding and one cannot really take notice of this unsworn evidence not supported by the documents, and it is entirely irrelevant to the issues that the Tribunal has to grapple

with, namely, admissibility. We know what his applications are, they are set out in the notice of appeal to which he should refer. Anyway, I make the point, madam.

THE CHAIRMAN: Thank you.

MR. SHOVELL: Madam Chairman, can I ask for some guidance on this point? Maybe a good example is to discuss one of the points he makes. On the page before the email, the one highlighted which is 3 4 "Briefing to Duchy", I have confirmed that that is a document that I prepared and emailed. I have referred to the quotes and he is quite correct that in this email, in this note it does not specify which company is responsible for those quotes. If you do not want me to say which company was responsible for those quotes, that I understand, if that is how you wish to proceed, but I was pointing out that the quote I referred to was almost identical to the quote on the previous page which is explicitly a BT meeting. So I thought it was fairly minor, and generally helpful to link the two and that is why I put them both in the file, so I do not think there is any great controversy that I intended that quote to be BT, because you have a contemporaneous file not the page before that shows that that was BT. But if there is any further guidance you wish to give clearly it will be taken heed of.

(The Tribunal confer)

THE CHAIRMAN: Mr. Shovell, as I understand it, what these documents do and what you are trying to show us is what case you put before the OFT, whether that case can be made out is not relevant to this, and we are not going into that.

MR. SHOVELL: I understand.

THE CHAIRMAN: Therefore, this is what you say a company did or did not do. Insofar as you are telling us something which is not in the documents, that probably is not appropriate.

MR. SHOVELL: Understood.

THE CHAIRMAN: But that is as far as this goes. How helpful that is to us actually, because we have read the materials, I am not sure. But if you want to present it that way I am not going to stop you.

MISS MURPHY: Madam, if I might just ask one more thing. I think it would help just to take my respective friend's point, that if, when Mr. Shovell, is going through these papers, he could identify or preface his comments on the documents as to their relevance to the issue before the Tribunal today.

THE CHAIRMAN: I think he has done that. What he has said is we have to understand the background of his complaint.

MISS MURPHY: I understand that, madam, but how much background do we need on the issue of admissibility.

THE CHAIRMAN: That is all these documents, as I understand it, go to. Mr. Shovell, I do not want to ----

MR. SHOVELL: I understand.

THE CHAIRMAN: It is not easy to prepare a case and present your arguments, and I do not want to take you out of your way of thinking, but as I understand it these documents only go to showing what your complaint was to the OFT.

MR. SHOVELL: The documents go to our understanding of why the case team thought that there was an object infringement and therefore the relevance of whether there was a non-infringement decision that should be inferred on the object decision and that is the basis of its relevance.

THE CHAIRMAN: These documents can only be in relation to the information before that you gave them – right?

MR. SHOVELL: Correct. All these documents were in the possession of the OFT, if that is not clear.

THE CHAIRMAN: Yes.

MR. SHOVELL: I am sorry, should I proceed, or is there a further question?

THE CHAIRMAN: Proceed. You have heard what is being said, you have to be careful that you do not give further evidence – I think we all understand now that this is your presentation of what you presented to the OFT.

MR. SHOVELL: This is an attempted short summary of what was presented to the OFT. I understand the need to restrict the documents that is in front, and I will do so on the rest of this small sect ion.

THE CHAIRMAN: Any way you were on p.5, which says "Annex 8.4" at the top.

MR. SHOVELL: Understood. That then links to the OFT's reaction to this document the branch director saying it was an invitation to boycott, and the question was whether there was evidence, whether that invitation was accepted.

On the next page is an example of the evidence that the invitation was accepted. The OFT have notes of the meeting that took place on about Monday, 3rd April, the Level 3 email was sent on Thursday, 30th, so it is almost two working days later.

The meeting that took place was between Level 3, BT, Cable & Wireless and Global Crossing, and we know that they discussed the Cityhook email and what was going on in Cornwall.

We then know from the next document in the public domain that ----

THE CHAIRMAN: Which document are you talking about? This has to get on the transcript that is why I am trying to number the pages. You need to refer to which document.

MR. SHOVELL: Annex 8.5. The CPC met Level 3, BT, Global Crossing and Cable & Wireless met to discuss the Level 3 email. It says "To discuss Cityhook and the Level 3 email". The next one, which is marked "Annex 8.6" on the top right, which is about three working days after the Level 3 email we can see from the public domain that BT, Global Crossing and Level 3 were all being represented by Level 3, had given Level 3 authority to speak for all three companies and so as an outshot from the meeting that they had, they had given Level 3 authority to find an alternative landing. That authority was given and so the net effect of what happened between – well we do not know when the dialogue started between the different UKCPC members, but we know that by 6th April they are well on the way to having secured the landing, which avoided having to cross a Duchy beach and therefore avoided having to use Cityhook.

MISS MURPHY: Madam, sorry to interrupt, can I point out the dangers of taking an uncorroborated newspaper report as evidence of fact of the contents.

THE CHAIRMAN: Sorry, none of this is evidence, in fact. It is not proved, these are the allegations, if I can put it that way, that were being made, that were before the OFT, that is all that this goes to.

MISS MURPHY: As long as we can clarify that is what is being ----

THE CHAIRMAN: That is why I said earlier that that is all this goes to. I do not think it is very helpful just to keep interrupting because it will take longer.

MISS MURPHY: Okay.

MR. SHOVELL: The next document is a contemporaneous file note of a conversation with David Brown. I am not sure if the piece of paper describes who he is, or what institution he has – it is in the documents, do you wish me to say who David Brown is?

THE CHAIRMAN: Well, who is David Brown?

MR. SHOVELL: Sorry, I am being cautious to not say anything beyond the documents. My recollection is that he was the CEO of North Cornwall District Council that was one of the parties they needed to get planning clearance from to land their cables. On 7th April his remark was "This cartel shows contempt for communities and is likely ----"

THE CHAIRMAN: Whose note is this?

MR. SHOVELL: This is my note again of the telephone conversation with David Brown on 7th April 2000. I cannot say what we said, he said "Local Government tried to get sharing of

masts, but they wouldn't share masts and central Government removed masts from planning permission which thereby meant that local Government no longer had any right to refuse anything to them.

Turning to the next page, the UKCPC had secured an alternative landing site collectively, had avoided the Duchy beach and it sent an email telling the industry not to use Cityhook or the Duchy. Cityhook sent a complaint to the CEO of Level 3 on 2nd May 2000, the full complaint is in the documents, but this particular page just as a marker. "Cityhook is now faced by boycott driven by senior UK Level 3 employees. It is natural to raise this at main Board level and if that fails seek support and remedy in the public domain from regulators and the courts". So on 2nd May Cityhook asked the CEO of Level 3 – I will not say what we asked other than is in the document, we sent this fax and intimated regulatory action.

Three working days later the next document, which is marked Annexe 8.8. The company funding Cityhook, which is CNS, mobilised their vessel, expecting a letter of intent, and then Alcaltel refused to give that letter of intent. The explanation given when CNS contacted Paul Woodward of Alcatel (and it is highlighted here) was, "Cityhook is causing a lot of waves. You'd better make a statement to the industry because there are e-mails flying about at a very high level between Tyco and ASN". Tyco were Level 3's installation contractors in Cornwall. ASN were installation contractors for Global Crossing. So, these were the other parties that were involved in Cornwall.

Turning to the next sheet on 11 May, this is Tyco. This was a meeting between the joint venture partner of CNS and they were told they would get no work if associated with CNS. "These guys are doing something with government agencies which pisses us off" - please forgive their language. Cityhook was the problem.

So, within three days of our complaint to the CEO of Level 3, Alcatel has taken action against the company funding Cityhook, and another eight days later so has Tyco.

That links back to the document earlier in the file - the document marked 8.5. I apologise - I have not got your numbering. That was Level 3's whistle-blower's admission as to what had taken place ----

THE CHAIRMAN: I have that as p.6 now.

MR. SHOVELL: Their attitude was to get rid of these people. So, these were the documents that we presented to show that that is what we thought had happened.

The next document is an e-mail dated 3 September, 2000. There have been some redactions because this was a document involving legal advice. However, the highlighted text at the bottom is that lawyers were to start drafting the complaint to regulators immediately, and

the response of the company that was backing CNS was, "If you do that, ASN, GMS and Tyco will be all over me like a damp rash". As I said, I am trying not to expand on the context.

That is the last factual document from the interveners in this section, which I am sure they will be pleased to hear.

There is then my note of a conversation with a member of the OFT case team on 9 August, 2005 (in File 2). They are explaining that the branch director's comments are now incorporated; that the panel review has received the SOO in its entirety on 8 August; that they are scheduled to have eight weeks; that they expect to issue the SOO in the middle of November at the earliest, or January 2006 at the latest. In their short summary the case team agree that this is an example of big companies acting together against small companies; that it is clear-cut; and that they want a final infringement decision in 2006.

THE CHAIRMAN: So, what decision in 2006? It does not say what that decision would be?

MR. SHOVELL: Apologies. I should not elaborate on the document. I think in our original notice of appeal we had inserted those extra words, but I will check that and maybe revert later.

That is the factual background under which ---- It is a short summary of the factual background under which we thought, and expected, that the OFT would be issuing an SO and pursuing an objects case. These documents are not discussing the effect on markets; they are not discussing anything of more complexity. They are just saying that when we started this investigation this was the evidence in our possession. Clearly the OFT collected a great deal of evidence from other sources, but this was our evidence of why we thought it was reasonable for the OFT to conclude that the object of these parties was to prevent competition, and Cityhook to enter the cable landing market.

Madam Chairman, would it be helpful if we just paused to number the items in Tab 2? I apologise. I should have done this last night before photocopying these things.

THE CHAIRMAN: Yes. It starts at p.14.

MR. SHOVELL: I think I ends at p.32 if I have got my numbering right.

THE CHAIRMAN: As I understand it, what you have just highlighted in Divider 1 is what you are saying is the material you gave to the OFT was related to object - not effect. Your complaint was object - not effect.

MR. SHOVELL: As I now understand it, that was primarily the basis of our complaint, yes.

(After a pause): We also went on to say that we thought the motivation - and, obviously, I am not sure whether I am allowed to discuss this or not now ----- If it is not referring to

documents, am I allowed to say what ---- Madam Chairman, I am slightly struggling as to what is the difference between me discussing evidence which is not before you (which I am not allowed to do) or discussing, if you like, the argument as to what we complained about.

THE CHAIRMAN: As I understand it, the reason why you have shown us the documents in Divider 1 is to show us that your complaint was in relation to object.

MR. SHOVELL: Those documents are principally in relation to object, absolutely.

THE CHAIRMAN: And that your complaint was not an effects complaint - it was an objects complaint. That is how you are putting it.

MR. SHOVELL: The complaint as originally filed ---- It is a document in the files. It said 'both object and effect'. The evidence that we had in our possession was almost entirely object-based because by default we were prevented from entering the market. So, we pleaded both. We gave explanations as to why the parties had as its object to stifle Cityhook from entering. We thought that that then drifted into the territory of effects. We thought that us coming into the market would facilitate competition, lower barriers to entry, and then that leads into the whole effects debate. But, the vast majority of the evidence that we presented to the OFT, as we now understand it, was in relation to the objects case.

THE CHAIRMAN: Thank you. Page 14 - Divider 2. Is that where you want to go next?

MR. SHOVELL: Yes. The relevance ----

THE CHAIRMAN: This is a document from CEDR.

MR. SHOVELL: That is correct. It is just off the internet, and I only intend to make some sort of small quick references through these. The relevance of this section is that we have presented all this evidence as to why we thought there is an object infringement. I believe it is agreed by the OFT that the case team thought the same thing. So, we want to track how we think we would have expected that to be handled by the OFT in its evaluation process and a case closure letter. We are not saying that for the sake of criticism or scoring points. We are saying that if we find that the OFT have handled that strangely, we think it is appropriate for the CAT to make appropriate inferences as to why they may have done that. So, I am not primarily focused on criticising for the sake of it. I understand that that would be more a judicial review kind of discussion. But, the relevance is: what inferences should be and the CAT draw from how the OFT has handled the process? Our original notice of appeal said that we did not understand it at all, and this section explains how we feel the OFT should have handled that process and how they did not.

My background is as an accountant, and therefore I have quoted something which is relevant to an accountancy process that I think has an analogy. It is clearly from how the

OFT has to handle itself, but it has shaped my thinking. So, for better or for worse, the Tribunal will at least understand why we hold the view t hat we hold.

Very briefly, in an expert determination an accountant sits - or other professional who is not necessarily a lawyer (and not a lawyer generally) - in a quasi-judicial capacity and one of the principles is whether they give reasons for their determination. Here, "CEDR explains giving reasons for your determination may make it more attractive". As I understand it, that is attractive to the parties so that they have an understanding of how the dispute has been resolved.

Page 15 just points out at the bottom that the expert is guided by whether he has agreed that he should, or should not, provide reasons.

