IN THE COMPETITION APPEAL TRIBUNAL 1073/2/1/06

Victoria House
Bloomsbury Place
London WC1A 2EB 14 May 2007

Before:
VIVIEN ROSE
(Chairman)

GRAHAM MATHER
VINDELYN SMITH-HILLMAN

BETWEEN:

TERRY BRANNIGAN Appellant

- v -

OFFICE OF FAIR TRADING Respondent

Mr. Terry Brannigan appeared In Person.

Mr. Daniel Beard and Ms Anneli Howard (instructed by the Solicitor to the Office of Fair Trading) appeared for the Respondent.

Transcript of the Shorthand notes of
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HEARING

THE CHAIRMAN: Good morning, everyone. Good morning, Mr. Brannigan. Let me just outline how I see the hearing going today. First of all, Mr. Brannigan, we will ask you to address us on any points that you wish to make. You can assume that we have read all the pleadings and the background documents. So, we are familiar with those. But, if there are any particular aspects of the case, the evidence, or the arguments that you wish particularly to draw to our attention, then you are free to do so. After you have spoken, we may have some questions to ask you, just to clarify certain aspects of your case. Then the Office of Fair Trading's counsel will make their submissions. Similarly, we may have some questions for them on the points that they have made. Finally, you will have your chance to make any comments you wish to make on what they have said. We will then not give a judgment today. We will retire and consider what we want to decide. You will be notified in due course as to when the judgment will be handed down.

Perhaps, then, Mr. Brannigan, you would like to kick off with anything in particular you want to draw to our attention.

MR. BRANNIGAN: I will try. First of all, and most importantly, apologies for this morning. Leaving at four o'clock this morning and being run ragged and then fleeced ---- Apologies to the court.

I am here representing myself. So, obviously, I'm just a member of the public trying to do my best. Apologies if I don't quite understand the technicalities of law or exactly what I should be saying. All I can really do is what's inside and how I have been treated in my life. I understand, obviously, today is more about the point of law and appeal which has been kind of explained to me by my barrister and my solicitor. The bottom line for me is that I can never quite understand how the champion of the people, with all their resources, against poor old little me wanting justice and getting my life back for what Newsquest have done spend all this money fighting to actually to do the case, whereas a simple 'phone call to a couple of witnesses would have proven there was grounds. So, there is a lot I don't understand. I apologise for that.

As of today, I hope that my appeal can be accepted (or whatever it is) so that things can still not just finish here. I think the bottom line is that I just want justice and get my life back. I've always thought that's what the OFT were there for - to protect the little people from, let's just say, the commonly seen ---- I can't really think of a polite way of putting it -- companies that are commonly seen and reputed for being anti-competitive, shall we say. I don't know if there's any guideline you wish to give me as to what I should be saying?

THE CHAIRMAN: Thank you very much, Mr. Brannigan. I think there are some points that

we want to take you to, just to clarify a few aspects of your evidence. You have the files there with the documents in. So, can I first ask you to look at the revised complaint which is in Volume 1, Tab 1B? I just want to get clear for the Tribunal what the various market share figures that you have put in your complaint, and then later in your notice of appeal -- how we should actually read those -- what they actually mean so that we know how to interpret them. If you turn to para. 42 of that document, that starts, 'Across East Sussex the Argus has an average readership ----" Could you tell us how you interpret those figures? That 15.26 percent - what is that a percentage of?

MR. BRANNIGAN: With newspapers, and with this being shown as 'across East Sussex', that would have represented all of the households - everybody across the whole of the county. 15 percent would actually show how many people, as such, read the Evening Argus within that whole county.

THE CHAIRMAN: Now, the Evening Argus is a paid for newspaper.

MR. BRANNIGAN: Yes.

THE CHAIRMAN: That means that across East Sussex 15.26 percent of households or people compared to the overall population of East Sussex or ---?

MR. BRANNIGAN: That will be population, yeah.

THE CHAIRMAN: Similarly, is that with Brighton and Hove Leader? Is that also a paid-for title?

MR. BRANNIGAN: Let's say a free weekly Newsquest title as is the mid-Sussex Leader and the South Coast Leader, and then the Uckfield Leader later. All of the figures are widely available through the market.

THE CHAIRMAN: But with a free newspaper what does the 14.87 then represent? A percentage of what?

MR. BRANNIGAN: With 0.42 being across East Sussex, the Brighton and Hove Leader would be obviously predominantly delivered to as good as every door in the Brighton and Hove region, seen as a county-wide percentage it would be 14.87 because I was asked to split the figure down to local readership across the county and try and make sense of what I can of it.

THE CHAIRMAN: So, would this be right: that the Brighton and Hove Leader is delivered through every door in its area, but because that area is only a small part, or is only a part of East Sussex then that counts as delivery into 14.87 houses.

MR. BRANNIGAN: County-wide as such. I think I was asked to try and provide a county breakdown. So, obviously, the local titles are incorporated within that.

THE CHAIRMAN: But within their particular area that they cover, they will be put through every door.

MR. BRANNIGAN: Yes. I think with free titles, technically, theoretically, they should be put through every door. I think normally figures range about 90 percent as a safe quote.

THE CHAIRMAN: The mid-Sussex Leader and the South Coast Leader, are those also both free weeklies?

MR. BRANNIGAN: Yes. The Leader is a Newsquest title. So, all it is is just -- The Brighton area is one. Mid-Sussex covers Haywards Heath. Burgess Hill is another area. The South Coast will be along the coast - Peacehaven/Newhaven type of area. Uckfield is the Uckfield area - just Uckfield on its own - rather than a region.

THE CHAIRMAN: Just going on a couple of paragraphs to para. 45, they said, "With consideration to all titles in East Sussex from every publisher, Newsquest, Sussex control a market share of 35.73 from their own titles". So, is that figure to do with what percentage of the overall number of titles is owned by Newsquest?

MR. BRANNIGAN: Yes. The basic breakdown was looking at all of the titles across the whole of East Sussex, and then taking their readership and saying how much all of their titles are together - so how much Newsquest their readership is; how much Johnston Press is. It's really predominantly those two. There's no-one else in the market. It's just basically adding up the Leader titles and the Evening Argus titles, and so on.

THE CHAIRMAN: So, the 35.73 is an agglomeration of the readership market shares that you have previously given?

MR. BRANNIGAN: Yes. In my individual state I've tried to work out the best from basically the corporate marketplace shares and doing my best without professional help to assess it. But, yes, all of this has basically been on my own and just trying to make certain of it.

THE CHAIRMAN: Looking at para. 48 where you are dealing with Uckfield, there the Argus has an average readership of 7.06 percent. That is also the number purchased compared to the overall population of the area. Then you say that within Uckfield the only other newspaper titles available apart from the Argus and the Uckfield Leader are Sussex Express, Kent & Sussex Courier and East Grinstead Courier. The Kent & Sussex Courier - is that a paid-for or a free paper?

MR. BRANNIGAN: That's a paid one - mainly a Kent title. But, Uckfield is fairly close to that side of the county where it borders on towards Kent. So, it does go across the border basically.

THE CHAIRMAN: And the East Grinstead Courier - is that a paid-for title?

MR. BRANNIGAN: Yes, it is.

THE CHAIRMAN: Then, when you say at the last sentence of that paragraph, "This means that Newsquest publish 40 percent of the titles available in Uckfield" - is that a readership figure or is that just saying, "Well, there are five, of which they publish three - so, that is roughly 40 percent"?

MR. BRANNIGAN: Yes. Basically that's my amateur-ish way of saying that they publish 40 percent of the titles in that area. I'm just trying to make it sound better.

THE CHAIRMAN: So, that 40 percent is not a readership figure - it is just the number of titles.

MR. BRANNIGAN: It's the number of titles, yes.

THE CHAIRMAN: Then, going down to paras. 51, 52, and 53 - are those also shares of the total number of titles published, but not looking at readership particularly?

MR. BRANNIGAN: Yes. This section here is looking at titles. So, within East Sussex, the two together publish thirteen out of eighteen. For instance, Lewes - there aren't any other publishers that do newspapers apart from Johnston and Newsquest.

THE CHAIRMAN: Thank you. If I could move forward then to the material you annexe to your complaint in Annexe 3 - the information published by Newsquest about their various newspapers in the area. Could you just tell me when roughly that was published? Was that current at the date of your statement? Can you remember when it was that you found that material?

MR. BRANNIGAN: There's notes on there saying that these are from the Newspaper Society who provide all of the national figures dated 2004. So, it would've been soon after my complaint.

THE CHAIRMAN: On the first page of that, where it talks about the Uckfield & Heathfield Leader, is that the same newspaper that you refer to in your complaint?

MR. BRANNIGAN: Yes, that's the one which I considered started as a market spoiler in a smaller area than they normally do, yes.

THE CHAIRMAN: The Scoop newspaper that is referred to there has not figured so much in the discussion. Is that purely advertising?

MR. BRANNIGAN: Yes, that's just an advertising trade magazine. To be honest, I don't think it's ever really been considered as a newspaper in any of our eyes - or my barrister's - or nothing. It's just purely used cars, washing machines, etc. A service magazine. (After a pause): On p.141 there is actually some more details on Scoop.

THE CHAIRMAN: Yes, that is what prompted my question. That is right. Now, if I could ask you to look at your revised Notice of Appeal which is at Tab 1F, para.75:

Paragraph 75.

> "In East Sussex the OFT estimated that Newsquest's market share based on readership was 36 per cent and Johnston's 37, a total market share on 73. On this basis Johnston and Newsquest were jointly dominant. Mr. Brannigan has calculated in terms of advertising revenues market shares were as follows, Newsquest 54, Johnston Press 27, Northcliffe, DMGT, 13, Trinity 5."

Could you just explain to us where those figures are coming from?

MR. BRANNIGAN: The advertising revenue, that basically came from published accounts of how much advertising revenue has been brought in by publications within the year, and also estimated through experience in the market of how much people charged per newspapers. It would have all been published material through the Newspaper Society and Newsquest themselves.

THE CHAIRMAN: It is rather striking that the readership shares are roughly the same between Newsquest and Johnston and yet you have put the advertising share as Newsquest being double, roughly, Johnston Press. Is that something that you would have expected to see or is that an unusual circumstance?

MR. BRANNIGAN: I think with East Sussex the Brighton Leader, for instance, has a higher rate card, what they charge per advertising. Although they have the same market share, the Sussex Express is split into more local. So Lewes has a title, Uckfield has a title. It has five titles split up over the region and they charge less in the titles. I think it is just really that newspapers charge different rates.

I think also with the Johnston titles, they are weekly, and Newsquest does actually have publications coming out every day of the week apart from Sunday.

THE CHAIRMAN: How does that work then with the readership figures when you are trying to compare a daily paper with a weekly paper?

MR. BRANNIGAN: I think with a daily paper, say if it has a certain amount of percentage per day they are likely to be recurring readers. Normally, what you do is with daily titles they can actually give a breakdown, not only daily but weekly and monthly. It does not falsify the figures, it is fairly true, the answer you get through the Society, and so on.

THE CHAIRMAN: Going back for a moment to para.14 of the Notice of Appeal, here you refer to the point that has been made elsewhere about the free advertising targeted at particular advertisers. I think in the complaint you did not make it clear whether the free advertising was offered in the Uckfield Leader or in the Argus, you just referred to it as having been offered by Newsquest. Here you do seem to specify that it was in the Uckfield Leader, and

I think that is what the OFT have assumed. Is that correct as far as you know?

MR. BRANNIGAN: I must admit, as far as I know it is correct. To be honest, one of my witnesses that I had put in my case, who used to work for Newsquest and would have told the OFT more details, just basically said that Newsquest offered free advertising. We are presuming that if they are Uckfield businesses they would have been Uckfield Leader advertising, rather than advertising in a Brighton predominant magazine or little news. I am assuming it is Uckfield Leader rather than Newsquest titles as a whole, but they would probably have been given the option just as long as they agreed not to advertise in mine any more.

THE CHAIRMAN: The complaint that you made about the offer of free advertising, there was a statement that was appended to the revised complaint that you put in on 31st May - that is taking you back to tab 1B of volume 1, p.101 of the bundle - is that what you were referring to. It says, "Newsquest offered them free advertising if they pulled out of ours".

MR. BRANNIGAN: Yes, this statement is from Carol Fox, who was my representative within the Uckfield region. She joined me from Johnston Press. She was the most experienced person there. Once I was told to try and get witness statements she came forward and this is what she provided.

THE CHAIRMAN: Yes, just looking back at para.18 of that document, p.89, you say there:

> "When we contacted the businesses they confirmed that they had pre-agreed a run of free advertising as long as they pulled from ours."

Did you have discussions with them, or is that paragraph also based on what Carol Fox told you?

MR. BRANNIGAN: From recollection, my main contact was Carol Fox because she was dealing with them week in, week out and had been for years. Obviously she was very happy with the response levels we were getting for the Halifax and got a testimonial in for them. Carol was very surprised when they pulled out. She approached them as their regular point of contact. Once she came back to me then I gave Richard a quick call and he confirmed to me that that is exactly why he pulled out and he apologised.

