IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1071/2/1/06

Victoria House
Bloomsbury Place
London WC1A.2EB

31 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. HOSKINS: Madam, I am going to deal with the admissibility part of the case.

THE CHAIRMAN: Yes. As I said yesterday what I wanted to do … and it is actually p.122 of bundle. This is now quite well trodden path for the Tribunal:

> "In our view the main principles to be derived from *Bettercare* and *Freeserve* are the question where the Director has made a decision as to whether the Chapter II prohibition is infringed is primarily a question of fact to be decided in accordance with the particular circumstances of each case. Whether such a decision has been taken as a question of substance not form to be determined objectively taking into account all the circumstances. The issue is has the Director made a decision as to whether the Chapter II prohibition has been infringed, either expressly or by necessary implicate on the material before him. There is a distinction between a situation where the Director has merely exercised an administrative discretion without proceeding to a decision on the question of infringement, for example where the Director decides not to investigate a complaint pending the conclusion of a parallel investigation by the European Commission and a situation where the Director has in fact reached a decision on the question of infringement. The test as formulated by the Tribunal in *Freeserve* is whether the Director has genuinely abstained from expressing a view one way or the other, even by implication on the question where there has been an infringement of the Chapter II prohibition."

I think that passage has been cited in every subsequent admissibility decision as being the starting point.

It is probably worth remembering what the position actually was in *Claymore* and we can see that from para.130, p.124.

> "In the present case the Tribunal was quite properly told by counsel for the Director during the hearing that the reason for the Director's decision of 9th August 2002 was that he had concluded that there was insufficient evidence to establish an infringement."

So that was the basis for the file closure in *Claymore*, that there was insufficient evidence to establish an infringement.

There are some other principles that come out of the case law, particularly from *Claymore* and I would like to go through them. Paragraph 10 of my skeleton is a good way to deal with them. If you could keep *Claymore* out, I am going to keep going through *Claymore*.

There I said that an appealable decision will only arise where the OFT has reached a

decision on the substance of the case whether positive or negative. I have given the citations from *Freeserve*, it is probably not necessary to go to them I do not think there is any dispute about that as a proposition.

But then the OFT's conclusion must be to all intents and purposes a final conclusion – stressing the word "final", constituting a firm decision, stressing the word "firm", that no infringement is established on the evidence before it; a provisional or tentative conclusion that no infringement could be established on the evidence will not suffice. Those propositions come from *Claymore*. So if one looks at para.145, p.127, similarly, in our view, that conclusion by the Director was, to all intents and purposes, a final conclusion, subject only to re-opening on the basis of compelling new evidence. In our view there is nothing provisional or tentative about his conclusion that no infringement could be established on the evidence. In our view, the Director has reached a firm decision that no infringement of the Chapter 2 prohibition is established on the evidence before him.

At 156 one sees effectively the same point again. At 156 that seems to us to be what happened in this case - the Director's investigation was long and detailed. No stone was left unturned. Very large quantities of information were obtained, etc. etc. Then, towards the middle of that passage, "The Director and his staff gave close consideration to the evidence and reached a view. That view was that the evidence did not amount to proof of an infringement. As we have said, there was nothing provisional or tentative about that conclusion", etc.

So, in our submission, what the case law shows is that there must be a final conclusion, a firm decision of non-infringement and a provisional or tentative conclusion relating to the substance of the matter is not sufficient to constitute an appealable decision.

The second aspect to come out of the case law is para. 10(b) of my skeleton argument. "An appealable non-infringement decision will arise where the OFT has fully or exhaustively investigated the matter and concluded to its satisfaction that the evidence is not sufficient to establish an infringement". Again, we see that in *Claymore*. If we can look first of all at para. 132, which is at p.125 ---- Perhaps if I ask the Tribunal just to cast their eyes down para. 132, but the crucial part of that paragraph is the final sentence: "We do not think that para. 83 of *Bettercare* was contemplating a case such as the present where the Director has fully investigated the matter and concluded to his satisfaction that the evidence is not sufficient to establish an infringement".

Again, at para.152 on p.129, "Applying the test set out by the Tribunal in *Freeserve* we cannot say that in the present case the Director has genuinely abstained from expressing a

view one way or the other, even by implication, on the question of whether there has been an infringement of the Chapter 2 prohibition. In this case the Director has investigated the matter exhaustively for the purpose of reaching a conclusion on whether the Chapter 2 prohibition has been infringed".

If one turns through to para. 155 in *Claymore*, "Under the Act the Director has the functions of both investigation and decision-making. Initially the Director is engaged in a process of investigation. The object of that investigation is to come to a conclusion whether the Chapter 2 prohibition has been infringed. In the nature of the process that conclusion can be reached only on the basis of the evidence available. At some stage in the investigation the Director reaches the point where he considers he has all the evidence he needs or can usefully obtain. At that stage he assesses the evidence and makes up his mind".

So, again, the situation which gives rise to an implied decision of non-infringement is where the Director has all the evidence he needs or can usefully obtain.

The flip side of that, we say, is therefore that an appealable non-infringement decision cannot arise ... will not arise where, in the Office's view, there were further matters to be investigated or avenues of inquiry left unexplored. We can see that flip side in *Claymore* again at para. 142 on p.127. "In addition, the letter of 9 August, 2002 was written at the end of an extensive and wide-ranging investigation which had lasted nearly two years. It is not suggested that in the Director's view there were further matters to be investigated or avenues of inquiry left unexplored."

One sees the same point in the *Casting Book* Judgment in the authorities bundle at Tab 6, para. 38 (p.224 of the bundle). It is actually the last two sentences of para. 38 that I need to draw your attention to. "However, it is clear from Mr. Ray's second witness statement [Mr. Ray was a deponent on behalf of OFT] that the OFT's understanding of the situation was far from complete, and that a number of important matters had not been addressed by the OFT. It is not the case therefore that the OFT has all the evidence it needs or can usefully obtain". That is a citation from the passage in *Claymore* that we have just seen.

The case law shows that one can only have an appealable non-infringement decision where, in the Office's view, it has fully, exhaustively investigated the matter and has all the evidence it needs or can usefully obtain.

Before I leave the case law I should say something about *Aquavitae*. I probably do not need to take you to it, but I have set that out as para. 11 of my skeleton argument. You have already been referred to it by Mr. Shovell. In a sense, this is one paragraph out of hundreds of paragraphs of Tribunal Judgments on non-admissibility, but it is the high point, if you

like, for would-be appellants, which is why it appears again and again before the Tribunal. But, let us have a look at what it actually says: "In normal circumstances 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. Moreover, the inference that the case has been closed because the relevant regulator has concluded that an infringement is not established 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".

Now, before I pass to the legal aspects of that quote, it is important to notice that the final sentence is not this case. What the Tribunal said in *Aquavitae* was that the inference will normally be irresistible if the regulator has already expressed a view to the effect that he sees little merit in the case. Of course, that is not the factual circumstance here. Mr. Shovell has continually referred to the case team's view that there was a breach here. You have seen Mr. Smith's evidence that the internal view within the Office (one sees it from the case closure letter as well) was that there was *prima facie* evidence of an infringement. So, it is not an *Aquavitae* type factual situation. It is actually the opposite.

But, in terms of the legal status of that statement, our primary position is that it cannot be correct in law. The mere fact that the Office opens an investigation on the merits, but subsequently decides not to adopt a final substantive decision cannot give rise to any presumptive inference that the Office has adopted an implied non-infringement decision. We say that must be correct because it is completely inconsistent with, for example, the accepted discretion that the Office has to close the file for administrative priority reasons. There are a number of perfectly legitimate, respectable reasons why the Office may close a file, which have nothing to do with the finding of non-infringement. Our submission is, therefore, that it is legally inappropriate for a presumption of that sort to be applied in this sort of case.

THE CHAIRMAN: The passage does not say it is a presumption. It says it is an inference.

MR. HOSKINS: I was searching for the word, and I picked the wrong one. Even as an inference ----

THE CHAIRMAN: An inference is something you infer if there is no other evidence or reason, or whatever.

MR. HOSKINS: Yes.

THE CHAIRMAN: I do not think one has to go as far as to say that this passage is wrong to put the argument that you are putting.

MR. HOSKINS: Madam, that is the second point I was going to make - precisely that. In this sort of case ----

THE CHAIRMAN: It depends what the circumstances are, and you have to read that passage in the circumstances. There is, or may be, an inference which can be upset or overturned, or whatever, and the word 'inference' is different from the word 'presumption'.

MR. HOSKINS: That is precisely our alternative argument - that what the Tribunal's case law also tells us is that one must look at the facts of each case, look at all the circumstances of the case, and that is what one must do, but our point is that when one does in these cases, there is then effectively in practice no room for such an inference, because as you say it is only really credible you could have an inference of that sort where there were no other facts. The reason why I make the primary argument is ----

THE CHAIRMAN: The facts may support the inference.

MR. HOSKINS: But then you do not need the inference. But the reason I make the primary point is obviously it is a matter that is coming up again and again. It has been put in a certain way and obviously the Office feels unhappy about the way that it is coming up. We say the correct way is the way, madam, that you have just put it, and that is what will almost always happen in practice, and that is what happens in this case. The Tribunal clearly has sufficient facts to make a conclusion without having to rely on any inference of the sort put forward in *Aquavitae*.

Madam, that is all I need to say on the law, I can then move to how does one apply those principles to the facts of this case? The question is do the contested decisions – I say that because there were two investigations that were closed – did the Office adopt either expressly or by necessary implication a non-infringement decision in relation to either? Well obviously there is no express non-infringement decision because the case closure letter on its face says the case was closed for reasons of administrative priority. The only issue is implication.

If I can ask you to turn to paragraph ----

THE CHAIRMAN: I am not sure that one can accept on its face that there is no express, because the letter says something, because the question is the letter is recording a decision made, the decision is not made in the letter, so one has to go back to the witness statements to see what the decision was. So I am just putting a pointer to the fact that I do not think at the moment one can say it is not express because the decision letter says something, because the

decision letter may or may not – I am not expressing a view, it is the principle that I am looking at not the evidence as such.

MR. HOSKINS: Madam, I understand the point. My understanding of "express", and the way I use the word is, for example, in decision letters it is spelled out on its face, but madam I do not think there is any point in my making submissions on what the point is because the point that you make is a good one and it probably does not make any difference for the purposes of this case, so I do not need to develop that further so long as you are happy for me to proceed on that basis.

If we can then look to the closure letter, which is the natural starting point, obviously I will come on to the evidence, but the closure letter is supposed to "express" the reasons for the decision and to reflect – is probably a better use of language – the reasons for the decision. What I have done in the skeleton is to set out some of the paragraphs for ease of reference. Obviously we are all very well familiar with the passages. If I can just begin, para.21 of the case closure letter, because I think this encapsulates, if you like, the three points I want to bring out of it. If you want to look at the letter itself it is core bundle tab.2, para.21.

> "The OFT has decided that although there is evidence of potential infringement in connection with both cases the collective boycott case and the collective setting case would both need to be developed considerably before a sufficiently robust statement of objections could be issued. This would have to include in particular in both cases a more thorough analysis of the effect of the parties' behaviour on competition. For the reasons set out below the OFT has decided not to carry out this work on the basis that neither case continues to constitute an administrative priority for the OFT."

A number of points come out of that. The very first line, the very first sentence: "There is evidence of potential infringements", the word "potential" itself indicates there is no concluded view, and do you remember the language from *Claymore* that "potential", "preliminary", "provisional" - that sort of language – is not enough. There is evidence of potential infringement, so insofar as the Office has any impression as to merits it is not of non-infringement, it is of infringement, but no concluded view, but in order to reach a concluded view would have to be developed considerably, i.e. investigation not fully exhausted, not fully carried out.

One sees that recurring throughout the passages I have referred to in the skeleton, 22 the Office's view that there is evidence of a potential infringement must therefore be regarded as preliminary and provisional. Then 24(b), the strength of the evidence that there has been an infringement, similar themes but there is an additional point here. Although there is

evidence of potential infringement as noted above the statement of objections would need to be developed considerably before it was issued in relation to the collective boycott case and/or the collective setting case. This would include first gathering and analysing additional evidence as to effect, second, it would include an investigation of plausible counter arguments whether in fact or law that the parties could possibly put forward in their defence to justify their conduct, or indeed to negate the evidence of a potential infringement. These are both material pieces of work impacting directly on the strength of the evidence to date. I will come back to this in a bit when we deal with the allegation that somehow the objects' part of the case has been concealed by the Office ,but it is important to know the language used. In particular work is needed in relation to effects, but in addition work is needed in fact or law, and of course the object case the issue was primarily one of law. So the language in the closure letter is perfectly consistent with what Mr. Smith has told us about internal debate.

THE CHAIRMAN: No, because as I understand it, the facts in relation to the objects' case had been fully investigated, the issue was whether it is an objects' case in law.

MR. HOSKINS: That is a fair inference from the evidence of Mr. Smith.

THE CHAIRMAN: If it is not an objects' case in law then one has to consider, or one may consider whether it is an effects' case. The factual evidence needed to consider whether it is an effects' case had not been explored.

MR. HOSKINS: Not fully explored.

THE CHAIRMAN: And the decision was taken that resources should not be put in to exploring that further?

MR. HOSKINS: Well no further resources in relation to exploring facts, but also in relation to further legal research and consideration.

THE CHAIRMAN: What is entailed in legal research?

MR. HOSKINS: There was a dispute between ----

THE CHAIRMAN: Well what is entailed in doing the legal research?

MR. HOSKINS: It is internally each side within the Office, or the people would have to go and produce notes, there would have to be further meetings at which the legal issues was debated, until a final conclusion was reached. There is clearly internal work to be done.

THE CHAIRMAN: But is that a difficult thing to do?

MR. HOSKINS: Well it may be or it may not, but the example I am thinking of – it may not be a very good one but it is the one that springs to m y mind – is the European Court of Justice where cases are decided by unanimity and what happens is there is a deliberation of all the

Judges and if it is the Grand Chamber there are 13 Judges. Now, there is a legal issue for the court to decide – it may be an easy one, it may be a difficult one – but what happens is that there will be deliberations until a decision is made that everyone is comfortable with. They would be the same in the Office. There is a legal issue that is identified, there are different views put and in order to reach a conclusion there may be an exchange of notes, there may be meetings

THE CHAIRMAN: They identified the legal issue, apparently Mr. Smith had spoken to the lawyer about it.

MR. HOSKINS: Madam, that was a different issue, I think.

THE CHAIRMAN: I do not know whether it was or it was not, of course.

MR. HOSKINS: The position is, and as Mr. Smith describes it, because it was not a concluded view he does not say "Well I could just have decided there and then", the feeling within the Office – and this is what he says – that further work was required on object.

THE CHAIRMAN: But if, for example, they had decided they needed counsel's opinion on this, so they went to counsel, and it is not something that is going to take months and months and months, or is going to be particularly expensive.

MR. HOSKINS: Madam, that is precisely why ---- I will come on to this ---- it explains why Mr. Smith, in the case closure letter, put the emphasis on the fact that there were areas in which the most resources would have to be expended to reach a final conclusion was on effect.

THE CHAIRMAN: I appreciate that.

MR. HOSKINS: But, nonetheless, there were still resources that would have to have been expended - whether internal (in the way I have described) or external (in the way you have described, Madam) - in order to reach a decision on object. But, they had not reached the end of the line on object in terms of all the work that might be done and/or reached a concluded view on it.

THE CHAIRMAN: If they had reached a concluded view on object ---- If, let us say, they had gone to counsel, and he said, "It is an objects case" and they decided to go with that, then that would have been the end of it, would it not?

MR. HOSKINS: If they had done that.

THE CHAIRMAN: Yes. But, what they decided to do was to go off and think about the effects side. So, that suggests that they had come to a view that, in law, they were not prepared to say this was an objects case in a statement of objections because they would not have had to have gone to effect.

MR. HOSKINS: With respect, Madam, that is not the factual situation that has been reached. The way it had been reached was that the analysis that had been done had been produced both on object and effect.

THE CHAIRMAN: But it is object or effect. So, if they had come to a view that this was an object case, then they could have issued a statement of objections on the object case. So, by putting in effect, and by saying, "We have got to do much more work on effect", that indicates that they have come to a view that they were not prepared to rely on an objects case in law.

MR. HOSKINS: With respect, Madam, that is not the factual situation of this case because both issues would be considered at the same time, because, as you say, the test is object or effect. The investigation ... the consideration was going ahead in relation to both of them, and at a certain time the decision was taken not to proceed with either limb. It was not sequential. It was not in the sense that there was a full investigation into object and then a view was taken, "Oh, we're not sure how promising this is. We'll move on to effect". That is not the way that the investigation gook place. It was parallel in relation to both, and at a certain time the decision was taken not to proceed with both. It was not because of the strength of the case primarily - it was because, according to the six prioritisation criteria, there were all sorts of other factors why it was not felt to be a good use of resources.

One place one can see this on the facts ---- Mr. Barling points out Mr. Smith's first witness statement at para. 43.

> "Following the CRM I understand that the case team set about reviewing the evidence that had gathered and conducting further research with a view to re-stating its original arguments that both the collective boycott case and the collective setting case should be characterised as object and effect infringements, and further supplementing its arguments concerning the effect of both the collective boycott case and the collective setting case as set out in the August draft SO. In addition, the case team briefed its new branch director, Chris Mayerk, regarding the status of both cases and re-stated its original arguments that both the collective boycott case and the collective setting case should be characterised as object and effect infringements, and supplemented its arguments concerning evidence of effect in both cases".

So, one sees there very clearly that both are proceeding at the same time, and are not alternatives. It is not a sequential process.

Madam, that is a perfectly natural and normal approach for a body such as the Office to take because it full well knows that at the end of this process it may end up before the Tribunal,

and it may well want to adopt a decision saying, "We think this is an object case, and we think it is an effect case", so that if, for example, the Tribunal disagrees on object, there is still effect there. It is a perfectly normal way to proceed.

In relation to the reasoning set out in the case closure letter ----

THE CHAIRMAN: As I understood it, what happened was that the other side of the Office was saying, "We don't think this is an object case. We think actually it's an effect case. We don't think that the case team are right to say object and effect". So, looking at what the case team thought is only looking at half the picture.

MR. HOSKINS: Madam, then the position goes on - and this is part of the problem one has in going back and looking at different views in isolation ----- But, when one goes on to look at what Mr. Mayerk says ----- This is in the first Smith at para. 47, p.52 ---- "-- purely an issue of substance. Mr. Mayerk recommended that an SO should be issued, characterising both the collective setting case and collective boycott case as object and effect infringements ----"

THE CHAIRMAN: You cannot stop there. You have got to read the whole of those paragraphs because he then goes on to say, "But you cannot issue it yet because we haven't got enough evidence on effect".

MR. HOSKINS: Yes. But the point is that he wants them issued ---- You will remember, also at the SO stage ---- We are not at the final decision stage. Again, if one is looking at what you would expect the Office to do ---- If you think it is possible, and, indeed, the view was that they thought it was potential infringement, both in object and effect, it is perfectly natural that you would put both in the SO to see what arguments came back, because you might get very strong arguments back to say, "This is not an object case", and if you took the view it was not, you could carry on with effect, or vice versa. But, certainly, what Mr. Mayerk shows, in his view, is that he recommended that an SO should be issued as to object and effect, in parallel. I think from recollection one sees the same from Mr. Priddis and Mr. Smith, but I hope I have made the point. Mr. Smith certainly takes the view ---- Again, he has not completely formed a view on either of them, and insofar as he sees his view is that there was a potential infringement, it is both in relation to object and effect. I hope I am not mis-characterising it. That is my recollection. I think it is para. 70 of Mr. Smith's ---- (After a pause): Yes, one sees the same point come out of that.