Page 16 - this is a note taken off the internet - Pinsent Masons. They are making a common-sense point. "A reasoned decision may increase the risk of the determination being challenged in courts on the grounds of manifest error. It is then easier to show that an error is manifest or a mistake is obvious." The simple inference we just want to draw is that when an accountant is making an expert determination, he understands that by giving detailed reasons, he increases the chance of the parties challenging his decision, but having agreed to give detailed reasons, that is what he should do.

At p.17 we go to see if the OFT has similar guidance to an accountant doing an expert determination. They say the purpose of their provisional decision, their letter is to set out the reasons for these provisional decisions and give the interested parties an opportunity to comment. The case closure letter says something similar. Page 18, case closure letter says the same thing, the purpose of this letter is to set out the reasons for these administrative decisions. Page 19 they expand in an annex. They say:

> "The OFT believes in the interest of transparency that it is necessary and proportionate for it to explain the detailed context of its administrative decisions. This is particularly so given the duration of the pertinent investigation."

They refer to an OFT guideline, to which we have attached some extracts at p.20. It says that it will consult the parties and the reason why you do that is to inform that decision making is robust.

On p.21 it goes further and says: "The provisional closure letters will set out the OFT's principal reasons." And it expands: "In investigations, which are at an advanced stage, the provisional closure letters are likely to contain more detailed reasoning. On p.22 it explains the final closure letter will explain why the additional information provided has not led the

OFT to change its view, and it goes on: "The level of detail given will depend on the case and the nature of the additional information provided."

So to understand how the OFT should have gone about this process, I have started by a process I have some experience of and the guidelines seem to be extremely similar. The OFT says it will give reasons, it will give detailed reasons and the further the case has been under investigation the more detail it will give to enable the parties to understand how it has made its decision so that they can be involved in the consultation process. On p.23 we have the provisional closure letter. Both the Cityhook case and the collective setting case would be run as object and effect infringements of the Act. There, and nowhere else in the letter, there is no clue that there has been an enormous technical debate within the OFT as to whether this is an object infringement or not. Certainly as a lay party we had no idea that there was a technicality that was fundamental as to whether the OFT was taking this case forward and I will come to a document later that this Tribunal picked up this issue because of something that was said in the case closure letter, which did not appear in this letter.

We say, having a duty to give full reasons to involve parties in the consultation process so that the decision is robust, they should have explained exactly why they made their decision, yet the OFT did not do so, they did not give us any understanding that there was a significant legal technicality that was under discussion. We refer to this in our skeleton, as to how many days this technicality was under discussion – 165 days is the figure, from memory, and that is just up to the January provisional letter. There is another five months before the final closure letter, so that is about 320 days in total in which the OFT decided it did not wish to express a view on this legal technicality. We will be reverting to that later.

In addition to the OFT not telling us that there was a technicality which is fundamental to their decision on the objects' case, on p.24, when an MP wrote to the OFT saying that he did not understand their decision and he wanted the OFT to explain to him why they had made their decision. I am sorry, I should read what it says rather than summarise.

> "I am astonished to hear the Office of Fair Trading has now indicated its intention to dismiss this matter. I therefore call you to reverse this decision."

On p.25 there is a reply from the CEO of the OFT. He says that the full reasons for this decision are contained in the OFT letter dated 24th January. He then has a polite fob-off, excuse me, he then says: "Once we have completed its review of the responses, we will write to Cityhook and other interested parties giving the reasons for our conclusions."

We say that the OFT did not give its reasons for making its decision, having failed to include the debate about the technicality on objects, they failed to give the parties sufficient

information to understand, and they failed to give Cityhook sufficient information to properly contribute in the consultation process. We say they did the same thing to the MP that wrote to them, Sir Alex Salmond. Mr. Salmond replied to Mr. Fingelton's letter that gave him no clarification, and just said the reasons were in the case closure letter. He says:

> "Unfortunately, the context of your response does little to illuminate me as to why, in what has been identified as a prima facie anti-trust case it is generating some 160,000 pages of evidence arising from several years' work, the OFT should now decide that it is appropriate to abandon this case."

Page 27 is an extract of Mr. Vincent Smith's reply. In that reply he says: "These alternative investigations included cases involving hardcore cartel-type behaviour. That could not be progressed in a timely manner."

The implication therefore is that the Cityhook case and the Wayleaves case were not hardcore cartel-type behaviour. Again, Mr. Smith's letter does not disclose to Mr. Salmond that there was a fundamental technicality about the objects' case which we say was wrong, he should have disclosed it there.

Then we come to the final case closure letter p.28. A more thorough analysis of the effect of the parties' behaviour on competition is cited as a particular reason for the OFT to have made its decision. Suddenly the word "objects" has disappeared, whereas the word "objects" was in the provisional case closure letter. It says: "Neither is clearly a hardcore infringement …" p.29. As discussed with Mr. Hoskins earlier , sometimes the OFT does not include the word "clearly" sometimes it does.

On page 30, a letter from Mr. Salmond to the OFT yesterday, 29th January. He had been provided with the OFT's documents, witness statements effectively a balanced position for him to make up his own mind.

> "This legal technicality was concealed from the provisional and final case closure letters. I find this disturbing as it begs the question how the consultation process from January to June 2006 could have any merit if the OFT had concealed the key issue."

That is the same point that we made earlier, that having concealed a key issue from Cityhook, how could we contribute to the consultation process?

I am not sure how much of this should be read, he is entitled to his own views, but conversely the Tribunal is entitled to its own view. He notes that Mr. Smith's letters do not conceal this technicality. He notes that Mr. Collins' letter to us, to Cityhook on 28th May also conceals this technicality. That Dr. Fingleton's letter to Mr. Salmond of 3rd March

asserts that the reasons for the case closure were included in the OFT letter to Cityhook, but he omits any reference to this legal technicality.

He infers: "It seems to me that the OFT must have reached a negative conclusion on this technicality.

On p.31 he goes on:

> "This would perhaps explain the OFT's responses to me, but would not excuse its conduct. I would be gravely concerned if it should come to light that senior OFT executives had collectively agreed to conceal such fundamental information in the provision and final case closure letters. I am also gravely disturbed if it should transpire that t hose OFT executives should also have attempted to thwart my own contribution to the consultation."

which is effectively the similar point that we were putting earlier, that by not disclosing the key piece, the consultation process to our mind was effectively a clear sham.

However, having mentioned it in the case closure letter at p.32 we had attached a copy of the transcript from the first hearing before the CAT, where we are very grateful, madam Chairman, that the Tribunal raised the point about all the talk in the case closure letter seemed to be about effect , and why could the OFT have not just proceeded with the object category? The Tribunal also raised the point about hard core infringement seeking to clarify.

There was an additional point about concurrency regulations and I understand the OFT has since confirmed they did not consider transferring it to OFCOM, and we are not sure if there are any further consequences.

Mr. Hoskins, at that hearing, said he would deal with the Tribunal's points about object and hardcore, but having skim read the transcript I cannot find any reference to him having done so. That is the end of section 2.

THE CHAIRMAN: Just so that everybody is absolutely clear as to what you are saying, can you just tell us what you say the legal technicality is?

MR. SHOVELL: Well there may be two. The first is our case cannot be treated as an objects' case – I had better reflect before summarising this, because this is in writing in a number of places. (After a pause) It is in the next tab, I am just going to flick through it to find the definition.

THE CHAIRMAN: All right.

MR. SHOVELL: (After a pause) The technicality as defined by Mr. Smith at VS2, at para.13 is:

"A collective refusal to purchase which is not organised as part of an underlying cartel, or does not target a direct competitor of the parties, does not have as its object the restriction of competition. It should therefore be characterised on an effects based rather than an objects based infringement. This view was based on an analysis of case law and guidance."

The case team disagreed. That is the technical point as best we understand it that the OFT was wrestling with. If the Tribunal were to infer that that is indeed the decision that the OFT had come to, or even if it was material that it should have been the case it should have been disclosed in the provisional case closure letter. We make the inference that it having been concealed from the provisional case closure letter and concealed from all the correspondence intervening is further evidence that that was in fact their decision, and the OFT wish to shield the fact that that was their decision.

On the record, as professional people it is difficult to explain how you feel about these things. It seems to be a hiding to nothing, but if an accountant had entered into an agreement with parties that he would provide detailed reasons in his determination, and then in submitting his determination concealed possibly the most important issue that he faced in making his decision, if the parties appealed that decision I would expect sanction, and I would also expect the accountant to have difficulty explaining his conduct to his own disciplinary board. That being the case, I do not understand how the OFT in their provisional case closure letter are allowed to omit that under their own guidelines without that being viewed as gross misconduct. Given that I have never been employed by the OFT and do not understand any more about their processes other than from their own guidelines, I can only say that in my understanding it would amount to gross misconduct. That is a judicial review matter, I suppose. But, our inference is not that that took place - it is, "Why did that take place? Why was this issue omitted?" We say it is because that was fundamentally the basis of their decision, and what came afterwards was perhaps a retrospective justification having already made that decision. We will come back to that later because there is CAT case law and further evidence to discuss.

We next come on to Tab 3, which is about the previous Chairman's view. This was picked up on earlier, but we are going to re-raise it. Should be number the pages again?

THE CHAIRMAN: I have got them from p.33 to p.40.

MR. TURNER: Madam, our bundles seem to be slightly ----- not in disarray ---- That would be wrong. But, in different order. It would be very helpful if Mr. Shovell could, when going

to a particular document, just describe it very briefly - possibly the title - and then we can all follow it through and number it. We have had to box and cox slightly.

THE CHAIRMAN: Would it be helpful if we just get your bundle into order? The first document has the number 72118217 on top of it. That I have as p.33. The next document is a Cityhook document, and it is Cityhook NFA 23 August, 2006 - p.34. Then I have something headed VS1, and it is para. 2 to 5. Then VS2 - paras. 21 to 24. Then Cityhook's skeleton - 9 January, 2007 - paras. 21 to 25. Then G - disclosure requests - 41 to 43. That is p.38. Then we have a letter from the Competition Appeal Tribunal which is p.39 and a request for further disclosure, which is 6 to 11, which is p.40.

Mr. Shovell, you need now only refer to the page numbers. I hope that makes it easier.

MR. SHOVELL: It certainly does. It would have made it easier had I spent more time in Prontaprint yesterday. Six copies was quite a bit of time to organise as it was.

This is a file note of a conversation with the OFT case team on 13 October, 2005. This is my file note again. Again, as you can see from the scrawly nature of it, it is contemporaneous during a telephone call. The highlighted passages ---- This is the day of the CRP, as I understand it. So, this would have been in the afternoon, speaking to a member of the case team. I am restricting myself to what appears in writing here, as requested. There is highlighted text on the right-hand side: "Old Chairman was very supportive of one argument not always made". The other text is that they have some concerns that we do not necessarily share", and then it says, "Policy. How much can OFT take risk?"

MR. TURNER: Madam, before leaving that page, could Mr. Shovell please clarify what the first indent half-way down the page says and means?

MR. SHOVELL: Do you mean the one that starts with 'Some concerns'? "Some concerns plus a few queries. Six ----" That might say 'hours'. I am not sure. I do not know if that is referring to ---- I should not say what it is referring to. I think that is 'six [something] Responses given at meeting by case team.' Shall I continue with the rest of the page.

MR. TURNER: My question was what that means, if you can recall it. Some concerns and a few questions ----?

MR. SHOVELL: Can I ask a question, Madam Chairman? There seems to be a change of policy by the interveners that when I wish to give explanation and expansion on documents I am shut down, but when the interveners wish me to give expansion on documents it is open season. Can I ask that one policy be applied for all documents?

MR. TURNER: I do not mean to be out of turn. This is Mr. Shovell's own note, and that was the only reason that I asked that he might cast light on what he meant when he wrote it.

MR. SHOVELL: Madam Chairman, all the previous ones were also my own note, and yet the parties did not wish me to expand then. I am happy to be guided by the Tribunal, as before.

THE CHAIRMAN: (After a pause): The Tribunal cannot see why it would be relevant in the admissibility application. But, the Tribunal has its own question, which is: if you look at the balloon above ---- the balloon on the right-hand side about the Chairman ----

MR. SHOVELL: There are two. One that says, "He left 30.9" and the one above that is "MB 28 October. Maternity leave".

THE CHAIRMAN: The one below that is ----?

MR. SHOVELL: "Left 30/9." That is referring to the date when the old Chairman left, as I ---- I am trying very hard not to read anything that is not here. If it assists the Tribunal, the next page, p.34 ---- We pleaded this point in our original notice of appeal. "The previous OFT Chairman was very supportive of one argument but the new CEO, John Singleton, and/or new Director of Competition Enforcement, Vincent Smith, was inclined not to pursue that argument. They have concerns that we don't necessarily share." Our question remains ---- Well, I should keep going through the documents. I will ask a question at the end.

So, we pleaded that the old Chairman was supportive of a particular argument. We attached in evidence in File 2 the contemporaneous file note as to why we believed that the old Chairman was very supportive of one argument, and not always made. So, did Vincent Smith, under his duty of candour, answer the point?

VS1 is at p.35. That is the only reference I can find to the previous Chairman, Sir John Vickers. Mr. Smith said that he was responsible to him, and not subsequently to the OFT's new Chief Executive, Dr. John Singleton. So, I cannot find a reference in VS1 as to where he discusses what this argument is.