THE CHAIRMAN: In that conversation was it clearer which newspaper it was that they had been offered the free advertising? Can you recall?

MR. BRANNIGAN: I must admit, with it being three and a half years that I have been battling this, I cannot recall.

THE CHAIRMAN: No, that is fine. Just finally from me, one small point: para.16 of that document, half-way through the paragraph:

"Johnston's three main titles under threat were the Sussex Life, Eastbourne Advertiser and Eastbourne Herald."

Should that read Sussex Express?

MR. BRANNIGAN: Yes, sorry, Sussex Life was a magazine that I joined later on. Let us just say that my head has been all over the place for the last three and a half years.

THE CHAIRMAN: That is fine, it just happens that that sentence is picked up in a number of other documents and I just wanted to be sure, if we needed to cite it, that we have got that right. That is fine.

Thank you very much, Mr. Brannigan, that is all I wanted to check with you, and now we will see what the OFT has to say.

MR. BEARD: Madam, members of the Tribunal, I am grateful. Before I turn to deal with the submissions there are perhaps a couple of matters it is worth confirming. First of all, Mr. Brannigan referred to the representation of Newsquest. As far as we are aware, there is no-one from Newsquest here.

MR. BRANNIGAN: The lady at the back is from Newsquest and she confirmed on my entrance.

MR. BEARD: Fine. There is no-one representing - that is all that I meant to say. I am grateful for that.

Second, just to verify, the Tribunal has the six bundles. They have been updated and updated indices have been provided. I assume we are all up to speed with those.

In the circumstances the Office obviously received the helpful letter from the Tribunal setting out the various points. Unless the Tribunal has a desire for the OFT to approach this in a different way, I was intending simply to work my way through those points.

The first raised is the general point about what this appeal is about. I apologise if a number of these submissions echo points made in the defence and the outline submissions. I will try not to be repetitive and simply provide cross-references. This appeal is clearly a challenge to the non-infringement decision issued by OFT on 9th June, which is found at Tab C of Volume 1 of the pleadings bundle. There are two parts to it - the first at 151, which has been referred to in previous proceedings as 'the administrative priorities decision', and, more importantly for the purposes of today, at 161 - although since the document at 151 also deals with matters in market share that are cross-referred to, I will obviously refer to both. Clearly, the question for the Tribunal is whether OFT was wrong in its conclusion that there was insufficient evidence to justify the making of an infringement decision, either under the Chapter 2 prohibition or under the Chapter 1

prohibition.

The decision that has been taken is taken on the basis that neither Newsquest, nor Johnston, whether individually or collectively, occupy the dominant position in a relevant market for advertising space in free and paid-for regional and local newspapers in East Sussex, although the decision obviously also considers the local markets as well. It further concludes that neither have committed any abuse.

In addition, in relation to the Chapter 1 prohibition, the decision is that there is no clear evidence of an agreement, whether vertical or horizontal, which would prevent, restrict or distort competition contrary to the Chapter 1 prohibition.

It is perhaps simply worth reiterating those points since it emphasises what this appeal is not about. It is not about issues of admissibility. The OFT has indicated that it does not pursue any issue in relation to the admissibility of the appeal. That was made clear previously. Perhaps most importantly in the context of the outline submissions provided by Mr. Brannigan most recently, it is not about whether the OFT should have commenced a Section 25 investigation under the Competition Act 1998. The CAT does not have jurisdiction to hear appeals in relation to the exercise of a Section 25 investigation. The Section 25 discretion, as it might be called, is not listed as one of the appealable decisions in relation to Section 46(3) of the Competition Act. These are matters that have been considered by the Tribunal and unless the Tribunal wishes me to I will merely refer to the cases of Bettercare and Cityhook and provide the references. But, I am happy to take the Tribunal to them, if that would be of assistance.

THE CHAIRMAN: I think, Mr. Beard, continue with your submissions on this point as to what the test is, and then we may have some questions to put to you about it.

MR. BEARD: Of course. At that juncture it may be relevant to refer to those materials. But, for the present purposes I simply note that in Bettercare, which appears in the authorities bundle at Volume 5, Tab 66K, in particular at pp.22-26, paras. 80 and 90 are relevant in this regard where the Tribunal was considering what the avenues of challenge are, depending on the relevant circumstances with which one is dealing, and delineates circumstances in which an appeal is appropriate and the circumstances in which judicial review may be appropriate. Similarly, in Cityhook (authorities bundle, Volume 5, 66M, pp.70 - 72, and in particular, para. 219, although the discussion there starts earlier at p.65). Finally in this regard, it will be important perhaps for this Tribunal to bear in mind the observations of the Court of Appeal in Floe (authorities bundle, Volume 4, Tab 66I).

In the additional submissions that have been put forward by Mr. Brannigan in the outline

submissions, paras. 4 - 22 appear at Tab 4 of the pleadings bundle. It might be worth having those open for these purposes, although the Tribunal is familiar with them. Actually, the point is summarised in para. 4. "My complaint is that the OFT has failed to investigate what I believe were clear abuses of a dominant position in breach of competition law by two big publishers who succeeded in crushing my efforts to start a freebie newspaper in competition". The following paragraphs develop that submission and in doing so refer to the case of Associated Convenience Stores. It suggests that it is open to this Tribunal on this appeal to decide whether or not a Section 25 investigation should have been opened.

As I have indicated, in relation to Section 46 of the Competition Act there is no indication that such a decision whether or not to open an investigation is an appealable decision. In the case cited by Mr. Brannigan in his submissions, rather than supporting his submission he actually specifically undermines it. The ACS case concerned an investigation pursuant to Section 131 of the Enterprise Act, and that is a market investigation. Mr. Brannigan may not have a Purple Book, but we have brought a spare copy. It is at p.234 of the Purple Book, relatively early on. The relevant paragraph is really 131(1):

> "The OFT may … make a reference to the Commission if the OFT has reasonable grounds for suspecting that feature or combination of features of the market in the United Kingdom … restricts or distorts competition in connection with the supply or acquisition of any goods or services in the United Kingdom or part of the United Kingdom."

The Tribunal may be familiar with this scheme. It is an additional scheme scrutiny apart from the prohibitions under chapter 1 and chapter 2 which allows for a wide ranging investigation by the Competition Commission - for example in relation to groceries, as is ongoing at the moment.

In the submissions Mr. Brannigan has attached weight to the reasonable grounds for suspecting phraseology in 131(1) and said that a similar phraseology is used in relation to investigation test for the purposes of s.25, and that in *ACS* this Tribunal was willing to scrutinise and that suggests that this Tribunal should be equally willing to scrutinise in relation to s.25 in the OFT's Decision to investigation. Of course, the reason why this Tribunal was empowered to consider whether or not the OFT had been right at that time not to make a reference for market investigation to the Competition Commission was because of s.179 of the same Act, which is found at p.263 of the Purple Book:

> "Any person aggrieved by a Decision of the OFT

- in relation to Part 4, which is the part covering market investigations -

"… in connection with a reference or particular reference may apply to the Competition Appeal Tribunal for a review of that decision."

Furthermore, sub-para.(4) below, the basis upon which that review is to be carried out is specified. It is a Judicial Review exercise that must be carried out by this Tribunal. This Tribunal is a statutory body and is, therefore, empowered to consider that particular matter in relation to whether or not the OFT did have reasonable grounds for suspicion pursuant to s.179. Of course, here there is no parallel provision set out in the Competition Act or indeed in the Enterprise Act which could be read as applying to s.25. So in those circumstances the very fact that you have a specific statutory scheme for enabling this Tribunal to carry out a review, and a review at Judicial Review standard, of a very broad discretion reinforces the clear position in relation to s.25 investigation, that this Tribunal does not have jurisdiction to hear these matters either on appeal or by some sort of review process and that if, in those circumstances, a challenge is to be brought to an investigation decision in relation to s.25 it would have to be brought by way of Judicial Review as the ultimate court scrutiny for any public body's decision making.

In those circumstances, this Tribunal is not dealing with whether or not it was right for the OFT not to investigate, it is dealing with whether or not the OFT was able to come to a conclusion on the basis of the material before it that the conduct complained was not an infringement of the Chapter 2 prohibition. I will focus on the Chapter 2 prohibition because that has been the focus of the complaint and appeal to date. In those comments, I do not ignore the existence of the Chapter 1 issue being raised.

When the Tribunal comes to consider that question, of course at that point one moves into consideration of the case law and learning in relation to the appropriate burden and standard of proof upon the OFT and indeed the manner in which this Tribunal has recognised that it must approach these questions on appeal.

If Mr. Brannigan is to establish infringement of Chapter 1 or Chapter 2 obviously the burden is upon him in these circumstances. The question of the standard of proof is, as has been repeatedly recognised, the civil standard on balance of probability, although there has been some relatively detailed discussion of what that precisely means in the context of serious allegations relating to matters which can result in fines, and in those circumstances the Tribunal must ensure that the rights of defendants are properly protected.

THE CHAIRMAN: Can I just interrupt you there for a moment. When you say, Mr. Beard, that the burden is on Mr. Brannigan, are you talking about in relation to this hearing today, that

he bears the burden of showing the OFT's Decision should be overturned?

MR. BEARD: Yes.

THE CHAIRMAN: Or are you talking about the burden that he bears in his complaint to you?

MR. BEARD: Obviously the situation when someone is making a complaint is rather different, and it is not, I do not think, helpful - and I am sorry if I elided the two concepts - to talk in those terms about "burden" in the ordinary sense when one is talking about a complaint. A complaint may give rise to concerns which then trigger an investigation and the matter then goes on further.

Obviously, the question of the relevant standard of proof being met is one that really falls for consideration at that point as between the OFT as the regulatory body and the defendant, and in those circumstances the burden would actually fall on the OFT to make out the case vis-à-vis the defendant, so the situation is rather different. I am not sure it would be helpful at that point. Clearly someone can come forward with a complaint which does not make out a full case. That is the purpose of the structure that exists to enable the OFT to investigate. That is undoubtedly right. I do not know if that answers your question for the purposes of today. Clearly, in relation to an appeal the burden must lie on the appellant.

THE CHAIRMAN: Yes, carry on, and we will see where we get to.

MR. BEARD: The discussion of the nature of the standard of proof and therefore the standard of proof that has to be discharged before this Tribunal has been the subject of consideration in particular in the Tribunal' lengthy Decision in Napp *Pharmaceuticals*, and more recently in the *Football Shirts* cartel case, which we tend to refer to as the *JJB* case. That is found in the authorities bundle, volume 4, tab 66F, at p.55 onwards. If it would assist the Tribunal perhaps we could turn to that briefly. There is only internal pagination in these bundles, sensibly, so that there is less confusion when cross-referring, and it is perhaps worth simply looking on from p.48. I will not read any substantial sections of this. Page 48 is sub-headed "Paragraph 166 onwards, Parties Submissions", and that sets out the framework of discussion about the Napp case, to which I have already referred.

In the *JJB* case what the Tribunal was then considered in more detail in more recent cases on the standard of proof, and then para.176 is looking at cases on the standard of proof more generally outside the realms of just competition. So the first is about sex offenders under the Crime and Disorder Act , *B v The Chief Constable of Somerset and Avon*, in which Lord Bingham made certain statements are germane and are quoted at para.177. Then at para.178 there is reference to a House of Lords judgement in relation to the

standard of proof in a deportation case, and that is the case of *The Home Secretary v. Rehman*. It is actually that paragraph that is quoted at 178, to which the OFT has referred in its pleadings. It has become a somewhat celebrated exposition of how the civil burden or civil standard, more exactly, should be considered when someone has to discharge the civil burden on balance of probabilities. The analogy with the sort of cogency of evidence that is required to satisfy oneself that one has seen walking in Regent's Park a lioness rather than an alsation rather suggests that it must depend on the sort of allegations, the seriousness of the allegations, and so on, that are issue in order to be satisfied which particular beast it was that you saw.

It should be stressed, and sometimes this is missed of course, that Regent's Park is where London Zoo and therefore it is not that the lioness is a completely vanishingly unlikely possibility, it is just distinctly more unlikely than finding an alsation in the circumstances, and I assume his Lordship chose the example on an informed basis for that reason.

At 179, *R v McQueen*, again a Crime and Disorder Act case, where further discussion was taken up in the House of Lords and Lord Steyn gave certain guidance which is quoted there.

There are then a series of further cases, *Gough*, concerning the exclusion of football spectators from leaving the country to go and visit football matches abroad. Then there are certain cases relating to children and sex abuse that are referred to, *Re T* in particular.

In para.184 the case of *Re EP* is also cited, and that is a case in which Lady Butler-Sloss made it clear that it wrong to conflate the civil burden and standard with that in criminal proceedings.