THE CHAIRMAN: If you look at para. 13 of the second witness statement of Mr. Smith, he says six lines down ----

MR. HOSKINS: This is the CRP view that he is reporting - not his view.

THE CHAIRMAN: Yes.

MR. HOSKINS: Where, I think, one finds the clearest expression of Mr. Smith's view is para. 70 at p.61 where he is talking about further work being done both in relation to effect and in relation to object.

THE CHAIRMAN: What he is talking about in relation to further work in relation to object is the legal analysis.

MR. HOSKINS: That is correct. Absolutely. Absolutely. It is also fair - and this is a point I will come back to, but I will make it now because it fits and I will not have to come back to the passage later ---- Paragraph 73 explains that in terms of administrative priority, although a conclusion had not definitively been reached either on object or effect, the bulk of the work that would take up the resources was certainly in relation to effect. But, there was still further resource implications if the object issue was to be taken to a final conclusion. That is para. 73 of his witness statement.

THE CHAIRMAN: (After a pause) How much case law is there?

MR. HOSKINS: It is quite a difficult area, madam, I am going to make some points in submission, but it is not a straight forward area and I will explain at a very simple level why object is not a simple area, if I may do a little bit later.

THE CHAIRMAN: I have taken you a bit out of your ----

MR. HOSKINS: That is fine, it is an occupational hazard. Madam, I was looking at para.18 of my skeleton and the reasons that were put in the case closure letter; and I have taken you to certain quotes. These same themes keep coming up, I have set them out in the skeleton, para.19 sets out some of the statements in the annex. If I can just draw your attention to para.30 of the annex, the case closure letter, which begins: "With regard to the alleged exclusion of Cityhook the OFT has decided that the case team had made out prima facie a case for the parties to answer." So again, no concluded view, but the preliminary provisional view was of infringement, not non-infringement.

I seek to draw the strands together at para.20 of the skeleton argument. Three points to be made from these passages. First of all, it is clear that the Office did not reach any final, firm – whatever language one wants to take from the *Claymore* conclusion – on the substance of the cases, insofar as the Office did reach any view on the merits it was a preliminary and provisional view that there was evidence of a potential infringement, not non-infringement. Thirdly, the Office believed that there were further important matters of law and fact that required to be investigated and considered. It had not fully or exhaustively investigated the matter when it brought the drawbridge up; it had not completed its investigation.

We say that when one takes the case law and takes those passages it is very clear that there is no express or implied non-infringement decision in this case.

But madam, we can take it further also by looking at Mr. Smith's evidence. Of course, I think we start with reminding ourselves that in the previous disclosure ruling the Tribunal did find that Mr. Smith's witness statements appeared to the Tribunal to be full and frank and to give a clear and transparent insight into the decision which the Office has made in the case, so that is the starting point.

Paragraph 25 of my skeleton argument I refer to para. 57 of Mr. Smith's first witness statement, again if you would prefer to look at it in the actual statement that is core bundle 4 at p.57. Mr. Smith is quite categoric:

> "In summary therefore as regards the substance of both the collective boycott and collective setting cases at no stage prior to or during this discussion meeting had an agreed view been reached or a decision been taken by the OFT as to whether there was an infringement of the Chapter 1 prohibition under the Competition Act, either on the basis of an object or effect based restriction."

And then he summarises in effect what the state of the debate was and how it proceeded within the Office.

THE CHAIRMAN: Of course, that is the difficulty with witness statements rather than looking at the documents, because that is a summary of what he says went before. One really needs to look and see what he actually says on the evidence, rather than what his gloss is.

MR. HOSKINS: We have been through the statements, the Tribunal has them, I am not trying to gloss.

THE CHAIRMAN: I am raising it so you can see how my mind is working – one has to be careful to look at what he says the actual evidence is and how he then uses a paragraph which might or might not, but it is his summary of what it says, which is different.

MR. HOSKINS: Yes, it is a point that Mr. Turner has made on a couple of occasions. One is looking at the decision of the OFT, one is looking for a firm and final decision of the OFT. What Mr. Smith tells us and legally it has to be correct, all the internal stuff that went before there was no concluded view, but it could not be a concluded view of the Office anyway.

THE CHAIRMAN: I do not think that is the point I am making. In para.57 he says that "In summary this is what I draw from what I draw in previous paragraphs".

MR. HOSKINS: Yes.

THE CHAIRMAN: So I think it is more important to look at the previous paragraphs than how he then summarises it. Of course he is doing the best he can, but you do have the problem

as is identified in *Tweed* that you cannot help but put a gloss on when you are doing that sort of thing.

MR. HOSKINS: Well madam, the Tribunal has found that the whole of the description Mr. Smith's witness statements are full and frank, clear and transparent.

THE CHAIRMAN: I am not saying – that is why I specifically said that you cannot help doing it, you are always going to have some sort of subconscious which is going to direct you in a particular way, but one has to be careful that one is looking at the actual evidence and not any gloss on the evidence.

MR. HOSKINS: Madam, the reason I put it in 57 is for ease of reference. The Tribunal has seen 1st Smith, we went through it in a lot of detail at the disclosure hearing and unless you wish me to I do not intend to go back through it in detail again. Of course, the punch line – and it is Mr. Turner's punch line I am stealing in a sense – what does Mr. Smith say about the reasons why he made the decision and I have just shown you para.70 and 73 of 1st Smith.

THE CHAIRMAN: Yes.

MR. HOSKINS: Indeed, over the page, at para. 26 of the skeleton I set them out again. That is where one reaches with this. Again, when one then considers Mr. Smith's evidence, one gets exactly the three same points I made in relation to the case closure letter. The Office did not reach any final conclusion on the substance of either case insofar as it did reach any internal view on the merits, it was a preliminary and provisional view that there was evidence of potential infringement, not non-infringement, and there were further important matters that required to be investigated and considered. It had not completed its investigation. So again, Mr. Smith's evidence, entirely consistent with the case closure letter, one marries it up with the case law and we say "quite clear no implied or express non-infringement decision."

Can I move on to consider Cityhook's arguments? Essentially what Cityhook's case boils down to is a challenge to credibility, both of the Office and of Mr. Smith, because – I am just taking you through the case closure letter – we have looked before in detail at Mr. Smith's evidence and on the face of both those documents it is quite clear what the Office's position is. What Cityhook's case is that despite what is said in the case closure letter, and despite what is said in Mr. Smith's evidence, the OFT in fact did something different and is trying to conceal it. It will not surprise you that our submission is that there is absolutely no basis whatsoever for the allegation, inference, call it what you will. It is a conspiracy theory without any foundation in fact.

If I can break it down into the issues that Mr. Shovell dealt with yesterday, first of all dealing with object. It has been put a number of ways, both in the skeleton argument and orally but the suggestion is that it is not credible that the Office did not reach a definitive conclusion on the object infringement because, for example, the length of time the investigation had been running, because, for example, the Office did not want to put the former Chairman's nose out of joint if he had indeed expressed a view on object before he left. But I come back to it, we have a full and frank explanation of the Office's position in the case closure letter and in Mr. Smith's witness statement. The Tribunal has accepted the veracity of the account, and the sorts of points that have been made to suggest that those explanations are not credible simply do not get off the ground.

I think one of the problems in the case may be Cityhook's perception of what an object restriction is. It seems to us that Cityhook has misunderstood the legal nature of an object restriction. The question of whether an agreement has the object of restricting competition does not depend on determining the subjective intention of the parties. What the case law establishes, and it is well established is whether there is an object restriction is effectively an objective test.

Object restrictions are those which, by their nature, can be legally presumed to be restrictive of competition, e.g. price fixing by sellers, market sharing. When one has an agreement to share markets what the case law tells us is, as a matter of objective assessment it can be assumed that the object is to restrict competition. But it is not simply a case of there is an agreement, we think we can establish that the parties to the agreement wanted to do bad things, therefore there is an object restriction; it is not as simple as that. I do not want to go into the details – I do no think we have to for the purposes of this case – but I put that marker down, it is something Cityhook may want to go away and think about for the future.

Of course, the very debate that was taking place within the Office concerned precisely the issue of whether the alleged agreements in this case fell within these objective categories of restrictions. One sees that from Mr. Smith's description of the debate, e.g. 1st Smith, paras. 38 and 39, p.49 of the core bundle. You will see from that description that the debate was not what was in the telecoms' companies' minds, the debate was what was the proper characterisation of the type of agreement in question? And having established – if the Office had established – what the proper characterisation was, is that in law to be characterised as an object restriction in law. It is not a debate about subjective intention, and that reflects the case law, and that is why the debate took that form.

The debate about certainly whether a collective boycott, which is the first case here, constitutes an object restriction in law, it is interesting if one looks at *Casting Book*, it is in the authorities' bundle, tab 6, para.22 which is p.217 of the bundle. One sees precisely the same sort of issue and situation in casting book. Mr. Rae, as I said, was the OFT official who gave a witness statement. That explains in some detail the evaluation process leading up to his recommendation not close the file. He states, among other things, that:

> "Whilst there was promising evidence, a considerable amount of work needed to be done. In Mr. Rae's view producing an infringement decision would have required at least another 18 months' work. For example, the story would have needed to be completed, the documentary record being fragmented, and the OFT would have needed to contact a number of key parties. In addition further legal research and evidence gathering would have been required on a range of issues including whether or not any collective boycott constituted an object restriction."

Now, it is fair to say the difference between *Casting Book* and here is that the collective boycott in Casting Book was a sellers' boycott, whereas here it was a purchaser's boycott. What this shows is a degree of consistency of debate within the Office about whether collective boycott cases are to be characterised as object restrictions or not. So if one is looking for the conspiracy theory, this is another reason why it does not fly, because the story as told by the Office in this case, and as reported by the Office in this case, matches up with the situation in *Casting Book,* there is consistency in the Office's position.

A final point, and this particularly came up strongly in Cityhook's skeleton argument, but not so much in its oral submissions, was the suggestion of something improper in the fact that a senior OFT lawyer had suggested to Mr. Smith, or had a conversation with Mr. Smith about the Tribunal's case law and what constitutes an appealable decision. That comes out of para. 73 of Mr. Smith's first witness statement at para. 62 of the core bundle. (After a pause): He says, "My final decision is recorded in a letter dated 23 June. Paragraph 21 refers in particular to the further analysis that would have been required of the effect of the parties ... competition. I took the view that the reference to possible objects infringement in the provisional case closure letter should be omitted from the final case closure letter for a number of reasons as follows ... and bearing in mind the views expressed to me by a senior legal advisor concerning the relevance of the Competition Appeal Tribunal's case law in this area ----" and then he goes on to give the reasons why he toned down the letter in the way he describes.

But, it is perfectly normal, when a body such as the Office is deciding whether to close a file, and on what basis, to consider the Tribunal's case law on what will constitute a non-infringement decision; what will constitute a pure administrative priority decision, etc.. To show there is nothing sinister in this, I will give you an example of the way that Mr. Priddis approached the question. This is Mr. Smith's first witness statement at para. 53(e). If one looks at para. 53 this is a summary of the Priddis memo in which he considered the six prioritisation criteria, the penultimate one being any relevant policy consideration. It is the last six odd sentences of para. 53(e):

> "One of the other policy considerations to which Mr. Priddis referred was the risk that the Tribunal might find that an investigation shut down at such a late stage without an infringement finding amounted to a non-infringement decision. However, Mr. Priddis agreed with Mr. Mayerk's conclusion that the available evidence did not support a non-infringement finding".

So, there one has the fact, not surprisingly, that the Office is aware of the Tribunal's case law and takes it into account as the background to its decision. But, there is nothing sinister in that.

THE CHAIRMAN: I have had some difficulty in understanding what is meant by - and this is repeated in other paragraphs of Mr. Smith's witness statement - "He agreed with Mr. Mayerk's conclusion that the available evidence did not support a non-infringement decision". As I understand it, if it was not an object case - just looking at the object and not the effect part ---- If it was not an object case, then it would be a non-infringement decision. That was a matter of law.

MR. HOSKINS: Madam, with respect, we do not accept that that is correct as a matter of law. I am going to come on to that. That cannot be correct.

THE CHAIRMAN: That is why I point it out. I do not understand what that sentence means.

MR. HOSKINS: Madam, I am happy to deal with that now. The position is that in order to succeed ----

THE CHAIRMAN: I should also say it is also at para. 57(e).

MR. HOSKINS: It is. One also has it at 51(a) - Mr. Priddis' view that this was not in his opinion a non-infringement case. My understanding, certainly, from para 51(a) is that the reason why he thinks it is a non-infringement case is because there is too much evidence of infringement.

THE CHAIRMAN: But there cannot be ---- If it is not an object case then it is not an infringement. If the legal analysis was that this does not fall within an object case, then you would have to come out with saying that this is a non-infringement because of that.

MR. HOSKINS: That is not correct, Madam, with respect - paragraph 38 of my skeleton argument, if that helps. The position is this: in order to show that this was an appealable decision, Cityhook would have to show that the Office had adopted a non-infringement decision. Under Chapter 1 there is a breach if an agreement has the object or effect of restricting competition. If the Office had come to the conclusion, for example, the definitive conclusion, that there was no object infringement, it does not follow that the Office had reached a definitive conclusion, that there was no infringement because it was perfectly open -- and, indeed, this was the case here -- for the Office to say, "We have concluded there is no object infringement, but we have not yet determined whether there is an effect infringement.

THE CHAIRMAN: I understand that. (After a pause): I understand what you are saying, anyway. But, assume that, hypothetically, it is not an effects case. Right? Looking at it hypothetically ----

MR. HOSKINS: Can I take the hypothesis to be that the Office has definitively decided it is not an effects case?

THE CHAIRMAN: Yes. Because of the legal problem they decide that it is not an object case. There would then be a non-infringement decision.

MR. HOSKINS: Absolutely.

THE CHAIRMAN: If they decide to look at a case, they may decide that they are not going to put in resources to look at an effects case. They may make this decision right at the beginning. Right? "The complaint is object. We are going to put in our resources on object, and we are not going to put in our resources on effect." They look at object. They come to the end. They do the full investigation and get all the evidence. Had it been an object case legally they may have come out with an infringement decision, but they decide this does not fall within the object case- you need the extra bit. In those circumstances, they would come out with a non-infringement decision.

MR. HOSKINS: In those circumstances.

THE CHAIRMAN: Yes.

MR. HOSKINS: But those are not these circumstances, Madam, because, here, as we have seen in parallel it was not the case that the Office began, or carried on, or at any stage said, "We

are not going to consider an aspect of it". It had considered object and effect in parallel right up until the moment when the decision was to proceed for prioritisation reasons.

THE CHAIRMAN: Well, that is not quite right, is it, because they had not explored all the evidence in relation to effect? There was the discretion there, which is why this whole debate started within the Office. They had both in mind. They had not made a decision not to go down effect at the beginning. So, that is the difference between my hypothesis and what happened.

MR. HOSKINS: Madam, they pursued both, but the conclusion was reached ---- Remember, a draft SO was produced. Then the view was taken that it was not sufficiently robust either in relation to object or in relation to effect.

THE CHAIRMAN: Not robust in relation to object because of the legal problem.

MR. HOSKINS: Yes.

THE CHAIRMAN: Not robust in relation to effect because of the evidential problem ----

MR. HOSKINS: -- and a lack of analysis. Absolutely.

THE CHAIRMAN: They had not actually obtained all the evidence needed in relation both to object and effect. They had concentrated on object and had effect in mind, and had put it in there for another eighteen months.

MR. HOSKINS: I am not sure it is fair to say they concentrated on object. I am not sure that comes out of the evidence, Madam. (After a pause): Certainly from my recollection that is not necessarily an accurate reflection of the evidence.

THE CHAIRMAN: That is the difficulty of not having the documents. We cannot see.

MR. HOSKINS: Not necessarily, because if one accepts that Mr. Smith's evidence is full and frank, then that is the position. These things are not always neat compartments - particularly after an investigation taking this time. They are not neat compartments. So, you have a case team that goes away; works on an SO; object and effect; presents it; a debate breaks out on object and effect. But, it is not a case of turning a blind eye to effect while pursuing object, or vice versa. It is a parallel investigation. For the reasons I have described, one would expect it to be a parallel investigation because when you put out the SO, you would want to put up object and effect in case the answers you get back kill object or kill effect. You want to keep your options open.

THE CHAIRMAN: It may or may not, depending on how strong your case is.

MR. HOSKINS: Certainly. But, that is what the evidence is, we say, in this case. It is a perfectly natural step for the Office to have taken, to have proceeded down both routes at the same time. Against that factual background, that is why we say that unless it is

established there is a final definitive conclusion against object and against effect, there cannot be an appealable decision in this case.

Another point on object that was made just orally yesterday was an allegation of failure to give reasons. Cityhook/Mr. Shovell submitted that the Office failed to identify the specific internal debate about object in the provisional decision letter and the final decision letter. They submitted that the Office has not given any explanation of why it did not do so, and they say therefore it should be inferred that the explanation given in Mr. Smith's witness statements is incorrect, and that the Office did in fact reach a final negative conclusion on object. That is the way that the argument was put.

We say that argument has to be rejected for a number of reasons. First of all, the quality of the reasoning contained in the provisional decision letter and the final decision letter is a matter to be considered by whichever court or tribunal has jurisdiction to hear Cityhook's substantive challenge to the case closure decisions. It is a similar sort of point, Madam, that we had yesterday. It is not a point that goes to, "Is this an appealable decision?" It is, "If this is a closure for priority reasons decision, was it properly adopted?" So, of course, we say that is a matter for the Administrative Court. So, that is the first issue about quality of reasoning.

Secondly, if one then looks at the inference aspect of it, is the quality of reasoning so poor that it suggest that the Office is not being straight with the Tribunal ---- That is a crude way of putting it, but that is what it boils down to. We say the answer is 'Not, and it is not a credible argument.

If I can look, first of all, at the provisional case closure letter (core bundle, Tab 3) ---- Can I ask you to turn to para. 21, which is on p.32,

> "The Office decided that the case team had made out *prima facie* a case for the parties to answer in connection with both the Cityhook case and the collective setting cease. Nevertheless, additional work to further improve the draft statement of objections would need to be undertaken prior to it being issued. On this basis were the Office to issue a statement of objections, then both the Cityhook case and the collective setting case would be run as object and effect infringements of the Act".

When I come on to the case closure letter we will see that the final sentence does not appear in the final case closure letter. So, perhaps put square brackets round the final sentence.

THE CHAIRMAN: From 'On this basis ----"

MR. HOSKINS: From 'On this basis ----', yes, Madam. Then, 24(b), overt the page, "The strength of the evidence that there has been an infringement ----" Before I read 24(b) it is important to note that 24(b) is just one of the six criteria that go to whether to close a case on priority reasons. The strength of evidence is the second one.

> "-- while *prima facie* the evidence appears to carry the primary constituent elements of infringement in respect of both the Cityhook case and the collective setting case there may be plausible counter arguments whether in law or fact that the parties could possibly put forward in their defence to justify their conduct, or, indeed, to explain why the *prima facie* impression is not accurate. As detailed above, the parties have not had the opportunity to make such representations and a statement of objections has not been issued".

So, you have the counter-arguments in law or fact, and I will compare that with the case closure letter in a minute. But, it is important at this stage to note that whilst the object case is the centre part of the conspiracy theory that Cityhook are putting forward, it is not in fact the central part of the question for the OFT on whether to close a file on administrative priority grounds, or not. When applying the six criteria for prioritisation, the important thing for the Office (as is expressed at 24(b)) is that there is, in fact, *prima facie* evidence of an infringement in relation to both. The details of it do not actually matter for the Office in deciding the prioritisation criteria are, or are not, at the forefront of the matter for the Office. It is only one of six criteria.