The next page, VS2, is p.36. He says, "I do not intend to respond to all Cityhook's attempts to identify what further specific documents might exist. I do not believe that such an exercise is necessary or appropriate". So, I cannot find any reference in VS2 as to whether he answered the question. So, we re-raised the issue on 9 January (p.37). "The old Chairman left 30/9. Was very supportive of one argument. Not always made. Cityhook repeats its request for this point to be clarified. Was this the technical objects point?"

Page 38. The OFT reply again. There is no basis for Cityhook's further disclosure request. So, the OFT declined again to comment on this. We are tremendously grateful to the Competition Appeal Tribunal - the letter of 24 January - which drew the parties' attention to

the Tweed judgment, which we intend to come to after this matter. The OFT had another opportunity to comment on this point, and their comment (on p.40) is, "A personal view expressed by a previous Chairman of the OFT prior to 30 September, 2005 is not relevant to the final contested decision adopted in June". The OFT have repeated that point of view. Well, the first question is ---- "The old Chairman was very supportive of one argument not always made" ----

THE CHAIRMAN: Mr. Shovell, there are two problems here. The first is that we already ruled on this.

MR. SHOVELL: Sorry?

THE CHAIRMAN: We have already, I think, ruled on this in the disclosure decision.

MR. SHOVELL: No, we did not ask for a document. I am not sure this even featured in the disclosure request. This was previously pleaded. Sorry. I did not mean to interrupt.

THE CHAIRMAN: We need to see whether we did rule on it. The second question is: why is it relevant to the admissibility?

MR. SHOVELL: The reason why it is relevant to the admissibility is that we do not know what this point is because we have asked five times roughly and we have not been told ---- or, we have asked a number of times. Let us infer that it was the objects technicality - that the old Chairman was willing to treat this as an objects case and that was his interpretation of the case law, and the case team had proceeded for a number of years and submitted an SO on that basis. How that critical opinion which was not as Mr. Hoskins described 'a personal opinion' ---- It was the old Chairman's professional opinion having been shepherding the case for a number of years. How his opinion was overturned does seem to me very relevant because it is natural that the Tribunal would wish to make inferences as to what the decision maker had done in dealing with the previous Chairman's opinion. If that is indeed the case, the matter on which he expressed an opinion.

So, your question is, "How is it relevant?" I have to make an assumption that that is what it is - that it is the technical objects case point. I then draw to your attention that that point was omitted from the closure letter ... the provisional closure letter, omitted from the correspondence with Mr. Salmond ... It was explained in VS1 after the Tribunal had required the OFT to explain the point. It is the most fundamental issue in our case. How is that it is still not explained by the OFT? What inference is it reasonable to draw from the fact that the OFT refuses to place on record that that was the issue?

THE CHAIRMAN: But whether or not the old Chairman had mentioned it, or not, at an earlier stage, we now know what is in Mr. Vincent Smith's evidence ----

MR. SHOVELL: Which does not address how the view of the old Chairman was discussed.

THE CHAIRMAN: But why is the view of the old Chairman relevant? What is relevant is whether they made a decision at the time they made it - not whether somebody thought about this two years before, or eighteen months before, or a year before.

MR. SHOVELL: No. The case team were referring to it on 13 October. So, in their minds it was live.

THE CHAIRMAN: Yes. But, the question is whether a non-infringement decision was made - not whether the Chairman had thought about this at some earlier point.

MR. SHOVELL: I understand the question. The nature of your question is a question of: what inference is it reasonable to draw from the fact that this item has again been persistently omitted? The difficulty here is that ----

THE CHAIRMAN: Well, what inference are you drawing?

MR. SHOVELL: We are drawing the inference that the OFT made a decision that they rejected the case on the object technicality point, and that as a result of that they understand that that would lead to an appealable decision and all around they have chosen to not disclose anything to do with that objects decision when they have had the choice. They failed to disclose it in the case closure - the provisional letter. They failed to disclose it in the final letter. They failed to disclose it to an MP. They are failing to disclose it still. It is reasonable to make inferences ----

THE CHAIRMAN: What they say now is that they have made no decision about it; that it was a problem that they thought meant they would have to do more work, which they decided their priority test did not merit.

MR. SHOVELL: We understand that is what they say.

THE CHAIRMAN: That is what they say. The question is whether they made the decision - not whether the Chairman had mentioned it at some prior point.

MR. SHOVELL: We think that if the previous Chairman had expressed a view on this point that it is something that should be pursued, then it is material to understanding the OFT's decision-making process to know that, and, if necessary, to see a document that supports ---- I do not want to get into documents. I would rather discuss that later.

THE CHAIRMAN: What we do know is that there were two views about it. If he had said at an earlier stage, "This is a problem. You need to pursue it", and they had not pursued it, how does that get you anywhere?

MR. SHOVELL: Sorry? Can you repeat the ----?

THE CHAIRMAN: We know that it was part of the consideration what the OFT then say became their priority decision.

MR. SHOVELL: Yes.

THE CHAIRMAN: If at some earlier stage the Chairman had said to the case team, "You haven't considered this. You need to consider it" and they did not consider it, then how does that help you?

MR. SHOVELL: Ah! Sorry. I need to run the hypothesis of facts as to how it is relevant. It is difficulty hypothesizing with no data and no explanations, but that is what we appear to have to do. My hypothesis is that the Chairman of the OFT decided that on the legal technicality this should be pursued as an objects base infringement, and having made that decision the case team presented its SOO. The CRP and Vincent Smith and the CEO disagreed. They agreed with Mr. Priddis' analysis that it was wrong to treat it as an objects case. They decided that it was in fact prohibited to be treated that way, which made it a much more complicated effects case. In such a circumstance I can understand that there would be tremendous political difficulty within the OFT with the new Chairman and CEO, and Vincent Smith making a non-infringement decision on something where the previous Chairman - thirteen days perhaps before the CRP - had already expressed a view to the contrary. In that circumstance that could be a contributory factor - a very material contributory factor - as to why they decided as a matter of internal politics that they would not rule on the point even though they had reached a view. So, the hypothesis is there. That is a factor - a very material factor - as to why the OFT decided that they would not express a view on the legal technicality. It is not that they did not have a view. After 165 days and a further five months they did have a view. It is that they were subconsciously or consciously swayed not to express that view because they did not wish to overturn an opinion that may be in writing from the previous Chairman.

THE CHAIRMAN: Let me just see if I have got it right … What you say is that they would have come to a non-infringement decision.

MR. SHOVELL: Correct.

THE CHAIRMAN: Because that went against, on your hypothesis, what the previous Chairman had said, they decided not to come to a non-infringement decision, and would come to the priority decision instead.

MR. SHOVELL: Yes. That is not our entire case. That is a hypothesis as to why this document and this explanation may be highly relevant. It is a hypothesis - no more. It is a strand of this case.

THE CHAIRMAN: So, what you are saying is that they went to all of this effort in relation to priority in order to cover up the fact that the previous Chairman had come to an opposite view to the new Chairman.

MR. SHOVELL: I think that puts it way too strongly. (After a pause): It would have been part of their thinking that the case team - and I have to put myself into the mind of a case team member ----

THE CHAIRMAN: Mr. Vincent Smith has been very candid about explaining that there were two views.

MR. SHOVELL: Yes.

THE CHAIRMAN: So, why should they cover up the Chairman's view?

MR. SHOVELL: Well, it is a fact that he has not referred to the Chairman's view. I do not understand why you would say that he is covering it up. It is not mentioned anywhere.

MR. HOSKINS: That factual point is not correct because it is first Smith, paras. 24 to 27, for example, which are all about Sir John Vickers' input at that stage. So, I do need to correct that factual point. I am sorry to interrupt.

THE CHAIRMAN: (After a pause): Mr. Hoskins, I think what you pointed out is 2004 - not 2005.

MR. HOSKINS: I think the difficulty we have got is that the reference to the departing Chairman being supportive is something that is taken from a conversation between Mr. Shovell and someone in the case team. We do not actually even know when that support was expressed. But, what Mr. Smith has done is he has given a history of the matter, including Sir John Vickers' involvement. I mean, part of the problem in trying to get to the bottom of some of the factual issues is: who do we go back to find out if a one-off comment made by the then Chairman to a member of the case team unspecified at a time unspecified - --- That is part of the problem. But, Mr. Vickers' involvement is explained. That is the factual inaccuracy, in my submission.

MR. SHOVELL: Okay, the art of being a barrister ---- He mentions this as if it is a random comment by a random case team member on a random day in a random process. This was something that was clearly front of mind on what was a rather fundamental day in the life of this case. This was mentioned by a case team member quoting the case review panel. I do not believe it is reasonable to make an inference that the comment was made on the basis that it was of no importance and it related to something that was said two or three years earlier. I think a reasonable inference is that it was a very significant point and it was live - otherwise it would not have been mentioned. (After a pause): I am also rather puzzled by

this. The OFT is a public body. Why does it take four or five requests to ask them to clarify what the point as? I would sympathise if we had asked for one hundred of these such requests. They could say that was oppressive, and unreasonable and we were just being vexatious. But, we asked for it in our original claim. We pleaded that this was relevant. Why is it that we spend this amount of time, over this length of time, making the same request over and over again? Why can the public body not just confirm the point?

THE CHAIRMAN: I am sorry. If you are saying that you have made the request before, was it not covered by the previous disclosure application?

MR. SHOVELL: We mentioned it in the ----

THE CHAIRMAN: We may need to look at the decision.

MR. SHOVELL: We mentioned it in our notice of appeal.

MR. HOSKINS: (After a pause): My understanding was that this was not one of the specific things that were requested last time. Therefore, it is not dealt with. I do not need to make any further submissions at this stage. You get the point.

THE CHAIRMAN: (After a pause): Mr. Shovell, we do not think it was part of your request last time.

MR. SHOVELL: Okay. Thank you.

THE CHAIRMAN: I think Mr. Hoskins agrees with that - that it was not part of the request. On the other hand, at the moment we find some difficulty in seeing why, having regard to what we said about disclosure, it should be disclosed now.

MR. SHOVELL: Madam Chairman, I understand your initial reaction. I was hoping to pick up the whole basket of disclosure at the end, if that is possible.

THE CHAIRMAN: Yes. You can see where we are coming from. You know ----

MR. SHOVELL: -- what to expect.

THE CHAIRMAN: Is that the end of Section 4?

MR. SHOVELL: Yes.

THE CHAIRMAN: You are now going to turn to Section 5. Sorry. That was the end of Section 3. You are now going to turn to Section 4.

MR. SHOVELL: Section 4 - the objects decision, yes.

THE CHAIRMAN: Would that be a convenient moment to break?

(Adjourned for a short time)

THE CHAIRMAN: Mr. Shovell?

MR. SHOVELL: Thank you, madam Chairman, should I proceed with the file?

THE CHAIRMAN: Yes.

MR. SHOVELL: My colleague has suggested to me that it might be helpful to the Tribunal if I provided short summaries of the sections as I finish them. I was intending to do that at the end, so I propose to provide a very short summary of the previous three sections before moving on. I have in mind a couple of sentences rather than anything more profound at this stage.

THE CHAIRMAN: I think I would do it at the end.

MR. SHOVELL: Okay.

THE CHAIRMAN: Tab 4 is in relation to the objects decision we have already started addressing it. Shall we number the pages again 41 – it is headed "VS1" and it is 71-73." 42 is the second page of that. 42 is "VS2" and it is marked "073" at the bottom. 44 is "074" at the bottom. 45 is "Cityhook skeleton 9.1.07" 46 is "MH skeleton." And 47 is "37 to 40". Yes?

MR. SHOVELL: The documents in this tab are in relation to the objects technicality. It starts with VS1, explains at 73: "I took the view that reference to a possible object infringement in the provisional case closure letter should be omitted from the final case closure letter." Well, I do not understand how the original case closure letter disclosed the key technicality on which this case has turned. I have been there previously and it does not at all, but the reason why the word "object is removed" from summary paragraph was because he had advice which we know understand was oral from a senior legal advisor, concerning the relevance of Competition Appeal Tribunal case law in this area.

I will go through the documents and then summarise the implications at the end. Page 42 he talks about the "further resource requirements related primarily to demonstrating an effect on competition" and he says that in relation to object there was only a further analysis and review of the case law.

In VS2 at para.13 there is a concise summary of the technical point. He is saying that

> "… a collective refusal to purchase, which is not organised as part of an underlying cartel, or does not target a direct competitor of the parties does not have as its object the restriction of competition. It should therefore be characterised as an effects-based rather than object-based infringement. This view was based on an analysis of case law and guidance."

He goes on to say the case team disagreed.

At VS2, p.44, He says:

> "… the OFT did not reach any definitive conclusion on the legal position relating to object infringements. There cannot therefore be said to have been an error of law."

I will come back to that as to what inference we draw from that thinking, but we note at this point that this technicality was not disclosed in the case closure letter in the provisional form in January and had it been done so, had there been discussion of it , that would have forced there to be a decision on the technical point.

The Cityhook skeleton, p.45, we refer to the fact that the OFT stated it had a duty of transparency. I think I have made the point previously that the key technical point was omitted from both the provisional letter and the closing letter, and that the reason for omitting it was partly because of the relevance of Competition Appeal Tribunal case law.