Thereafter, from p.54 onwards, the Tribunal itself turns to consider these various matters, and reaches its conclusions effectively from para.197 onwards, p.57. Paragraph 198, an infringement is a serious matter, must distinguish what sort of evidence is necessary to satisfy the test, but also identify what the test is. At para.200:

> "The Tribunal must be satisfied that the quality and weight of evidence is sufficiently strong to overcome the presumption that the party in question has not engaged in unlawful conduct. For example, if, in a borderline case, the decision is finely balanced and the Tribunal finds itself toing and froing the correct analysis is that the evidence is not sufficiently strong to satisfy the Tribunal on the balance of probabilities that the infringement occurred."

Then, from thereon in, there is a further discussion about how these sorts of principles are to be applied in particular cases recognising that in some cases obtaining evidence is easier

than in others.

That sets out the approach that this Tribunal has recognised that this Tribunal must apply when considering an appeal in these circumstances as to what the standard of proof is that must be discharged by an Appellant.

That perhaps gives the most up to date analysis of the law as this Tribunal is concerned but also more generally. We are not aware of key cases in relation to the analysis of the burden of proof in civil cases that take these matters any further forward.

In those circumstances, the evidence that has been before the OFT and was the basis for the Decision and that which is now challenged is the Decision, it remains for this Tribunal to consider whether or not there is sufficient material to suggest that the OFT got it wrong.

That is not to suggest anything like the position under a s.120 appeal that this is some sort of review. The OFT entirely accepts that this is a merits appeal, but that does not alter the burden and standard that the Appellant must meet in the context of this sort of case.

THE CHAIRMAN: I am still not sure, Mr. Beard, what you are saying the test that we are applying is. I can see the relevance of Napp and the burden and standard of proof if it was your case that in order for the Tribunal to overturn the non-infringement decision we would have to be satisfied to the Napp standard that there had been an infringement. But, if it is not the case that we can only overturn the OFT's decision if we would be prepared, in effect, to substitute an infringement decision, then I do not see quite where Napp gets into the picture, other than in a way to say, "Well, the OFT, when it is assessing whether to launch an investigation, has to take into account the fact that if it is going to move to an infringement decision then it has to have a very strong burden of proof, and it has to assess the evidence in front of it in deciding whether it ever thinks there is a prospect of meeting that decision". But, I do not see why there is a particularly strong standard of proof if what Mr. Brannigan has to show is that there was an error of law or a mis-appreciation of facts by the OFT rather than having to show that there had been an infringement. That is where I am not quite sure where Napp comes in.

MR. BEARD: It perhaps depends on the nature of the considerations, madam, you suggest. In relation to a matter of law, in fact, burden and standard of proof are rather more difficult concepts to apply because there is a straightforward -- essentially a fight between the two sides as to what the law is. You do not determine the law by saying, "Well, someone has not discharged the burden". That is just not the way that one would approach that sort of question. So, to some extent that issue is to one side of the Napp and JJB analysis.

On the other hand, if one is saying, "Well, there is a mis-appreciation of the facts", then

that is the sort of matter that it would have to be shown to the proper standard that that mis-appropriation of those facts had occurred, because in those circumstances you have a situation where the suggestion by the OFT is that it has taken a decision which it considers entirely proper. It is maintaining that in the face of an appeal. If the appellant is going to show that that decision was wrongly made, it is going to have to make out its case. The Tribunal then has to assess what the standard is that that appellant has to hit in order to overturn the OFT's case.

Now, it is clearly a matter that becomes confused to some extent by the asymmetry that exists essentially between an infringement decision and a non-infringement decision where it is taken earlier on. Of course, in an infringement decision, what the OFT is saying is, "We have crossed a relevant threshold. We have met the burden and standard in relation to a particular individual defendant". In an non-infringement decision, the non-infringement decision is effectively a label attached to a conclusion that there is no sufficiently compelling evidence - in other words, that the OFT has not satisfied itself that those relevant thresholds are crossed. But, it cannot possibly be right in those circumstances for the Tribunal then to consider when an appellant comes along and says, "Well, the OFT got it wrong", that there is no sensible threshold that the appellant has to cross. The burden remains on the appellant in those circumstances. There is no reason why the standard that applies in relation to particular grounds that are being raised against the OFT should not be considered in the same way as in Napp and JJB. After all, the notion of a burden and standard of proof is not some sort of abstract concept. It is a concept intended to protect the rights of those that might otherwise fall to be subject to infringement decisions, and so on. So, that is what has driven the structure of analysis - not just in this jurisdiction, but obviously in relation to all questions of where the burden and standard lie.

THE CHAIRMAN: What do you say are the grounds on which this Tribunal can overturn a non-infringement decision - not looking at the burden and standard of proof at the moment? On what grounds can we ----

MR. BEARD: Undoubtedly an error of law. There is no doubt about that. But, beyond that, it may be difficult to give some sort of exhaustive list. Obviously, there can be clear errors of fact. Clearly, if you get something fundamentally wrong ---- If you say that Newsquest was not present at all in East Sussex - and it obviously was - and material had been put before you showing that it was, and you just missed the pages, well, clearly that is an extreme example of an error of fact that could undermine a non-infringement decision. It would not at that point be incumbent upon the Tribunal to say, "Well, it necessarily follows

that there was an infringement here and there must have been an infringement decision found". It is easy to identify those sorts of clear examples, but it does become more difficult when what is facing the Tribunal is someone coming along and saying, "You should have gathered more material" because that is simply the wrong approach here.

MR. MATHER: Why is it the wrong approach precisely, Mr. Beard?

MR. BEARD: Why is it the wrong approach? Because it is up to the OFT to decide the extent to which it is going to investigate matters - otherwise this Tribunal would be accruing to itself a jurisdiction over whether to decide to investigate.

MR. MATHER: But, is that power for the OFT an absolute one? Is it the sole judge of whether adequate investigation has been made?

MR. BEARD: No. No. Clearly it is not absolute power. It cannot be. But, that power is subject to judicial review and scrutiny by the courts, and ordinary public law principles apply to it. So, it is certainly not absolute power. It is power that is tempered by judicial control in the way that any public decision-maker's powers are properly constrained. But, the fact that that constraint exists in another forum in relation to the decision of whether or not to investigate does not mean that the OFT is unfettered. It simply recognises that where one is dealing with these sorts of broad discretions, different approaches may be entirely appropriate. If it assists, it may be appropriate just to refer to the Court of Appeal in *Floe* where, of course, there was a specific consideration of the extent to which this Tribunal should act as the scrutineer of the OFT in its more general regulatory function.

THE CHAIRMAN: Before we get on to that point, I just want to try and clarify again what you say the test that we should be applying is - that is, what the test is, not the standard by which we have to be satisfied that that test is met. Just the previous step to that. I think you have been handed a copy of an extract from the *Freeserve* decision of this Tribunal. If you just look at paras. 109 and 110 of that judgment, that indicates that the Tribunal has jurisdiction to hear an appeal on the merits, whether it is an infringement or a non-infringement decision - that is to say, to decide whether the Director has made an error of fact or law, or an error of appraisal or of procedure, or whether the matter has been sufficiently investigated. Now, that was the Tribunal in that case's encapsulation of on what grounds the Tribunal can overturn a non-infringement decision. Now, first of all, can I ask whether you accept that that is correct?

MR. BEARD: Can I take it in two parts? Paragraph 109 talks about the statutory jurisdiction of the Tribunal being the same for infringement and non-infringement decisions. No issue is taken with that. The question that is being asked by the Tribunal is what the repercussions

of that are. Now, in relation to an infringement decision, it is very easy to see how one can have an error of material fact, an error of law, an error of appraisal of the facts or unfairness in procedure. One can see the same grounds operating in relation to non-infringement decisions if we mis-construe the *Akzo* test - if we had wholly misunderstood how one assessed dominance -- if one had not recognised who the relevant players were in the relevant areas. Those would be fundamental errors of fact, or could be errors of law. There could be an error of appraisal - although that matter can be one that can be difficult for this Tribunal in circumstances where it is an appellate body and is not trying to hear matters **de novo** of course. But, that is clearly accepted. Of course, if the fairness of the procedure followed no issue is taken at all. As to whether the matter has been sufficiently investigated -- Well, if what is being said there is that that lack of sufficient investigation -- -- Taking it first for an infringement decision - if it is one where the Tribunal looks at that matter and says, "Well, you don't have a sufficient factual basis for what you are saying", that makes perfect sense because in the context of an infringement decision, what you are effectively saying is that you could have done more. "In those circumstances where we are looking at the material that you had before you, and upon which you took the decision, we are not satisfied that you have discharged the burden and standard upon you." When one is considering a non-infringement decision it is more difficult to see how that can properly be a reasonable ground for challenge because in those circumstances if you have got a situation where the OFT has said, "Well, we have this information. It's been passed to us by a complainant. We're not investigating it, but on the basis of that material we consider that there isn't a case to be made here, and we are not going to exercise our discretion to trigger a full, formal investigation" ---- In those circumstances, to consider that you have a ground of challenge saying, "Well, OFT, you just didn't have enough material" just does not make sense. That is the very essence of a non-infringement decision - "You didn't have enough information". So, you cannot impugn the decision on the very basis on which it is properly made.

MR. MATHER: Are you sure, Mr. Beard, that is exactly right, because it may be the case that there are facts which are necessary to be known to come to a proper decision, whether infringement or non-infringement. I therefore put to you that it is possible to contemplate circumstances, even for a non-infringement in which the OFT's lack of knowledge of those facts could vitiate its decision.

MR. BEARD: I think there may be circumstances, but I am not sure that is separate from the question of whether or not there is an error of fact, a material error of fact. If, for example,

someone put forward a complaint and the typing of the complaint was unclear, so you could not actually tell whether or not it was being alleged that X was in fact a perpetrator of an infringement. In those circumstances, I can well see that you might be able to turn round to the OFT and say, "Well, you could not possibly have known what the allegation was and therefore you should at least have asked that much". That is very different from having a position where you know the allegation and the suggestion is that you do not have enough evidence to go on to make an infringement decision, or you have decided not to investigate. It is in that sense that one must say that the sufficient investigation that is one of contemplating as a potential ground really does not make sense in the same way in relation to non-infringement decisions. So you might be able to find extreme examples, but it is not clear that that adds anything to the broad analysis that is being put forward.

MR. MATHER: If I may pursue it for a second, there may be a broad division between facts which are wrong and facts which are not known. Some of the facts which are not known may turn out to be necessary for the OFT to make a proper decision. In this case, I think that is what Mr. Brannigan is saying, and that if it cannot be resolved, if there is this category of facts which are necessary for the OFT to know to come to a proper decision, then the absence of those would, it seems to me, at first sight, make the decision challengeable.

MR. BEARD: It is worth perhaps starting with the pre-cursor to your question, which is the notion of a proper decision. When one is talking about a non-infringement decision it is perfectly proper to say, "We do not have enough material here to reach an infringement decision". In the circumstances, that is a non-infringement decision. There might be issues to do with admissibility. They do not arise here. There is nothing improper about that. That is perfectly proper. That recognises the degree of autonomy that the Regulator has in deciding how to prioritise and what steps it considers it is appropriate to take in all the circumstances given the range of case work that it is faced with. There is nothing inappropriate about that and it is a perfectly legitimate non-infringement decision.

It is difficult to hypothesise what it is that the OFT must go and seek out in order to make that decision proper. If one cannot work out how to delineate that process, it actually indicates why that may not be the appropriate analysis here, and what one should be asking oneself is, "Do we have enough information here to say we have got an infringement decision? No, we clearly do not. Are we going to decide to investigate this further? No, we are not."

THE CHAIRMAN: Could you help me with this point, which I think takes on that discussion:

as I understand it, part of Mr. Brannigan's case is that there are some facts which can only be discovered by the OFT, or only discovered with reasonable ease and facility by the OFT, because of the nature of its powers compared with those of a member of the public. If the OFT, again hypothetically, wilfully or cavalierly decline to use those powers, or to use its authority, speaking in very general terms, would that be a category where it had not sufficiently investigated the matter to come to the appropriate decision?

MR. BEARD: There are two points. One is that category is very, very difficult to understand in practice. Of course, the OFT has all sorts of powers that can go after information from people, and people will regularly turn up to the OFT and say, "Well, you have got these powers, you go and use them, you can get these documents, you can back up the case that we are making". That does not make it necessary for these purposes. In answer to the broader question, the answer is no, because unless the decision to investigate is irrational and could be challenged by way of Judicial Review there is nothing wrong.

There may be circumstances where, if the OFT decides that it is not going to investigate someone because the target has ginger hair, in those circumstances it is clearly irrational and it would be susceptible to Judicial Review under ordinary public law principles.

Equally, if the OFT had set out particular statements about how it was going to behave and it acted contrary to those, those might give rise to a potential ground of challenge. They might not because there would be issues to do with whether or not it was a binding policy that could be varied, whether or not legitimate expectations arose, and so on.