Then, if one moves on to the case closure letter (backwards in the bundle at Tab 2) we can compare the similar paragraphs. First of all, para. 21 of the letter (p.17 of the bundle) ---- You see that at para. 21 the explanation has been expanded. The final sentence of the provisional case closure letter has been omitted.

> "The OFT has decided that although there is evidence of potential infringement in connection with both cases, the cases would both need to be developed considerably before a sufficiently robust statement of objections could be issued. This would have to include, in particular, in both cases, a more thorough analysis of the effect of the parties' behaviour on competition. For the reasons set out further below the OFT has decided not carry out this work on the basis that neither case continues to constitute an administrative priority for the OFT".

So, there is the addition of the focus on effect, in particular, and that is consistent with Mr. Smith's para. 73 of his 1st witness statement. He explains why he put the focus on effect.

The final sentence has gone out, which is, "The intention would be to issue an SO on both object and effect grounds".

Then 24(b) is the strength of evidence equivalent. Again, it is in very similar terms, except there is an addition in the middle of that section. "This would include first gathering and analysing additional evidence as to effect". So, again, more of the focus on effects for the reasons explained by 1st Smith at para. 73, but ' --- still investigation of plausible counter-arguments whether in fact are law on strength of the case'. So, that obviously covers the object case.

As to the reason why the last sentence of para. 21 was dropped, one finds the answer to that at p.22 of the bundle - Annexe para. 6. Certain of the Respondent's provisional closure letter had said that it was too strong in its suggestion that there was an infringement, and asked for it to be toned down. Paragraph 6 is the Office's response, beginning half-way down.

> "Having reviewed the provisional closure letter, the OFT acknowledges that the original drafting of the letter may have given an unduly categorical impression of the Office's assessment of the issue of breach in light of the internal view that further work, including on the effects issues, would be required before a statement of objections was issued. Therefore, changes have been made to the attached letter to reflect more closely the Office's assessment of the issue of breach".

Again, that is perfectly consistent with para. 73 of 1st Smith.

This probably is not relevant at this stage, but in relation to the question that might become relevant on costs, for example - and I will deal with it now - in relation to the suggestion that a company like Cityhook was not able to protect its position on the strength of evidence point, I would refer you to p.24 of the bundle (para. 15 of the Annexe) and one finds one Respondent ---- I do not know the answer, but I am guessing it may well be Cityhook, but I do not know the answer ---- Then you see the argument. You read para. 15 and it is precisely the point Mr. Shovell was making yesterday and which he says they were not in a position to make because the consultation was not sufficiently clear. Well, we say it was sufficiently clear and in any event one Respondent, be it Cityhook or not, made precisely the arguments that have been made now. So, we do reject the suggestion that consultation was defective. We certainly reject the suggestion of any concealment of a material factor. So, that is how the provisional closure letter dealt with object and effect. That is briefly how the case closure letter dealt with it.

Then one has 1st Smith, para. 73, in which he explains the difference in focus between the two letters. I have already taken you to that. I do not need to go back to it again. Again, put ourselves back into a conspiracy theory ---- The suggestion that the Office, either in the case closure letters or, in particular, Mr. Smith in his evidence, concealed what was happening in the Office just simply does not stand up ---- particularly the fact ... the idea that we concealed what the internal debate about object was does not stand up. If you look at 1st Smith, paras. 38 to 39, again they are sections we have seen already today ---- 1st Smith is Tab 4. Page 49. There you have it in black and white - the description about the object debate within the Tribunal.

So, the conspiracy theory is built on an allegation of concealment. The concealment argument just does not stand up. Here it is in black and white. It is in Mr. Smith's evidence, and it is for that reason we say that that aspect of the conspiracy theory simply does not get off the ground. It is a very serious allegation, but it comes nowhere near being a credible allegation.

Madam, that is all I wanted to say on object unless the Tribunal has any questions at this stage on that issue. I was going to move on to the issue of effect.

THE CHAIRMAN: Page 24, para. 15 - where Respondent - and for the time being assume it is Cityhook, but it does not really matter ---- That addresses the point that is made that there was nowhere in the provisional letter which addressed the point about the legal issue about whether it was an object case.

MR. HOSKINS: Madam, the way I understand it plays out ---- Paragraph 15 of the Annexe. What one finds in the provisional closure letter are statements made about the strength of the evidence. What is said is that although there is *prima facie* evidence of infringement, further work is done, i.e. it is not a clear-cut case.

THE CHAIRMAN: As I understood the complaint that was being made, the disclosure letter did not ---- the provisional disclosure letter did not explain that there was a legal problem about object. Therefore that could not be addressed. Now, as I understood it, you are saying para. 15 does expose that, and therefore it must have been understood.

MR. HOSKINS: Yes.

THE CHAIRMAN: Now, I am not sure, in reading para. 15, or in reading the answer, that that addresses the legal problem.

MR. HOSKINS: Madam, the way it was put in the provisional closure letter, under the specific heading of strength of evidence, was that although there was *prima facie* evidence of infringement, further work was done, i.e. (and I am paraphrasing what I would understand

from that) it is not a clear-cut case - to use Cityhook's language. Cityhook (or whichever Respondent this is) gets a provisional closure letter, reads the section on strength of evidence, and if you are Cityhook, having heard what they had to say, you say, "Hang on a minute! What are they saying. It's not a clear-cut case? We've given them all this evidence on object. Of course it's a clear-cut case on object". Then, you, Cityhook, put in your submission on strength of evidence.

Now, here in para. 15 one has the summary of what the party came back with on strength of evidence, and what they said was that,

> "-- evidence of infringement of the Act was overwhelming. It also stated the alleged cartel-type behaviour is unlikely to be repeatedly evidenced in writing ... must evaluate the body of evidence, etc,. etc., making intelligent inferences between strands of evidence, and with an understanding of the parties' commercial motivations".

So, there you see Cityhook's subjective intention idea.

> "This party alleged that there was evidence that the parties vehemently wanted to keep entry barriers high to stifle competition and obstruct new market entrants."

Cityhook's case on object is that telecoms companies had a subjective intention to restrict competition, and that equals an object case, and that is clear-cut.

THE CHAIRMAN: I understand that.

MR. HOSKINS: That is what is being said there.

THE CHAIRMAN: I understand that, but when you come to answer it ----

MR. HOSKINS: When we come to answer it, we say we do not accept it is a clear-cut case.

THE CHAIRMAN: But you do not actually explain the point.

MR. HOSKINS: Not in detail, no.

THE CHAIRMAN: No. you do not explain the point. So, if the Respondent ---- If it is made clear in the provisional letter that there was a legal issue about object, and that that was a problem, then he would have had an opportunity to deal with that legal issue. He has said -- -- The Respondent has said - and you have read it in that way - with an understanding of the parties' commercial motivations ---- he understands that there is subjective intent. He has not understood that the OFT does not think that ---- their understanding as lawyers is that it is not subjective, but it is objective. Therefore, he has not had an opportunity to address ---- Clearly there is a problem about it because it is not clear-cut because the Office does not know what the answer is apparently, and he has not understood that he has to put in a

response which is directed and focused at that point, because that is the point that is worrying the OFT. I am putting their argument. I am not sure that para. 15 and para. 17 deals with it.

MR. HOSKINS: Madam, I am going to deal with it in two ways. You probably will not like my first answer, but I will answer your question with my second answer. We need to keep remembering ---- It is my own fault. I said I wanted to go into this because it might come up again later. The only basis for this argument at the moment is to support an allegation of deliberate concealment by the Office to show that its evidence and its case closure letter are not what they say they are. We say that even with this debate you do not get any of that. But, the secondary point is that what one has to remember - and this is typical of this sort of case - is that the Office is writing a provisional closure letter and a closure letter not just for one particular person, but for, here, quite a large number of parties - there were fifty-odd people in the original investigation and a large number were dropped.

Now, it so happens we have ended up here with Cityhook as the complainant, and have fixated on this point to run their conspiracy argument. But, the question is - and the case law is quite clear - whether the reasoning given ... the consultation given is sufficient in all the circumstances of the case. Now, it may well be that Cityhook did not get a tailor-made reasoning letter, but in our submission, even if it were relevant, this was still perfectly sufficient against the background of the exercise that was being done.

THE CHAIRMAN: I am not sure that really answers it. It may be that it is not for here, but since it has been raised it is appropriate to be looking at it. The reason why the decision had been taken in relation to object was because of the legal problem.

MR. HOSKINS: It was because there were legal issues that were outstanding, yes.

THE CHAIRMAN: The reason why the decision had been taken in relation to effect was because of the need for further investigation. Now, the letter deals - and the second letter deals very clearly - with the need for further investigation in relation to effect. It concentrates on effects.

MR. HOSKINS: For reasons Mr. Smith describes, yes.

THE CHAIRMAN: It does not identify that there was a problem on object and that that problem on object was a legal problem and that that problem was going to take up resources, etc., and it was decided, “No, we’re not going to do that either”.

MR. HOSKINS: Madam, I do not think it is quite accurate to say it does not raise it at all. The question is whether it could have said more about it. If I can explain why I put it that way - --- Obviously, the focus has to be on the provisional closure letter, looking at the ability of

Cityhook to respond. So, if we go back to the provisional closure letter (Tab 3, para. 21) ---- I am sorry. We have just seen these, but I think we need to go back to them. Paragraph 21 is at p.32 of the bundle. It is quite clear from that para. 21 that the provisional decision is focusing on both object and effect aspects of the case. Then, when one comes to the strength of evidence part.

THE CHAIRMAN: Yes.

MR. HOSKINS: You will see there is not the focus on effects. The strength of evidence points in the provisional closure letter is plausible character arguments whether in law or fact that the parties could possibly put forward.

THE CHAIRMAN: "While culmination of the evidence appears to carry primary constituent elements of infringement in respect of … " both cases "there may be plausible counter arguments that the parties could possibly put forward in the defence to justify their conduct, so that does not explain that the OFT has a problem, it is saying that there may be counter-arguments with other people. So it looks as if you have come to a view.

MR. HOSKINS: Madam, I understand the points made about the language. I think what the Office is saying is that if we were to come down on object one side or the other there were plausible character arguments that other parties would come up with on object, because we ourselves have identified them. I accept that that may be a relatively clumsy way of doing it. But the point we are focusing on is whether it was not apparent at all that there was a legal issue that might relate to object. My point is if you take 21, specific reference to object, if you take 24(b), specific reference to legal problem, and you take annex 15 and see the response that came back specifically dealing with what was perceived to be an object point, i.e. motivation, that you do not get close to the concealment argument.

THE CHAIRMAN: It may not have been an intentional concealment argument, because these things happen. It may not have been concealed as such, but one can understand why it has caused some consternation.

MR. HOSKINS: Madam, I think we may well come back to this at a later stage ,because there may well be a costs' application to be made, etc. But I do say in relation to the Office that it is very easy to look at these things with the benefit of hindsight, this has become the focus of this particular challenge, but absent our hindsight, the question of whether this was a reasonable provisional closure letter, and whether the closure letter was reasonable, given that it was dealing for a number of parties with a number of prioritisation criteria, to expect the Office to go into the – I use this and it is an exaggeration, and I apologise for it – the n^{th} degree on every issue that might subsequently become an issue in litigation I think would be

unfair to the Office, but I think I will probably be making that submission to you again if we get to a costs' hearing. You have my primary submission on why it does not get a conspiracy argument off the ground.

Is that sufficient for today . Thank you.

So that was object. In relation to effect, which I can take more quickly, I think it is quite useful to look at Cityhook's skeleton argument on admissibility just to pick up the effect point; para.26 of that skeleton argument. The way it is put, and the way it was put yesterday in relation to one of these letters is that if one looks at the correspondence that was coming out of the Office at the time, the reality is that they had reached a conclusive view on effects because of the language of the letters, and then three extracts are set out.

Our submission is that if one looks at the letters they are in fact entirely consistent with the position in the case closure letter, and Mr. Smith's evidence which is that on effect we needed to do more work on gathering evidence. So for example on the first letter, on the consumer benefit point, we have not seen evidence from third parties of the impact that Cityhook would have had on the speed to market for submarine cables generally and in particular no evidence from third parties as to how it would facilitate entry into the market for new entrants. That is the sort of evidence we envisaged we would have to go and get.

"B. The OFT has not seen concrete evidence from third parties on the impact that Cityhook would have had on the speed to market …" etc. It is the same point, that is exactly the evidence we would have to get, and the same with the third letter. So far from showing our concluded view on effect, this is showing that we needed to go and do further work on effect, therefore no concluded view on effect.

The final point, coming back to an old friend of ours, which is hardcore infringements, there is one final point to pick up as a result of the submissions that Cityhook made yesterday.

Mr. Shovell was asked to explain why the characterisation of hardcore or not might be relevant to the admissibility question, and the way he put his argument was this: if an object case is a hardcore infringement, and if the OFT has said that this alleged infringement is not hardcore, then it follows that the Office is saying that this is not an object case, i.e. the Office has decided there was no object infringement.

You already have my submission about that not being sufficient. Cityhook would have to show there was a definitive conclusion on object and effect; I will not repeat that. But in any event, that argument is based on a false legal premise, because the issue of whether an infringement is hardcore or not does not depend on whether it is an object or effect infringement.

An object infringement may be hardcore or not hardcore. An effect infringement may be hardcore or not hardcore, i.e. the premise that all hardcore cases are object cases, or all object cases are hardcore cases does not necessarily follow.

THE CHAIRMAN: So what you are now saying is that it is a different test?

MR. HOSKINS: Yes, they are not exactly the same, yes. But, madam, as I say, the primary point on this is the one I have made earlier, which is that even if the logic were correct it is not enough to show an object infringement, we would have to show an effects' infringement. But certainly there is a degree of similarity in the case law between what is an object case and what is a hardcore case, but they are not linked.

THE CHAIRMAN: This comes back to my question at the outset, which was how was the word being used in the various documents that have been put before us, because it looks as if it is being used to mean an object case.

MR. HOSKINS: Sorry, madam, that was not my understanding from the documents, and I did not understand that was where the Tribunal was coming from, I must admit, I apologise if I have been slow on that.

THE CHAIRMAN: Anyway, you are saying that it is a completely different ----

MR. HOSKINS: Not completely different, there is a large degree of similarity because of the way I have described how an object case is recognised, the object cases are the ones that are by definition generally seen to be restrictive of competition. The problem is when one moves from the obvious object cases, we have the debate here about, for example, a purchaser's alleged price fixing agreement, one may well have different questions to ask oneself, well is that enough for an object agreement and if it is an object agreement, is it still a hardcore object agreement, but there is a large degree of similarity between the two concepts.

THE CHAIRMAN: So what does "hardcore" mean?

MR. HOSKINS: Well, as I said yesterday, there are certain elements that they are ----

THE CHAIRMAN: I know that it is said to include, so what does it mean?

MR. HOSKINS: Well then it is a matter of judgment by the Office as to whether it sees it as a particularly serious infringement or not, as a hardcore infringement, to use the language.

THE CHAIRMAN: A particularly serious infringement.

MR. HOSKINS: But there is not chapter and verse within the Office because otherwise I would obviously have given it to you. One can recognise, in a sense, an obvious hardcore case, but there will be other cases where one will have to scratch one's head and decide. Indeed, I think that is why the language – I appreciate there is different language used in the letter –

but not clearly a hardcore infringement is a far more representative way of the position that was faced by the Office in this case.

THE CHAIRMAN: So what do you say they meant by those words now?

MR. HOSKINS: Sorry, by "hardcore"?

THE CHAIRMAN: "Not clearly a hardcore infringement"?

MR. HOSKINS: It is the point I made yesterday. If we go back to the case closure letter, and it was footnote 13 in the annex, para.20 in the annex: "The alleged collective boycott does not constitute a hardcore infringement of the Act", and then examples of what would clearly be hardcore infringements are given – sale price fixing, output restrictions, bid-rigging and market sharing.

THE CHAIRMAN: I have lost the document.

MR. HOSKINS: Page 25 of the core bundle, behind tab.2. It is the first sentence of para.20, and footnote 13.

THE CHAIRMAN: I mean is the term "hardcore infringement" of the Act not something that has been classified? I do not know.

MR. HOSKINS: There is no definition in the Act.

THE CHAIRMAN: No.

MR. HOSKINS: It is a phrase that is used by the Office, for example, in a number of contexts, one being now the prioritisation criteria. That is why I use the word "seriousness", because what the Office is in effect saying is: "In deciding whether this is an administrative priority or not one of the things we will consider is how serious the infringement is that is alleged, and the degree of seriousness of the infringement may encompass a number of different considerations." That is why I say it is more a matter of assessment, of judgment by the Office, rather than, for example, a black letter legal concept.

THE CHAIRMAN: When you come to para.15 of Mr. Smith's second witness statement: "In any event, the question of whether the potential infringements were hardcore infringements concern the nature of any infringement."

MR. HOSKINS: Yes.

THE CHAIRMAN: Well is the nature whether it is an object or effect, or what does the nature mean? Not the existence of an infringement?

MR. HOSKINS: I think this is trying to get the point across, which is what I tried to get across the very first thing yesterday, is what he is saying – again I will use the paraphrase, because I think it is the best way to explain it: "The seriousness of the infringement that might be found is not relevant to the question of whether the Office had decided whether an

infringement existed or not. Madam, I think the way you put it to me yesterday, a different way of putting the point was, if it is decided, for example, that this is a true administrative priority decision it will then be for the Administrative Court to decide whether the Office's assessment of whether this was a hardcore infringement or not. It will be for the Administrative Court to decide that.

THE CHAIRMAN: Well it would be for the Administrative Court to decide whether the ----

MR. HOSKINS: -- exercise of discretion was lawfully exercised, absolutely.

THE CHAIRMAN: Yes.

MR. HOSKINS: So my point is I do not understand Mr. Smith to be equating hardcore and object, or rather nature and object here, because otherwise his point would not make as much sense.

THE CHAIRMAN: What does he mean by "nature", what does he mean by "existence"?

MR. HOSKINS: The way I have just described it, the nature of the infringement ----

THE CHAIRMAN: "Existence" is the evidence.

MR. HOSKINS: Well "existence is whether there is an infringement of object or effect, so that is existence.

THE CHAIRMAN: Which is the evidence.

MR. HOSKINS: And he is contrasting nature of the infringement therefore with object or effect, so nature must be something different from object.

THE CHAIRMAN: The type of infringement.

MR. HOSKINS: Yes, for example, the seriousness of it.

THE CHAIRMAN: Well "nature" being seriousness, or "nature" being type?

MR. HOSKINS: Well my submission is that the existence of the infringement, the decision there encompasses the decision of whether there is an object infringement or an effects infringement, therefore by contrasting the nature of the infringement, with the existence of the infringement, the nature of the infringement must be different from the question of whether there is an object infringement.

THE CHAIRMAN: I can see that "nature" could mean price fixing or output restrictions or something of that sort, not the seriousness of it.

MR. HOSKINS: Well, I think, madam, one of the aspects of "seriousness" is the nature of the infringement. So, for example, price fixing by Sellers is seen as one of the most serious types of infringement. Market sharing is seen as one of the most serious types of infringement. One sees that, for example, when one comes ----

THE CHAIRMAN: But that is looking at it as serious in the categorisation not in what the people actually did.

MR. HOSKINS: Well once you have established that what they have done is, for example, market sharing, that is generally seen as serious and, for example, market sharing by three companies who dominate the UK market would be a very serious form of market sharing.

THE CHAIRMAN: Yes, but market sharing by a couple of shops might not be serious but it is still market sharing.

MR. HOSKINS: That is right, and that is why there are a number of elements, I say, when you are looking at the prioritisation criteria, and considering the seriousness of ----

THE CHAIRMAN: Would they both be hardcore infringements?