Page 46, Mark Hoskins' skeleton. He refers to the closure letter did not expressly refer to a potential object infringement. I think that is unhelpful wording, something that does "not expressly refer" seems to me a bit different from something which completely conceals the key technicality on which this case has turned.

MR. HOSKINS: To put it in context, the sentence begins: "Finally, Cityhook suggests that the main reason …" it is not my suggestion.

MR. SHOVELL: Sorry, I was just objecting slightly to how they summarise our case. We did not say that the closure letter does not explicitly refer. We said "it concealed and omitted". Mr. Hoskins then says on p.47: "In order to succeed, Cityhook would have to establish that the OFT had reached a definitive non-infringement decision in relation to both object and effect." We say that cannot be right. If the CAT decides that the OFT reached a non-infringement decision on object, which was our primary case, that must surely be enough to establish that a fundamental non-infringement decision was made, so that feels to us wrong as a point of principle. Mr. Hoskins suggests that the OFT had adopted – sorry, I am just trying to re-read … (After a pause) We have highlighted an argument that Mr. Hoskins made, but that follows that that does not make any sense. (After a pause) On p.41, I have already summarised that previously. Similarly p.42 – I apologise, Mr. Hoskins' skeleton summarised these bits of VS1 and VS2 so I do not need to repeat those. That is the end of that tab by way of documents.

Before moving on, we say that the OFT must have made a non-infringement decision on the objects' case certainly in relation to our primary market of cable landing. The discussion in the OFT's documents is all about further work and investigation work effects, and it is also talking about effects in the cable laying market, so it seems to us that the OFT has focused all its thought about how much further work there was on a downstream market on an effects case, whereas our primary position was on our upstream market on an object case.

Tab 5 starts, I believe, with p.48 and goes to 52

THE CHAIRMAN: Do you want to check which documents they are? The first one says "P Collins, Cityhook", that is p.48. "VS1" is 49, para. 53. "VS2" paras. 15 to 17 is 50. Page 51 is "Cityhook's skeleton 9th January", and then p.52 is "MH skeleton 16th January".

MR. SHOVELL: Some of these documents were referred to earlier in the discussion between the Tribunal and Mr. Hoskins on hardcore, that is the section, so I will move through quickly rather than repeating what was discussed earlier.

The short summary is that in some documents the OFT described it as "not hardcore", and in some documents it is prefaced with the word "not clearly hardcore". For example, ----

THE CHAIRMAN: I think we have got that point, so if that is what it is going to, you heard the discussion before ----

MR. SHOVELL: Understood. There is an inference that I wish to draw, so I was just going through the documents.

THE CHAIRMAN: Yes.

MR. SHOVELL: The issue from our point of view, is it correct as a matter of law that if it characterises an object-based infringement it would have been hardcore, whereas if it is characterised as an effect-based infringement it is not hardcore? If that is not the case, or at least that is arguably the case, then given that the OFT says that it is not hardcore and that was part of their analysis, it is reasonable to make the inference that they thought the objects' case had been rejected in using that language.

I find it difficult to summarise the point in clear terms, but I think about it a grid. If it is an object case then it is hardcore, then the OFT is saying it is not hardcore is the same as them saying "It is not an objects' case". I do not know if that is a clearer summary.

THE CHAIRMAN: I think I understand what you are saying.

MR. SHOVELL: Okay. Tab 6 deals with some sundry items, and starts on p.53 and goes to 59.

THE CHAIRMAN: Make sure we have the right documents. 53 is the memo headed "Kenny Shovell", 54 is "Notice Supplemental to an Option Agreement", 55 is "Cityhook skeleton 9th January, paras.28 to 31, 56 is "Cityhook skeleton 9th January, paras.32 to 35". 57 is headed "(g) Disclosure requests", and 58 is a letter from the Tribunal, and 59 is "Mark Hoskins submissions, 26th January 12 to 15."

MR. SHOVELL: On p.56 we requested if a senior OFT executive visited the Duchy at that time, or if they wrote to them. Mr. Hoskins kindly confirmed earlier that neither of those two things had happened. Unfortunately in our skeleton we did not include the concept of telephoning them. It is not a fantastically clear point because I suspect that had that been the case the OFT would have disclosed that to us. I mention this for a number of reasons:

one, the OFT has chosen to clarify that one point because they are able to clarify it in a way that is helpful to their case, which closes the question that we have asked, but that does not seem to us a very just process when we are asking for clarification of matters, if the OFT selectively chooses which matters it chooses to clarify, and which matters it does not choose to clarify. Again, if we had asked for clarification of 100 items I would sympathise with them, but give we have asked for clarification of a small number of items, as a process that feels unjust and unreasonable.

THE CHAIRMAN: The position is, are you satisfied with the information you have now been given in relation to that matter, so that that matter is no longer a question in your mind?

MR. SHOVELL: I regret not having used the word 'telephoned' in my skeleton. I meant 'communicated with'. It is unfortunate that I specified two things. I would be grateful if Mr. Hoskins would be able to confirm that there was no communication of any form, given that he has done the other two.

MR. HOSKINS: I am hesitant to be helpful as it gets me in hot water apparently ... My instructions are - and, as I say, we have not gone back through the files, every page, but these are the instructions - that there was no official contact either in writing or in person by the private office with the Duchy of Cornwall in the period September 2005 to April 2006. The person who sent the instructions also said, for the record, "We can recall no contact in the last few years from this office in any form". I hope that covers telephone as well.

MR. SHOVELL: On that basis, then, thank you.

THE CHAIRMAN: Can we move to Tab 7?

MR. SHOVELL: There remains para. 32. It starts at p.56, Tab 6. The CEO's views in relation to these matters ---- (After a pause): We have asked if the CEO's views are recorded in writing either by e-mail, paper or meeting minute in relation to this technical issue on non-infringement ----

THE CHAIRMAN: Is this something you asked for last time?

MR. SHOVELL: I am not sure.

MR. HOSKINS: I think it is covered at para. 37 of the disclosure ruling, which is at Tab 7 of the authorities bundle that we put in for this hearing. There is a request for the Chief Executive's views, and the request was turned down. It is para. 37. It is in the authorities bundle at Tab 7. Tab 7 should be the Cityhook disclosure ruling. It is para. 37 of that ruling.

MR. SHOVELL: Does the saying 'no submission has been put' mean that the Tribunal rejected whatever submissions were made, or does it mean that literally no submission was put and therefore it was not requested?

THE CHAIRMAN: Sorry?

MR. SHOVELL: In para. 37 it says, "No submission has been put to us by Cityhook" ----

THE CHAIRMAN: It was not argued, that.

MR. SHOVELL: Okay . So it was requested in a note, but nothing was said by Cityhook on the subject.

THE CHAIRMAN: What do you mean by 'requested'?

MR. SHOVELL: This means that some document in relation to the CEO's views was requested, but does that mean that counsel for Cityhook said nothing about it at the Tribunal?

THE CHAIRMAN: If you read what it says ---- No submissions were put by Cityhook ... They did not receive anything which showed ----

MR. SHOVELL: Does that mean I should put that up in disclosure later?

THE CHAIRMAN: You can do. The problem is that we made a decision.

MR. SHOVELL: Okay. That is a general point. I will probably pick them all up after going through the documents.

Tab 7 therefore is the case law. This is pp.60 to 70. (After a pause): Most of these are photocopies of pages of previous Judgments.

THE CHAIRMAN: Let me just get to the end, and then I will make sure that we have all got the same. (After a pause): Page 60 starts with para. 10 of the case law. Page 61 has manuscript at the top - 'Alcatel request to intervene'. Page 62 is a manuscript note - 'CM AB 9 August '05'. Page 63 is VS A. Salmond - 2 May, '06. Page 64 is Aquavitae. Page 65 is Cityhook - 20 May. Page 66 is Claymore. Page 67 is Claymore, para. 133, 134, an d135. Page 68 is Claymore, paras. 155, 156. Page 69 is Claymore, paras.141 to 145, and then p.70 is Tweed.

MR. SHOVELL: The Tribunal plainly has a great deal of expertise on the law and we clearly have very little expertise on the law. What I have done is highlighted passages which struck me as being relevant, based on my reading of the Judgments. I would like to talk through those very briefly. I do not wish to talk through those at all, other than refer them to facts as to whether we feel that we have met those criteria.

In relation *Aquavitae* (p.60) ,

"--where the OFT or a concurrent regulator has expressly indicated that they will consider a complaint on its merits, the Tribunal will expect that investigation to reach an outcome. If

the outcome of that investigation is to close the file, the Tribunal will normally infer that that is because there is insufficient evidence of infringement'.

So, for us, we then have to ask, 'Did the OFT expressly indicate that they will consider a complaint on its merits?' On p.61 Alcatel admit that the OFT went a great deal further than whether they would consider it on its merits.

> "In a meeting between the OFT's case team and ASN on 24 January 2005, the OFT informed ASN that it was likely to be a recipient of a statement of objections setting out the OFT's case in respect of both the suspected collective boycott and the collective setting infringements".

So, not only did the OFT say it would consider the merits, it went further and said, "We would order an SO", or, "They should expect to receive an SO". Page 62 is a document you have seen elsewhere in the file. The case team summary. It was clear-cut and they wanted a decision in 2006. Again, it is going far beyond the *Aquavitae* test of whether the OFT said it would consider the merits.

On p.63, in a letter from Vincent Smith to Alex Salmond M.P. dated 2 May, 2006 Mr. Smith says,

> "I would also add that it is incorrect to say that the case was almost complete. It is not uncommon for cases to take six months or more from issue of 'statement of objections' to issue of final decision. In addition, in the OFT's experience there is a need for it to factor in resources to cover appeal to the Competition Appeal Tribunal".

When Claymore elsewhere refers to further work we cannot imagine that the Tribunal thought that further work included dealing with the process from statement of objections to final decision, nor dealing with the piece after if the alleged cartel members appealed to the Competition Appeal Tribunal. But, yet, it does appear that that factored into the OFT's decision, which is surprising.

On p.64 Aquavitae .... "-- where the OFT or a concurrent regulator has expressly indicated that they will consider a complaint on its merits, the Tribunal will expect that ----" I have read that from Mark Hoskins and the case law itself. The case law goes on to say,

> "It will normally be irresistible if, at an earlier stage, the regulator has already expressed a view to the effect that he sees little merit in the case".

We will come back to the effects because it does seem to us that they expressed a high degree of scepticism in relation to the effects case. It was a specific example in *Aquavitae*, "In the present case, the Director expressed sceptical views ----" Let us see if there are any

sceptical views expressed by senior OFT executives on the effects case. Mr. Collins to Cityhook on 20 May, 2006.

> "Given that the cost of landing a submarine cable is minimal when compared to the overall cost of installing one, it would seem that factors impacting on the costs of other parts of the installation process (and not just the landing process) are more likely to impact on telecommunications costs ----"

That reads to us as being an extremely sceptical view on the downstream effects case. He goes on,

> "-- it was far from clear that adoption of Cityhook technology would have shortened the construction time for trans-Atlantic cables actually under construction".

Again, a sceptical view on the record. It seems to us we have met the *Aquavitae* test on the effects case.

Turning to p.66 - *Claymore,*

> 'His view that the commitment of further resources would not be warranted was merely the consequence of the prior conclusion that the evidence of infringement was not sufficient".

It seems to us that that is the same case here - particularly on the effects case - that having decided that the evidence was not sufficient, it is not an administrative decision to then say that you did not want to put further resources into it. We think the same applies here. Similar language in para. 133. The OFT in this case 'merely communicated an administrative decision to close the file' but the Tribunal noted that it was 'inadequate' and it was also 'inadequate because it did not reveal with sufficient clarity the Director's true reasons for closing the file'. We say that is exactly the case here on the objects technicality. *Claymore*, para. 156 on p.68. "The director and his staff gave close consideration to the evidence and reached a view". Well, after four years we do believe that was the case. "In such circumstances we see no basis for construing the Act narrowly in a way which would deprive the applicants of an appeal to the Tribunal". I understand that to be a reference to inferring a non-infringement decision.

Page 69, para. 142 of *Claymore*. The key OFT letter was 'written at the end of an extensive and wide-ranging investigation which had lasted nearly two years'. Well, here we have had nearly four years. 'It is not suggested that in the Director's view there were further matters to be investigated ----' In relation to the objects case we say that is exactly the same here. When the Tribunal was deciding on *Claymore,* when they said further matters were to be

investigated, 'investigated' we would view as being in relation to the evidence. We do not believe that it was reasonable or was intended that considering the case law further can fairly be described as investigation work. The OFT is sitting as a judge, I do not believe it counts as work for a judge to express a view on the law in that sense. I do not believe that is further work. That concludes our lay understanding of the relevant cases that have been cited as authorities. It may be appropriate now to do a short summary of the different tabs, and pull together what we intend. I would intend to save a more detailed analysis until a reply after the parties have gone. Then after that I then come to discuss *Tweed*. Is that a reasonable way forward?