So it is not that there is no scope of challenge, but the scope is distinctly limited. That scope is distinctly limited quite properly because of the different functions that the Regulator and this Tribunal have in the scheme of Competition Regulation. One can see that when one is faced with a case and looks at it, "Well, if the OFT did the following things, it made the following calls, it looked at the following documents and it contacted the following people, surely that would not be too hard for it? After all, if it is going to be the Regulator, surely it should do that with any case?" That is where the danger of a fallacy creeping in arises. Of course, it is not just this case with which the OFT is dealing, it is a plethora of cases, and not just in relation to enforcement matters, but a wide rather of other matters. Furthermore, when it comes to the practicality of dealing with cases it is not simply a matter of saying, "We will make one or two phone calls, we have to maintain a case team in order to deal with these matters, we have to think about what the outcome of any phone calls are going to be. Are we going to scrutinise them further. What are we actually going to do in relation to the planning of our process of our going forward?" That

is why we have the process and the threshold of dealing with investigations formally under s.25, where we look at matters and we decide whether or not we are going to proceed to a full investigation and commit the necessary resources. We recognise there may be meritorious Competition cases out there that are not getting full investigation. That must be a possibility. No regulator could possibly suggest otherwise, but that is not the test. That is not the test for today and it would not, in fact, be the test where this matter to come before a court for Judicial Review. It would have to consider only those heads that were appropriate for the challenge on Judicial Review and it would bear in mind the breadth of discretion that did exist in relation to whether or not to investigate precisely because no court, no adjudicative body, however well informed is going to be in a position to carry out that sort of balancing exercise.

MR. MATHER: Therefore, in conclusion, there are certainly cases, you are suggesting, many cases perhaps, where full investigation cannot be made. You are accepting that the Tribunal's jurisdiction does extend to whether the matter has been sufficiently investigated - sufficiently rather than fully - taking into account the caveats ----

MR. BEARD: I do not think I am accepting that at all, with respect. The point that was being made was simply that there are grounds on which you can challenge a non-infringement decision. If the investigation is very, very fully advanced, and you get a situation, as you have done in other cases, where there is very, very detailed material before the Tribunal - *Claymore* is the obvious one that springs to mind that went on for a very long time - in those circumstances the scrutiny that may be brought in relation to whether or not the OFT had enough material to make an infringement decision will mean that you may look at how they have carried out their analysis and whether or not there were matters that they looked at. That is a different question from whether or not sufficient investigation had been undertaken, because all you are doing there is testing whether or not the burden and standard had not been made in those cases. Where they are more advanced you get much closer to the question of whether or not this Tribunal could substitute its judgment and at that point obviously there are different concerns; but no, it is not part of the OFT's case that this Tribunal can consider in these circumstances whether this matter has been sufficiently investigated in the terms that have been put forward by Mr. Brannigan.

THE CHAIRMAN: Just looking at the other grounds there, error of factual law, error of appraisal or of procedure, I am still not clear where the question of the Napp standard comes in. Are you saying that there is some specially high threshold for our deciding that there has been an error of factual law because the idea of the OFT making such an error is

more of a lioness than an alsation, to use Lord Hoffmann's analogy?

MR. BEARD: It is not the quality of the OFT, it is the nature of the decision that is being taken. It is the seriousness of the consequences of an infringement decision that is going to be crucial. That is why you are going to need more compelling evidence in order to cross the threshold. If that is the threshold that the OFT has to cross, this Tribunal when assessing whether or not it has properly been crossed and whether or not the thing can be overturned must consider that threshold in the same way. It cannot be asymmetric in those circumstances. It is rather difficult to see how it possibly could be.

If you have got a situation where someone comes before the Tribunal appealing against an infringement decision and you have got a decision where the OFT has said, "Yes, we have crossed the relevant burden and we have met the relevant standard here" ----

THE CHAIRMAN: Yes, I can quite see how it works in the infringement decision appeal because there you are looking at whether the OFT had satisfied the Napp standard, but with a non-infringement decision where I think you have accepted that it is not the case that the Tribunal can only overturn the non-infringement decision if it is satisfied that there has been an infringement, I think you do not put your case that high.

MR. BEARD: No, we do not put the case that high. That cannot be right.

THE CHAIRMAN: To what part of our deliberations are you saying we have to apply the Napp standard?

MR. BEARD: In relation to an error of fact - the notion of an error of fact here appears to be, since it is distinguished from "sufficiently investigated an error of material fact", and in those circumstances we are talking about the sort of black and white error. I think it is was in an immigration case called *Highleigh*, where this was drawn to particular attention, and it was considered in a further case by Lord Justice Carnwath called *E*, where the question arose of whether or not someone was facing persecution in Sri Lanka from a particular group. It turned out that the first two tribunals had got the acronym wrong, and had said that there was no persecution because DPLC did not have any beef against this particular individual. Actually the allegation was that it was the EPLC that was the persecuting party, it could have had a beef against the individual, there had just been a misreading and a misrepresentation all the way through. It was a black and white mistake. It was a fundamental error of fact and it was recognised that, where one is talking about an appeal on a point of law or a Judicial Review, you could extend the grounds of review or appeal on law to cover that sort of material error fact, and I think that is what is being talked about here because of its juxtaposition with error of fact/error of law.

If one is talking about that, then as indicated earlier, applying burdens and standards, it does not quite make the same sense. When one is talking about an error of appraisal on the other hand, the matter may well be a matter where it is incumbent upon an appellant to show that the OFT had got the thing wrong. What you are doing here is assessing whether, on the balance of probabilities, which is the approach that this Tribunal must adopt, the OFT's appraisal was wrong. In those circumstances, all of the material that has been put forward appears highly relevant, and the question that one then must be asking is whether that appraisal is such that it should be overturned. The question you additionally ask is, "Are we looking at lionesses here?" It will depend on what the point is that is being made - the context of that point in the proceedings and the significance it has as to the cogency of evidence that would have been required to show that that appraisal was wrong. That is a slightly tortuous way of formulating, but it fits with the jurisprudence to which I have already referred. So, it does come in there. When it comes to procedure, the same sort of principles may arise, although it appears, in principle, less likely that you are going to be dealing with looking for lionesses when one is dealing with questions of procedure. But, at the moment I cannot point to that. It will depend on what the allegation is. But, it is not to do with the context of the existence of the OFT which determines whether or not you need cogency to find a lioness rather than an Alsatian. It will depend on what the challenge is; what the error is that has been alleged, whether in terms of appraisal or procedure. Does that assist to some extent?

MR. MATHER: At the risk of opening another front, does the cogency issue relate back to the discussion in which we were engaged a few moments ago? Could you expand a little on the cogency of the evidence? Could cogency be related to volume or nature of evidence? Is that what makes it particularly cogent?

MR. BEARD: Cogency is probably one of those terms that if it ever gets properly assessed going up through the courts, the courts will say that you should not gloss it, and that cogency should stand as it is, and that there might be a range of considerations which determine whether or not evidence is to be considered more or less cogent. That, to some extent, is a non-answer to the question that is posed, but it may nonetheless be the appropriate answer because when one looks back at the jurisprudence and looks at the cogency point that is being made, what is being said is that if the matter concerned is less likely - the matter of fact in particular that you are talking about is less likely - it has very serious consequences for somebody. Then, in those circumstances, although you are only talking about a balance of probabilities assessment, the quality of the material that will

enable you to cross that balance of probabilities when the matter in question is relatively unlikely or has serious repercussions needs to be more cogent. That is the context in which it arises. In relation to this matter, it is not clear that that issue adds anything in respect of the question that was being posed earlier to do with whether or not sufficient investigation was being undertaken because it would be to turn the matter back round on itself to say that the OFT required cogent material to prove the non-infringement. It is not proving a non-infringement - it is a decision that an infringement has not been proved. Therefore, the concept of cogency is not relevant in relation to that assessment.

THE CHAIRMAN: I think we had better move on, Mr. Beard.

MR. BEARD: We then begin to turn to the substantive matters in the case - the concrete challenges. If I may, I will break the first of those down into two parts. The first issue raised by the Tribunal relates to the consultation process - or, the absence of consultation in this case. The Tribunal asked what the consequences of the alleged failure to consult are or might be in its letter. That issue obviously contains two points: was OFT under any duty to consult and then if it was, what are the consequences of the breach of that duty.

THE CHAIRMAN: Mr. Beard, on the first of those points, we have your very full submissions in your defence and in the observations, and also those are matters that Mr. Brannigan did deal with. So, you may take that reasonably shortly.

MR. BEARD: I shall do so. Was there any duty to consult? Five points. First, Mr. Brannigan's case is **sui generis** given the circumstances in which the consideration came to be made. It was not under any ordinary procedure. It was under a scheme that operated following the undertaking to this Tribunal by Mr. Smith on 28th April, 2006. That was the suggestion adopted by the Tribunal. The Tribunal adjourned to allow that consideration. When it was suggested that more time would be required because of Mr. Brannigan's position, the Tribunal was most reluctant to allow any further extension of time, but did so. The OFT then worked extraordinarily quickly to ensure that the material was then produced. In those circumstances, given that this was a scheme dealt with in the course of Tribunal hearings and following undertakings, and an approach adopted by this Tribunal, it would be unfair now for this Tribunal to suggest that the OFT had somehow acted improperly in dealing with the matter as it did. There was no suggestion at any point during those hearings that there would be any form of consultation prior to a decision. What was suggested was that in advance of the re-assessment, Mr. Brannigan should provide any possible comments he could.

So, that is the first and the key point. Secondly, when one moves on to the question of

whether or not there is a statutory obligation to consult, there is none, and there is no basis to imply one. There is nothing in the rules that says there is a statutory obligation, and an implied obligation simply cannot be read back into the statutory scheme, whether by Section 60, or by any other matters.

Now, for clarity, the OFT does not accept that Section 60 applies more generally to procedural matters. It considers that Section 60 applies to matters of substance in relation to competition law. But, in any event, the extent to which one is comparing the process before the European Commission and through the European system, and that which obtains in the UK, it is important to note that there are salient differences - most particularly the absence of Article 7, or the equivalent to Article 7, of Regulation 773 (2004) which governs the rejection of complaints by the European Commission.

In this country, the legislator has taken a view as to the allocation of resources in OFT closing cases, and it has decided not to require the OFT to be obliged under statute to have a similar requirement as obtains at a European level. Nothing in Section 60 should be read to circumvent that. In fact, the case which has been referred to by Mr. Brannigan in this context - the *Pernod* case - is no authority for requiring the OFT to consult complainants before it rejects a complaint. It was clear that the decision was focused on a very different situation. The Tribunal adumbrated its points very clearly. The proceedings were very much more advanced. The position of the parties was very different. The Tribunal expressly left open the question where the complainants are entitled to compensation before their complaint is rejected (that is at p.63 of the decision which is found at Volume 4, 66G).

It is worth noting a further point here. One must properly compare the relevant facts. In this case, the process undertaken that resulted in the relevant decision under appeal was a process undertaken, the matter having been before the Tribunal and undertakings being given to the Tribunal. This is very different from an ordinary course of investigation where the matter results in a closure of file, because of the circumstances in which this matter came to be dealt with. If a comparator is to be drawn, somehow one has to conjure a comparator in EC law where a Commission decision is under some sort of challenge - otherwise you really are not comparing like with like. There is no suggestion thus far been made that if this was a matter that had been before one of the European courts - and of course it is recognised that jurisdictions are different - and that is of course right - that actually just enhances the difficulty of comparison here. The question whether or not, if undertakings were being given in the course of litigation in relation to European matters,

those undertakings being accepted by relevant judicial authorities -- in those circumstances it would then be still incumbent upon the European Commission even to apply Article 7, notwithstanding all that I have said about the reasons why there should be a difference adopted here.

So, there are salient differences, and there are salient differences in the legislative structure, but in relation to the consideration of the particular facts of the case - and *Pernod* is no authority to the contrary.

Finally, if there is not going to be a statutory basis for the duty - and one cannot imply one - then one has to identify some other legal basis for this duty to consult. Well, there is no other basis for it. There is no legitimate expectation that Mr. Brannigan had, and particularly in the circumstances of the hearing, and the undertaking being given at the hearing, it cannot possibly be said that representation was given to him that it was clear and unambiguous; that he properly relied on it, and so on. So, in those circumstances, there is no other legal basis.

Now, the OFT has quite properly drawn attention to the fact that in its guidelines on formal complainant status, it will now take the view, in cases where a formal complainant has been designated, that it will give notice where it is going to close the file. But, the fact that the OFT does that in guidelines more generally does not amount to any basis for a legitimate expectation. It does not change the statutory interpretation. Indeed, the very fact that an extra statutory scheme is effectively being introduced by the OFT actually militates against there being found to have been a prior legal duty - otherwise, one wonders why the thing would be necessary.

Those points perhaps sum up the five reasons why there cannot be found to be a duty to consult in the circumstances of this case. This is not a wider submission about duties to consult in all circumstances.