MR. HOSKINS: I do not think I can answer that, madam, because I cannot sensibly give you views as to what the Office would say in that situation, I would just be guessing and it is not really appropriate for me to do that.

MR. SHOVELL: Chairman, can I just ask the Tribunal to read the cross-reference, because it seems that Mr. Smith uses the word "nature" and then cross-references in his evidence to the word "object" and "effect" distinction.

THE CHAIRMAN: Where is that, sorry?

MR. SHOVELL: He refers to it at para.39 of his first witness statement, so could I ask the Tribunal ----

THE CHAIRMAN: Where is the first cross reference, sorry? I have closed my file and gone to something else.

MR. SHOVELL: I apologise, madam Chairman, I was trying not to interrupt but also not to have to go to exactly the same paragraph again.

THE CHAIRMAN: That is all right, where do you start?

MR. SHOVELL: Page 74, which is VS2, para.15, which is the paragraph you raised.

THE CHAIRMAN: "Paragraph 39(a) of my first witness statement …"

MR. SHOVELL: If you highlight the word "nature" he then makes the cross-reference to 39(a) and 39(a) is entirely about object and effect, which is on p.49 of the bundle.

THE CHAIRMAN: (After a pause) I suspect Mr. Hoskins has not got an answer.

MR. HOSKINS: I am not sure I can take it much further. I come back to a point that is often made by advocates which is that it is always very dangerous to try and read witness statements and construe them as if they were a statute. I appreciate that is not a reason for asking the questions always, but there you are there may be a grey area there, but you have my submissions on instruction about how the Office understands it approaches this

problem, and beyond that there is probably not much more I can add, and there is probably not much merit to be gained in trying to adopt a statutory construction to Mr. Smith's evidence.

THE CHAIRMAN: It appears to be confusing, I am not saying deliberately confusing, because these things happen.

MR. HOSKINS: Precisely. I am not sure that I can take it much further. If you would just give me one second.

MR. SHOVELL: (After a pause) Madam Chairman, the reference at p.12 says the same thing.

THE CHAIRMAN: Page 12 of what document?

MR. SHOVELL: I apologise, on p.74 he gives two cross-references that guide us as to what he meant by the nature. One cross reference is 39(a) that we have just looked at and the other cross-reference is para.12 of this same witness statement. That is the same legal issue between objects and effect, which is on p.73 of this bundle.

THE CHAIRMAN: We are a little concerned about this because the references to this not being a hardcore infringement, or not clearly a hardcore infringement, if hardcore is the categories that are in the footnote, or that sort of thing ----

MR. HOSKINS: They are certainly within the categories.

THE CHAIRMAN: -- and those categories are object.

MR. HOSKINS: They are not necessarily object, madam, that is my point, there is no necessary correlation. Those categories will be object but they could also be effect ones as well. I am sorry, it is my fault. I have said there is a great deal of similarity between them, and generally, for example, where one has a price fixing agreement by sellers, or a market sharing agreement by sellers, then according to the case law you could categorise that as an object infringement, but it does not mean you cannot have, for example, an analysis of price fixing agreements or market share agreements, etc are all summarised as "effects" infringements. But the point in the case law is that if something as a matter of law can be characterised as an object infringement, it is not legally necessary to go on and show an effect on competition in order to show an infringement.

THE CHAIRMAN: I appreciate that. The problem is that if what was meant by "hardcore" was an object infringement, i.e. one that you do not need to show subjective intent, then one reads the evidence one way. If what is meant is that this is part of looking at seriousness, then one may read the evidence a different way. The only evidence we have is the evidence of Mr. Smith who has used this term, and from the debate we have had there appears to be – no criticism of him because these things happen – that there appears to be some confusion

about it. I am not sure we can leave it there, because if we leave it there we may have a difficulty, because you cannot address me on it because you do not know what the position is.

MR. HOSKINS: Madam, can I make a suggestion to see if I can satisfy your concern. I made the submission yesterday that the language which is used I appreciate varies, but the expression which is used, at least some of the time, is "this is not clearly …"

THE CHAIRMAN: Once, not "some of the time".

MR. HOSKINS: The expression used "… not clearly a hardcore infringement", and that would tally with the fact that although there was an allegation of price fixing in relation to the Wayleave case, the setting case, it was alleged price fixing by purchases rather than sellers, and that is why I say "not clearly". I come back to the point that it is not appropriate and case authorities have said this, it is not appropriate to construe a witness statement as if it were a statute.

THE CHAIRMAN: We are not trying to construe it as a statue, we are trying to find out what he means.

MR. HOSKINS: Madam, that is precisely the point I am coming to. So the question before us is did the OFT in fact reach a concluded view that there was no infringement on object? Our submission is that if one reads Mr. Smith's witness statements, 1 and 2 as a whole, it is quite clear that despite the potential lack of clarity of language on that particular issue we have just identified, it is perfectly clear from what he says that he did not reach a concluded view and nor did the Office.

THE CHAIRMAN: I am afraid that that might be another reading because if you read "hardcore" to mean "object" then there are references to it not being a hardcore infringement, and if you read it as object not being an object infringement.

MR. HOSKINS: Madam, I understand how the argument can be put, but if one goes back to Mr. Smith's first witness statement, para.70. In our submission this is categorical.

> "It was my view that, subject to recognition that none of the undertakings under investigation had yet had the opportunity to respond to an SO, but there was evidence of potential infringement in relation to both cases. However, I believe that the collective boycott case and the collective setting case would both have needed to be developed significantly before a submission and a robust SO could be issued. This would have to have included in particular a more thorough analysis of the effect of the parties' behaviour on competition. However, further consideration would also have been required in relation to the legal analysis of object

infringements as explained. Further drafting work, in relation to both object and effect, would also have been necessary."

That, in our submission, is the pivotal paragraph of what the decision maker, Mr. Smith's view was of the merits of the object and infringement case. Whilst I fully understand, madam, the way you have put it to me, one can come up with a construction on particular parts of the evidence which might lead one to say "Oh look, it is actually something else". Paragraph 70 is so categorical that there can be no room for doubt that Mr. Smith had not reached a definitive conclusion that there was no object infringement.

THE CHAIRMAN: As explained in para.73. That supports it.

MR. HOSKINS: Absolutely, it is completely consistent with para.70. Mr. Barling points out, if one goes slightly back in the story to para.60, which is where he describes what his view was at the time of the provisional closure letter, he says with regard to substance:

"It was my view that the case team had made out prima facie a case for the parties to answer in connection with both the collective boycott case and the collective setting case. On this basis considered that were the OFT to issue an SO then both the collective boycott case and the collective setting case, should be run as object and effect infringements. Nevertheless, I agreed with further work …" etc.

Again, there may be some lack of clarity in certain parts of detail in Mr. Smith's evidence, but this is the central part, para.70 I particular, and there is no lack of clarity here, and that is what this case is about. Had Mr. Smith reached a definitive conclusion of non-infringement on object, clearly not.

THE CHAIRMAN: (After a pause): You have to go back to the Annexe, do you not, paras. 20 and 29? "Based on the evidence seen by the OFT the alleged collective boycott does not constitute a hardcore infringement of the Act". (After a pause): I do not know whether we can take this further.

MR. HOSKINS: I understand the point, Madam. You have my submission.

THE CHAIRMAN: Yes. That is why I am not sure we can take it any further.

MR. HOSKINS: You can do the detailed analysis. I understand, obviously, why the Tribunal has to do that. As I say, it comes back to Mr. Smith's witness statement at para. 70, bolstered by 73, and bolstered by 60. We submit the position is clear. It may be that the closure letter creates a degree of ambiguity because of its drafting, but in our submission the factual position is entirely clear, given Mr. Smith's evidence.

THE CHAIRMAN: If one looks at who made the decision rather than how the decision was recorded ----

MR. HOSKINS: Precisely - which may be a fairly common occurrence, unfortunately, in terms of how these things are done.

THE CHAIRMAN: I do not think we can take that very much further.

MR. HOSKINS: Madam, in the best traditions of the Bar, I have dramatically overshot my time estimate, for which I apologise. Those are our submissions.

THE CHAIRMAN: We have one further question. The way that you focus your submissions are that the OFT were considering, and then decided, to close the case on administrative priorities, and therefore their decision is a decision on administrative priorities. Is there any difference between a decision-maker saying to themselves, "Well, what are we going to do on administrative priorities?" or are they really saying, "Am I going to continue to investigate further or am I going to stop my investigation now?" Then the question is, "Well, what are the consequences of so doing?"

MR. HOSKINS: Madam, there has to be a distinction because it is well-accepted, both when one looks at the European case law and the Tribunal's case law - albeit the Tribunal has been going, frankly, for less years than the European jurisdiction - that the Authority have an administrative discretion to close the file. Now, I think it is also fairly clear that that administrative discretion can be exercised at any stage of the case. It is not only something that has to be done on Day One. Therefore, if it is possible to have a genuine administrative discretion decision at any stage in the investigation, then one has to recognise that there is a distinction between a genuine prioritised decision and, for example, an implied non-infringement decision.

THE CHAIRMAN: I am afraid that confuses the issue because, yes, it has - or assume it has - an administrative discretion ---- What do those words mean? If you come away from the OFT and this sort of thing, and just look at what we all do every day of the week ---- or what doctors do ---- You have a problem, and you have to investigate that problem. Lawyers investigate by getting in the facts. At some point you have to weigh up whether you have enough facts in order to decide what to do, or whether you are going to go and get more facts. Part of that decision is this administrative priority, and administrative resources, which the OFT are relying upon, but is part of all the decisions that we take. Similarly, a doctor will have a patient before him, and he will decide what investigations to do. He may have twenty investigations he could do, but he does one or two, or does he do twenty? When does he stop? When does he decide he had got enough information in order to diagnose what that patient is suffering from? Exactly the same. It all has costs, resources, priorities ---- all of these factors. They are not exclusive to the OFT. They happen to be part

of what we do every single day, and what any professional person making decisions has to do. It would be quite inappropriate ---- So, that is where the administrative part of it comes.

But is it that you sit there and make the administrative decision, or is it that you are sitting there making an assessment as to whether it is right to go on or it is right to stop?

MR. HOSKINS: Madam, take the barrister example ... the lawyer example ---- If I am instructed to advise in a particular matter I will, to the best of my ability, carry out the research, put in the thinking that I think is required, and I will come up with a conclusion. Say I submit that to the client, but I caveat it with, "This is the conclusion I have reached on the basis of the following work, but if you wanted a more definitive conclusion I would have to go and do the following: research French law; research Belgian law, for example. I leave it up to you, the client, to decide whether you want me to do the further work, or whether, for resource reasons, you want me to stop here". Then there is, in a sense, a resource decision being taken that stops it.

Now, that is not a perfect analogy here because, as I said a moment ago, there is a distinction in law between a genuine administrative discretion and a concluded decision on infringement or non-infringement. Now, insofar as one has to accept there is that distinction, what one is looking for, and what we are doing now, is to see whether, as a matter of fact, the OFT has reached the stage where it has in fact reached a concluded decision, or has taken the view that despite all the work that has been done, in view of the further work that has to be done, it will not proceed to that final decision.

THE CHAIRMAN: But that is the sort of assessment that we all make. There is no difference. It is all part of ----

MR. HOSKINS: That is right, Madam.

THE CHAIRMAN: One of the things you have to consider - one of the six criteria that the OFT use - is the strength of the case.

MR. HOSKINS: But, Madam, the distinction is between a definitive conclusion and a decision not to pursue that definitive conclusion any further. If, for example, a tribunal sat above lawyers, doctors, etc. on the way we conducted our business, then you would have to have a legal definition of what was an appealable decision. The fact is that as a matter of law this tribunal only has jurisdiction when it decides, as a matter of fact that there has been a definitive final non-infringement decision. There is a legal distinction between a final non-infringement decision and a decision taken for administrative priorities not to proceed to a final decision. That is the comparison, and that is the question the Tribunal has to ask itself.

I think there is a danger in that whenever the OFT reaches a decision to close its file, then somehow that must be either an appealable decision or a non-infringement decision and therefore an appealable decision - because there is this legal distinction which allows the Office to stop and not go further.

THE CHAIRMAN: No. Clearly the Tribunal has not said that because ----

MR. HOSKINS: Casting vote for example - the water case. So, one has to recognise the distinction, and when one has accepted that distinction one sees that the question is, "Is it a final concluded decision or is it a decision not to proceed to a final concluded decision?" That is what the legal issue comes down to. Madam, you have my submissions on which side of the line we fall.

THE CHAIRMAN: It is not easy.

MR. HOSKINS: Unless there are any further submissions I can make ------

PROFESSOR GRINYER: How would you define breaching a definitive final conclusion? In a way, if you are taking a multi-stage project, at each stage you are doing your further assessment. You are saying what resources are required; what is the value on any successful outcome; what are the probabilities of achieving that outcome; and you are looking at alternative uses - what economists call opportunity costs. You will be aware of that. So, in a way, there is a problem of recognising at what point you have reached the full definitive conclusion. You can talk about exhausting all opportunities ... reasonable opportunities, but they are infinite. You have an open-ended process which goes on for ever. So, you have to decide to cut at some point.

How would you define that point having been reached because this is something which troubles me? I have not got an answer, let me say.

MR. HOSKINS: Sir, that is, in a sense, one of the philosophical questions that underpins the issue. What one can see in the Tribunal's case law is an attempt to posit the appropriate legal questions to determine that answer. So, for example, the two I have focused on - and I can show you the case law - is to ask whether when one looks at the way the office has expressed its conclusion is that in substance expressed as a final conclusion ... as a firm decision, or is it expressed to be provisional or tentative? Depending on the answer, you fall on one side of the line.

Another way that the Tribunal puts it - and I think it is quite important here to look at the language - is whether the Office considers that it has completed its investigation. So, in a sense, there is a degree of subjectivity, I accept, on the part of the office.

PROFESSOR GRINYER: You are suggesting almost a subjective matter for the decision-taker to decide whether it is a final conclusion or just an interim provisional one.

MR. HOSKINS: I think there would also be a case ---- or, there may be a case - though I think it would be an extreme case - where the office adopts a case closure decision and says, "This is a priority decision because we think the following further streams of work are required". If it came before the Tribunal, the Tribunal might think that that was not a particularly credible explanation because, for example, the further work would be unlikely to add anything, or the further work would be so expensive that it would just not be credible that anyone ---- This chimes of the example you put to me ---- that any reasonable body would say to me, "We can only reach a final conclusion once we have done absolutely everything, and spent millions of pounds". So, I can see there may well be an extreme case where you might say, "I'm sorry, but we're just not accepting that".

But, bring it back to this case. What the Office has done is to identify particular items of work which it says it would still have to do in order to reach a definitive conclusion. If the Tribunal takes the view that what the Office has identified as being necessary to reach a definitive conclusion are in fact reasonable things for the Office to think it would want to do before reaching a conclusion, then I think you can reach a conclusion in this case. So, that is why I say there is a degree and one sees it in the case law in the way it is expressed - what does the Office think it needs to do to complete? But, I think the way one controls that is that the Tribunal would ten have the power to say, "Well, that's not a reasonable view to take". That is the way I think the two levels would fit together.

PROFESSOR GRINYER: Do you see, looking at this process, any relationship between the stage at which the decision was made - which is classed objectively as provision, and interim, and not definitive - and the amount of time and information over which it has been collected, and the relative strength of the evidence? In other words, if one has proceeded for three years and in fact has collected a great deal of information and evidence, and then reaches a decision that further work will be necessary to produce a robust decision, is there any implication, do you think, from that that there is not a strong robust case ---- you know, that there is innocence?

MR. HOSKINS: That obviously is a factor that the Tribunal could consider in deciding whether the extra streams of work were reasonable, or not. But, I would not suggest it was a particularly strong factor. I think it is slightly dangerous to assume without knowing exactly, for example, why it has taken so long. Casting Book was quite a good example, I think ---- This is not on instruction - this is just from reading the cases. One sees Casting

Book where I think there was one case officer who was left with the case and there was a real resource problem.

So, obviously, over time, the longer it goes on, the more the Tribunal might be sceptical about the reasonableness of further works needing to be done. But, I think it is important not to be too sceptical about that because it may well be - as we know, for example, in this case - there were other cases that were seen as more important for the Office, and the Office was trying to shift resources between them. So, we simply do not know, or cannot assume, that because, for example, an investigation has lasted four years, that means there has been a team of ten working on it every day for four years. That is not the way these things tend to operate.

So, I understand how that might well be a factor when it comes to the Tribunal's view of reasonableness of the way the Office has presented what it believes it has reached - the stage it has reached. But, it cannot be a determinative point. I am not suggesting that is the way you have suggested it, but it cannot be determinative. My own submission would be that one would have to be wary of giving it too much weight because one simply does not know how the Office has conducted the investigation as a matter of resources, time, practice, procedure, etc.

PROFESSOR GRINYER: Thank you very much.

THE CHAIRMAN: I think you said earlier that you were going to explain - although we should not really get into it - what the legal problem is. When I said, "Well how long is that going to take to resolve because it is not so difficult?" -----

MR. HOSKINS: That was the point I had addressed. The point I had in mind was I thought that Cityhook had misunderstood that an object infringement had depended on subjective intention.

THE CHAIRMAN: Right.

MR. HOSKINS: So, that is the point.

THE CHAIRMAN: Because out of the discussion you have just had is raised the question whether if the effect problem was not there, the legal problem on object was such that they had not come to a decision. Do you see where my mind is sort of going? There is Mr. Smith, who is a solicitor, well experienced in competition; other people in the OFT well experienced in competition. You say this is a difficult problem - you can see it from the other case that there is this issue.

MR. HOSKINS: Yes.

THE CHAIRMAN: But you cannot have issues of that sort not being resolved within the OFT. They may have to get resolved by courts, but unless the OFT resolves them first or puts their foot in the water, they are never going to get resolved.

MR. HOSKINS: Well, there could be private actions obviously, Madam, as well. It does not necessarily come ----

THE CHAIRMAN: No. But, then the OFT will not have their say in relation to ----

MR. HOSKINS: They can intervene in domestic proceedings.

THE CHAIRMAN: But the matter has to somehow get before the court. If it is such a serious problem within the OFT then it is something which possibly should be encouraged to go before the courts in some way. Unless they are prepared to put their foot in the water, that will never happen. Now, it cannot be such a difficult legal problem that it is going to take months and months to resolve, because as I said you can go to counsel, and Mr. Priddis is just as good as anybody else to resolve it at the OFT level. I do not mean to say this in the way it is going to sound, that it is a criticism, but I do not mean to say so, but when you said "Is it credible?" putting it in that way is it really credible that the OFT's legal people could not actually come to a decision on that?

MR. HOSKINS: Madam, the problem is that it is actually a question of fact whether the OFT decided to commit the further resources to coming to that conclusion, and it is not simply ----

THE CHAIRMAN: Further resources is either Mr. Priddis sitting in an office, or a group sitting in an office for a day, or going to counsel and getting an opinion, and how much does that cost? You may be so expensive that it is not worth convincing themselves ----

MR. HOSKINS: I will not comment.

MR. PICKFORD: Keep within the appeal, madam.

MR. HOSKINS: Despite encouragement. The problem is that the question for the Tribunal is whether the OFT as a matter of fact has decided to ----

THE CHAIRMAN: But I was turning the point round. Is it credible that he did not actually come to a view?

MR. HOSKINS: Well the question is: Did Mr. Smith sit down for a day and come to the conclusion? He has told us he has not. With Mr. Smith, a respected OFT official, a witness statement backed by a statement of truth to say on the basis of what we heard over the last two days, that the reality is that he, on behalf of the Office, came to a concluded view. He is quite candid about his own decision, he thought there probably was an object case, but he is also quite candid that he did not come to a concluded view, and that is a question of fact.