MR. RANDOLPH: I am sorry to interrupt, madam, I really do not want to hold things up. I just heard from Mr. Shovell that he wanted to - I think the words used – "give a more detailed analysis of his position in reply", and that makes our position rather difficult because then you go from a reply to a reply to a reply, because if we do not know the case we are facing, or my learned friend does not and we do not then it makes the position rather more difficult. If Mr. Shovell knows what his full case is now, which I assume he does, then we say it would be more appropriate for him to put that now so that we can deal with it rather than have a difficult application, or an unfortunate application where we say Mr. Shovell has raised something new, we have not been able to deal with it, so we have to then go round the houses again.

MR. SHOVELL: Sorry, I have no intention to refer to any other documents, other than the file that we have here.

MR. RANDOLPH: That was not my point. If you are going to make submissions then you should make them now so that we can reply to them rather than keep them back, if you will, for our reply.

THE CHAIRMAN: I do not think he was saying that, I think what he was saying was that he is going to summarise what his submissions are. He is going to deal with *Tweed* and the disclosure application. On that basis he will then have the opportunity to hear all of you and having done that he wants an opportunity to reply to what you say.

MR. RANDOLPH: Absolutely. The only concern I had was the more detailed analysis of his position – I think those are the words he used, and maybe it is my oversensitivity to the issue. So long as there are going to be no new issues raised after our reply.

THE CHAIRMAN: Mr. Shovell, did I understand it.

MR. SHOVELL: I thought that you did. Apparently there is now a point that I am not allowed to raise anything new, whatever it is I hear from the other side that does not sound right.

THE CHAIRMAN: No, the way it works is that the Appellant puts in their submissions – right?

MR. SHOVELL: I understand.

THE CHAIRMAN: And tells exactly what they want to tell us. The Respondents then respond to that and, in responding to that, they may make points which you have answers to.

MR. SHOVELL: Understood.

THE CHAIRMAN: You then have an opportunity to answer those points, but if the situation is that you put new material in at that point, first of all that is not playing the game, but even if you are allowed to that, that means that they then have an opportunity to respond and the thing just becomes helter-skelter.

MR. SHOVELL: I understand the concern.

THE CHAIRMAN: So if you have any points you want to make it is much better to make them now, and that is not to say that we do want to hear what your answers are to what they say.

MR. SHOVELL: I understand the point. I think my remarks have probably been over analysed by counsel, but I am happy to comment now then, I will summarise through.

My remarks are only in relation to the file that has been talked through and I do not know whether it would have been better to have done this up front, or in arrears. My concern about indicating up front is there is so much time spent in interruptions from various barristers it is kind of difficult to keep the train of thought, so I thought it was better to go through the facts first.

Our case is, the best I am able to put it, we have included a selection for you of the contemporaneous evidence of why there was a clear cut case of objects' infringement. The word "clear cut" was used by the OFT, the OFT case team I should say, in a contemporaneous document. That was our view. That clear cut objects' case, we saw the effect-case, and I am afraid this is a lay way, but I may as well explain it, we understood the reason why the Telecoms' companies had strangled our technology at birth is that we would be facilitating competition in the downstream markets, so it is quite understandable that the OFT gave consideration to the effects' case. It is possible we understood it slightly differently. We thought that was useful for the OFT to understand by way of motivation. I do not know why the cartel chose to strangle our technology because we were facilitating competition. We were doing so in a way that was very familiar to the industry. The Cityhook invention is just a multiple duct system, there is multiple ducting on land, you can have telephone masts that have more than one line across them. It is nothing new that the industry has sought to oppose. The first person coming in with their infrastructure resisting the companies that come after them sharing that infrastructure. It is about first to market,

and maintaining prices while people come after you it takes them longer, it is a simple barriers to entry point. So we believe that that was their standard motivation to objecting to the deployment of our technology, and was factored into their thinking as to why the form the cartel. The OFT may have seen that as being an effects' case. We understand why after four years they felt that they did not have enough evidence – whether or not we agree is another matter, and we have not seen their evidence, but nonetheless, that is how we saw our case as going into the statement of objections. We thought it was a clear cut objects' case, and an effects' case that we thought we had been made out as a point of principle, but we did not know what evidence they had.

The OFT provisional case closure letter gave us no explanation whatsoever as to why our clear cut objects case had been rejected. The administrative priority piece did not make sense to us in a number of regards. It spoke about prioritisation criteria. It said there was nothing particular about the strength of evidence. Well the evidence was clear cut. That is not always the case I would imagine in these investigations, so it seems to us that the prioritisation criteria looked like they are a retrospective justification for a decision that had already been taken, and it is not for us to say whether that was conscious or subconscious, and my understanding of the Tribunal case law is that we need not show anything of the sort.

Had the OFT disclosed in its case closure letter on 24th January 2006, that there was this fundamental technical objects' point, and they disclosed that they had spent 165 days not reaching an opinion on that technical objects' point, I think they would have been subject of ridicule by the Member of Parliament that wrote to them, and I think it would have been reasonable for Cityhook in making submissions in response to the provisional case closure letter to say "It is not open to you, or not reasonable to have closed the case on that basis."

We say therefore that its omission was deliberate because they did not want light shone on the fact that they had privately decided that they did not want to pursue an objects' case and we cannot think of an alternative explanation as to why someone who has a duty to give reasons, just as an expert has a duty to give reasons, would choose not to disclose the reasons on such a fundamental issue.

In tab 3 we refer to the previous Chairman's view, which we have no way of assuming that it is anything other than precisely the point that is in dispute, the technical objects' case, the fact that it is not referred to in any way is, we say, consistent with the previous behaviour.

In tab 4 we discuss the objects' case the technicality. It seems to us that the OFT's discussion in their case closure letter and Vincent Smith's evidence is primarily about the

downstream market effects. As far as we could tell the OFT decided that it would reject the objects' case for cable landing, and also the objects' case for cable laying on the technicality and it rejected the effects' case on cable landing, and the effects' case on cable laying due to insufficiency of evidence. The same approach seems to apply in relation to the Wayleaves' case, that seems to have been rejected on a technicality on the objects case. In relation to effect it is reasonable to conclude that the Duchy case would not likely have a material effect on consumers. The amount of crossing foreshores was about £12,000 a year for a particular cable, and on a cable that cost $500 million, whether they paid £12,000 or £15,000 is obviously not going to have any effect on consumers. There is a more technical case about "Does it somehow affect the supply of land?" I also agree with the OFT on that one that as an effects' case it is weak, and they would not have had evidence that caused them to think that it was clear. As an objects' case, however, I think the case was strong. We can only infer that the reason why the case team spent on the Wayleaves was because they considered it a case of hardcore infringement. There was an exchange of live price data. It seemed logical that, given that it is the same parties, it is the UKCPC that were circulating live price data, and acting as a cartel on the Wayleaves case, I can imagine that the case team thought that that was useful to join with the Cityhook case, because if you have demonstrated that there is hardcore cartel behaviour by a group of companies in relation to one case, and it is exactly the same companies, in exactly the same area that is logical that you would want to combine it with the Cityhook case for cable landing, and that contributes to thinking that that was hardcore as well because it was operating in a cartel manner.

The case against the parties that also contributes as to why they must have rejected this as an object case is the primary evidence was against what we have come to know as the "Cornwall 6", it was Level 3, BT, Cable & Wireless, Global Crossing, Alcatel and Tyco. Viatel owned a quarter of Level 3's cable. There is other evidence in the bundles in relation to NTL, but we say that the problem must have been in relation to the technicality on objects, else the OFT would have pursued this case.

In relation to the OFT saying that hardcore is not relevant we have two issues. It is fundamental in their prioritisation criteria that they say it was not hardcore, and therefore it is rather strange to hear them saying now it is irrelevant whether it is hardcore, but it also leads us to the inference that the reason why they thought it was not hardcore is because it was an effects case and on an effects case they were more uncertain whether it was hardcore or not. We say that causes you to reach the conclusion that when discussing hardcore they

had decided that it was not an objects' case and if they have made a non-infringement decision on the objects' case then that is the case that we are appealing here to get admissibility.

In relation to sundry evidence, I do not want to pre-judge *Tweed* but we said in the first hearing it is extremely difficult to understand what information we need to help us understand the decision without sight of the documents. We have requested a few items, and the OFT response has been the same. Mr. Smith says "I am not going to comment on everything" and therefore he selects which things he replies to. The OFT in their skeleton say they are not going to comment on everything and they select. There is then this curiosity that where they have a nice, simple, clear cut rejection of our point they then volunteer that information to be helpful to the Tribunal. It is reasonable for a lay person to infer that in those cases where they do not provide information it is because it is not helpful to their case and I am surprised that a public body, whether it can justify that on technicalities or not, I am surprised that a public body would behave like that. Either they give disclosure on all the points that you plead, or you do not. If we pleaded hundreds of points I would fully understand them saying it is oppressive and it should be restricted, but we did not. I do not think it is reasonable that a party should have to ask the same question five or six times, and the OFT decide which ones it chooses to answer to. I think when we come on to *Tweed*, the House of Lords had a similar view in relation to these items. But, I will put it as a lay person first, and then invite the Tribunal to consider it in the context of the House of Lords' decision.

Given that I am supposed to be presenting our case, would it be possible to have five minutes to discuss with my colleagues whether I have failed to include something in my summary which is our case?

THE CHAIRMAN: If you deal with *Tweed* and then do that ---- Then you can make sure you have covered everything you want to say about that as well.

MR. SHOVELL: Thank you, Madam Chairman. Eminently logical. As with our short run through *Claymore* and *Aquavitae*, (p.70) ---- We have come here to try and assist the Tribunal with our understanding of the facts and the perspective of the facts. We obviously cannot assist the Tribunal in an enormous amount in relation to the law. All I have done is that I have cut and pasted three paragraphs from the *Tweed* Judgment on to p.70, which struck me as representative of their Lordships' decision. Is there any purpose to me reading these on the record, or shall I just leave everyone to read them?

THE CHAIRMAN: You can leave us to read *Tweed*.

MR. SHOVELL: For the record, the paragraphs we have quoted are Lord Bingham at para. 4, Lord Carswell at para. 25, and Lord Brown at para. 56. (Pause whilst read): Our short interpretation of our understanding of what *Tweed* says is that (1) the law has changed; and (2) that a court or tribunal cannot rely simply on a decision-maker summarising the underlying documents. There is no onus or necessity to prove lack of candour. It is about sovereignty of a court. It is about justice. It is about making sure the decision-maker who is inherently in a conflict of interest, that the court has access to the same documents that they do.

THE CHAIRMAN: I think what their Lordships are saying is that you still have to make out a case of why you need the documents.

MR. SHOVELL: I do not want to get into a debate with the Tribunal as to what a legal Judgment makes. That is not productive. They refer in para. 4, 'It is ordinary good practice to exhibit it as the primary evidence'.

THE CHAIRMAN: That is good practice. It is not saying they have to do it.

MR. SHOVELL: Okay. I understand. I think a fair inference from *Tweed* from our ----

THE CHAIRMAN: It is clearly not saying you have to do it because they are talking about making an application.

MR. SHOVELL: I understand. There is court discretion in this relation. I am not saying it is mandatory. I understand that they have removed the burden of demonstrating that there is lack of candour in relation to the Judgments. I think an inevitable inference must be that where you are dealing with matters of fact - because that seems to be the primary focus of the Judgment, rather than technical matters ---- Where you are dealing with matters of fact, a court must treat the affidavits, to some degree, in a circumspect manner because otherwise it would not be necessary to penetrate them. It strikes me as a matter of common-sense and reasonableness. So, whether or not this Tribunal chooses to issue documents, or not ... whether it chooses to go back to the previous ruling in any way, my understanding is that under Rule 19 of the Tribunal's rules you may order discovery essentially of anything at any time. It does not say anything about whether you have ruled on it previously. That seems to me a very technical legal point. So, I merely note that I could not find anything about a previous ruling. It seems to us that circumstances have changed quite significantly in that regard. The purpose of their Lordships' Judgment is to ensure justice and fairness, and we understand that the Tribunal has those powers. So, it is not clear to us at this stage whether it is appropriate or necessary for the Tribunal to be fixed in the decision that it made at the previous disclosure hearing. I understand that there is a point of legal principle, but my

understanding is that it remains at the Tribunal's discretion - whether they choose to order discovery in relation to the items at the previous hearing.

Madam Chairman, that is probably a good point for us to take a break, just to make sure there is nothing further we need to put.

(Adjourned for a short time)

THE CHAIRMAN: Have you had enough time? Can I just before you, start – or finish – I have just looked at the Judgment in *Tweed*.

MR. SHOVELL: Right.

THE CHAIRMAN: Have you got the full Judgment.

MR. SHOVELL: I do not have the full Judgment, no.

THE CHAIRMAN: Ah.

MR. SHOVELL: I might be able to get hold of it though.

MR. RANDOLPH: I have a spare copy, if I can pass that up to Mr. Shovell.

THE CHAIRMAN: That is very kind. If you can go to p.23, para.38, I think this is Lord Carswell.

MR. SHOVELL: Is that the one that starts: "It remains …"

THE CHAIRMAN: "It remains there to consider …" and you will see a little way down, "the proportionality …" seven lines down.