We then move to the second part of the issue, which is: what are the consequence of a lack of consultation? Well, nothing in the procedure has compromised the fairness or transparency of the consideration of Mr. Brannigan's complaint. In those circumstances, where there has been absolutely no prejudice to Mr. Brannigan by reason of that lack of consultation, there cannot be any basis for impugning the decision. Mr. Brannigan was given ample opportunity to revise his complaint, and this Tribunal has been extraordinarily flexible in the way that it has dealt with Mr. Brannigan and dealt with various different versions of the complaint and the appeal to be formulated and re-formulated, and re-re-formulated. Mr. Brannigan has been given numerous opportunities since the decision to

submit additional materials - most recently effectively the witness statement. The Tribunal has, as I say, given him those opportunities, but none of the material that has come forward has changed the basis on which the OFT considers that this decision should be maintained. Indeed, the material that has come forward is extraordinarily limited and amounts effectively to somewhat speculative material relating to market shares.

In the context of the overall fairness and the transparency of these proceedings, there can be no complaint from Mr. Brannigan as to the appropriate procedure followed. To that end it is perhaps worth briefly referring to the *Apex* case in this regard (authorities bundle, Volume 4, Tab 66H at p.51). If I may, I will turn back to p.47 at para. 100. Having heard submissions on the various matters relating both to domestic and European case law, and in the context of the European case law, emphasis was placed by the Office on the case of *Corus* and was quoted at length at pages 44 to 45. That matter was later taken up by the Tribunal at (f) of para.100 at p.48. "It is not appropriate for the Tribunal to annul a decision on the basis of omissions in a preparatory document which have no repercussions on the defence of the undertaking concerned. The crucial question is whether the defence was affected by the defect". It then goes on., "To consider the application of the principles in that case ----" What was being said in *Apex* was that the OFT had not properly notified the appellant that they were going to be fined. They had been implicated in an infringement, but there was no mention in Rule 14 that they were actually going to be fined. They was subsequently a telephone call, but the telephone call also did not specify that a fine was on its way. That might be thought to have been a relatively significant matter so far as a potential appellant was concerned, because, of course, an appellant might change its strategy depending on whether or not it was going to be fined. Being told you are an infringer and actually having to pay some money is often a rather different prospect to a defendant.

Nevertheless, having considered the matter and considered the relevant case law, at paras. 109 and 110 it was noted at para. 109 that the Tribunal did not consider that it was sufficient for Apex merely to say it had lost the opportunity to decide how to respond without indicating what difference that could have made to its responses.

Then, at para. 110 the point was emphasised, drawing on, in particular, the domestic case law, and the case of *Jeyeanthan* - an immigration decision ---- In that case it was to do with whether a notice had properly been given ---- Lord Woolf had set out various considerations as to whether or not a particular failure to comply should be treated as vitiating any part of subsequent procedure. There has been substantial compliance with

the procedural requirements. Non-compliance can, and should be, waived since there is no prejudice and the consequences of non-compliance - i.e. remittal to the OFT - serves little purpose when the matter has been fully argued on the merits before the Tribunal and Apex has had every opportunity to be heard.

Those three factors are precisely reflected in these proceedings. In the circumstances, that effectively settles how this Tribunal should deal with that matter. Unless it assists the Tribunal I will not discuss the domestic or European case law further in relation to these matters. It is noted that the Tribunal does not have before it any detailed copies of domestic case law - *Jeyeanthan, R -v- Sanaji* and there is another relevant case, *R -v- Bentham* which deals with the extent to which failures to comply with requirements should render invalid subsequent steps. If it is of assistance, those materials can be provided, but it was thought that *Apex*, in the circumstances, was perhaps sufficient, given the burden of paper already before the Tribunal.

Unless I can assist the Tribunal further on that matter, those are the Office's submissions in relation to matters relating to consultation. Thereafter we do turn directly to the remaining matters of actual substance rather than procedure substance. I would hope to be relatively short on them, given that relatively detailed submissions have been made in relation to those matters.

(Adjourned for a short time)

MR. BEARD: Madam, members of the Tribunal, the order of points I was going to take the Tribunal through, are issues to do with geographic market, single firm dominance, collective dominance, the abuses, touch on the Chapter 1 prohibition, and then turn to relief, following your outline. I am conscious that much of what I am going to say has been well trailed in the defence and outline, and therefore I will be relatively brief. But, if there are any matters, obviously, that the Tribunal is concerned about I am very happy to slow down and go through the documents in some more detail if that will be of assistance.

In relation to the relevant geographic market issue, Mr. Brannigan has argued that the relevant geographic market is local, and in particular that the OFT has failed to consider the three levels of the market - national, regional and local. The OFT maintains the position that is clearly set out in its decision at para. 9, and in its defence, at paras. 33 to 37, that it clearly did consider all three levels of the market. It specifically focused on issues to do with whether or not there were local markets for Uckfield and Lewes and/or a separate

market for East Sussex - a regional market. It concluded that there was not a local market due to the overlapping readership between regional and local publications which enabled advertisers to switch between them. It concluded that regional and local papers could act as price constraints on one another. It did not consider that a national market for local newspapers or national newspapers would compete to constrain regional or local papers, and that the correct definition that should be adopted by reference to the market was regional, and there was a chain of substitution between all regional and local newspapers. Indeed, it may be that there is no issue here because in the revised complaint from Mr. Brannigan, it appears that Mr. Brannigan also considers that regional assessment may be appropriate. Certainly no evidence has been put forward to undermine that conclusion. Unless I can assist the Tribunal further in relation to geographical market, I was not intending to say anything further.

THE CHAIRMAN: Just one point that you could clarify: in attachment F to the document, at Volume 1, Tab 1C, para. 20, the last half of that - "Due to overlapping readership areas of different publications, it is likely that advertisers interested in regional advertising would have prices in the overlapping publications constrained as a result of chains of substitution". I think the OFT was talking there about the prices that the advertisers face.

MR. BEARD: yes.

THE CHAIRMAN: "However, as mentioned above, prices for truly local advertisers would not be constrained and Johnston would be able to price discriminate against such advertisers because its newspaper would be the main vehicle for advertising unless Newsquest was able to act as a competitive constraint."

So, there you seem to be saying that regional papers do not act as a constraint on pricing in local papers, but then in the defence you seem to say something different. If you look at Volume 1, Tab 2, para. 33C you say that the OFT considered all levels of the market and examined the extent of competition between regional and local publications and found that they had overlapping readership areas enabling advertisers to switch between them,, and that it concluded that regional newspapers acted as a competitive price constraint on advertising in local newspapers, and vice versa.

MR. BEARD: I can take instructions from those behind me, but my understanding of the position is this: that what is being referred to in para. 20 is the circumstance where an advertiser really only has interests within the particular very narrow confines of the particular locality. In those circumstances regional advertising would not be a substitute for local advertising. You would not want to, or need to, take the expense of getting a

regional advertisement if the service or product you were offering was only of interest to people within a very, very narrow geographical radius. What is being said there is that if you control the local advertising market, then there are a group of people that only have interest in advertising locally, who, if you could price discriminate against them - in other words, be able to identify them - then in those circumstances there might be a group that could potentially suffer from someone having a very large market share in that area. On the face of it, those people would not necessarily benefit from the general point about the chain of substitution because they would not necessarily be looking at different possible newspapers in which to publish their advertisements. But, the conclusion that is being reached is, overall, that the chain of substitution between local and regional is sufficient, and sufficiently strong, to mean that the conclusion that there are distinct local markets is not robust, and that the market definition to be preferred is that for regional and local papers. In those circumstances East Sussex would be the relevant geographical market. I have asked those behind me.

THE CHAIRMAN: So, the assumption is that it is more expensive to advertise in a regional newspaper and that they have the same advertisements in the newspaper regardless of where the particular item is being distributed. If you do not know, then that is fine.

MR. BEARD: I am not able to answer whether or not those implicit assumptions are being made, but I think it would be wrong for the Tribunal to assume that those implicit assumptions were being made. I recognise that, earlier, Mr. Brannigan talked about different fascias (for want of a better word) being put on a regional newspaper being distributed in different localities, and that then there would be different prices for appearing in each locality. In those circumstances the distinction between regional and local paper actually begins to dissolve even further, and that analysis would further militate in favour of a broader market being accepted. But, if those implicit assumptions are important to the Tribunal's analysis of this, then, of course, I can ask those behind me whether they can enlighten any further in relation to those matters.

THE CHAIRMAN: We will leave it there for the moment.

MR. BEARD: I am grateful. Turning then to the issue of single firm dominance, again, the OFT maintains the position set out in its decision - particularly paras. 19 - 22 - one of which we have just referred to. We see the defence in paras. 51 - 67. The complaint is somewhat diffuse, but appeared to focus on alleged predation by Newsquest in Uckfield and to some lesser extent in Lewes. The OFT has looked carefully at that proposition in each of those markets, and looked at whether or not Newsquest could be considered

dominant in each of those markets, or, indeed, in the East Sussex market which it considers is the more appropriate overall analysis. It did not consider that there was any merit in the complaint. Clearly, the OFT also considered the position of Johnston - although, obviously, one of the ironies of the case is that in the circumstances in Uckfield where the predation was specifically alleged at the outset, predation was alleged in relation to Newsquest whereas it is Johnston which has the larger market share.

Looking more generally at the market in East Sussex, on the material that had been provided to the OFT and on the basis of which the OFT worked, Newsquest had a readership of around 36 percent and Johnston 31 percent.

THE CHAIRMAN: Can you point me to where you get those figures from?

MR. BEARD: If one turns back to the decision at paras. 20 - 21 on p.156 which is what is referred to as 'the administrative priorities decision'. It is why at the outset I said that although the focus would be on the Annexe F decision ---- There are references to the market details in the other part of the decision -- or, the other decision, depending on which way one wants to characterise it. There is a typographical error in my notes k- it is 36 percent for Newsquest and 38 percent for Johnston across East Sussex. I am terribly sorry if that is what was confusing the Tribunal. You are rather ahead of me. Miss Howard has pointed out my mistake. I am grateful.

Earlier there was a discussion about readership figures. The OFT recognises that readership figures which point, as the title suggests, to the readers of the newspaper may be imperfect, but they were the best available material. The question was raised earlier about whether or not the consideration of the data was in respect of households. That is not how the OFT understands the data. The OFT does not know whether or not those collecting and collating the data use households as reference proxies for readers, but these are undoubtedly readership figures that are being used as far as we understand it. As noted in the Decision there can be an extent to which you will get readership figures above 100 per cent for areas. For the purposes of comparative analysis between different companies, it is less important that the overall total can be more than 100 per cent.

Those were the best available figures to the OFT and ones provided to Mr. Brannigan. We understand the source to be the Newspaper Society, or an adjunct to it.

On the basis of those figures there is relatively little to be said about the notion of single firm dominance in East Sussex. Not only do those figures fall below the minimum rule of thumb which is sometimes articulated as being 40 per cent below which you are not going to be found to be dominant. The very fact that the structure suggests that there are two

major players militates strongly against any finding of dominance. Indeed, it is one of the rather remarkable matters in this case that if something unpleasant happens to you in a market there appear to be some implicit assumptions made by parties assisting Mr. Brannigan that someone somewhere must be dominant and to be blamed for the unpleasantness. As quoted by the OFT at para.29 of the Decision, at one point Mr. Brannigan was advised by one of his advisors:

> "It seems likely that either Newsquest or Johnston Press will occupy a dominant position for the sale of advertising space, but it is not possible to determine which of the two has greater market power. That actually reveals a wholly misconceived approach to the question of dominance. If, in fact, you are in a position where you are looking at being unsure whether or not one or other of two large parties has the greater market power, that clearly militates against any conclusion that there is any single firm dominant in that market."

THE CHAIRMAN: Yes, although there is the point that I think Mr. Brannigan also makes that there is authority for looking at the conduct of putative dominant firms and saying, "Well, if they act like a dominant firm then they obviously think they are a dominant firm and therefore they may be a dominant firm". There is some read-back from conduct into the concept of dominance, I think.

MR. BEARD: I think that is not going to be rejected. I know that often in Competition law the analysis is broken down into work out whether or not a person is dominant and then work out whether or not they have abused that dominance as if those were two entirely discrete and unrelated steps. It is recognised that that cannot quite be right. If you can behave in a way that exhibits very high market power and you could not otherwise act unless you had market power, then that must inform the prior assessment of whether or not somebody is dominant. It would be naïve to suggest otherwise. Conceptually, one can see why one deals with these matters in two steps, but equally in practice one must recognise that there is some sort of inter-relationship.

That said, of course, it does not mean that one moves away from a proper assessment of "relevant market", a proper assessment of the structure of that market in considering whether or not there are other major firms. The fact that someone enters a market with a free newspaper in the OFT's view is very, very far from any indication that you are dominant. The idea that characterising a free newspaper as a "spoiler" somehow means that it is an implication of dominance just does not stack up. There is no proper reasoning underlying that, and it is quite right to look at the relevant market shares of the competitors

in that market which are being relied upon by the complainant in this context.

So whilst in principle the proposition put by the Tribunal must be accepted, in this case there is nothing to suggest that that basis is made out and actually the countervailing evidence is strongly to the contrary and it cannot properly be ignored. After all, the proper approach to market definition and assessment of dominance is relatively well accepted both by the OFT and the European Commission and within its own context, in particular the Merger Control Guidelines, by the US authorities, so this is not a question of reinventing the wheel to any degree at all.