I can see very well that it is tempting for the Tribunal to say: "A court can decide this, it would be nice for us to decide it". But the problem you have is that you have to have an appealable decision. You cannot short circuit ----

THE CHAIRMAN: If in the OFT they always sit on the face and therefore say "Oh well that is all too expensive to decide, I am not going to do it" they are never going to have a decision and therefore they are never going to be able to resolve any of those cases.

MR. HOSKINS: Well madam, with respect, it is a matter for the Office and it is a matter to be resolved. For example, if we are talking about administrative priority decisions and whether or not they are rational we know that those are decisions for the Administrative Court to decide on rationality. It may be a political issue, but what we do know is that the relationship between the Tribunal and the Office is one of the Tribunal's job is to determine legal disputes which involve the Office but not ----

THE CHAIRMAN: We fully understand that and ----

MR. HOSKINS: -- to tell the Office how to run its business, and the *Floe* case is an example of that. The Tribunal has to be careful not to cease being a legal arbiter, and being a "Come on, OFT, would it not be better if you did things this way?" The Office has to be allowed a margin of appreciation, and if it is felt that it has acted irrationally – because that would be the test – then it is for the Administrative Court to make that finding. Obviously, as we all know rationality challenges are very difficult to win because the courts, legal Tribunals do not tend to tell, for example, regulators how to do things unless they think they have done them irrationally.

THE CHAIRMAN: The difficulty here is it is rather tied up, one really needs to see both sides of it, the administrative side and this side to understand the administrative side. So the division is very difficult.

MR. HOSKINS: I understand but the Tribunal, the specialist competition body only gets there once the trigger in the legislation has been passed.

THE CHAIRMAN: And the Administrative Court does not understand the other side of it, so it is very unfortunate.

MR. HOSKINS: One sees the Tribunal grappling with that in its case law, because I think – I hope I am not speaking out of turn – certainly in the early cases one sees a certain expanse of approach. I am not saying it is one that is legally justified, but a certain expanse of approach to questions of jurisdiction and perhaps more recently a more restrained approach. That may just be simply that the case law has become better defined and therefore it is easier to apply. But one can see that philosophical-type tension coming through the

Tribunal's case law, but what I have attempted to do is to show where the case law has arrived at and show what the trigger is.

THE CHAIRMAN: Thank you.

MR. HOSKINS: Unless there is anything else.

THE CHAIRMAN: Mr. Barling

MR. BARLING: Madam, it seems that I have drawn the short straw, but looking at the time I do just wonder whether – we have had a lot to digest, and whether ----

THE CHAIRMAN: You would like the opportunity of lunch

MR. BARLING: -- whether the opportunity of reflection along with some food might shorten things after lunch. I do not know whether that attracts you to take lunch slightly early. It is 10 minutes early, or less than 10 minutes early, and then I will try and hone, as it were, hone away.

THE CHAIRMAN: We thought an hour for all of you, do you think you are still going to be an hour, or do you think the ground has been covered

MR. BARLING: Well a lot of ground has been covered. I think when I have taken the blue pencil to some of these points in the light of what Mr. Hoskins has said, I think I will probably be about 15 minutes.

MR. RANDOLPH: I would imagine with the same blue pencil, or maybe a different blue pencil, I would be about 10.

MISS MURPHY: We measured beforehand at 10 and I am staying at 10.

MR. TURNER: Madam, in my case there is a difficulty. I do think that there are points that ought to be brought out. I am conscious that there is a litigant in person on the other side ----

THE CHAIRMAN: I am just working how I give him a break.

MR. TURNER: I would propose that we kick-off now, and in fact I would be happy to kick-off. I will explain, in part, madam, you mentioned at the beginning of the hearing yesterday that there were certain authorities which might be relevant, you mentioned the *Pernod* case and the *Independent Water Company* case.

THE CHAIRMAN: But I only mentioned them because I thought we ought to ----

MR. TURNER: For completeness.

THE CHAIRMAN: For completeness, yes.

MR. TURNER: It turns out that Mr. Shovell has not read either of those cases. So far as the *Pernod* case is concerned, it is my view that in fairness there are one or two points that ought to be drawn to the Tribunal's attention. Similarly, there are one or two other points which have not entirely been canvassed in argument this morning that ought to be brought

out in favour of the litigant in person's point of view, and with that in mind I would say that I have probably got, subject to the Tribunal's control, 25 to 30 minutes.

THE CHAIRMAN: I think we will break now because there is no point in five minutes. Perhaps it would be appropriate for you to discuss with Mr. Barling so that we do not have any overlaps.

MR. TURNER: Duplication, yes, we will do that.

THE CHAIRMAN: I do not know what he was going to do, and it may be that some of these points are points that he was thinking of anyway

MR. BARLING: We will have a chat.

THE CHAIRMAN: Have a chat. It is probably easier if not too many people say different things, if you see what I mean, put it in different ways – the same thing, or say it in different ways if it is all the same point

MR. BARLING: We will try and divide it up.

THE CHAIRMAN: See whether you can divide up the load. You may have already done that, but if ---

MR. BARLING: It is going to be pretty short anyway, but one always sees, as it were, slightly different angles.

THE CHAIRMAN: Yes

MR. BARLING: I think we know now where Tribunal, as it were, is troubled, and there are some points we would very much like to try and provide assistance on.

THE CHAIRMAN: And it would be most helpful to Mr. Shovell. So that means that you are not going to finish until around 3, probably.

MR. TURNER: Yes.

THE CHAIRMAN: We are then going to have to have a break for probably at least about half an hour – you think you will need a break? You do not know yet?

MR. SHOVELL: Well this morning Mr. Turner suggested to me that each of the Interveners had reflected and thought they would take five minutes each, therefore, I thought not only would I have a break, but there was going to be no pressure on time. I now find they do not even get to think what the reply is until ----

THE CHAIRMAN: It is all right, Mr. Shovell, can I just ask you if you could use the adjournment now to at least think about what you were going to say in answer to what Mr. Hoskins has said?

MR. SHOVELL: Madam Chairman, I completely understand what the Tribunal is trying to do.

THE CHAIRMAN: We do not really want it to go over to another day because if we go over another day that is very costly.

MR. SHOVELL: It is costly and it is also unhelpful to the flow of logic as far as the points that have been made, I have well understood.

THE CHAIRMAN: I want you to be relaxed and content, and have enough time.

MR. SHOVELL: I will do my best to assist the Tribunal, madam.

THE CHAIRMAN: Thank you very much, shall we say 2 o'clock?

(Adjourned for a short time)

THE CHAIRMAN: Mr. Turner, you are going first?

MR. TURNER: Yes, Madam.

MR. SHOVELL: Madam, may I raise a procedural matter, just so that there is transparency for the Tribunal? You asked me to prepare my response and I have duly done so, and I am ready to respond to Mr. Hoskins. Just before the break, Mr. Turner tried handing me a 200 page Judgment - I think it was on *Pernod* - but I declined to do so on the basis that I was told to try and prepare for Mr. Hoskins' replay rather than ----

THE CHAIRMAN: You cannot do everything.

MR. SHOVELL: The second point in relation to that is that at the start of this case Cityhook delivered a bundle of seventy sheets of paper and Mr. Turner objected vigorously, and he said that this was prejudicial to his client. The Tribunal allowed us to proceed, and it seemed reasonable partly on the basis that sixty-six of the pages were already in the bundles behind us; two or three of them were common-sense points on what an expert does which are not contentious, and one of them was a letter. I understand that Mr. Turner wishes to discuss the cases which have not been included in the core bundle that we have had no opportunity to read, and I would repeat Mr. Turner's point in response - I do not think it is reasonable to be presented with 200 page technicalities part-way through the case because we have no basis to respond - if that is indeed what is going to happen. Thank you, Madam Chairman.

MR. TURNER: Mr. Shovell's apprehension is entirely understandable. Over the luncheon adjournment I discussed with my learned friends whether we need to raise these points in fairness to Mr. Shovell. This is not an ambush. This is the opposite of an ambush. I trust that Mr. Shovell will appreciate that when we go through it. Our submissions are going to be that there are answers to the points that I will raise, but will draw to your attention because if counsel for Mr. Shovell was here, he would have made those points. That is the purpose of raising these points now.

THE CHAIRMAN: Mr. Shovell, it is partly that I mentioned at the beginning of this hearing that there was the *Pernod* case and another case which have considered these matters, and for the sake of fullness, because it would be wrong that you did not know that, and had not had an opportunity ---- I mentioned them yesterday right at the beginning. Now, I suggest what we do is that we let Mr. Turner make the submissions and take us through the cases, and he will do it in a way, hopefully ---- You have a copy there, do you?

MR. HOSKINS: No, I declined ----

THE CHAIRMAN: You must have a copy there. He will take you through it, and subject to what the points are that he is going to make, we can then decide how much time you need to answer. It is only fair. If it is thought that these cases ought to be drawn to your attention, then it is only fair that they are drawn to your attention so that you know what has been said in these cases.

MR. SHOVELL: Okay. If I can contrast ---- The case law that was in the bundle - I selected out the paragraphs that I thought were relevant and included them in my bundle. I have not had the opportunity to ----

THE CHAIRMAN: We will give you the opportunity.

MR. SHOVELL: Can I waive my right to have these cases considered?

THE CHAIRMAN: No, because I think there is a duty to the court that we consider all relevant materials. If you had had counsel here, he may well have wanted these cases ---- We need to see what they are. When we find out what they are ----

MR. SHOVELL: Understood. I cannot discuss it, or my suspicion is that they are not for my assistance but for his client's assistance. But, that is a matter for the Tribunal.

THE CHAIRMAN: Let us just see where we go.

MR. TURNER: Madam, as I say, we discussed between ourselves, and all counsel agree that there is a need to refer to two cases in particular - those being the *Pernod* case and the *Glaxo* case, which was in the authorities bundle for the disclosure hearing. It is not in the authorities bundle for this hearing - a point which I have only belatedly realised. Now, I have a copy -----

THE CHAIRMAN: We have the other authorities bundle. (After a pause): Mr. Turner, I assume, when you are taking us through this, having regard to what Mr. Shovell says, you are going to show us all the references that are relevant?

MR. TURNER: Of course. Of course. *Glaxo Smith Kline* - T16801.

THE CHAIRMAN: It was in a file, Mr. Shovell, that we have got as 16. It was a Monkton file. You may have it as a Monkton file.

MR. TURNER: Mr. Shovell can share my copy when the time comes.

THE CHAIRMAN: I think we ought to give him his own copy.

MR. TURNER: Perhaps if that can be copied ----? I will not get to that for about ten minutes or so.

MR. HOSKINS: Madam, can I put in a bid for a copy as well please as I do not have one?

THE CHAIRMAN: We probably also ought to point out that in the *Pernod* case Mr. Summers was part of the Tribunal.

MR. TURNER: Mr. Summers will recollect that I came into that case only after this admissibility Judgment.

If it pleases the Tribunal, there are two essential issues for decision today. The first: what are the relevant questions for deciding the admissibility issue? What is the test? Secondly: how should those questions be answered?

So far as the relevant questions are concerned, it is our submission that the test is extremely simple: did the relevant decision-maker make up his mind on the issue of whether the statutory prohibitions had been infringed? With that formulation of the test, I propose briefly to turn to some support in the case authorities, seeking to avoid duplication with ground already covered by Mr. Hoskins.

The first case, and the grandfather of cases in this area, is *Bettercare* at Tab 2. Again, a case in which Mr. Summers sat. I would ask the Tribunal to turn first to para. 62 on p.21 of the numbering of that tab. This is by way of grounding ourselves in what the Act on behalf of the OFT must be to trigger appealability. The Tribunal stated, "There is no definition in the Act of what constitutes a decision. On the ordinary meaning of words, to take a decision in the legal context means simply to decide or determine a question or issue", and then it goes on with the words that the Tribunal is familiar with - that it must be a question of substance, and not form.

I dwell on that first sentence because taking a decision means - and we will see that the Tribunal has subsequently picked up this thread - making up its mind: not merely forming a provisional view about a matter, but deciding it in the ordinary sense of the word. That is what we are looking for in this case.

At para. 66 in the same Judgment, over the page, you will see the application of that to the facts of the *Bettercare* case. The Tribunal was considering a letter of July 25, 2001. It said,

> "It is true that the letter of July 25th states, 'We currently consider that Norton West is not an undertaking when acting as a purchaser of social care ----' rather than, 'We

have decided that Norton West is not an undertaking when so acting. On the other hand, when read with the letter of November 29th, to which the letter of July 25th referred, it seems to us that at the very least [and this is the important part] the letter of July 25th states ... carefully considered and to all appearances final view on the Director's behalf that Norton West is not acting as an undertaking when purchasing social care".

That reference to the view that you have needing to be a final view is what marks the boundary between a decision that is reviewable in the Administrative Court and a decision that is appealable to this Tribunal.

We turn then to the *Claymore* case at Tab 4. Mr Hoskins has covered the ground fairly comprehensively, and so I shall be brief. At para. 155 that concept of finality is crystallised in the statement of the Tribunal seven or so lines down from the top of the page.

"At some in the investigation the Director reaches the point where he considers that he has all the evidence he needs or can usefully obtain. At that stage he assesses the evidence and makes up his mind".

Again, we lay some weight on that because we say that that marks the relevant boundary for the Tribunal to consider. In the following paragraph, the Tribunal pointed out, again about seven lines down from the top of the paragraph, that:

"The Director and his staff, in that case, gave close consideration to the evidence and reached a view. That view was that the evidence did not amount to proof of an infringement."

As we have said, there was nothing provisional or tentative about that conclusion. Pausing there, it is clear from that that when the Tribunal uses the expression "a view" as in the well-trodden statement at para.122 of the same judgment about what it means to make a decision.

"The Tribunal envisages the "view" to mean a final view in the sense of a decision, in the sense of making up one's mind."

And if one travels back to paras. 139 and 140 in the same case one comes to the territory that Professor Grinyer was inquiring about as to the difference between a view and when a view crystallises into a decision that is appealable to this Tribunal. One sees what was the situation in the *Claymore* case. Paragraph 139:

"The OFT's press release of 9th August 2002 states that: 'After an extensive and thorough investigation the OFT takes the view that further investigation is unlikely to lead to a finding of abuse'."

So there, and thinking in terms of Professor Grinyer's continuum of decision making, at that point the OFT had decided: "We can go on gathering information until the cows come home, but we now feel it is proper to form a final view. We feel that we can responsibly say that in this case there was not an infringement." You see that from para.140, moving forward, Dr. Mason, who was then the senior director in the competition branch responsible for this case, said in a meeting:

> "If we do not see a realistic possibility of a breach of the Competition Act to the level of proof set out in *Napp* then we are currently minded that the only fair thing we could do would be to make a non-infringement decision. We are of the view that we should now bite the bullet and now make a non-infringement decision."

So subjectively in that case the OFT had crossed the line. They had come to the point in their thinking that they had decided that it would not be productive to keep gathering further information to look at this issue. They had decided, again subjectively, that it was responsible for them to form a final view. That was the trigger in the *Claymore* case.

I would contrast with that what happened in the *Aquavitae* case in the following tab, tab 5. That was a case in which – I will turn to para.191, which is the paragraph I am going to ask the Tribunal to look at, but in short what one had in that case was extremely strong expressions of view by subordinate officials within OFWAT and in particular, Miss Beryl Brown, who was the head of competition policy who thought that the case had no merit and she said so robustly in terms that were disclosed voluntarily by OFWAT in that case, so that the complainant could see them. But the ultimate decision maker in that case, the Deputy Director General, was the person whose decision was in issue, and he took that into account and he had formed perhaps his own views about the merits, but he took the decision to close that investigation for other reasons. In para.191 you see the Tribunal's digestion of all of this; it said:

> "Taking all these considerations into account, we are unable to persuade ourselves that the letter of 4th September 2002, which was the closure letter, decided or determined that there was no infringement of the Chapter II prohibition. Assuming in Aquavitae's favour that the director asked himself whether the prohibition was infringed, in our view the answer he gave was, in effect: 'I think it is highly unlikely, but I will consider on its merits any specific complaint you make.' In our view that is not a decision as to whether the Chapter II prohibition is infringed within the meaning of the Act. In other words, the director did not quite close the door. He left it ajar, if only slightly. Again that delimited the boundary between an

appealable decision and a decision that was subject to review by the Administrative Court."

Before turning to *Pernod* now, which was the additional authority I wished to draw to the Tribunal's attention, and drawing the strands together, on the question that was raised by the Tribunal at the end of Mr. Hoskins submissions, we say there is a dividing line to be drawn between the position that you see in *Claymore* at para.155 and the position where the door is left ajar when you leave the problem and move on to other matters – even if only slightly. That is the difference between a decision - which is appealable, and a view – which is not. For the avoidance of doubt our position is that where the decision maker has not arrived at a final decision but has moved on for other reasons, it would not be for this Tribunal then to assess the reasonableness of that behaviour, whether he should have made a decision in the circumstances, or whether he should not if he had gone ahead to do so; certainly the former case are matters for another court.

Now, with your permission, madam, I turn to the *Pernod* case, and I believe Mr. Shovell has a copy of that. *Pernod* was an unusual case, and I will briefly summarise the factual background. In that case, the matter at issue concerns the closure by the OFT of an investigation into suspected abusive behaviour by Bacardi, the drinks' supplier. It related to certain arrangements which had been made by Bacardi about the supply of light rum in the United Kingdom, and whether those arrangements, mainly with customers, were restrictive and excluded competitors. Pernod made a complaint that there was an abuse.

The investigation, which was long running, was closed by the Office of Fair Trading after taking certain assurances from Bacardi about its future conduct, that it would not do X, Y and Z and to show the Tribunal what was happening I would ask you to look at paras. 60 and 61 of the Judgment, on p.15. There is a press release from the OFT, Bacardi gives assurances on exclusivity, and if the Tribunal briefly scans that you will see that Bacardi gave the OFT assurances that it would not enter into or maintain certain types of agreement with on-trade retailers, such as pubs or restaurants.

The Tribunal will see what was said, in the final paragraph of the press release there was this:

"The assurances remove the competition problem that prompted the investigation and should widen competition opportunities in the market. It would not be appropriate in the circumstances of this case to devote more resources to it."

There you have a sort of mixed statement, the OFT saying it is not appropriate to devote more resources to it, but the focus of the Tribunal's attention was on the first sentence in

that paragraph: "The assurances remove the competition problem that prompted the investigation." The question that arose for decision was whether, in closing the case, the OFT had made an appealable decision or not, and with that we turn to the reasoning which begins at para.139 of the Judgment after a rehearsal of the statutory framework. The Tribunal began by setting out the well established tests and referring to the previous case law. The distinctive feature of this case was brought out in paras. 145 and 146. In that case Pernod (which was bringing the appeal before the Tribunal) conceded that there had been no appealable decision as regards the past, as it were – the OFT had not made its mind up as to whether there had been an infringement on the past – but it focused on the idea that the OFT had said these assurances removed the competition problem going forward. The issue there was whether that constituted a decision. Paragraph 146 of the Judgment deals with that point and the question is whether, as it were, a decision for the future constituted an appealable decision; that was the distinctive feature of that case. The Tribunal decided that given the terms in which the OFT had accepted the assurances that was an appealable decision. It looked at the kinds of behaviour which the OFT had said were prohibited, and which it had said were allowable, and on the basis that the OFT had concluded that those sorts of behaviour either would or would not constitute an infringement, said "That is sufficient. That is enough to trigger the application of the Act."

The relevant part from Mr. Shovell's point of view comes at para.161, and I will explain the significance.