> "The proportionality issue forms part of the context in which the court has to consider whether it is necessary for fairly disposing of the case to order disclosure of such documents. It does not give rise automatically to the need for disclosure of all documents. Whether disclosure should be ordered will depend on a balancing of several factors of which proportionality is only one, albeit one of some significance."

And then if one looks a bit further on at Lord Brown's Judgment, para.56 which, on my copy, is p.28 – yes?

MR. SHOVELL: Yes.

THE CHAIRMAN:

> "This then is the general framework within which applications for disclosure should be considered. In my judgment disclosure orders are likely to remain exceptional in judicial review proceedings even in proportionality cases for the court should continue to guard against what appears to be merely fishing expeditions for adventitious further grounds of challenge. It is not helpful and is both expensive and time consuming to flood the court with needless papers."

Then he says that the rule about inconsistencies should not be followed. Then:

> "In future, as Lord Carswell puts it, a more flexible and less prescriptive principle should apply leaving the Judges to decide upon the need for disclosure depending on the facts of each individual case.
>
> 57. On this approach the courts may be expected to show a somewhat grater readiness than hitherto to order disclosure of the main documents underlying proportionality decisions."

So that goes back, it seems to me at the moment, to the necessary point, so the question is if you are going to make an application you have to show why it is necessary.

MR. SHOVELL: Right, understood. I suppose our position remains that the debate around the technicality on the objects' decision was covert on 24th January 2006, which to us seems like misconduct, as we explained earlier, in breach of the OFT's guidelines, and that causes us to think that it is unfair and unsafe to rely entirely on the summaries as presented. We have had it suggested by Lord Bingham in para.4 that demonstrating that

> "… it is necessary, or that there is some inaccuracy or incompleteness is usually an impossible task without sight of the document. It is enough that the document itself is the best evidence of what it says.

The primary objective of the Tribunal or any other court we understand is to ensure that justice is done. There has been a sea change in the law in between the interim disclosure decision and this hearing . Rule 19 gives the Tribunal discretion as to what it feels is helpful or reasonable in ordering disclosure, and therefore our first point is that we do not think the Tribunal is bound, as a matter of law or as a matter of ethics, to not revisit the previous interim hearing, and that is a matter of law for the Tribunal; we say not. Then if you are free to consider then given the natural concerns we have about how the object technicality has been handled it seems just and reasonable that we see the underlying documents in relation to that.

THE CHAIRMAN: We probably also ought to have pointed out to you Lord Bingham in para.3, where in the penultimate sentence, he says:

> "… even in these cases orders for disclosure should not be automatic. The test will always be whether, in the given case, disclosure appears to be necessary in order to resolve the matter fairly and justly."

MR. SHOVELL: I understand.

THE CHAIRMAN: Our previous disclosure ruling dealt with the question of "necessary" so does *Tweed* actually change the position? Or, if you look at our ruling, although we did not have the decision in *Tweed*, does it follow it?

MR. SHOVELL: Okay, I am now treading in territory which is getting worse and worse. We are now being asked to comment on how a previous hearing under a different set of legal rules dealt with exactly how it should be evaluated. My understanding of the difficulty at the previous hearing was the burden to show inaccuracy or incompleteness in the evidence that was presented. That was my understanding of the primary basis on which it failed. It seems to me that that hurdle which we ran smack bang into and did not cross has since been removed by the House of Lords.

THE CHAIRMAN: So, we also dealt in that Judgment, I think, with the question of whether it was necessary. But, you did have to get over that hurdle first. Now you say you do not have to get over that hurdle first. If you do not need to get over that hurdle first, you still have to show the documents are necessary.

MR. SHOVELL: Can I have a definition of how one would decide whether it is necessary or not? I think of 'necessary' in terms of the execution of justice.

THE CHAIRMAN: Yes. Well, if they are peripheral ---- At the moment, for example, the Chairman's view a year before seems to us to be very peripheral. We do not see how that is necessary.

MR. SHOVELL: How do we know ---- What if the Chairman's view was ----

THE CHAIRMAN: You see, you have to show that actually it is pertinent to the actual decision that you are trying to show was made ---- and the decision was made at a much later date.

MR. SHOVELL: How do we know that the Chairman's view was expressed a year before - rather than fourteen days?

THE CHAIRMAN: Because of the date of the ---- It is expressed before the decision is made. 2005.

MR. SHOVELL: Yes. It cannot be later than 30 September, 2005, if that was his last day. It seems to us that the case review panel meeting on 13 October, which was only fourteen days later, was the one which rejected the Chairman's previous view. That is only a fourteen day gap.

THE CHAIRMAN: Yes. But, how is it relevant to the making of a non-infringement decision? One has to focus it to the fact that what you are trying to show is that a non-infringement decision was made ----

MR. SHOVELL: I understand.

THE CHAIRMAN: I do not think we see how, whatever the Chairman said, it is necessary to see whether at a later date a non-infringement decision was made. There are lots of things that are discussed, going forward, in coming to a view. But, the fact is that the only question here is what was the OFT decision ... the body ----? What decision did they take? Was it a non-infringement decision or was it a priority decision? One has to look at what happens at that time and the witness statement goes very carefully through how they came to that decision.

MR. SHOVELL: The witness statement goes very carefully through the effects ----

THE CHAIRMAN: Would it make any difference if he said that the legal technicality was a good point, or if he said the legal technicality was a bad point? How would that change the non-infringement decision ---- the question of a non-infringement decision?

MR. SHOVELL: Maybe it is better if I argue it backwards? The OFT evidence is that they spent 165 days not expressing a view on the one legal technicality, and then they spent another five months not expressing a view on that technicality between the case closure provisional and the case closure final. That does not make any sense that an organisation that is packed full of in-house lawyers, barristers and solicitors would not reach a view on a technicality in 165 days.

THE CHAIRMAN: Or is it not that they had different views about the legal technicality? Not that they did not express a view, but that there were different views expressed and they never came to a conclusion is what they say.

MR. SHOVELL: I understand that is what they say, but, again ----

THE CHAIRMAN: Therefore, if he said one thing or another is not going to change the ----

MR. SHOVELL: I suppose I was thinking ----

THE CHAIRMAN: He was not the Chairman at the time the decision was made, and so he cannot be the decision-maker. So, you cannot say, 'Well he made a decision at that point'.

MR. SHOVELL: No, we are not suggesting that was the case. We just thought it was relevant to understanding. I go back to the principle, and then try and think what documents could be relevant. It is entirely normal for Judges to make decisions on the balance of probabilities. That applies to findings of fact, and that applies to findings of law. The point can be argued either way. The fact that there were two different opinions on a point of law in the OFT does not suggest for a minute that a solicitor or barrister within the OFT did not have in his mind a view. The only issue is that it had not been expressed here. We say that in 165 days they did have a view, and it just has not been explicitly communicated. Therefore, we are looking for documents, whatever they be, which give us an insight into how the object

technicality was discussed. The previous Chairman's view - we are not even certain that is the point, but it looks like it is. That is just an example of a document. We are seeking disclosure of any document that the OFT has that discusses the object legal technicality. We think our case for requesting it is all the stronger, the fact that they concealed it from the provisional case closure letter.

THE CHAIRMAN: But how is it going to help you to see documents? Just assume that there were documents which say, 'This is the legal technicality. We think it is a good point' and some other committee or person says, 'This is legal technicality. We think it's a bad point'. Now, that is not going to help to arrive at seeing whether when they came to make the decision they decided it one way or the other, because we have got the material in the witness statements that says there was a group that said this ... there was a group that said that? How does it take it any further?

MR. SHOVELL: Because, as the House of Lords in *Tweed* emphasise, you remove the uncertainty that is created by a summary by a person who made the summary. It might be the case that the original document gives the Tribunal a perspective that makes it even clearer than it currently is to us - that Mr. Smith had clearly decided that he was not willing to pursue the technical point.

THE CHAIRMAN: One of the difficulties is that you have chosen to open the whole case, and not just disclosure. So, we have heard from you all the submissions. Now what do you propose us to do? If you say, 'Well, we ought to actually have those documents', are you suggesting that if we decided that, we have to adjourn so that all the documents ----

MR. SHOVELL: Well, obviously the master plan is not to have a House of Lords ruling in between the case starting and the case finishing. So, I apologise for the consequences of that. I suppose my ideal summary is not going to be attractive to the others in the court. We feel there is sufficient for the Competition Appeal Tribunal to make a non-infringement decision on the objects case, and probably also the effects case after four years of evidence. I would ideally like to put our case - if you agree with us that there is no need for any disclosure ---- If you have any uncertainty in the matter, then there may be a need for further disclosure. I appreciate from your reaction that that is a difficult position for you to accept. I do not know, Madam Chairman. My difficulty is that we are here as lay parties, but we understand our professional duty to be reasonable and treat the court with courtesy. I do not like the idea of an adjournment to look at the documents in relation to the point, but if you are not minded to consider that a non-infringement decision was made on the object, despite all the evidence that there seems to us to be, then I have a conflict of interest. I do

not wish to aggravate the Tribunal, or cause disturbance to process, or generate increased cost, but, equally, I do not wish to turn down documents that it seems to us just that we would have. Had the House of Lords' Judgment come in before the interim hearing, I think we would have been given those documents in the circumstances.

THE CHAIRMAN: At the moment I have difficulty in seeing why they are necessary. I think we all have difficulty in seeing how they are necessary. So, we do not think, at the moment, that our decision would have been different even if we had had the *Tweed* Judgment. That is why I am pressing you.

MR. SHOVELL: Does the Tribunal have reasonable clarity as to ----- Let me put it a different way: if I had been the decision-maker and someone had said to me, 'There's this fundamental object technicality, and it can be argued either way', I would have called a meeting with the relevant people who had the right to express a legal opinion, and we would have left, having made a decision one way or the other. It would have taken a week or two weeks to T up the necessary meeting, and then a decision would have been made. The idea that a difference of opinion, which is as fundamental as this to the entire case, and it is agreed that it is fundamental to the entire case ---- The idea that that goes for 165 days I find ridiculous.

THE CHAIRMAN: But getting the documents is not going to help that because they have said that there were these two views. So, the question is whether, at the end of the day, with that before them, they made a non-infringement decision or they decided ---- they came to a conclusion that they were not able to resolve this difficulty ---- that they were going to have to go off to do ---- to spend more money to do that, and their priorities did not allow them to do that.

MR. SHOVELL: I understand that is what they said. I also understand ----

THE CHAIRMAN: So, I do not see that we need to know the detail of the discussions in relation to the technicality. All we need to know is that there were those discussions.

MR. SHOVELL: Madam Chairman, I understand the point you are putting to me is that given that it has been summarised that there was a discussion and there was a difference of view, you are asking what could the minute of that meeting possibly say, other than that there was a difference of view. I am not suggesting the meeting is going to be ----

THE CHAIRMAN: What I am saying is that we do not need to go into the detail of those discussions. We know that people were presenting different arguments, and whether it was the Chief Executive, or the Chairman, or the legal advisors or whoever, it does not really matter because we know that there were the two points of view, and the question is whether,

at the end of the day, the result of that was that they made a decision of non-infringement, or whether at the end of the day they threw up their hands and said, 'Well, in order to resolve all this we need to go off and do all sorts of other things, and to do that it is going to cost us money. Our resources, and looking at all our other cases, etc., mean we cannot do it' It does not seem to us that we need to get into the detail of who said what to whom, or as to how the particular technical difficulty was being analysed.

MR. SHOVELL: Madam Chairman, I completely understand the argument you are putting. I guess, okay, I have to come up with a hypothetical example. What if Mr. Priddis, who first expressed that this was a clear cut non-infringement on this technicality ---- His job, as I understand it, was to filter new cases, to make sure that the OFT only undertook cases which were in accordance with their priorities. Therefore, his views would have carried tremendous weight. What if it turns out that the CEO agreed with him on this technicality? What if it turns out that the Chairman agreed with him on this technicality? What if it turns out that Mr. Smith agreed with him on this technicality? What if it turns out that the only people who disagreed were two economists who happened to be members of the case team? That would be useful data, it strikes me, to the Tribunal because you might be willing to make the inference, 'Well, if the four senior experts and the OFT's internal legal team were all saying the same thing, and the only people disagreeing with them were two economists who thought that this was just improper or unreasonable", maybe that is material evidence, and it would assist the Tribunal to decide that in fact it was a non-infringement decision and that it was just a fop to the case team to not rule on that basis. It is difficult to hypothesise, but that is an example, where it would seem to me useful to see the exact document.

THE CHAIRMAN: We are told who, at the relevant time, expressed what view - which side they were on.

MR. SHOVELL: I suppose we are told it was the case team. Okay, so the Tribunal already knows that it is effectively the more junior people in the OFT who were expressing the view. (After a pause): I still struggle, because it seems to me, as a lay person - and it is not helpful that I have not read the whole Judgment carefully ---- It strikes me that the House of Lords did not envisage us being put in this position of not having any documents. I understand the necessity point as the Tribunal sees it.

THE CHAIRMAN: But they have said it is exceptional.

MR. SHOVELL: I understand. Well, many cases before judicial review would not turn this acutely on findings of fact.

THE CHAIRMAN: They are talking about findings of fact cases.