That really is very much the beginning and end of the matter in relation to single firm dominance. The only additional point to mention is the fact that in a letter provided to the Tribunal dated 30th October 2006 Mr. Brannigan produced some other data relating to what he said were the safe estimates of advertising market shares.

THE CHAIRMAN: Sorry, what was that date again?

MR. BEARD: 30th October 2006. Clearly the evidence in question post-dates the Decision. So formally it is not a matter that should be taken into account in challenging the Decision, but obviously the OFT in its Defence has touched upon why it does not consider that these matters change anything.

First of all, the evidence, with all due respect to Mr. Brannigan, it is, he recognises, a personal guesstimate. He says it is based on assumptions and knowledge of the industry. It is not supported by any independent objective data. It is inconsistent with the readership figures which have previously been put forward by Mr. Brannigan. It is also inconsistent with earlier data on advertising shares that Mr. Brannigan had, himself, put forward. In particular, I would refer the Tribunal to the document to Winn-Baxter, which is found in the pleadings bundle at tab 1, p.17, which suggests very different assumptions in relation to advertising share.

THE CHAIRMAN: That is the letter from Mr. Brannigan to Winn-Baxter of 13th March 2004?

MR. BEARD: That is right. They were later repeated in further documents that the Tribunal may have seen, and they are appended to the revised complaint of 31st May 2006, if my recollection serves me correct. The specific figures are given in para.10 of that letter and in para.22.

Madam, it is notable there that the Newsquest figures are for around 7 million as a safe assumption at para.10, and the Johnston figures are for 8 and a bit million at para.22. The new material that was put in can be found at p.216 onwards in that same bundle. As can be seen there, at p.216, para.(vi) for Newsquest it is now over 10 million and for Johnston it

has fallen substantially to 5 million. So, as compared to the previous safe estimates, Newsquest is now more significant and Johnston less so. In any event, that is merely one part of the concern. The overriding concern of the OFT was that these figures were not reliable figures upon which it could sensibly qualify the approach that it had previously taken.

THE CHAIRMAN: I am just trying to check, the figures that were on p.218 are those the ones that then make their way into para.75 of the revised Notice of Appeal that we took Mr. Brannigan to earlier?

MR. BEARD: They are, madam. It is important to qualify, the first part of 75, as we read it, is referring to the readership figures. The second part of 75 is then referring to these new figures. To be fair to Mr. Brannigan, they are not being relied on in isolation in any event. It is not clear whether Mr. Brannigan would press the point. It is simply to confirm the OFT's position which is set out in its defence at para. 63 that it does not accept that this material, even if it were to be admitted by the Tribunal, is such as to cause it to reconsider its decision.

Unless I can assist the Tribunal further in relation to issues of single firm dominance I would intend to move on.

Turning then to collective dominance, these are allegations that have, to some extent, taken on a life of their own since the Tribunal's earlier judgments. In the OFT's view their very existence indicates to some extent the fundamental weaknesses of the case being made by the appellant. The claim started as a claim of individual abuse of dominance by one market player - Newsquest. It focused on local markets in Uckfield and Lewes. But, that did not really make sense because Newsquest was not the largest player in the market. So, a wider market of East Sussex then becomes considered. But, even there, Newsquest does not look largest - or, in any event, is around a similar size to Johnston. So, to solve that problem an allegation of collective dominance is brought into play. But, that allegation is without any merit. Of course, it is worth perhaps bearing in mind that although these matters have now been struck from the revised notice, Mr. Brannigan did originally seek to allege that even if that claim was not well-founded, in fact all of the national players in the local newspaper and regional newspaper industry were in fact in cahoots. So, in order to remedy a weakness in the case, a broader and broader conspiracy is effectively alleged.

Turning then back to the joint dominance between Newsquest and Johnston in East Sussex, from a brief mention in the original complaint this is now expanded. But, the OFT maintains its position. as set out in the decision at paras. 32 - 36, and the defence at paras.

41 - 50, that simply saying two players have a large market share between them is simply not enough. You need to make sure that the three limbs of the *Air Tours* test, as it has been referred to are fulfilled, or there is a basis for considering that they are fulfilled. There is no sufficient evidence of market transparency as between Newsquest and Johnston in relation to their behaviour. Mr. Brannigan has made various assertions in this regard. There is no evidence, or contemporaneous evidence, in particular, that Newsquest and Johnston knew of each others' rates and could anticipate each other's behaviour. Certainly no common policy is established on the evidence. There is no evidence that they were continuing monitoring one another.

When one turns to the second limb of *Air Tours* there is no specific evidence of tacit co-ordination between them. Mr. Brannigan has relied, in part, on the Competition Commission reports, or some of them, that have related to a number of consolidations within the local newspaper industry, if one can term it as that without trying to delineate between regional and local for these purposes. There have been numerous reports that Mr. Brannigan essentially overstates the comments of the Competition Commission and, before it, the Monopolies & Mergers Commission, in dealing with these various reports and the merger situations that fell for consideration under them. He seeks to derive rather concrete findings from them that patently the Competition Commission did not make. The Competition Commission comments or observations were couched in tentative and prospective language of what might happen and tendencies for matters to occur.

It is quite unsustainable to suggest that you can fail the Chapter 2 infringement on those sorts of comments - or, indeed, that those comments are sufficient to suggest that there was tacit co-ordination between these two players in these markets. Otherwise, Mr. Brannigan's suggestions as to evidence are hearsay comments about potential collusion and they do not amount to any sort of strong or compelling evidence.

Finally, in relation to issues of retaliation, Mr. Brannigan has again relied on the Competition Commission reports. Again, that reliance is mis-placed. There is nothing in those reports that provides the substantive foundation which Mr. Brannigan would need in order to make out even the real basis for a case on collective dominance here. The Competition Commission reports show evidence of aggressive, pro-competitive responses by individual publishers against one another - not collective elimination of new entrants. Indeed, some of the analysis provided in those Competition Commission reports is instructive. In parts they refer to the difficulties that small, new entrants may face in circumstances where relatively large players are established in markets. But, that may well

be to do with the economics of this industry, and not to do with any particular activity, and certainly nothing in the Competition Commission reports suggests to the contrary in the circumstances.

Unless the Tribunal wishes me to go to the particular Competition Commission reports I was intending not to deal with these matters further.

THE CHAIRMAN: On the *Air Tours* test, you have said that the first requirement of the test is not made out here because there is no evidence that there is transparency as to price. But, I wonder whether that is really a requirement in a case where, as here, the allegation is not that they have had some tacit co-ordination with regard to price, but rather that the tacit co-ordination is with regard to the launch of a free newspaper. The allegation, as I understand it, is that they present a collective face to the market, in a sense, because they will not issue a free newspaper in an area where they both have paid-for newspapers. Now, if that is the allegation, one could say, "Well, it clearly is transparent to them both whether the other has issued a free newspaper because there it will be - the newspaper - and so they will know when the other has done it. They can easily retaliate by issuing their own newspaper". Now, if that is the allegation, are you nonetheless saying that in order to be collectively dominant they have to co-ordinate all aspects of their business strategy and not just the one in which there is an allegation that they have co-ordinate? I am not sure if I have made the point clear?

MR. BEARD: I think I do understand the point, I hope, madam. First of all, one has to look at what the *Air Tours* tests are doing. Clearly, in the context of pricing there will be a focus on transparency in relation to pricing. But, what we are concerned about is a common policy on the market. It would be strange in those circumstances for the common policy to make any sense in terms of collective dominance if it only related to one particular strand of business in circumstances where the losses or profits made by the parties concerned would be fed through whatever prices they were able to charge for the relevant products. The difficulty to some extent in working out whether or not, hypothetically, you could have collective dominance in relation to free newspaper entry on a regional market ---- With respect, it seems such a strikingly implausible way of co-ordinating behaviour - to provide a common policy, particularly in circumstances where you have a situation where one of the players already is running free newspapers in relation to the relevant markets, and in those circumstances the idea that you are co-ordinating policy in relation to the launch of the next free newspaper would seem more difficult to hypothesise as a basis of common policy for the very essence of the nature of collective dominance in any event.

But, what one would have to do in order to properly be able to articulate whether or not that could be a sufficient condition is analyse whether or not you could talk about a rational business strategy just dependent on that limited element of co-ordination and no other elements of co-ordination. In those circumstances, that, on its face certainly is difficult to articulate. Simply saying, "We will launch a free newspaper" if one is talking about the Newsquest paper being launched in Uckfield, for example ---- Johnston is already present. It is the largest player in that market. There are a whole range of reasons why the notion that that newspaper was a 'spoiler' targeted at Brannigan does not make business sense because Johnston would not be leaving the market in any event.

Now, when one is talking about a situation of hypothesising that that entry is to drive out Brannigan in circumstances where Johnston would remain but would lose business to Newsquest because that would have to be the hypothesis in circumstances where presumably it would be being suggested that it would lose less business to Newsquest than it would to Brannigan - otherwise that would not be a rational strategy. You begin to have quite a complex set of relationships that would have to be the predicate for that one point of co-ordination, to which you are referring, being an indicator of collective dominance at all. Now, it is true that that does not mean that it has to be necessarily in relation to pricing, but it may be that as a matter of business logic you would need that level of co-ordination in order for that to make any sense, and for them really to be presenting a common policy on the market. So, the answer to the question must be: in theory that may be possible, but it would depend on all of the surrounding circumstances. In practice it seems rather unlikely that you could sensibly be having a common policy, but nothing in relation to pricing in those circumstances.

THE CHAIRMAN: As far as the Competition Commission reports are concerned, I think the point that is being made - and Mr. Brannigan will correct me if I am wrong, I am sure - is that looking at the market -- at how the Commission described the market in the various reports, the launch of the Uckfield Leader was an unusual turn of events, if I can put it like that - it went against the trends, and therefore one can infer that it had some other motivation, other than a normal business practice. Now, is there anything in the Commission reports that you would want to rely on to say, "Well, that's not the case"?

MR. BEARD: It is rather difficult to prove a negative. We do not see that as part of the Competition Commission reports. There are references which Mr. Brannigan has referred to, to the Commission saying, "Well, there is clustering and clustered launching of publications". But, that suggestion is completely to the contrary of what, madam, you were

putting to me there about Newsquest's launch of a free sheet being unusual - because actually that part of the Competition Commission's analysis is saying completely the contrary - that if Newsquest is present in a market, it might be easier for it to launch. As is recognised in the Competition Commission's reports, paid-for and free newspapers may well form parts of the same market. In those circumstances, what you may well be seeing is precisely what the Competition Commission is recognising - that this is just part of a cluster development. But, that does not suggest it is unusual. To the contrary, the bits of the report that Mr. Brannigan is citing suggests that it is perfectly normal.

The concern that we had seen Mr. Brannigan citing from the Competition Commission reports was of clustering and the reference, to the phrase, 'Live and let live'. But, those factors alone do not tell you anything sufficient to suggest that there is any sort of co-ordinative behaviour at all. If one looks at 'Live and let live' as a proposition, what is actually being said is that people will enter markets where they think that they have got the best chance of doing well in them. That might well be very sensible in circumstances where you already have a foothold. That is why you get the sort of clustering effects. It may be tougher for Newsquest to launch in an area where it does not have any presence whatsoever, whereas it might be much easier for it to launch a free sheet where it is already running a paid-for sheet; and has relationships with advertisers; has profile with people in the area - whatever infrastructure is required. None of that suggests any sort of co-ordinative behaviour with anybody else at all. Even if, as a whole, those sorts of trends across a market could cause concern, those are matters that would have to be dealt with in an entirely separate investigative procedure. When I say that, I do not mean under the enforcement provisions because there is nothing suggesting that that is a matter that falls foul of the Chapter 2 prohibition, or indeed the Chapter 1 prohibition.

THE CHAIRMAN: Just going back to something you said before - that the Competition Commission does comment on the difficulties that face a new entrant - that even though barriers to entry are low in the sense of it not costing a great deal to start a newspaper, they sometimes face a robust challenge from the incumbent ---- As far as I recollect though, they do not say anything as to whether that is an unlawfully robust response, or an acceptable pro-competitive robust response. They just comment on the fact that this sometimes happens.

MR. BEARD: I do not think that they make explicit points so far as I recall. I do not pretend I have read them in sufficient detail sufficiently recently that I could give you an absolutely secure answer, but I would be fairly stunned if they did say anything. I would equally

suggest that, in circumstances where there is no suggestion that the attitude of the parties is unlawful, it would be to read an awful lot into the Competition Commission's analysis to suggest that it was implying that it was somehow unlawful. After all, the Competition Commission, if it considers that there are concerns, for instance, in relation to agreements that it encounters in the course of an investigation, such that the agreements might fall foul of the relevant prohibitions does tend to indicate that. Indeed, of course, if there is any European dimension it has to because of the way that the modernisation regime works. It is not actually a designated enforcement body for the purposes of Article 81. In those circumstances it would be anticipated that it might mention it. It cannot be put higher than that. It is not certain that it would, but the absence of any detailed critique of these things sends a very clear that it is reaching no conclusion that these matters are unlawful.