> "As the Tribunal has found in previous Judgments, the words 'as to whether' in s.46(3)(b) refer both to a decision that the prohibition has been infringed, and to a decision that the prohibition has not been infringed. It was equally common ground that there may be a decision that the prohibition has not been infringed if the decision in question finds that at least one of the necessary elements comprising the Chapter II prohibition is lacking. Thus even if the decision is limited to deciding that the body in question is not an undertaking, as in *Bettercare* that, by necessary implication, is a decision that the Chapter II prohibit ion has not been infringed, because an element essential to establishing the infringement is not present."

I want to deal with that but the relevance so far as this case is concerned is pursuing, madam, the Tribunal's thoughts in canvassing argument with Mr. Hoskins, that if here the OFT had said to itself "We decide that there is no restriction by object", if that is the correct analysis, and if that deals with, removes one necessary element of the case, then following that logic, and following the earlier case of *Bettercare* it could be said there was a sufficient

basis for finding an appealable decision. That was the sufficient basis for a non-infringement decision.

THE CHAIRMAN: Can I just stop you because it is important that Mr. Shovell understands what you are saying.

MR. TURNER: Of course.

THE CHAIRMAN: What you are pointing out is a paragraph here which he may well want to cite to me.

MR. TURNER: Yes.

MR. SHOVELL: Madam Chairman, I thought the point that counsel for the OFT was making was preposterous as a point of law ----

THE CHAIRMAN: It does not matter, I am just making sure that you understand that what is being pointed out is a point in your favour.

MR. SHOVELL: I understand.

THE CHAIRMAN: Mr. Turner is going to distinguish it, or explain to us why we should not follow it, or whatever, but I just wanted to highlight that for you.

MR. SHOVELL: Okay, I understand and I am grateful for at least the first part of this then.

MR. TURNER: Assuming therefore that Mr. Shovell has understood this point, what I propose to do is to deal with it in a few moments, because before answering that question and dealing with the objections raised by the Tribunal at the end of argument with Mr. Hoskins, I would like to turn to the next question which is the facts of this case. Did the OFT make its mind up in this case on the question of infringement? Was there, within the meaning of s.46(3) of the Act a decision as to infringement of the Chapter 1 prohibition in this case, s.46(3)(a)? The starting point, as Mr. Hoskins rightly says, is a decision letter, although it is not the decision itself, which apparently was made few days earlier on 19th June, it records the decision that was made and the reasons for it. It records in terms that the decision to close was made on grounds of administrative priority, and in the interests of speed I will simply refer briefly to the relevant paragraphs: paras. 1, 2 and 24 to 26, all of which were covered comprehensively by Mr. Hoskins.

MR. SHOVELL: Madam Chairman, I am sorry to interrupt again, but having read this for the first time I am not convinced it helps us at all. I think what it is saying is ----

THE CHAIRMAN: Let Mr. Turner tell us all about it ----

MR. SHOVELL: Apologies.

THE CHAIRMAN: -- and you will have an opportunity to tell us why you do not agree with Mr. Turner.

MR. TURNER: All of that, taking the decision letter at face value is, we say, clearly inconsistent with the notion that the OFT had made up its mind that the two cases, collective boycott and collective setting cases, had no merit, and that they were dismissed on that account because they had no merit. Cityhook's case is that when you study the decision letter and study the statements made by Mr. Smith in his witness statement, however, one may deduce that the OFT did reach substantive conclusions on the merit and, madam, the Tribunal was exploring with Mr. Hoskins before lunch the extent to which statements made in Mr. Smith's statement and in the decision letter could have a different complexion thrown upon them, and that is the nub of the issue we now face.

I would like to deal with that first of all by looking at what Mr. Smith says again as to object and as to effect very briefly, and then answering the questions raised by the Tribunal at the end of Mr. Hoskins' submissions.

Briefly, so far as object is concerned, Mr. Smith explains – and I am now summarising because it is tedious to go over it all again, but he explains – that there was a strong difference of view in the OFT left unresolved, as to whether the alleged infringements could be characterised as restrictions by object. The relevant paragraphs that I have noted include the end of para.73, and paras. 38(a) and 39(a). Perhaps it is just worth, in fact, turning to those latter two references which were also noted by Mr. Shovell in interjection. In Mr. Smith's first witness statement at 38(a) he is concerned with the first case, the collective boycott case, whether the parties, now the interveners, clubbed together and refused to adopt Mr. Shovell's technology. In 38(a) one sees it recorded that the CRP (Case Review Panel) as opposed to the case team, considered, having reviewed the case law and statements from the European Commission, their legal view was that a collective refusal to purchase of that kind should be characterised as an effects based rather than an objects based infringement unless (a) it was linked to an underlying cartel; or (b) possibly it was aimed at eliminating a competitor.

Then you see the case team disagreed, arguing that this has to be an object based restriction, a group of people getting together to do this sort of thing. You have a debate, it is left unresolved. 39(a) deals with the collective setting case. Following the second sentence of that subparagraph:

> "In particular, the CRP argued that the collective setting case concerned a joint purchasing arrangement which would not, of itself, appear to constitute an object restriction. The case team strongly disagreed, arguing that the evidence in this case was not consistent with joint purchasing but with a buyer's cartel."

On that last note we have the link back up to the question raised in 38(a) about whether you need a cartel to found an objects based infringement. What you plainly see from this, without the need to go into all of the substance of the case law, is that there was plainly an unresolved debate. Mr. Smith says that at the time he took the decision, rightly or wrongly, that debate had not been closed with a view.

Madam, you raised the question would it not have been simple to arrive at a view and stick by it bravely? As Mr. Hoskins says and in our submission, they did not do so, and that is a separate question. Our question is whether they reached the final decision on that point, and the answer is "no", according to the evidence before the Tribunal.

So far as effects are concerned, I will content myself with merely giving some references: paras.41(which refers to the case review meeting minute) 42. 47 and 51(b). 51(b) if I may on reflection I will simply draw briefly to the Tribunal's attention. 51(b) is important because it is not words but actions. This is part of Mr. Priddis's recommendation about how to go forward in December 2005. You will see from 51(a) that his view at that time was that the evidence suggests a degree of horizontal co-ordination inconsistent with proper competition, and that closing the case on the basis of a non-infringement decision was not an option.

So pausing there, the view at that stage, from Mr. Priddis at least, is that he could not say there has not been an infringement of the Act because in his view that is not consistent with his understanding of the evidence of what might be gathered. You get that last point, what might be gathered from 51(b).

> "The weakness of the current evidence as to the anti-competitive effects of the alleged conduct was, in his view, concerning though it was possible that further evidence could be gathered."

Pausing there, we come back to Professor Grinyer's question: well did they think that further evidence can always be gathered about everything, but nevertheless we have enough to reach a final view? You see from what happened and, in particular, from the following phrase in the brackets, that the OFT did not arrive at this conclusion. In this connection Mr. Priddis noted that the case team has already prepared information requests to gather relevant data under s.26 of the Competition Act. It follows that the state of mind of the OFT at that time was that it had not made up its mind. These matters both as to object and effect were left unresolved, and that is at the heart of this case.

Having said that, I desire to address the Tribunal very briefly on the question of "hardcore", and "object". As the Tribunal has pointed out, the case closure letter refers on occasion to

whether or not this was a hardcore restriction case ,and the thinking of the Tribunal – as we understand it – is if hardcore essentially means "object" effectively you are talking about the same thing. If the OFT is saying to itself "This is not a hardcore case", is not the OFT saying "This is not a case of restriction by object", and if that is so has it not made a decision that there is no restriction by object, thereby triggering an appealable decision to this Tribunal.

Now, the first point is that the concept of "hardcore" as Mr. Hoskins indicated, overlaps with but is not identical with the question of a restriction by object. What the OFT meant in this case by "hardcore" is not in doubt because it is footnoted, and Mr. Hoskins took you to the reference – market sharing, supply side, price fixing, bid rigging. Those matters are what the OFT understood when it made the decision are there to see. The question is whether those are identical to and map on to a restriction by object. Well for the reasons already given in the parts of the witness statement which I have just taken you to, there was a debate in the case team, within the OFT more generally, as to whether what you had here, which was not that sort of thing, it was not a supply side price-fixing case or anything of that kind, might nevertheless be a restriction by object. So the OFT's position is this is not, or they did say at one point "not clearly" a hardcore cartel case. But the question they were facing was whether, for the purposes of the Act you had a restriction by object. They noted that this was an allegation that buyers had got together and refused to pay, for example, certain prices for wayleaves and that sort of thing, and they did not resolve the question about whether that was a restriction by object for the purpose of the Chapter I prohibition.

I would go further: assume that that were not the case, assume contrary to what I am now saying that on the facts the OFT did say to itself contrary to what we see from Mr. Smith, the evidence before the Tribunal, there is no restriction by object in this case. If there is a restriction it has to be an effects' case.

Let us just test that and see where it leads. Does it mean that there is an appealable decision? In my submission, plainly not, because the question under s.46(3)(a) of the Act is whether the OFT has made a decision as to infringement of the Chapter I prohibition. What the Tribunal sees in this case, even on that hypothesis, which we refute, is the OFT saying "This is not an objects' case, but we are concerned. We are concerned that this may still involve a restriction of competition". There is further evidence we would want to gather to test that. It was because of those considerations that the OFT said to itself, as you saw adumbrated by Mr. Priddis, "We cannot take a non-infringement decision".

Coming back now to *Pernod* and whether a necessary element was lacking or not, found to be absent in this case – restriction by object – the relevant element of the prohibition is whether there is a restriction of competition, by object or effect. It is not restriction of competition by object. S.46(3)(a) refers to a decision as to whether there had been infringement of the Chapter I prohibition; the relevant ingredients include an undertaking, or undertakings in the case of Chapter I; an agreement – a decision of an association of undertakings or concerted practice, effect on trade and a restriction of competition by object or effect. It was on that point, as you see from Mr. Smith's statement very clearly, that they had not made up their minds, and that is why we say that even on the hypothesis that we refute, this is not an appealable decision.

Now, may I turn to the second authority which we felt, in fairness, should be drawn to Mr. Shovell's attention, which is the *Glaxo* case? I am not going to go in any detail to the facts of this case. This case has aroused some interest in competition law circles because of what it says about when there is a restriction by object. I will turn directly to the relevant paragraphs, which begin at para. 114, under the heading: "The existence of an anti-competitive object." Essentially the subject matter of this case concerned certain sales conditions imposed by Glaxo SmithKline which limited parallel trade between Member States. The question was whether that is enough to found a restriction by object.

At para.118 the Court of First Instance said this:

> "In effect the objective assigned to Article 81(1) which constitutes a fundamental provision indispensable for the achievement of the missions entrusted to the Community, in particular for the functioning of the internal market …"

And then there is a reference to certain cases:

> "Is to prevent undertakings by restricting competition between themselves or with third parties from reducing the welfare of the final consumer of the products in question."

Then it goes on to say that at the hearing in fact the Commission emphasised on a number of occasions that it was from that perspective that it had carried out its examination in the present case. I will move on to the following paragraph, but the point that they are making, apparently, is that you get into an infringement only if you have an arrangement or agreement which is harming consumers. So, moving forward to para. 119,

> "Consequently the application of Article 81(1) to the present case cannot depend solely on the fact that the agreement in question is intended to limit parallel trade in medicines, or to petition the Common Market [which leads to the conclusion that it

affects trade between member states] but also requires an analysis designed to determine whether it has as its object or effect the prevention, restriction or distortion of competition on the relevant market [and then you get these additional words] to the detriment of the final consumer. As may be seen from the case law cited above, that analysis, which may be abridged when the clauses of the agreement reveal in themselves the existence of an alteration of competition, as the Commission observed at the hearing, must, on the other hand, be supplemented depending on the requirements of the case where that is not so".

Then, at para. 121, before I comment on these paragraphs:

"While it has been accepted since then that parallel trades must be given a certain protection, it is therefore not as such, but as the Court of Justice held insofar as it favours the development of trade on the one hand, and the strengthening of competition on the other hand - that is to say, in this second respect insofar as it gives final consumers the advantages of effective competition in terms of supply or price. Consequently, while it is accepted that an agreement intended to limit parallel trade must in principle be considered to have as its object the restriction of competition, that applies insofar as the agreement may be presumed to deprive final consumers of those advantages".

Now, standing back, there are two points here - one in favour of Mr. Shovell, and one against. The point in favour of Mr. Shovell is that it could perhaps be argued on his side, were it the case that the OFT had taken a clear decision that this case involved no detriment to consumers ... if they had finally decided that, then it might be argued that that was equivalent ---- that made the tie-up, the connection between administrative priorities on the one hand and infringement of the Act on the other hand, because the Court of Justice is saying that the Act - and that prohibition is all about protecting final consumers ... preventing them from a loss of welfare ----

Now, my submission as to that is - again without going through absolutely everything that we have already seen - that that was not the factual basis in this case. The OFT did not decide, "This is a case where we are satisfied that there is no consumer detriment". They closed the case without having arrived at that as the final view. They expressed a view of a provisional and more tentative kind for the purpose of their administrative priorities assessment. Therefore, on the factual basis alone, and even taking *Glaxo* on that point at face value, we say that you do not even get into that territory.

That was the point which I say is in favour ... that would be argued in favour of Mr. Shovell.

THE CHAIRMAN: I was going to point out that the decision is September 2006, which is after ----

MR. TURNER: That is correct. We say that that does not necessarily make a difference because this is a statement of what the prohibition (which has been there since 1957) involves - it is declaratory as to the law rather than constitutive ... making new law.

THE CHAIRMAN: But, has a case declared that law before? Is this declaratory of previous authority, or is this a new principle?

MR. TURNER: This is something that is effectively new, yes. The precursor for this ---- Madam, as you will be aware, there has been much discussion in competition law circles about the extent to which competition law should be tied into questions of economic welfare. In the Commission's Article 81(3) Notice that accompanied the modernisation package (from memory it is roughly paras. 18 and 19), the Commission itself had trailed the point that when you are dealing with a restriction on competition, you only get into it if you find that there is a detriment to final consumers, or something that could cause a detriment - --

THE CHAIRMAN: That, I think, is referred to. Does it not say the 'Commission Guidelines' or something? The analysis of the Commission ----?

MR. TURNER: In *Glaxo*?

THE CHAIRMAN: No, in either the case closure letter or in the Annexe or ---- You are nodding?

SPEAKER: From recollection it does, yes.

MR. TURNER: I would have to look at that to see if that is what it was referring to. So far as I am aware - and my friends will tell me if they are aware of other authority - that is interesting because it is the first statement from the European courts that that is coming to the fore at any rate in such clear terms.

So, that is that point.

The second point which you get from this is a point which is not so much in Mr. Shovell's favour, which is that whatever a restriction by object might entail it is not straightforward - even where you have something that might be, on its face, the sort of thing that is often characterised ---- labelled a restriction by object, such as the partitioning of national markets in that case, the court plainly says that you cannot do without an analysis to see whether it is the sort of thing that may be presumed to deprive final consumers of economic advantages. That helps to understand that the OFT's position when it was considering object was by no

means black and white. The term ‘legal technicality’ was used as though this was a simple matter. In my submission it is not.

Madam, only two final matters before I close. Hardcore restrictions. That term, and the way that it is used in the case closure letter ---- It may not have escaped your notice that it maps precisely market sharing, bid rigging, price fixing on the supply side precisely on to the categories of activity which are criminalised in the Enterprise Act as the cartel offence. Over the short adjournment - and I am willing to develop this if you wish, but I hope that it is treated as a peripheral matter - I found indications that where the OFT uses the expression ‘hardcore’ it is often referring to those sorts of activities (the same sort that are criminalised in the Enterprise Act), but the important point here is that those are not equivalent to ... not identical to everything that might be characterised as a restriction by object for the purpose of the prohibitions ... the civil prohibitions in the Competition Act and under the Treaty. It is a narrower group of kinds of behaviour which, when accompanied by dishonesty, as the mental element, have been criminalised in the Enterprise Act.

The second, and final, point that I desire to address is the issue that was raised as to the relevance of the fact that the OFT’s position on object - and Mr. Shovell has laid some great weight on this point - was not made clear in the provisional closure letter. Now, I am not going to cover the ground as to concealment or a sham, or anything like that, but the essential point that seemed to come out of that observation was that Cityhook (and other people) were thereby deprived of an opportunity to comment on the matter before the final case closure letter arrived.

Now, two points. First, as I say, we are not in the territory of a concealment here of a firm decision already taken by the OFT at the time of the provisional closure letter that there was no object restriction in this case. There was no firm decision in that connection unless you are prepared to say that Mr. Smith’s account of the ongoing unresolved debate about object (which travelled forward) was untrue, or at least not that he deliberately lied, but that he put a gloss on it. With such a matter as that, it would be, in my submission, extraordinary to suggest that he was making that up or concealing it.

If one puts that to one side and says, “Well, this is not a case of having already reached a firm decision, but covering it up”, then the consequence so far as this Tribunal is concerned is that there is no appealable decision on any view. The significance of not having mentioned it in the provisional closure letter at its highest would be a question relating to the adequacy of the consultation process ... the fairness of the consultation process, which

again is a point subject to control by the courts. It is not a point subject to control by this court.

Madam, that concludes my submissions. This is an appeal which is not against a decision as to infringement of the Act. It is an appeal against a purported non-infringement decision, but, in my submission, what follows from everything that you have heard is that the real complaint and the genuine grievance of Mr. Shovell - if there is one - lies against the OFT's administrative decision to close its file in order to release resources to what it thought were promising cases.

THE CHAIRMAN: Thank you very much.

MR. BARLING: May it please the Tribunal, thanks to Mr. Hoskins and Mr. Turner, I can be very brief. I adopt their submissions - both of their submissions. I have therefore no need to deal with case law, except to make one very brief point, if I may, on *Aquavitae*. I will restrict my comments to a few bullet points, endeavouring not to take you again to any of the evidence itself ... but, some bullet points on the evidence which I think, in the light of the discussion which, as always, has evolved over the course of the argument, is important now. Then perhaps a word or two about the cases that Mr. Turner has just referred to.

So, first of all, if I may, can I turn to *Aquavitae*? It is just to say this: that we take the view, Madam, that your comment to Mr. Hoskins is correct, if I may say so with respect, about the dictum that was relied upon by Mr. Shovell from that case at p.204 - we do not need to look at it, because you are very familiar with it - where the question of a possible inference is referred to, where there has been an investigation on the merits and a case closure.

We submit that all that the Tribunal was doing in that passage was making the very obvious point that if one has an investigation on the merits, and then, without more, a case closure, there may well in those circumstances be an inference, depending on the circumstances. What the Tribunal was not, in our submission, doing there was dealing with a case such as the present where there has been a full, frank, transparent account of the decision-making process. When that is the case, it is quite clear, as the Tribunal has indeed said time and time again, that the question of whether there is a decision must be determined on the facts of the case in the light of the substance and not form, and so on. There is then, in those circumstances, no room for any inference.

Turning then to some short bullet points in relation to the evidence, which we do submit leads inexorably to one conclusion and one conclusion only on the assumption that it is not, to put it crudely, a pack of lies. The only question is whether Mr. Smith, on behalf of the OFT, reached the point in his investigations where he had made up his mind as to whether

or not there had been an infringement, and if he had reached that point whether he decided, expressly or by necessary implication, that there had not been an infringement.

There is no dispute that Mr. Smith is the relevant decision-maker. A few points emerge, we submit inexorably from the evidence if you accept it - first of all, that there was no meeting of minds within the OFT at any stage on any aspect of the possible ways of putting an infringement. You already have in some detail the polar views as between the case team and the CRP which were never, at any stage, resolved. As a result of the polar disagreement between them, it was decided at that stage - that is, the stage of the CRM - not to issue the statement of objections in its current form, and further work was to continue. You get that from paras. 38 to 42.