MR. SHOVELL: It is still exceptional in those cases. (After a pause): If that is the case ---- if that is the Tribunal's understanding, then clearly we have a difficulty in overcoming your position. We think it would be helpful, and shed light, and be in the interests ----

THE CHAIRMAN: If you could show us that it was necessary, then I think that is an important consideration. We did not think on the last occasion that you showed that it was necessary. At the moment I do not think you have shown this time that it is necessary.

MR. SHOVELL: The fact that it was concealed from the case closure letter in breach of the OFT's guidelines to me raises enough concern about the evidence that it would be reasonable to see the underlying documents. I am not sure I can put it any more clearly or more strongly than that, but that does seem to me that ---- I guess, professionals that get involved in investigating or evaluating things have to assess the reliability of the sources, and it seems to me that the exclusion of the key point from various letters from January onwards causes you to have doubt as to the reliability of the source. That is part of our thinking.

THE CHAIRMAN: Can I just make sure that I understand? You are going further than just the Chairman's view. You are saying that we need to re-look at the whole question. What you are asking for is all the documents in relation to ---- or, certain documents in relation to this point because it was not in the case closure letter.

MR. SHOVELL: I am referring to the object technicality. I am trying to focus on the simplest neat point. Correct.

THE CHAIRMAN: (After a pause) Mr. Shovell, I think we now understand the point you are trying to make, or you are making which is that the case closure letter did not refer to this technical point on object. Mr. Vincent Smith's witness statements do refer to it. You question why it was not referred to in the letter, and clearly it is relevant, you say, because it is in Vincent Smith's statement, but he does not explain why it is not in the letter.

MR. SHOVELL: That is certainly the case.

THE CHAIRMAN: Therefore, you say, as I understand it, that in order to see what decision was made, because clearly it was something relevant according to Mr. Smith, but not in the letter – right?

MR. SHOVELL: Yes.

THE CHAIRMAN: The underlying documents, you say, I am putting your argument ----

MR. SHOVELL: Yes.

THE CHAIRMAN: -- I do not want it to be thought that I am saying what the position is. Your argument is the underlying documents are relevant. I think for our part we have not

understood it to be put that way before. I think we will hear what everybody says about that. You have given all the submissions you can on that point, unless we have not understood, and that is why I put it to you what you are saying.

MR. SHOVELL: I am trying to think if you have put it that much better than mine that I actually need to think about if there is any difference between the two.

THE CHAIRMAN: Well that is what I am ----

MR. SHOVELL: You think you have put it the same way, let me just understand. Vincent Smith says that he decided to not include it in a case closure letter, this technical issue, but he admits in his witness statements that it is a fundamental and relevant issue. Therefore, we need to see the underlying documents to understand how it has been handled. Yes, that is true. We make the additional point that his decision to exclude it, if he was an accountant in a similar situation would seem to fall as gross misconduct, and therefore I do not understand why his decision to exclude it is not gross misconduct for him.

THE CHAIRMAN: I do not see that point because we are not dealing with gross misconduct here.

MR. SHOVELL: Apologies, I am trying to explain the logic from a justice point, to have to rely on his summary of the documents, when it was his decision to exclude the point in the first place.

THE CHAIRMAN: I think your point is that he has not summarised these documents.

MR. SHOVELL: Yes, that is true, the trouble is we do not know what documents exist, and it is difficult to say whether they have been summarised or not. But in relation to the objects point, the technicality, we do not have an understanding as to how it evolved in 165 days of discussion. I am not sure how I can put the point any more.

THE CHAIRMAN: Shall we see where it comes out in the submissions in response?

MR. SHOVELL: I think that is probably best. Thank you, madam Chairman, for your assistance.

THE CHAIRMAN: All right, so that has dealt with that request for disclosure, is there any other request for disclosure?

MR. SHOVELL: Clearly we do not know what documents exist in general, but if proportionality is an important factor, and we have said this throughout, if the documents that are relevant to the discussion about the objects' technicality are provided to us it would seem to us that that is the majority of what is important to us and therefore may be as a matter of courtesy to the Tribunal we should restrict it to that.

MR. HOSKINS: Madam, I am sorry to rise, but I am very concerned about where this is headed because we had this debate right at the outset.

THE CHAIRMAN: No, can we just finish, and then we will come back.

MR. SHOVELL: Well, madam Chairman ----

THE CHAIRMAN: That is really your point.

MR. SHOVELL: That is our point. Mr. Hoskins tried to close and limit the discussion of disclosure up front and this is one of the reasons why I did not want to have that discussion then, I wanted a fact based discussion based on the arguments that we put today, so I think we should close at that point.

THE CHAIRMAN: All right. We gave you a 10 minute adjournment in order to consider whether you have put all your submissions, or whether you wanted to say anything else.

MR. SHOVELL: I think we should close, thank you, madam Chairman.

THE CHAIRMAN: Thank you. Mr. Hoskins?

MR. HOSKINS: I am sorry, madam, it has been tough sitting on my hands all afternoon, I hope I have done a reasonable job of not intervening too much. I have to start with a general disclaimer, it appears in our skeleton, which is both in the written and oral submissions there have been quite a significant number of allegations about the probity of the Office and the individuals, and I would just like to make a general disclosure at the start, we do not accept them. I am not going to take the Tribunal's time going through them individually, but I have to say that because those behind me will not thank me if I do not.

The issue is whether there was an implied non-infringement decision, and that is the only issue before the Tribunal today. I appreciate that certain members of the Tribunal have sat in previous admissibility cases. I am not going to take a long time, but I would like to quickly go through the law.

THE CHAIRMAN: Can we go through disclosure, because ----

MR. HOSKINS: Well I am sorry, madam, well I am in your hands as to the way you would like to deal with things. I was not aware that you wanted me to deal with disclosure first. I certainly can if that is your preference.

THE CHAIRMAN: If we do not deal with disclosure first where do we get to?

MR. HOSKINS: Certainly, I am perfectly happy, yes. We have put in a separate supplemental skeleton on further disclosure dealing with *Tweed*. The main point as to why we should not go back and re-write history and revisit the disclosure ruling is because the test that the Tribunal applied in its disclosure ruling was, in effect, the same as *Tweed*. The Tribunal did not apply the old – but not that old – Judicial Review test. It applied the test from the Tribunal's own case law which comes from the *Claymore* disclosure ruling, and the test it

applied was where the disclosure was necessary, relevant and proportionate. Perhaps it is worth quickly going back to the disclosure ruling. It is in authorities' bundle, tab 7. Madam, the test that the Tribunal applied is set out at paras. 25 to 26, p.234 of the bundle. If I could just ask the Tribunal to quickly read those paragraphs rather than have me read them out.

THE CHAIRMAN: (After a pause) Yes.

MR. HOSKINS: That was the actual test applied, "necessary relevance and proportionate".

THE CHAIRMAN: I am not sure though whether what is now being asked for was not documents being asked for then.

MR. HOSKINS: Madam, the reason I rose, I am losing track of what is actually required, and the point I was going to make and, if I may, I will make it now, is that the reason why at the very outset I pressed very strongly for a request to be made of what documents were being sought was precisely to avoid this situation and we had that the last time. Those documents were considered, against this test, necessary, relevant and proportionate.

THE CHAIRMAN: If one goes back to para.12: "(a) the minute of the case review meeting, (b) Mr. Maycock's memorandum… (c) Mr. Priddis's memorandum (d) the final draft of the case closure letter … (e) the draft summary of the final comments from interested parties ." So that really is where we have landed up this afternoon ----

MR. HOSKINS: Mr. Barling points out in para.13 there are other points. The reason why we make a request like this and the reason why first of all, if I remember this correctly, Mr. Smith's first witness statement was given and then the list was produced was precisely to see what documents might be said to be necessary and that is the reason why we suggested we did it in that way.

Now, when it comes to the way in which the Office considered the object issue for example, you have a full and frank account in Mr. Smith's first witness statement, so the question that then arises against that background, is there anything else by way of disclosure of documents that might be necessary relevant and proportionate. The reason why these documents were asked for, of course, is that these are the documents that go to the object, or contain discussion of the object issue within the Office. This is what they are. If you dig any lower down you are looking at personal file notes of a case worker to help himself along. But these are the formal procedural, although they are internal ones, if you like. We heard the arguments, we had the submissions last time and Cityhook legally represented then did not even come close to showing that any of these documents were necessary. So

when one now says "We want the object documents, these are the object documents. That is why we structured the exercise in this way.

Just to compare the way the Tribunal approached the matter last time and what subsequently happened in *Tweed* can I ask you to turn to para.40 of this disclosure Ruling.

> "We do not need to consider whether the disclosure principles applicable to judicial review or to proceedings for annulment before the European Courts bind this Tribunal, since the application fails on the basis of this Tribunal's rules and jurisprudence."

In fact, the Tribunal's test as applied in this disclosure ruling is actually more liberal when it comes to ordering disclosure than the old Judicial Review test, than the EC test. So what is being said here is having applied the Tribunal's more liberal approach we do not need to go and look at the other ones because they are more strict. So if you do not get it on the Tribunal's liberal approach, you are not going to get it on the stricter approaches. That is why we should not be going back in history.

We come then to *Tweed* of course which intervened. I have put *Tweed* at bundle 8, but I do not think the Tribunal has it. You have been through some of the paragraphs with Mr. Shovell. The test is almost identical, I think it is effectively identical to the one the Tribunal applied. So, for example, Lord Bingham, para.3, he talks about the need that he has identified for there perhaps to be more liberal disclosure rules, particularly in fact specific Judicial Review cases, but the punch line is: "The test will always be whether in the given case disclosure appears to be necessary in order to resolve the matter fairly and justly."

THE CHAIRMAN: Yes.

MR. HOSKINS: "… necessary, relevant, proportionate" – it is a different way of saying the same thing.

The next passage I was going to was Lord Carswell at para.38.

> "If Girvan J [the First Instance Judge] in the passage which I have quoted … intends to lay down the general proposition that the disclosure of documents referred to in affidavits should always take place where proportionality is an issue. I could not support that. The proportionality issue forms part of the context in which the court has to consider whether it is necessary for fairly disposing of the case to order disclosure of such documents. It does not give rise automatically to the need for a disclosure of all the documents, whether disclosure should be ordered will depend on a balancing of the several factors, of which proportionality is only one, albeit one of some significance."

Again, that tallies exactly with what the Tribunal did in paras. 25 and 26, including the proportionality exercise in the context of this case – was it appropriate? Lord Brown – again I think it is a passage you have been to, madam – para. 56:

> "In future, as Lord Carswell puts it, 'a more flexible and less prescriptive principle' should apply, leaving the judges to decide upon the need for disclosure depending on the facts of each individual case."

The other two Law Lords agree I think with each of those three speeches, so they should be saying the same thing.

So you take the disclosure ruling from last time, you take *Tweed* where the same test was applied, we should not be revisiting. So the only issue then is whether any of the new items requested satisfy the test for necessary, relevant and proportionate. If we can pick this up on our skeleton on disclosure, since I have tried to identify what the individual requests are. It is para.7 of our supplemental disclosure skeleton. 1st Smith para.73 refers to "the views expressed to me by a senior legal adviser concerning the relevance of the Competition Appeal Tribunal's case law in this area." Perhaps it is worth going to 1st Smith, that is core bundle, tab 4.

THE CHAIRMAN: I am not sure this is being proceeded with now though? Or whether it was being confined to the legal technicality point.

MR. SHOVELL: Sorry, madam Chairman, I have missed the thrust of the last 10 seconds, I was trying to find the relevant bit of the disclosure Judgment.

THE CHAIRMAN: Are you still asking for the legal advice document?

MR. SHOVELL: The OFT has suggested that there is no legal advice document ----

THE CHAIRMAN: Absolutely.

MR. SHOVELL: Sorry?

THE CHAIRMAN: They say there is not, yes.

MR. SHOVELL: Again, this as a lay person it seems to be wrapped up in technicality. Is there any basis to know what that legal advice was?

THE CHAIRMAN: Well they say there is not a document. Mr. Hoskins was just referring to it, that I thought had been accepted before, that there is not a document.

MR. SHOVELL: Sorry, Mr. Hoskins has said in his skeleton that there is no document.

THE CHAIRMAN: I thought at the outset that had been accepted.

MR. HOSKINS: Maybe the best thing to do is to work through these points and Mr. Shovell can tell us whether they are still pursued and if they are I will make submissions and if they are not obviously we can skip to the next one. But it sounds as if that one is not pursued.

The next one is, the request for further information rather than disclosure request, which is this reference, the case team in a telephone conversation to Mr. Shovell said "The old Chairman was very supportive of one argument, not always made." The question is: "What is that one argument?" Madam, you have our submission.

THE CHAIRMAN: As I understand it where the whole discussion this afternoon has come from because it is suggested that that argument is this legal technical point and ----

MR. HOSKINS: Well, madam, let us assume that it was. Let us assume that the old Chairman was very supportive of – well it says "one argument not always made", so let us presume the old Chairman was very supportive of the object case. I am sorry to be crude, but 'so what?' He left before we even had the case review meeting which we have a full account of. There is a new Chairman in place. There is a new CEO in place. Mr. Smith has given a full and frank account of what happened from then on. It simply cannot make any difference to the legal question before the Tribunal of whether there is an implied non-infringement decision. So therefore it fails the test of necessity, it fails the test of relevance.