Actually, the commentary that goes alongside them suggests that this is simply part of the course of dealings in the market. There is no suggestion that those are matters that concern the public interest in the context of the merger control.

Indeed, taking one step back, that is perfectly understandable. If you see someone entering a market profitably then that might well be the trigger for you to do the same. Although Mr. Brannigan has suggested here that the freesheet launched in Uckfield was a "spoiler" aimed at him, it may be that Mr. Brannigan did have a very good business idea, it is just that someone else was able to carry it out more effectively and more efficiently and was able to continue a freesheet, because we know that that paper continues and that he, in fact, acted as a signal that there was an opportunity there to be had.

THE CHAIRMAN: I think that brings us conveniently to the next subject heading, Mr. Beard.

MR. BEARD: Alleged abuses. I will briefly go through the various provisions. First of all, there is the allegation that the manner in which the word "life" has been protected by Newsquest with the threat of litigation is without justification and is part of a scheme of dominant predatory behaviour. It is not a well particularised ground. No error of law or fact has been identified. The allegation must be read in the context of the preceding assessment of market and dominance. In any event, the circumstances in which litigation can ever amount to unlawful anti-competitive are very, very limited indeed. It is clear from the case of *ITT Pro Media* that it is only in exceptional circumstances that litigation can ever be seen to be being used for anti-competitive purposes. *ITT Pro Media* is not in the bundle. We have copies with us if that would assist the Tribunal. I can read the quotes and provide the copies if that would be of assistance.

The only reason I stress this is simply because the citations given to *ITT Pro Media* are to

the Commission's approach and not to the court's judgment. The court's judgment is clear and emphatic in balancing the proper interests of allowing people full access to the courts and tribunals of the Member States with which they are dealing, and indeed in terms of access to the European courts, that it will be very rare that such access should be curtailed by reasons of competition law.

THE CHAIRMAN: If you would just tell us, Mr. Beard, which paragraphs in the court's judgment you would particularly draw our attention to we can check it ourselves.

MR. BEARD: Certainly. The copies are here and I will have them passed forward, but paras.1 to 6 of the summary, and then paras.60 and 61 articulate the general principle, and then there is a more detailed consideration that goes on in relation to the arguments of the parties, and the outcome is at paras.72 and 73 so far as is relevant. Then the findings of the court, para.93.

The second alleged abuse is the launch of the Uckfield spoiler, the Uckfield Leader free newspaper by Newsquest. As set out in the Decision, paras.40 to 51 and 55 to 61, and re-emphasised in the Defence, paras.69 and 70, the OFT maintains that the launch of the Uckfield Leader offering below cost advertising space was a perfectly legitimate behaviour as it was offering new title on a short-run promotion. Newsquest had limited readership in the area, 7 per cent, had scope to expand and compete. None of the other incumbents reacted in the same way. It made no sense to treat this as a spoiler when the other incumbents would not be expected to exit. It is still running long after Mr. Brannigan has left the market. Therefore, it must properly be assumed to be profitable. There is no convincing evidence of any cross-subsidy. Those points are more fully articulated in the Decision and Defence, unless the Tribunal wishes me to rehearse them. A number of those points have been touched upon in the course of submissions already.

THE CHAIRMAN: The point that you make about it being of short duration, I am not sure that helps you where, on Mr. Brannigan's case, it was effective, if he was right that the intention behind launching the Uckfield Leader was to cause him to exit the market. If it succeeds in achieving that goal in a short time, it is still right to say, "Well, because it is of short duration it is not an abuse"?

MR. BEARD: I think perhaps the manner in which I compressed the point is perhaps not fair to the way the OFT approaches it. What the OFT is saying here is that it is perfectly legitimate, when you are launching a new publication, in order to get readership, in order to get take-up, you promote it. It is not just in newspapers, it is in all sorts of entry into all sorts of markets that you promote a product. It is well recognised in case law that there

may be circumstances where, for instance, the Akzo test for predation cannot possibly be sensibly applied in circumstances where you are trying to get something off the ground. So what the OFT is saying is that, contrary to the implicit assumption that there is a conspiracy against Mr. Brannigan, actually this conduct is perfectly consistent with the competitive action of someone wishing to enter a market. So the short run is significant in the sense that it fits with what is a perfectly coherent pattern of rational competitive entry. Obviously if the discount was a long run so that it looked like there was not any sensible profitability and that there the predation was just being maintained to drive someone out of the market obviously that would work in the other direction. So it is not that short run, if effective, cannot amount to predation, it is that short run, as seen in this context, is completely consistent with a competitive response.

So the point has to be seen in the context of the assessment being undertaken by the OFT: is what is going on here really a driving out of Mr. Brannigan, or does it fit with what we see in all sorts of markets much of the time? If it did not fit with that then that might cause further alarm bells to ring. What we see is not that.

The next alleged abuse is the exclusion from the market by the refusal of Newsquest Sussex to print Mr. Brannigan's paper. Again, this ground is not adequately particularised and does not really identify any error of fact or law on the part of the OFT as a ground of challenge. It was not a refusal to supply. It was a refusal to supply by one part of Newsquest. It did enable Mr. Brannigan to publish his newspaper. There might be all sorts of reasons why a particular printer does not accept business from somebody. Certainly, if one is trying to characterise this in terms of an infringement of the Chapter 2 prohibition, there was not any refusal to supply an existing customer. More generally, there is not an unlawful refusal to deal here. There is not any basis for suggesting that the requirements of Oscar Bronner in relation to an essential facility are made out in relation to the Newsquest Sussex print works. In those circumstances, we do not understand on what basis it can be said that this amounts to an abuse.

THE CHAIRMAN: You are taking us through the various allegations individually, but is there a point that the whole can be greater than the sum of the parts in the sense that if you have a number of events or a number of incidents of conduct, none of which in itself might constitute an abuse, it then does start to look like a course of conduct which might be abusive taken as a whole, in particular since we have no information about what Newsquest would have said had they been asked by the OFT as to why they had done these various things?

MR. BEARD: It is certainly not something that could be presumed by the OFT or by the Tribunal. In circumstances where it is necessary to consider each of the allegations, it would be quite wrong for the OFT simply to take the view that there were all sorts of allegations being made, and that because lots of allegations were being made, in those circumstances cumulatively they could be treated as abusive. It is quite right to look at each of them and consider them as to whether it amounts to an abuse or a possible abuse because if they do not amount to a possible abuse then the idea that one can take lots of examples of matters that do not suggest abuse and from it come to an abuse is a proposition that needs to be dealt with with real circumspection. That is not to say that it is impossible that a course of conduct is such that it is abusive when taken in sum, but that is a step that one would need to be extraordinarily cautious in taking in circumstances where, taking the individual allegations, there is no real basis for a suggestion that each amounted to an abuse.

MR. MATHER: In para. 74 of the defence, at line 3, there is the sentence, "-- nor was there any exclusionary intent".

MR. BEARD: I think the point that is being made is in connection with the preceding sentence - that if you are saying to someone, "You can't print at Sussex, but you can print at Essex" you are not actually excluding them. To suggest that that would amount to exclusionary intent would be a substantial leap. I think that is what is being said there.

MR. MATHER: But how would the Office know there was no exclusion - or is that a presumption?

MR. BEARD: As I say, it is working on the basis that in circumstances where Newsquest, the group, is saying, "You can't print here, but you can print there" ---- The idea that you are being excluded from the ability to print and therefore run your newspaper and sell it in the relevant area is not one that could sensibly have been drawn from those facts. If Newsquest had said, "No, you can't print at Sussex, and you can't print at all", then in those circumstances the question might remain open. All that is being said is that the fact that Newsquest is offering to print in any event militates against any conclusion that one could infer exclusionary intent in those circumstances. It is perhaps too compressed, but that is all that is being said there - not that there is not a more substantial point being made. Miss Howard has pointed out to me as well that in *ITT Pro-Media* itself there was an observation that it is possible that non-abusive conduct can amount to an abuse, but in that context it was stressed that it was only in the context of super-dominant companies that that sort of leap could be made. That reinforces the point I was making earlier that although it

cannot be excluded **per se** that you will need a fairly compelling analysis to enable you to reach such a presumption, it could clearly be wrong to start by looking at matters in the round without having considered whether each of the allegations itself amounted to abuse. I can provide you with the reference to that. That may assist to that comment more broadly.

The fourth alleged abuse was the targeting of Brannigan customers. To some extent this overlaps with the arguments in relation to the Uckfield Leader since the advertising targeting was alleged to be part of the process of the launch of that paper. Those matters, of course, were not substantiated before the decision was taken. So, in any event, they would not form a proper basis for criticising the decision. But, in relation to the ground of appeal and the revised notice of appeal, he fails properly to identify what error the OFT has made in relation to these matters. The OFT has dealt with these matters in its decision at paras. 52 to 54 and in the defence at para. 75.

THE CHAIRMAN: Which part of this do you say was not alleged at the time of the decision?

MR. BEARD: Paragraph 87 of the revised Notice of Appeal characterises Newsquest's approaches to Mr. Brannigan's Advertiser's selective price discrimination and systematic targeting of customers. That is not the way these allegations have been phrased previously. We have had the particular example in relation to the Halifax, where we had one instance of someone being offered an exclusive deal with the new entrant. The nature of exclusive deals are that, as such, other people do not get their business. When you are a new entrant in those circumstances that might well be part of the promotional methodology that one uses. There is no suggestion that it is anti-competitive. When one comes to talk about a systematic approach, if that is what is being put forward, we simply do not have the proper particularisation of how that is made out in this case at all, apart from the fact that this is being suggested some time after the decision. It is not denying that certain point were made previously. It is not pretending that the Halifax allegation had not been made previously at all. It is simply saying that those alone did not amount to abusive behaviour, and the further allegation that is now being made is not made out and is not properly particularised.

Then, the final issue that arises in relation to the questions of abuse relate to causation, as raised by Mr. Brannigan, and dealt with in the decision at para. 82 and in the defence at para. 77. This, as a separate head, does not add a great deal to the previous points that have been made. Here we have a situation where the evidence of abusive behaviour on behalf of this notionally dominant company are very weak. The evidence that had been put before

the OFT indicated, in fact, that Newsquest and Johnston followed normal and perhaps even vigorous competitive responses. On the evidence provided, the demise of Mr. Brannigan's newspapers, sad though it may be for Mr. Brannigan in particular, given his effort and dedication, are not attributable to anti-competitive behaviour.

THE CHAIRMAN: Are you saying that they are not attributable to the behaviour of Newsquest or that they are attributable, but Newsquest's behaviour was simply aggressive competition rather than unlawful competition?

MR. BEARD: I think we are saying both, in the sense that we do not know whether the demise was caused by Newsquest's activities, but if the cause was Newsquest's activity, we do not consider that that was anti-competitive. Of course, in relation to making out his case, Mr. Brannigan would have to make out both of those points insofar as he is alleging that this is a ground.

THE CHAIRMAN: But it would not be an element in establishing an infringement to show that ---- The element of causation - obviously if Mr. Brannigan was pursuing a damages claim, then he would have to show that the behaviour was unlawful and that it caused his loss. But, does he have to show the second element in order to establish an infringement?

MR. BEARD: Perhaps it is right to deal with this the right way round in the sense that this was a point made by Mr. Brannigan in support of his claim. Essentially it is a recapitulation of his earlier points, but under a different head. All the OFT is saying is that it does not accept that his demise was caused by Newsquest or caused on an anti-competitive basis. But, that is a responsive submission. We do not suggest it adds anything. So, we are not making any submission about precisely what tests have to be fulfilled here. It is simply that when one works systematically through the five grounds that have been raised as grounds of abuse, Ground 5 is headed 'Causation'. There is no greater significance attached to it than that, madam.

That concludes the five grounds that were put forward as heads of abuse. That then takes us naturally to the seventh topic - Chapter 1 infringement. Again, this recognises that the Office were not recognising the points that had been made about advertising contracts. The decision at paras. 52 to 54, 73 - 75, and 77 - 79 deal with matters relating to the Chapter 1 infringement and it is covered at para. 78 - 82 of the defence. It is very unclear what the extent of any exclusive purchasing requirement was, or whether it was targeting Mr. Brannigan, or whether it was actually being targeted at other publications. There is no evidence that advertisers are prevented from advertising in other publications run by Newsquest's competitors at the moment beyond the statements that have been referred to.

Certainly there was no basis on which the OFT was able to determine that these arrangements would have appreciable effect for the purposes of the analysis. In any event, the recognised law, and in particular the safe harbour provided by the vertical agreement's block exemption, which is essentially imported into domestic law as a parallel exemption, would mean that exclusive purchasing of this sort is the sort of thing that would be considered as perfectly acceptable as long as the party to hearing the exclusivity inured the benefit of that exclusivity, and had market share of less than 30 percent. Of course, where we are talking about Uckfield and Newsquest we are talking about 7 percent.