The next point that emerges is that following the CRM - and this is a very important point - the case team continued to work on both the object and the effect aspects in relation to both cases whilst seeking to beef up (to put it in the vernacular) the effects element of both cases. You get that from para. 43. Both object and effect they carried on working on following the CRM.

The next bullet point is that as a result of those two groups - the case team and the CRP still being at loggerheads - Mr. Smith asked Mr. Maycock to look at substance of the merits, and he asked Mr. Priddis to look at administrative priorities. You get that from paras. 44 to 45 of Mr. Smith's first statement. Another crucial point that emerges is that both Mr. Priddis and Mr. Maycock were of the view that a non-infringement decision was not an option. Mr. Maycock, at para. 47, said that both object and effect elements should go ahead. That was when he was looking at the substance ... the merits. Both object and effect should go ahead - para. 47. He recommended that there should be a statement of objections prepared on both object and effect.

Mr. Priddis - the next bullet - recommended closure of both cases on administrative priority grounds (you get that from paras. 50 to 55). Mr. Maycock agreed. It was decided in the light of that that Mr. Smith would take a decision ---- in the light of the advice, Mr. Smith would take a decision on behalf of the OFT as to whether to proceed with the case or call a halt on administrative priority grounds. Then he concluded - and this again is crucial - three things: first, that there was evidence of potential infringement in both investigations on both objects and effects. You get that from paras. 60 and 70. Secondly, he concluded that further work was required both in terms of legal research and the collection of evidence on those elements - objects and effects - before the case would be in a fit state to serve a statement of objections. Again, that is the same paragraphs. Thirdly, he decided that

neither case merited the further resources which would be needed to pursue them, and the investigation should therefore be closed (paras. 61, 68 and 71).

Finally, he is adamant that at no stage was there any agreement within the OFT as to whether an infringement either on object or effect existed in either case. You get that from para. 57.

So, Madam, a non-infringement decision would be wholly inconsistent with the evidence of Mr. Smith's and with his account of the decision-making process, and it would simply be not possible to reconcile a non-infringement decision with his statement at paras. 70 and 71, attested by the witness of truth. In a sense one can see that it would have been highly surprising to say the least, in the light of his evidence, if they had sought to drop one or the other of those ---- or take a view against objects. In many cases regulators would pursue both as a matter of common-sense. In starting a case he would normally see both taken in tandem. As the evidence shows, that is exactly what was happening here throughout.

So, Mr. Shovell has, very realistically, seeing the implications of the evidence, sought now, contrary to the position really I think at the earliest disclosure hearings, to very politely suggest that this is really nothing but a sham - this evidence - and really it is done to disguise what was in fact a non-infringement decision.

In our submission, that is, as it were, Mr. Shovell's only option in this case - there is no third way, we submit. The problems with it are threefold: first of all, there is no evidence to support the sham theory, and there is overwhelming evidence to the contrary; secondly, the evidence to the contrary is, on its face, extremely full, frank and transparent. It is a warts-and-all type of evidence. It has the ring of truth, and it is just simply implausible to suggest that such an elaborate scheme could have ever been imagined, involving not just Mr. Smith, but other officials whose views are recorded. That evidence has been expressly found by the Tribunal - now not once but twice - to be full, frank, and to give a clear and transparent insight into the OFT's decision-making in your disclosure decisions.

So, we submit that really there is no alternative in this case but to draw the obvious conclusions from it.

I just want to say, if I may, a quick word about the nature of object, because it has been referred to and has assumed some importance. Mr. Hoskins dealt with the test for it, and I will not repeat that. It is right to say that it is not a straightforward matter, as perhaps has been suggested. It is actually quite a complex matter involving legal, factual and economic analysis - as the *Glaxo* case itself shows. Factual matters related to it can, of course, arise in relation to possible justifications or exemptions, which is a matter which I think was

referred to in one of the letters - I think the provisional closure letter. Of course it has resources implications both in relation to legal research and drafting, and it needs people to do it. As I understand the evidence, Mr. Smith either had to have someone working on this case - it does not matter what they are doing in a sense; it is work - or moving on to a case that had a much higher priority in their view. They could not do both because they could only afford to do two cases at once. It is not just, as it were, taking a decision or going to see counsel, of course. It is following it through in the drafting of objections, the oral hearing, the actual decision, and, no doubt, in many cases, and would have been in this, the appeal process. So, it is a huge commitment if one is only focusing on the objects side - as one can well see.

May I also then turn, related to that, to say one word about hardcore? Mr. Smith does not equate, as we read his evidence, hardcore with object in any sense. I just refer to paras. 60 and 70 of his first statement where he says that his view was that at each of stages if the case proceeded it should proceed on both object and effect. So, it would be wholly inconsistent with him equating that it was not a hardcore case with a view that hardcore meant object because at no stage did he resile from his view that if the matter went forward, it should go forward on both.

As far as *Pernod* is concerned, I think that has probably been covered. We submit also that the case is not in point here because even if - which is not the case - there had been a decision taken about object -- a non-infringement decision taken about object ---- Even if that were the case, it would not be a necessary element in the sense that you have to have an undertaking, as in *Bettercare*. So, para. 161 of *Pernod* really does not assist Mr. Shovell's argument in our submission.

Glaxo finally. *Glaxo* is useful in confirming that the question of object is a complex one, as I have said. It cannot affect this case because on the evidence there was no decision. Whether, had *Glaxo* been available, which it was not - Madam, as you rightly said, it came afterwards - whether it would have been a useful tool or something which they would have had regard to is another issue. If you accept, as we suggest you really do, and have done, the evidence on its face, then no decision on objects was ever taken. Of course, there remains the point in relation to that even if a decision had been taken as to objects, the point that Mr. Turner made and which is also argued out at para. 38 of Mr. Hoskins' skeleton that effects is an alternative ---- You cannot say there is no infringement just by saying there is no object. You have got to go on and consider both.

So, in our respectful submission, there was no non-infringement decision of any kind. It would be a travesty of the evidence to suggest otherwise. Therefore there is no jurisdiction. Thank you, Madam.

MR. RANDOLPH: Good afternoon, Madam, gentlemen. I think it is the law of increasing returns rather than diminishing returns, because it is increasing for the Tribunal in any event ---- I will be saying less than I would otherwise by virtue of the fact that my learned friends Mr. Hoskins, Mr. Turner, and Mr. Barling have already addressed you. I can be brief. I will not repeat what has already been said.

The Tribunal, in its ruling yesterday on disclosure, made, if I may say so, very clear the purpose of this hearing today in fact on admissibility. That purpose is to determine the nature of the OFT's decision to close the investigation. That is what was said yesterday. The need to determine the nature of the decision of the OFT to close the investigation is obvious. This Tribunal is not a tribunal of general jurisdiction. It is a tribunal established by statute, and it is limited to the jurisdiction granted to it under that legislation. We have been to the legislation and we know what it says. Insofar as concerns appeals from decisions of regulators such as the Office of Fair Trading, the limit on your jurisdiction is quite clear. It has been made quite clear by statute, by the Competition Act. Insofar as is relevant to the present case, this Tribunal can only hear appeals in relation to a decision of the OFT as to whether the Chapter 1 prohibition has been infringed - again, in the context of this case. So, that is clearly the limit to the discretion of this Tribunal. It may not go beyond that.

Whatever else the nature of the OFT's decision to close the investigation was - whatever else that nature was - it is clear that it was not an infringement decision, because otherwise it would have taken one. There is no finding of infringement. The evidence of Mr. Smith makes that clear. As the Tribunal pointed out yesterday, again in its ruling on disclosure, there was a difference of views, and Mr. Smith, as he states in his evidence, and there is no reason to go behind that, says there was a genuine difference of views. It appears to be a rather heated difference of views, and a great gulf was fixed as between various officials within the Office of Fair Trading. But, that in itself is important because it demonstrates that there was no settled position - there were two different positions - conflicting positions. We say that is important.

Nothing, with respect, that Mr. Shovell might say with regard to the obviousness of the position - say with regard to the object point, demoting it to a pure legal technicality, we say changes that. For the record, we do not accept that for the reasons that have already been

set out by my learned friends on the point with regard to object. As a matter of law we do not see it as a "slam-dunk". I will come back to that term, if I may use it, in a moment because in the *Bettercare* case there was a "slam-dunk" - no undertaking; you do not go any further. This is not that at all. As my learned friends have said already in terms of object it is not a "slam-dunk", not least because it is an objective rather than a subjective test to be measured against all the relevant economic contexts in which it operated.

So, it was not an infringement decision, and there was a major debate going on within the OFT as to the position - at least as with regard to object. With regard to effects, we know that there was more work to be done.

In those circumstances, if Cityhook's appeal is to be admissible, Cityhook must demonstrate, we submit, that the closure decision was in fact, and in law, a non-infringement decision. There appeared to be yesterday - and I may have mis-heard this - a suggestion by Mr. Shovell that part of his case was that actually the object case was indeed an infringement decision. I do not know whether that was meant. I am not going to take a point on that. I think his major point ---- or, certainly the case was put on the general basis that it was a non-infringement decision, but insofar as he does rely on that, that again, we would suggest, with respect, underlines the difficulty of their position You cannot have something that at the same time is an infringement decision and a non-infringement decision. We, of course, say it is neither - for the reasons given by Mr. Smith.

As to non-infringement decisions - was this a non-infringement decision? - we have heard from Mr. Hoskins who made the point, and following input from the Tribunal ---- It was agreed that the evidence from Mr. Smith was that neither the case closure letter, nor that evidence demonstrates explicitly that there was a non-infringement decision. Given that, you go down the scale and Cityhook have got to show, if they want to make sure that this appeal is justiciable before this Tribunal, that a non-infringement decision can be inferred.

The law has been set out. I would simply say this - and I have regard to the time - and point out, if I may, the particular facts that were relevant to the decisions that have been made by this Tribunal on questions of admissibility, because I think they show there are certain circumstances when a non-infringement decision will be ----

THE CHAIRMAN: Are you going to say any more than has already been said?

MR. RANDOLPH: Yes. I am just going to point out ----

THE CHAIRMAN: Because so far you have spent a lot of time saying what has already been said.

MR. RANDOLPH: Right. I apologise then, Madam. I had thought I was putting it in a slightly different fashion. If I can just give you the references where I thought ---- Anyway, the point with regard to *Bettercare* ---- *Bettercare* was found to be a non-infringement decision, and therefore appealable. Why on the facts? The Director-General never launched an investigation because of its view re. an undertaking. That is the "slam-dunk" point. I do not think that has been made before. That is para. 34. Because it was not an undertaking, Chapter 1 could not even be brought into engagement. There is a point which has not been made, and if I may go to it very briefly ---- At para. 83 of *Bettercare*, p.25,

> "In addressing the central issue it is not, in our view, helpful to use the concept of a decision to reject a complaint because such a term is ambiguous. The Director may decide to reject a 'complaint' for many reasons - for example, as he may have other cases that he wishes to pursue in priority. He may have insufficient information ... None of these cases necessarily give rise to a decision by the Director as to whether a relevant prohibition is infringed ----"

And then the reference ---- Now, the Tribunal has not been taken to that as far as I was aware, and I think that is important because it obviously pre-dates the administrative priorities scheme within the OFT because this is 2002 as far as this administrative priorities scheme was concerned, and this case is concerned. But, nonetheless, they are making the point ---- This is a point that you, Madam, raised at the end of the morning session in questioning my learned friend, Mr. Hoskins, "Look, you could have a situation where the OFT never gets off the fence". I think those were the words you used. "You can have this situation where nothing is ever determined, and you just sit on your hands and never take a decision". Well, the answer to that - in *Bettercare* in part - is that you are entitled not to take a decision generally. In any event, that is a clear question of law. But, there may be examples when the OFT and the Director decide to pursue other cases in priority ... not to come to a decision, for whatever reason, and so long as that is based on a proper following of the relevant policy with regard to administrative ----

THE CHAIRMAN: It is a matter for judicial review, is it not?

MR. RANDOLPH: That is again a matter for judicial review.

THE CHAIRMAN: I think we have got the point.

MR. RANDOLPH: Well, yes, Madam ---- I appreciate you want to speed me on, but, equally, I think I am entitled to take you to paragraphs that you have not been taken to before. For your note, that is exactly the point that is made at para. 90 in *Bettercare*. I think that makes the point about judicial review. We say that is still good law.

Freeserve - again found to be a non-infringement decision and therefore appealable. The preliminary investigation had been concluded (para. 92). The matter never progressed beyond the preliminary stage because the Director-General concluded there was no case to answer (para. 93). Again, no case to answer. "slam-dunk". Like *Bettercare.*

Claymore - I do not need to trouble the Tribunal. You have been taken to that extensively. *Aquavitae*. Now, here, the decision in question was found not to be a non-infringement decision, which led to it being appealable. Why? The case closure letter - and this is para. 198 - was based on new legislative proposals. Effectively there was a *novus actus* coming in, and there was also resource limitation. The position is set out in para. 200 for your note. We say that is very similar to the present position in this case.

Finally, Madam, in terms of authorities, *Casting Book* - again, this was a decision which was found not to be a non-infringement decision and therefore not appealable. Why? Paragraph 22 - promising ---- They said it was promising, but there was a considerable amount of work remaining - akin to the present case. A considerable amount of work remained to be done. That is para. 22. At para. 29 - the similarities with the present case are clear - a genuine independent reason was shown not to continue. Again, we say (just for your note) para. 30 of *Casting Book* can be relied on in support of our case, as witnessed by Mr. Smith's evidence. As I say, that is para. 30.

I can close now, having dealt with those points, with this final submission: Mr. Shovell yesterday made a lot of argument with regard to justice, and how inequitable the situation was. Two points: first of all, his remedies, as we have already in our skeleton, are not closed off. That is important. This is a judicial review point. That is critical, we would say, to the Tribunal's approach. The Tribunal's approach would be conditioned, obviously, by what the structure of the jurisdiction is, but if possibly this were the only opportunity open for Cityhook to challenge one way or t'other the decision, then it might be possible ---- I am not saying it should be, but it might be possible for this Tribunal to take a liberal view with regard to what it could, and could not, do.

That is not the position here. The proper place for the determination of the matters raised by Cityhook, as my learned friend, Mr. Barling, said. Basically it goes to the reasonableness, or otherwise, of the decision to close the investigation based on the administrative priorities. That is not a matter for this court. That is a matter for the Administrative Court where proceedings are presently stayed following, I think, the first hearing when the Tribunal made the point clear to Cityhook that it might wish to do that.

THE CHAIRMAN: Not might wish to stay the proceedings, but start proceedings ----

MR. RANDOLPH: Yes. I am sorry. -- might wish to start proceedings. The proceedings were then stayed because, obviously, it was logical to proceed with these matters first. Secondly, we would say that if one wants to look at justice, it cuts both ways. The Competition Act makes it clear that this Tribunal's jurisdiction is restricted. If the decision of the OFT to close its investigation were held, contrary to our submissions, to be appealable, then that finding, we say, would cut completely across not only the relevant legal principles that we have seen ---- not only the facts on which those case were based, which I have just taken you to ---- but also across Mr. Smith's evidence, which the Tribunal has already accepted was given in full candour. We say that if that were the case, that would, in turn, cut across the interveners and their rights, which rights include the expectation that the relevant legal principles will be adhered to, particularly given, in this case, the clear, candid evidence from the Office of Fair Trading.

For all those reasons, and also for those of my learned friends who have gone before, and, I am sure, those of my learned friends who will go after me, we respectfully submit that the Tribunal find that the decision in question is not appealable and that you do not have jurisdiction to deal with it. Unless you have any questions ----

THE CHAIRMAN: Thank you. Miss Murphy, you have drawn the short straw in coming last. It has been very fully argued by everybody else, and although one understands that you want to put your own points, can you please make sure that they are your own points and not points that have already been dealt with?

MISS MURPHY: Indeed, Madam.

THE CHAIRMAN: We quite understand that you would stand there and spend the next two hours, if you had started by putting everything that everybody else has said.

MISS MURPHY: I appreciate your point, Madam I was thereby going to go on to say that depending on your perspective I have the good fortune of going last.

Accordingly, the points that have been made have led me, in large part, to blue-pencil what I was going to say. Global Crossing, however, does fully adopt the arguments on admissibility that have been made by the OFT and by my fellow interveners. But, there is just one point that I would like to add: as set out in Global Crossing's skeleton on admissibility at para. 11, it would seem to us that by Cityhook continuing to dwell on the issues of disclosure, the credibility of Mr. Smith and the veracity of the OFT's position ---- the large part of Cityhook's case on admissibility is that the OFT was wrong - perhaps improperly wrong - to close its investigations into what has been referred to as the collective boycott and the collective setting cases respectively. On the issue of the veracity of the

OFT's position, there are strong allegations, and they have already been dealt with by the OFT today. On the issue of the position of the undisputed decision-maker, Mr. Smith, as the Tribunal has already said, and has been underlying today's proceedings, but as the Tribunal said in its ruling on disclosure in this case, para.26:

> "These witness statements 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."

However – or perhaps I should say "moreover" – the question of whether or not the OFT was right to decide to close its investigation is not actually relevant to the issue of admissibility; these are issues for Judicial Review. Accordingly, if the construct of Cityhook's case on admissibility is that the OFT was wrong to close its investigation then Cityhook has no case.

If Cityhook's case is that there was an object infringement, and that the OFT chose not to pursue and thereby indirectly made a non-infringement decision then for the reasons that have already been dealt with by my learned friends there was no such non-infringement decision on the part of the OFT. Accordingly, we submit that the Tribunal has no jurisdiction to consider Cityhook's application and that it should accordingly be dismissed. That concludes our submissions.

THE CHAIRMAN: Thank you very much. Now, it is 3.30. Mr. Shovell, we are somewhat in your hands. I am sure you want a break so ----

MR. SHOVELL: Possibly not, actually. It might give us the best probability of completing by 4.30 if I pick up on my notes from where I was on Mr. Hoskins and then try and go through the points made by others, either if I remember as I go along or possibly to have a break after I have at least dealt with that. But since there was some duplication it might be better to kick off now if the Tribunal is ready to do so.

THE CHAIRMAN: We are going to have a break for five minutes, if you want longer you can have it, but otherwise we will be back in five minutes.

(Short break)

THE CHAIRMAN: Yes, Mr. Shovell?

MR. SHOVELL: Shall I proceed? My attempt was to first go through Mr. Hoskins, as it was prepared over lunch. If I can remember cross-references to where other parties made related points so as to not go to the same document multiple times, I will do my best, but I have not had that opportunity to prepare. If I could first of all go to *Claymore*, para.155 which is in the authorities' bundle, p.130.

THE CHAIRMAN: Yes.

MR. SHOVELL: Mr. Turner said he laid some weight on that paragraph, and Mr. Hoskins also referred to it, and it may be relevant to a question Professor Grinyer put. The test in *Claymore* and I refer to the fourth line onwards:

> "The object of that investigation is to come to a conclusion whether prohibition has been infringed. In the nature of the process that conclusion can be reached only on the basis of the evidence available at some stage in the investigation the Director reaches the point where he considers that he has all the evidence he needs and can usefully obtain, and at that stage he makes up his mind."

I understood that Mr. Hoskins, in the OFT's evidence, conceded that that was the point that had been reached by the OFT in relation to the objects' case.

MR. HOSKINS: That is not correct, I hope that has been clear. I am sorry if it has not been clear to Mr. Shovell, that is absolutely not the case.

MR. SHOVELL: When I am referring to "evidence" I am referring to evidence from investigation work or from economic work, I am not referring to analysis of case law. Could I ask Mr. Hoskins to clarify? Is he suggesting that in relation to the objects case that there was work beyond the analysis of case law now?