MR. SHOVELL: Madam Chairman, is it appropriate to comment now or should I wait.

THE CHAIRMAN: No, let him finish.

MR. SHOVELL: Sure.

MR. HOSKINS: The third item was the hardcore issue, which again it was more a request for clarification for information which I dealt with this morning, so I do not think there is anything else I can usefully add at this stage. The fourth item is there any contact with the Duchy of Cornwall, which I clarified this morning. I have explained what my instructions were and I understand now that that is accepted, there is nothing else in that.

The final point was disclosure of the CEO's views and, as we have already seen, that was an application that was made last time, it was rejected at para.37 of the disclosure ruling, and no further argument has been put forward to day to show why, despite that ruling it is necessary, relevant and proportionate, so we say there is nothing in that either.

Madam, that is all we wanted to say on disclosure. I do not know whether you wish to hear from the others, or whether you rather I carried on with the substance of the matter.

THE CHAIRMAN: It seems to me we have to deal with the disclosure first, because if we came to the conclusion that there should be disclosure then that needs to be dealt with.

MR. HOSKINS: I understand.

THE CHAIRMAN: Mr. Barling

MR. BARLING: I do not have very much to say on this. I hear and adopt what Mr. Hoskins says on the individual application, could I just make one or two very general points about

disclosure. It does seem to me that there is an insuperable problem for Mr. Shovell in seeking disclosure at this stage. The Tribunal has decided in the ruling that it has the necessary material before it on which to decide whether the OFT has or has not taken a non-infringement decision, and that is in para.27 of your ruling, where it says that these witness statements, referring to Mr. Smith's, "… appear to us to be full and frank and to give a clear and transparent insight into the decision which the OFT made in this case."

So if the Tribunal has the necessary material to decide the question in issue, and the only question being one of admissibility, then no further material can be necessary, and indeed, you went on to conclude, as Mr. Hoskins has said, you are not satisfied that any of the specific documents requested on the last occasion were necessary, relevant or proportionate to determine whether the OFT has taken a non-infringement decision – again that is para.27. If further material is not necessary for that purpose then it is in our respectful submission indisputable that the disclosure of it cannot properly be ordered, and whether you look at the Tribunal's test in *Claymore*, or you look at some of the passages that have been referred to in *Tweed*, by Lords Bingham, Carswell and Brown, they all lead to that conclusion. Indeed, in their disclosure skeleton Cityhook themselves accept that. If one looks at paras. 13 and 16 of Mr. Shovell's disclosure skeleton on the last occasion, one will see that effectively he agrees with that principle. Of course you, madam, on the last occasion also dealt with it on the basis of it being not proportionate to order further disclosure in the context of this case, as well as not being necessary you also said that it would be in effect disproportionate. I think that emerges from para.26 of your ruling. It really is sufficient to dispose of any renewed application in our submission for disclosure.

I suppose one should just also refer to the fact that if, as it were, the Tribunal, contrary to the submissions that have been made, were minded to reopen this whole question then it would be necessary to consider some of the matters that were not considered on the last occasion – expressly not considered on the last occasion, and I simply refer to them, without going into them, to what extent is the ECJ and CFI case law on internal documents in the light of s.60 of the Act binding on the Tribunal? Of course, as para.40 of your ruling indicates that did not really fall to be decided in the light of the ruling, but it would be if the matter were to be reopened, and obviously I do not want to go into what our submissions were on that at the disclosure hearing, but the Tribunal is well aware of them, they are in our written and oral submissions on 14th November.

I suppose one would also have to consider to what extent the disclosure principles in Judicial Review are either binding or helpful, and then I suppose to what extent the *Tweed*

decision in the House of Lords would need to be read. In an EC case, if s.60 did apply, to what extent, as it were, the House of Lords' decision has to be read in the light of the ECJ and CFI case law, because of course the *Tweed* decision was not dealing with EC law, it was a Human Rights' Convention case, but there was no 'Luxembourg' point, if I could put it that way, as there would be here if s.60 applied. All those matters, as it were, would have to be dealt with if this matter were reopened. But in our submission, your decision was wholly consistent – if it needed to be – with *Tweed*. *Tweed* has been said to be a sort of sea-change by Cityhook in the submissions today, but in fact it has made a relatively minor adjustment by saying what hitherto had been considered a rule should not be considered a rule, namely, that before you could go underneath the affidavit or witness statement evidence you should have to show something on the face of it that was inadequate or incomplete or wrong. That rule should no longer apply the House of Lords said, but nothing else really changes and as Mr. Hoskins has said, you madam, did not on the last occasion, apply that rule. So, really, you are unaffected by *Tweed*. In any event, *Tweed* was a very special case because it was almost entirely, their Lordships said, directed to whether there was a proportionality challenge, very heavily fact-based, inevitably, because there has to be a weighing and a balancing in a proportionality challenge. Time and time again - and I will not go through it now because I do not want to take up time - if one reads their Lordships' speeches in that decision, they emphasise that they were dealing really with a proportionality case which was very fact-specific - to use, I think, Lord Bingham's phraseology. In this case there are facts involved, and it is not in the same league as a proportionality challenge, in our submission.

Those, Madam, I think, are our thoughts on disclosure.

MR. RANDOLPH: Madam, I can be very short. I adopt what my learned friends, Mr. Hoskins and Mr. Barling have said, and would just point the Tribunal to para. 5 of *Tweed*, and Lord Bingham's short synoptic speech, if I can describe it as such. He makes the point there, which has not been brought out yet (four lines down), "The Commission's deponent has summarised five documents which Mr. Tweed wishes to see. Disclosure is resisted on the ground that this would beach the assurance of confidentiality ----"

They are not saying ----

THE CHAIRMAN: I do not think any of the documents that are now being asked for come into that category.

MR. RANDOLPH: I was not going there, Madam. In this case it is said that the document are not relevant. That was not the point being put by the Parades Commission. They were

saying, “It may well be relevant, but they are confidential”. So, it is a different point. This Judgment was based on that fact - that the Parades Commission was actually saying, “We’re not going to disclose this to you - not because it is not relevant, but because it’s confidential” and it was on that basis that they wanted to go behind the affidavits from the deponent and see for themselves what the position was. So, we say that is an important factor which is different from the present case.

Secondly, very briefly, I entirely adopt my learned friend, Mr. Barling’s point with regard to internal documents because that is what is being sought here. Just for your note, Madam - and I am sure the Tribunal will have the submissions previously made - it is in paras. 8 to 10 of NTL’s skeleton that we set out what the law is under EC law with regard to disclosure - or, rather, non-disclosure of internal documents, and that makes reference to not only Commission notices but also the case law of the European Court of Justice.

Madam, those are my submissions.

MISS MURPHY: In terms of the submissions for Global Crossing, we wholly adopt the submissions that have been made by the OFT, by BT, and by NTL, and would say simply, I think in conclusion, hopefully, that nothing has been said today that would demonstrate that the disclosure sought would, as Mark Hoskins has already said, be necessarily relevant and/or proportionate to the issue of admissibility which is before the Tribunal today.

MR. TURNER: Madam, I also adopt what my friends have said. I will add a few brief points of my own. As to the test, it turns out, it seems that there is no dispute about the fundamental test for whether disclosure of underlying documents is necessary. Your Judgment at para. 23 of the disclosure ruling, repeating the *Claymore* principles, matches what Lord Bingham has said at para. 3 of *Tweed* about the basis of the test. The only additional paragraph that I would draw to the Tribunal’s attention is para. 32 of *Tweed* in Lord Carswell’s Judgment. That is on p.15 of my copy. Half-way down Lord Carswell says,

“I consider that it would now be desirable to substitute for the rules hitherto applied a more flexible and less prescriptive principle which judges the need for disclosure in accordance with the requirements of the particular case taking into account the facts and circumstances”.

Then, a few lines down, this admonition:

“Even in cases involving issues of proportionality, disclosure should be carefully limited to the issues which require it, in the interests of justice”.

So, it all depends on the circumstances of the case before you. As far as our case is concerned, I have two observations: first, in our case there is a single, narrow issue of fact

for the Tribunal - namely, what was the reasoning that impelled Mr. Smith, on behalf of the OFT, to close the file on the collective boycott case and the collective setting case? That is the question. It distinguishes this case, in particular from *Tweed*, not just because *Tweed* was a human rights case, but because the issue in *Tweed* depended on whether the Parades Commission had struck a lawful balance when weighing up all the available evidence on effects on community relations. Quite different, far more narrow here.

The second observation is this: that when you are considering what was the reasoning of Mr. Smith, the best evidence of his decision is supplied by the contemporaneous decision letter which you have as amplified fully by the detailed and candid witness statements from Mr. Smith which you also have. Largely, Mr. Shovell's requests go to the opinions and views of other officials along the way. For the reasons already canvassed in argument, we take the view that those are peripheral and documents that record the blow-by-blow debates are of limited evidential value only. For completeness, I would record that in the *Aquavitae* case, at para. 209, a similar point was made by the Tribunal about the limited evidential value of officials who were not themselves responsible for taking the relevant decision.

Madam, those are our submissions.

THE CHAIRMAN: Mr. Shovell?

MR. SHOVELL: I suppose a few quick points. In the OFT's core bundle at Tab 7, the disclosure Judgment - if I have the document correctly described ---- Paragraphs 28 to 30 ---- Can I just check we are looking at the same document? Paragraph 28 starts, "Cityhook has not been able to explain ... It has not identified any inaccuracy or misrepresentation in Mr. Smith's evidence. The application appears to us to be a fishing exercise." It then goes on in para. 30 in relation to the 13 October, 2005 meeting minute. "It has not been suggested by Cityhook that Mr. Smith's account of the meeting is inaccurate or complete. We see no reason to order disclosure." The Tribunal will know what it had in its mind when it wrote that, but when I read it, and as we were sitting here during the hearing, it struck us that it was principally the judicial review point that it would only be given if it was demonstrated that there was an inaccuracy or incompleteness in Mr. Smith's account, and therefore we thought that that document was not given to us on that basis. That hurdle has been removed.

The reason I mention that document in particular is that the conversation with the case team about the previous Chairman's view was also on 13 October, 2005. It strikes us as certain - or, at the very least, very, very likely - that the note of that meeting on 13 October, 2005 would record the case team describing what the previous Chairman's view was, and

therefore that strikes us as being a document which addresses our specific request and which we were previously denied, principally because of the law before *Tweed*.

Two other points. I believe it was Mr. Turner that suggested that the paragraph he read out from *Tweed* was, "If you require it in the interests of justice ----" That is exactly what we say is the reason why we want this bit.

Then, Mr. Turner said the best evidence of his decision is his letter and witness statement. Well, we have already explained why we feel that his case closure letter is inadequate on this point, and it is not true that the best evidence is his witness statement in the eyes of *Tweed*. It feels that it is reasonable to look behind the documents, and the best evidence is the document itself. If it is helpful to the Tribunal, we are concerned about the proportionality of this. If it is helpful if it were restricted to this one document, maybe that might be more acceptable on the weighing up of not disturbing the proceedings unduly - the note of the 13 October meeting - because that seems to be the one that is likely to document the previous Chairman's views. I am sorry if I am using jargon - I think that is the case review panel meeting ----- If the OFT could confirm that I have the jargon right? (After a pause): Case review meeting on 13 October and the case team's expression of the Chairman's views were straight after that meeting, and so our inference is that they were discussed at that meeting and are recorded by the note. I am not clear if it is of any relevance or assistance to the Tribunal at all, but if it was helpful Cityhook would be willing to allow the document to be shown to the Tribunal first, and for the Tribunal to review that document to decide if it is material or if it is helpful to the Tribunal. If that in any way deals with any of the other technical points, then we suggest that if that is of assistance. Other than, we repeat our request for that document disclosing the previous Chairman's thoughts and how they were dealt with.

THE CHAIRMAN: Thank you.

(For Ruling please see separate transcript)

THE CHAIRMAN: Tomorrow morning, at ten-thirty, Mr. Hoskins can address us. Do you still think you are going to take an hour?

MR. HOSKINS: Around an hour - perhaps slightly longer. I doubt very much I will be more than two.

THE CHAIRMAN: On that basis we probably need your submissions and the interveners' submissions before lunch. I am very concerned that Mr. Shovell can reply, and that he has an opportunity to think about your reply. That will give you lunch-time to consider your

reply. Hopefully, on that basis you can reply at two o'clock or 2.15 depending on how the timing goes.

MR. SHOVELL: Thank you, Madam Chairman.

MR. RANDOLPH: If, on this side of the bench, we finished early of course at, say, twelve-thirty, then of course Mr. Shovell could possibly, with the court's permission, and with an early adjournment, have the opportunity to ----

THE CHAIRMAN: I think we have got to give him sufficient time, and that will come into the lunch adjournment anyway. It seems to me easy to break and start again at two o'clock. If you were very quick and it was eleven-thirty, then we could change ----- It may give you an incentive to be quick.

(Adjourned until 10.30 a.m. on Wednesday, 31 January, 2007)