As to the alleged cartel that has been put forward, there really is nothing beyond hearsay evidence. That sort of hearsay is far from the sort of compelling evidence that would be required to meet the Napp standard. Now, earlier this morning we had this discussion about what it was that was the relevant standard to be met in relation to matters being put forward on appeal. Obviously, the test is one of balance of probabilities, qualified as discussed in the context of the various judgments. The Tribunal asked, "Where were the lionesses in this sort of appeal?" It may be that allegations of cartels, or indeed collective dominance on the basis of the sort of material being put forward are those sorts of lionesses, but it is put no higher than that. The primary submission of OFT is that in this case Mr. Brannigan must make out his appeal on the balance of probabilities. Nothing here suggests that he has done so.

So, turning to issues of relief it is the OFT's case that this appeal should be entirely dismissed and the decision upheld. It is a non-infringement decision taken at an early stage without full investigation, and one where the accused companies have not been participating. In those circumstances it would certainly be inappropriate for this Tribunal, if it was concerned about anything that the OFT had undertaken, to substitute its assessment in the circumstances that substitution power exists, of course, under para. 3(2) of Schedule 2 of the Act. Furthermore, given the state of the inquiry that has been undertaken the OFT equally cannot see that if this Tribunal were minded to remit this matter, that any particular part of this could properly be separated out. But, those latter submissions are all made without prejudice to the primary submission, which is clearly that this decision was entirely appropriate and should be upheld.

It is quite right to sympathise with the difficulties of a litigant in person in dealing with these sorts of matters. But, the law that applies does not change for them. The Tribunal has been most sympathetic in its dealings with the litigant in person, and it has been extremely flexible in the way that it deals with these matters. But, that flexibility in relation to

procedure cannot change the way that substantive law applies. It is a complaint that has been made. It is a complaint without merit and an appeal without merit. There is no good evidence of dominance. There is no good evidence of abuse. Ironically, the party to have the largest share in a relevant local area is not the one that has been alleged to be directly abusive. I have already adverted to the difficulties in making a wrong assumption that if something unpleasant happens to somebody in a market, someone must be to blame, and that there may be a dominant entity that is to blame. That is a mis-conceived approach. In fact where a small player who is a new entrant to a market does not survive, it may simply be that larger players are reacting and, indeed that new entrant may be a signal to them that they are missing a trick. That appears to be what has happened here, although in these circumstances that does not form part of the OFT's judgment, nor need it form part of the OFT's judgment. The OFT need only look at the material before it and conclude that on the basis of that material there is not sufficient evidence to conclude that there has been an infringement, and in doing so it bears in mind how parties behave in competitive markets. That competition in markets may be brutal. It is not sentimental and neither is Competition law. Whilst, on a personal level, the efforts and commitment undertaken by Mr. Brannigan are recognised and are admirable, where an effort fails, although it may be natural to feel sympathy for the individual concerned, it does not mean that Competition law here must protect that effort, and in those circumstances there is not any basis for allowing this Appeal.

Unless I can assist the Tribunal further, apart from providing the reference to *ITT Pro Media*, those are the Office's submissions.

MR. MATHER: If I may just ask one or two questions on your final remarks, Mr. Beard. First, I think I heard you say that in these circumstances the OFT need only to look at the material before it in coming to its decision and that is your settled view. That is the extent of its obligation.

MR. BEARD: The extent of its obligation is to consider the complaint. In considering that it looks at the evidence before it. In doing that it brings to bear its experience and its breadth of knowledge. It would be wrong to say that it only does that. After all, it was the OFT that first referred to the Competition Commission reports. It was the OFT that mentioned them in the Decision. They have then been taken up by Mr. Brannigan as being matters upon which he wishes to rely against the OFT. So there you have an example of the OFT going wider than that material. It is what the obligation upon the OFT is. Here we have a situation where the OFT quite properly looks at the material, considered the case being put,

considered it bearing in mind its range of experience and, on the basis of the material, considered that there was not dominance and that there was not abuse and, in those circumstances, rejected the complaint, and quite properly Mr. Brannigan is entitled to appeal against that. It is in that sense that the OFT considered the case on the basis of the material before it. It has been unambiguous throughout in saying that it did not carry out further substantive investigative steps.

MR. MATHER: Yes. So essentially the word "only" should be omitted really. It can take action going beyond the material before it but that is within its discretion?

MR. BEARD: Absolutely, there is no doubt about that. I am sorry, if that was what I said then that was quite inappropriate because this case proves that even within the confines of this case where there is not further investigation undertaken, it is not limited in that way.

MR. MATHER: Particularly I was struck by the cartel issue. When the defence says that this was unsubstantiated tittle-tattle, I think the phrase is, from Johnston employees, is that also something which need not be followed up if the OFT is put on notice that discussion by employees of cartelised activity? That also need not trigger any action?

MR. BEARD: No, it need not trigger any action. The OFT is not naïve. It recognises that evidence of cartels, although it may in many circumstances come through the leniency programme and in those circumstances you do get a much more detailed picture, if you are not getting the information through a leniency programme it may come through rather tendentious sources, sources for instance with an axe to grind. It obviously has to consider those matters in the round. It may well be that disgruntled employees are the sort of people that do usefully reveal that there may be grounds for pursuing a cartel. That is absolutely right.

The question is a slightly different one, as posed, which is, is it obliged to go and do anything about tittle-tattle from employees? The answer is no. If it were not the case there would be a remarkable incursion, I would suggest, upon the discretion of the OFT in how it dealt with matters given that disgruntlement and speculative accusation is found in all parts of economic activity I do not doubt.

THE CHAIRMAN: Thank you very much, Mr. Beard. I think, Mr. Brannigan, you have heard a great deal of toing and froing in the course of the argument. We will now rise for ten minutes to give you a chance to collect your thoughts and then it will be your turn to come back on any of the points that have been made by the OFT that you have heard.

(Adjourned for a short time)

THE CHAIRMAN: Mr. Brannigan?

MR. BRANNIGAN: Please, bear with me. I shall try my best. With all the mention of lionesses and alsatians around today, I feel like a gazelle at the moment with a pride of lions around me. So, please, excuse my nervousness.

There's not really a lot I can say towards this morning with the laws and all of that. That's just straight over my head. I'm just a member of the public trying to get justice. If I go on to this afternoon, I've made a few notes and I'll try and make sense of them, if that's okay.

Working through, the OFT tried to make mention about the market definition - local and regional advertising spend, and so on. They found it quite hard to define local spending for advertisers and the effect it would have on our regional basis and how much worth they would get if they advertised regionally. It just started making me think then, "How can you actually define market domination if you're not fully aware of the market and analysing it properly?" I, as a lay person, can only do so much, and I would have hoped that the OFT would have been able to look into that further to try and define that.

Also, with market domination I have referred to the printing before, but the only printing works in Sussex is Newsquest, Sussex. There aren't any others. Johnston Press had closed theirs down years before. So, within East Sussex, and within Sussex as a whole, the only way to get printing for newspapers is Newsquest, Sussex.

I have made mention about Kevin Baker, who was the print manager at Newsquest Sussex. He was subsequently fired by Newsquest for first of all giving me print slots which were available. He was willing to bear witness which, as a lay person, I would hope the OFT could have made a simple 'phone call to him and seen evidence that there was predation. He then helped me go on to Newsquest, Colchester, which Newsquest, Sussex weren't happy about. I did mention that in my revised defence. So, I think there are very important eye witnesses, even from within Newsquest that can prove dominance. Speaking to my counsel earlier, he suggested that probably the OFT have probably spent about £100,000 - £150,000 on this case at present, basically just defending their right not to look into it. As a member of the public I think, "Why couldn't some of that money have gone into investigating my claims?" The spokesperson goes on about balance of probability, and that when you consider all of the individual facts, the does not seem to be any probability of predation. But, as you mentioned yourself, if you have a look at it on the whole, then surely the balance of probability does point to predation and infringement of the Competition Act.

I must apologise for the difference in figures from my first submission to later. That was

basically due to me being asked to define the markets more, to be more comprehensive in my figures. So, not only did I look at the local newspapers, but I think later in my figures I did include such publications that Newsquest do, such as Scoop, and so on. So, the full advertising revenue across the region can be clearly defined. But, again, that was very much from a layman's point of view, just trying to look on the internet rather than as someone within the industry or with the power of the OFT and being able to investigate properly.

There is mention about the two main players in the area, and that collusion could not be proved. I find that quite difficult to believe because when you look at East Sussex - or even Sussex as a whole - you see that Newsquest publish in Brighton and there is no Johnston. Johnston publish in Lewes and there is no specific Newsquest. There's a little bit of cross-over with the Argus, but nothing like that. The same in Eastbourne, where I actually had backing to extend into. That's Johnston's jewel in the crown where they have the Eastbourne Herald there. There are no Johnston titles. It's the same throughout basically the whole of the south region where there is one major player - either Newsquest or Johnston - and the other leaves them alone. During my time there - fair enough, it may just be tittle-tattle - it was always known that -- it was agreed that there wouldn't be any cross-overs as such. In fact, for myself, I've now just moved up to the north-east for the first time in my whole life, because of a domination in Sussex of these two newspapers - just to get a newspaper job again. So, I'm back to where I was fifteen years ago on the ground. I've had to move up to the north-east out of my home county because of all of this.

With regards to the Uckfield Leader - the spoiler launch - it was mentioned that first of all they might have launched because of the prospect of profitability, seeing how well my newspaper was doing. I find that hard to believe as well because they launched so soon after I did. If Newsquest have records that they were looking to launch into Uckfield before my launch, then, fair enough, it does take time to monitor and assess. But, with it being so soon after mine, they could not have assessed my profitability as such. They would have probably waited a bit of time to see how I got on.

They say they had relationships, as such, with people in Uckfield who were advertisers. So, that was another reason for launching in Uckfield. It was mentioned that they only had 7 percent readership in that area. So, that does not really show a strong link with the advertisers in the region.

With the Uckfield Leader, also it was mentioned that cheaper costs for advertising as a

launch for an incentive to try the product is a normal procedure. But, I am pretty sure that I've read within the Competition Act that if the cost is below -- if, basically, the charge is below the actual cost of production, then that is an indication of predation. If clients are actually being given full-page advertising in full colour at no cost, then surely that is below total cost.

It's difficult for me to really get across what I need to say because I was ... the basics of the Competition Act and how it would be protecting small businesses and members of the public, and how SMEs such as myself are basically the life-blood of competition, and that we are encouraged to start up, and that we do have organisations such as the OFT to cover our backs. I have been fighting now for three and a half years just to get justice. Thank you for recognising that and thank you for your help in listening to me. It shows my commitment to getting justice and what I believe, and how strongly I believe in it. The whole procedure does not seem very conducive to small businesses, to members of the public. The main arguments have always been about, "Mr. Brannigan has not put his case in the right wording. He needs to do this -- do that" rather than the actual helping me. It seems that the OFT can easily set aside ---- For instance, the money they have wasted in this, they could easily have set aside a department within the OFT where they actually look into the first merits of a case and then decide 'Yes' or 'No', they should be drawn out. They say there is a possibility that there are worthwhile cases not being looked into. I do see myself as one of them. So, if they can just set up a department where they do minor investigation, and do a few investigations and then have more cases such as mine, then I think they would be champions to the little people more than they are now, because it definitely feels like it's me against them. It shouldn't be.

If I do fail, then the message that would go out from yourselves and the OFT to the newspaper industry, and maybe to other industries, to Newsquest, I don't think would be very conducive to small businesses starting up. It would basically show that they can ride rough-shod over any new entrants, and there wouldn't be any come-back on them. After the Aberdeen Journal you would have thought that there would have been more cases like this where it had set a precedent to actually protect the smaller businesses, but it just seems like nothing has been learnt by the OFT from that. All I can ask is just that you hear me fairly, and if it is possible for a few investigations, then speak to the people - the eye witnesses, such as the print manager at Newsquest. I think there will easily be found grounds to say, "Okay, there could be suspicions to investigate". That's all I ask really.

THE CHAIRMAN: Thank you very much, Mr. Brannigan. As I said at the outset we will now

go away and consider what we are going to do, and we will notify you in due course when a decision will be handed down. I think it only remains for me thank Mr. Brannigan for coming here today and making his submissions, and Mr. Beard as well on behalf of the OFT. They were very clear and helpful in what is quite a complicated case. Many thanks to the parties.

MR. BEARD: Madam, just one matter. I promised a reference to *ITT Pro-Media*, the reference in question is in the summary at para. 6(2) and at para. 139. I should stress that that is talking about non-abusive conduct in relation to litigation - not in relation to collections of non-abusive conduct. Obviously, it may be of assistance to the Tribunal in that regard. If I might just correct one thing: I referred to Mr. Brannigan having referred to the Commission decision. It was not. It was the Commission's submissions in *ITT Pro-Media*. I am sorry. That was my mistake and my mis-recollection.