MR. HOSKINS: Madam, you have Mr. Smith's evidence. In terms of the way he puts it, the physical investigation work seems to be in relation to effect, there is nothing specific identified in relation to object, and that is Mr. Smith's evidence.

MR. SHOVELL: I am sorry ----

THE CHAIRMAN: As I understand it, and what Mr. Hoskins said, I think possibly in answer to me yesterday, was that the factual investigation work in relation to the objects case there was no more to be done. What was to be done was the legal analysis, the legal point.

MR. SHOVELL: And the investigation work was in relation to the effects' case.

THE CHAIRMAN: The factual work was in relation to the effects' case.

MR. SHOVELL: Correct, that was my understanding.

MR. HOSKINS: That is my understanding of Mr. Smith's evidence.

MR. SHOVELL: Okay, I appreciate that, then if that is a matter of fact that is agreed by the OFT, then are the interveners seeking to speculate that by reference to subsequent case law that they might have thought there was further investigation work in relation to the objects' case? Whilst very interesting as a piece of retrospective legal analysis it has no bearing on the matter before this Tribunal, it is a question of fact, and I believe the point has been conceded.

THE CHAIRMAN: As I understand it, the *Claymore* case, para.155 happened to be dealing with evidence, and therefore it was not dealing with any legal issues, so it is directed at evidence. You must cite it to us on the basis that in that case it was a question of evidence and they had reached whatever point they had reached. In this case, it is a question of evidence on the effects' case, it is a question of legal analysis on the objects' case.

MR. SHOVELL: That is understood, thank you. We say following this that if all the evidence was collected in relation to the objects' case, then under the principle in *Claymore* then that is the point at which the director makes up his mind because there is no further evidence in relation to the object case and we say that that is relevant as to assessing whether it is reasonable for the Tribunal to infer that the decision maker made up his mind.

THE CHAIRMAN: Mr. Shovell, I have an awful feeling that when you look down the microphone does not pick up, and you will not know that until the transcript will not have what you say. Can you make sure that ----

MR. SHOVELL: I am looking up when I am speaking.

THE CHAIRMAN: -- so if you are looking down if you just move it down.

MR. SHOVELL: Thank you, madam Chairman. Madam Chairman, there is one aspect which is about the tone in my skeleton of which some counsel have chosen to make more of than perhaps is appropriate. You mentioned earlier today that *Tweed* suggested that it is inevitable that someone submitting an affidavit when they are the decision maker cannot help but put a gloss on it and therefore it is necessary to look at someone's subconscious motive, whether that was indicative of what they thought. I feel that is a helpful articulation of the sorts of issues that I have tried to articulate in my skeleton and it is possible that my skeleton would have been drafted differently with that in mind.

In relation to hardcore, Mr. Turner tried to suggest that the OFT meant something different. He referred to criminal acts under the Enterprise Act. My understanding is that that does not apply to the *Cityhook* case, because the infringements relate to matters that took place principally in 2000, continue in 2001, but my understanding is the Enterprise Act is about 2003, roughly speaking, and therefore while it is an interesting piece of speculation by Mr. Turner it seems unlikely that that was in the mind of the parties at the time. It seems to me that the most likely inference of what was being discussed is as discussed in the witness statement and as cross-referenced by Mr. Smith earlier today.

It has been re-raised that even if the Tribunal find as a matter of fact that it is correct to infer that Mr. Smith made a non-infringement decision on the objects' case that is not sufficient to get home because you might decide that they had made an administrative decision in

relation to the effects' case. I struggle to put this in anything other than lay terms, but that to me would flout business commonsense if someone adopted an interpretation of that in relation to a contract, or in relation to some other matter. If you plead a case as A and B and you win on A, but not B, that does not mean that you do not win A. It is inconceivable that that is how the legislation could be constructed because it would mean that if the OFT considered something which was a remote possibility, for example, they might have considered something other than the Wayleaves' case out of curiosity at the same time. Does that mean that if they close that case then they do not proceed, they have not made a decision on the other two? That strikes me as wholly illogical.

Mr. Hoskins suggested that the case closure letter at p.18 obviously covers the object case, para.24(b), I should probably turn to it. This is document 18, and the case closure letter was at tab 2 in the authorities' bundle. When I try and check whether it obviously covers the object case point, 24(b): "… this would include gathering and analysing additional evidence as to effects. Second, it would include an investigation of plausible counter arguments whether in fact or law." My understanding is that because the word "law" appears in that paragraph we are supposed to have leapt to the deduction that the problem was on the objects' case that there was a legal technicality. I find that an extraordinary suggestion and I think it is simply false. I do not think it is reasonable to suggest that we were reasonably put on notice in 24(b) or had any prospect of knowing that that was the case, or what was intended by 24(b).

In relation to the further evidence on effects, Mr. Turner helpfully drew attention to para. 139 of *Claymore* on p.126 in the bundle. I can probably just read out the two lines that I am after:

> "After an extensive and thorough investigation the OFT takes the view that further investigation is unlikely to lead to a finding of abuse."

My understanding is that Mr. Turner said that degree of clarity of thinking amounted to a non-infringement decision. Well it does seem to us that that is where the OFT had reached on the effects' cases in relation to evidence. I do not doubt for a moment that there are things that could have been done to collect further evidence. I do not doubt that the case team was hoping to bolster its position by suggesting that it could, but as was helpfully discussed between Mr. Hoskins and Professor Grinyer, that is always the case and, as articulated at para.139, we suggest it is the same position they reached here. I should probably refer back to Mr. Collins' letter to Cityhook of 20th May, the language in relation to effects was sufficiently sceptical that I think it is reasonable to infer that he had

concluded that that further evidence would not be material. Furthermore, we were shown a copy of the draft s.26s that were sent at the start of the investigation, I believe one of them is in the bundle. It includes an obligation on the parties to produce any document with the word "Cityhook" in it, anything that relates to Cityhook, and anything which mentions Cityhook indirectly or directly. That being the case it is hard to think that there could be a great deal that was still in the possession of the parties, bearing in mind that there were three or four subsequent waves of s.26s served during the course of the four year investigation. If that is the conclusion that the OFT reached, without seeing the evidence, I can understand that they may have felt that that was logical at the time, but that still amounts to a non-infringement decision in relation to effects.

In relation to hardcore, we had a discussion earlier about Mr. Vincent Smith cross-reference as to what he meant by hardcore, and it is a matter of fact for the Tribunal to decide what they think he meant. It is not pertinent what other competition lawyers in this room or elsewhere thought, it is pertinent what Mr. Smith thought. His witness statements cross-reference to two places which both say what he thought. If that is the case, if the Tribunal finds as a fact that is what he meant then I believe we are home on that point.

Mr. Hoskins suggested that it was wrong to adopt a statutory-type interpretation to witness statements and therefore the Tribunal should consider whether it was or was not what Mr. Smith meant, that is in the hands of the Tribunal, but it would seem to us and our primary case is that is what he meant, even if the Tribunal disagrees. It seems to us extremely likely, if not certain, that that kind of vocabulary was in the mind of Mr. Smith, Mr. Priddis, Mr. Mayock, other parties in the OFT, because it seems to me that that kind of ambiguity arises when that kind of ambiguity is prevalent in the way that that language is discussed. Therefore, that to me taints the language – "taints" is the wrong word, that is not intended as a criticism - that causes you to think that when other parties are discussing whether there is a hardcore or not they may intend it in the same way.

Mr. Hoskins then says, and this is a point that the Interveners pick up on quite vigorously, because Mr. Smith explicitly states that they did not make an infringement decision on the legal technicality, that means that they must not have done. Mr. Hoskins admitted that there was a lack of clarity in the detail when we tried to examine the point and he says in some ways you are busting his evidence completely, which is wholly inconsistent with finding that he has exercised his duty of candour. I do not think that is a matter of logic, the devil is in the detail; it is precisely why he is asked to provide a witness statement. We know that Mr. Smith says that he did not make an infringement decision so to rely solely on his

statement in bold facts seems to us rendering the purpose of a witness statement pointless. There is not a lack of clarity, it is clear, that is what the cross-reference says in relation to hardcore and what it means, and I think *Tweed* is helpful guidance how it is not necessary for this to be presented as serious criticism in any way of an executive, it is just a natural tendency when you are in the position of a decision maker, and I think that is a reasonable way to make the inference.

Mr. Hoskins suggested that at some point it might be reasonable to make the implication that there was not a strong and robust case on effects, but that does not mean of course that further work could not be done. We would point out that the case team had prepared a 600 page statement of objections with full exhibits and targeted issuing it in November 2005. That being the case it is perfectly rational for Mr. Smith, or Mr. Collins, or whoever was looking at it, to say "I fully understand that you could do a bit more work, and you could help", but it is also fully understandable how the level of scepticism that that further work would make any further difference on the effects' case; would cause them to think it was time to close the file, and that amounts to a non-infringement decision, if there is that degree of scepticism as we discussed earlier.

It seems to us that is very different situation from a case which is three, six months old, at a much earlier stage. Mr. Hoskins suggested that "Well, some cases drag on if there is only one case worker, or it gets pushed on to other things". As a point of principle that could easily be relevant, however it does not apply here because having got to the 600 page SO with full exhibits ready for issue in the minds of the case team, I think it is reasonable for the other executives at the OFT to have felt that no further work was going to assist them on the effects' case.

A number of the parties have made quite a meal about the fact that there could be private action and there could be Judicial Review. It is a matter of fact that we served Judicial Review, guided partly by the Tribunal at the first hearing. It is a matter of fact that we file protective proceedings in the High Court for the same sort of reason. Let us go through those procedures: the Administrative Court, as Mr. Hoskins plainly admitted, there is an extremely high burden before the court will look at it. In practice it is extremely unlikely that it would be considered if it finds, as the Tribunal has already done, that Mr Smith exercised a duty of candour. It is very unlikely that they would penetrate underneath. I would have thought that the decision here would effectively close such proceedings – I may be wrong on that point but it seems to me that this is a specialist Tribunal with an

understanding of competition law; this is the logical forum if, indeed, you have an appropriate legal basis to do so.

In relation to private proceedings, whilst we filed a claim, and I would not wish to create an impression with the defendants that we are not going to find any way to pursue it under any circumstance, maybe it is best to give an idea of the practical reality of these things.

In our first documents we included a piece of paper that referred to emails between Alcatel in Paris and Tyco. We have served a writ and we have cited Alcatel in France as a defendant. We have been told by them that they have refused to accept service because they are in France, the lawyers who act for them say: "Yes, we are acting for them but we refuse to accept service". They have scheduled a hearing for about 15 days' time for our failure to give them service to cause them to be struck out of the case. The reason why we have not effected service yet is because we spoke to the court and they said "You have to translate all your documents into French. You have to do that with the service bundle. You then have to have those formally served. Cityhook does not have the funds to go through that process now, or in relation to further pleadings. So unless Cityhook somehow raise funding we cannot sue parties, and this applies to other parties outside the jurisdiction; we physically cannot cope with the costs.

After that point, even if we could proceed there are all sorts of strike out applications. If we lose one do we face the risk of a cost order against us, thereby halting the proceedings? If we do not it has been suggested to us that if we went the full distance and lost at trial and a cost order of many millions of pounds was ordered against the directors of Cityhook, the directors of Cityhook might face personal liability. The High Court had in the past, in some circumstances, made personal cost awards against directors. So we find ourselves with a decision that even if this Tribunal said "No", and the Judicial Review said "No", and we tried to litigate the objects' point we could be personally bankrupted. That is a rather difficult position for a small company to go forward with, it is an impossible position for the directors of the small company to go forward with. I think the reality is that we would be starting from scratch. The OFT has placed on record here that in the objects' case it was only down to one neat technical point. Well if we could go to the High Court and have that one neat technical point tried, that would be wonderful, but I am told that we would start from scratch, that none of the evidence would be in the possession of the court. That seems to me to be a ludicrous position, and to suggest here that the Tribunal should be comforted by the fact that there are technically other legal jurisdictions strikes me as abhorrent. It is a point of principle, but it is not very practical.

I am just starting to read through my notes of points to refer back on Mr. Turner. I was going to ask for a break, but I am not sure what consequences that has – do we definitely stop at 4.30 if there was any kind of break now?

THE CHAIRMAN: Do you want until 4.15?

MR. SHOVELL: That would be helpful. What time do I have to stop if we are to finish today?

THE CHAIRMAN: We are quite flexible – 5 o'clock, we have difficulties after 5 o'clock.

MR. SHOVELL: Madam Chairman, I understand clearly we did not expect to be in this position either.

THE CHAIRMAN: Let us give you a break until 4.15.

MR. SHOVELL: Thank you, madam Chairman.

(Short break)

THE CHAIRMAN: Have you had sufficient time?

MR. SHOVELL: The time has been helpful, Madam. I am happy to proceed. Much was made by a number of the interveners' counsel that because there was a difference of opinion through the OFT it would be wrong for the Tribunal to infer that a firm decision was reached by Mr. Smith. Well, that is in error. That submission is in error as a matter of fact. If Mr. Smith made a decision, then Mr. Smith made a decision, and whether a number of case team members completely disagreed with him every step of the way, it does not in any way deflect the fact that it is reasonable to infer that he made a decision.

I would further say in relation to the likelihood that it is reasonable to infer that he had a view, aside from the 165 days that took place up until the provisional closure letter and the further 150 days that took place before the final closure letter, of course Mr. Smith is a solicitor with expertise in competition law, and this is not the first job he has done. He has been in the profession in this area for numerous years. He must have seen either identically this technical point or very similar technical points on numerous occasions before, and it seems to me that that must go to the basis on which the Tribunal could fairly, and reasonably, make an inference as to the decision that he in fact made ---- or, it is fair to infer that he made.

The point about the item being omitted from the case closure letter ---- The interveners have suggested that that is a judicial review point. I do not disagree that that point has some merit as to judicial review, but that is not why it has been made. I think it is reasonable to make inferences as to the mind of the decision-maker when choosing to exclude that. I think it is helpful that that causes someone to think that that item was closed. It was removed from the final case closure letter, and the word 'effects' was left in. I think it is reasonable

to make an inference that the person who directed that had thought that that item was closed. Again *Tweed* provides a helpful insight as to how that can be articulated and thought through, but that is the point that we make - that it is reasonable to make an inference.

So, by way of summary, my understanding is that the issue is whether there was, or was not, a non-infringement decision and whether it is reasonable to make such inferences. There is very little in Smith in relation to our market - the landing market - but it seems to us that it is reasonable to infer that he made a non-infringement decision on the objects case in our landing market somewhere in that 165 day period. I think it is helpful that the clarity with which the OFT persistently expressed that it was not hardcore ---- occasionally that was prefaced by the words 'not clearly hardcore' but the numerous occasions where the caveat clearly was omitted, and I think it is reasonable to infer that there was a consensus that it was a not hardcore case. It is helpful to making the inference that it not being hardcore would seem to suggest that it was either certainly not object, or individuals thought that it was not an object case. Therefore, we say that the OFT made a non-infringement decision on the object cases during that period.

In relation to effect, we completely understand that there was the concept of doing more work, but after four years and a detailed SO, sceptical views expressed by the Chairman, and by a number of other parties - particularly in relation to consumer effect, but in relation to the case itself - I think the *Claymore* language referred to earlier that caused them to think that it was unlikely to make any difference if they do further work ---- That does seem to be what has happened here in relation to the cable landing market and also in relation to the cable laying market.

We feel that it is material and envisaged by the CAT case law that because it is best placed and has this understanding of competition law that the Competition Act should not be interpreted too narrowly. I do not propose to go back to the previous CAT references, given that the expertise lies with the Tribunal already. But, that has been articulated in the case law referred to previously, and it seems to us that this is where we are on this case. It seems to us that there is always going to be a discretionary finding of fact by the Tribunal. It is in all the previous cases. The CAT has effectively penetrated that it was not an administrative decision, and it was an inferred non-infringement decision. This is no different to those cases, and it seems to us that it is within your discretion to make that finding of fact . We encourage you to do so, first, because we think you are able to do so or, as far as we can

understand on the balance of probabilities, it is right for you to do so, and it is also reasonable in such circumstances that this is the primary jurisdiction.

Moving on from that it would then be open to the CAT to look at the legal technicality and that would be a resolution for all parties at a subsequent hearing, I suggest. The reason I mention that is how long would the CAT need to take a view on that legal technicality to close the case? I suspect that that hearing would be one day, and if that hearing is one day in the CAT with the members of the Tribunal not having come across this technical issue before then I suggest you make the inference that it was not such an impossible thing for Mr. Smith to have implicitly have decided on the point himself with all of the documentation and all the legal advice that had been presented to him. I mention it two ways, (i) for the inference that that is what he did and (2) for the invitation to the CAT that you can determine this case once and for all without any great oppression and ironically that would perhaps be helpful to the OFT as well as helpful to Cityhook, as well as helpful to numerous other parties who are likely to have the same technicality before the OFT. So ironically it is peculiar to find ourselves on the other side of the case with the OFT given that we are a victim and they are not benefiting. It would be beneficial to the OFT and beneficial to the rule of law in the UK for this issue to be determined, so if you are able to do so as a non-infringement decision, which we believe you are then we encourage you to do so.

Before 4.30 we would be grateful to take any questions, but that may be an appropriate point to close.

THE CHAIRMAN: That was done very succinctly and you went through it very thoroughly, so thank you very much. We do not have any questions.

MR. BARLING: Just one small point. Mr. Hoskins was asked a factual question in relation to the objects part of the case and I think it was his view that on the evidence everything that could have been done had been done, and a harvest had been gathered in, as it were, that was the effect of Mr. Smith's evidence. May I just say that we are not quite so sure that that is the effect of Mr. Smith's evidence, and I am not going to take you to it but I just wanted to make that clear – it is the closure letter para.24(b), p.18, and similar wording in para.5 of the annex to the closure letter.

The very simple points made there are that, I suppose one should just glance at it, looking at para. 24(b) this is under the heading "The strength of the evidence that there had been an infringement. They talk about need for the Statement of Objections to be developed considerably in relation to the collective boycott case and the collective setting case.

"This would include first gathering and analysing additional evidence as to effects. Second, it would include an investigation of plausible counter-arguments (whether in fact or law) that the parties could possibly put forward in their defence to justify their conduct or, indeed, to negate the evidence of a potential infringement."

So that second item of work, which includes a possible factual investigation, does not seem to be limited to the effects side of the case and, indeed, I do not see why it should be, because looking at lawful counter arguments it would apply just as much to an object allegation. So all we say is that we are not at all sure that Mr. Smith's evidence is to that effect, and therefore we do not make any concession about that.

THE CHAIRMAN: It is a different point, is it not? It is not effectively the gathering of evidence, in relation to that. The investigation is a difficult word there, but it is the analysis and thinking of what the parties might say about it.

MR. BARLING: Yes, it is.

THE CHAIRMAN: It is counter arguments, it is trying to predict, so it is not going out to get more evidence, but it is work ---

MR. BARLING: It might raise points, well if they are going to raise that point had we not better cover that off with facts, and the facts might mean raising them in evidence. It is not clear, but for our part at any rate we do not concede that they were necessarily saying there is nothing else ----

THE CHAIRMAN: Doing the counter arguments, or whatever mean that they raise something else which would start a hare running again

MR. BARLING: Yes.

THE CHAIRMAN: Thank you very much

MR. BARLING: Perhaps I ought just to say also that obviously you gave a ruling yesterday. There are now two rulings in this part of the case both on disclosure and you will eventually make the ruling on admissibility, and I suppose questions of costs may arise on one or both of those, and it is not the appropriate time to say anything, and we do not - we just say that there will come a time probably when there has to be more said about it.

THE CHAIRMAN: In due course.

MR. BARLING: In due course.

THE CHAIRMAN: We will consider all the submissions and give written reasons.

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