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IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1104/6/8/08

Victoria House
Bloomsbury Place
London WC1A.2EB

Monday, 16th March 2009

Before:

THE HON. SIR GERALD BARLING
(President)

PROFESSOR JOHN PICKERING
MR. GRAHAM MATHER

Sitting as a Tribunal in England and Wales

BETWEEN:

TESCO PLC Applicant

and

THE COMPETITION COMMISSION Respondent

and

WAITROSE LIMITED
MARKS AND SPENCER PLC
ASDA STORES LIMITED
THE ASSOCIATION OF CONVENIENCE STORES Interveners

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HEARING

APPEARANCES

Mr. Mark Hoskins QC and Mr. Julian Gregory (instructed by Freshfields Bruckhaus Deringer LLP) appeared on behalf of the Applicant.

Mr. Peter Roth QC and Mr. Daniel Beard (instructed by the Treasury Solicitor) appeared on behalf of the Respondent.

Mr. Tim Ward (instructed by Slaughter & May) appeared on behalf of Asda Stores Limited.

Other Interveners: The Association of Convenience Stores, Waitrose and Marks & Spencer did not appear and were not represented.

THE PRESIDENT: Good morning. Thank you very much for your written submissions which we found very useful. I am hoping we are going to be told that you have agreed everything and all we have to do is sign the order. No? Have you reached agreement at least on the quashing part of matters?

MR. HOSKINS: Your heart will sink when I say a degree of agreement. You have seen the way that the matter has progressed where originally we suggested all the formal paragraphs which said "We recommend that …" should be deleted and that is agreed. The waters became a bit muddier when the question of what should happen to paragraphs which contain, for example, reasoning relating go the competition test, what should happen to them? You have seen the most recent correspondence where we say that if you are going to strike down some of those you have to do it consistently and the position we take is that if a paragraph says that the competition test is necessary or effective or appropriate then that begs the question and those should go. We also say that any paragraphs that assume the competition test is going to be adopted and so, for example, suggest that something else should follow to make sure the competition test is effective should go.

As you saw on Friday, we produced a list of the paragraphs we thought satisfied those criteria. We do not have agreement on those paragraphs. Mr. Roth and I have agreed to suggest to the Tribunal that we try and reach further agreement and if we cannot then we make submissions in writing, but then of course that will mean the matter going beyond today, but we think there certainly is scope for us to have further discussions.

THE PRESIDENT: Yes, it is obviously a matter that ought to be capable of being agreed, but speaking for myself it seems to me that what the Commission, looking at their submissions, want to do is simply to achieve a certain amount of consistency; I am sure what you all want to achieve is a certain amount of consistency in the existing report and there may be some grey areas but it ought to be capable of being agreed. I am just a bit concerned about how long that would take, but we can perhaps deal with that later. Does that mean that you think it would be better if we did not concern ourselves at the moment with that?

MR. HOSKINS: I think that is right. We have produced a list, Mr. Roth has not had the opportunity to come back and say "Yes", "No", "Yes", "No", so I do not think that battle can be joined today although perhaps Mr. Roth can comment on where he is up to with it.

MR. ROTH: There is, as Mr. Hoskins said, a measure of agreement in certain paragraphs and I think at the outset of our skeleton we have clarified one or two points we have been asked. The additional list that we got on Friday afternoon we have not been able to work through fully yet. Some points I am sure it is clear already can be agreed, some we will have to go

back on, but we share your hope and expectation that with goodwill on both sides it can be agreed. It might to some extent be affected by the outcome of the decision you take on the question of reference back which of course has implications for how the report stands.

THE PRESIDENT: Yes, I see that. So as far as the way forward this morning, shall we park the question of the area between you on quashing and move on then to the question of referring back?

MR. HOSKINS: I think that is sensible, and I think that is certainly what Mr. Roth and I had agreed would be the sensible course as long as you are happy with that?

THE PRESIDENT: Yes.

MR. HOSKINS: As you say it may well be that we need to put some sort of timetable on it just to focus people's minds but we can do that when we wrap up at the end of this morning.

THE PRESIDENT: Right. So let us turn to that then, shall we?

MR. HOSKINS: Again on the referral back issue Mr. Roth and I have discussed how we handle it and it has been agreed that I should go first in the sense that I am making the legal submission that he wants to shoot down so I am quite happy to lead on that.

THE PRESIDENT: Just pause for one second, would you, Mr. Hoskins? (After a pause) Do carry on.

MR. HOSKINS: You will have seen from the skeleton arguments that there is a degree of progress on each side as to what the dispute is about. On our side we point to the fact that s.137(1) of the Act imposes a two year time limit within which the Commission must prepare and publish its report and our submission is that it is therefore not open to the Tribunal to refer this matter back to the Commission because the time limit has expired in this case. Part 4 of the Act is in actually in our authorities' bundle behind tab 1, because I mean to take you through it.

The other side of the coin, the Competition Commission's position, is that our interpretation is not correct, cannot be correct because that would mean that there could not be any action in any case where there was a successful appeal, because generally they take a certain amount of time to do things. That is, broadly speaking, where the battle lines are drawn. Our submission is that the answer to that debate actually lies in the statutory construction of the Act. You do not have to look beyond the Act applying normal principles of construction. To make that point good I would like to take the construction issue in three stages. First, I would like to look at what the Commission's statutory duties are, in particular what has to be contained in its report. Secondly, to look at the Tribunal's powers to refer back and none of those are new grounds, they are canvassed in the skeletons, but I

will take you through the sections, and the third point, which is a development, having seen the skeleton arguments, is what statutory powers does the Commission have after publication of its report, because there are, in fact, express powers in the Act, and we say that gives the answer to this particular legal question.

So the first stage: what must be contained in the Commission's report, and I need to go through the Enterprise Act, as I say Part 4 is in our supplementary bundle of authorities behind tab 1. If I could ask you first of all to turn to s.134, p.104, this is "Questions to be decided on market investigation references". At the bottom of the page:

> "The Commission shall, if it has decided on a market investigation reference that there is an adverse effect on competition, decide the following additional questions –
>
> (a) whether action should be taken by it under s.138 ….
>
> (b) whether it should recommend the taking of action by others ….
>
> (c) in either case, if action should be taken, what action should be taken and what is to be remedied, mitigated or prevented."

But a distinction is drawn already between action to be taken by the Commission under s.138 and a recommendation of action to be taken by others.

If we can look next at s.136(1)

> "The Commission shall prepare and publish a report on a market investigation reference within the period permitted by section 137."

That is establishing a time limit for preparation and publication. Then importantly, 136(2) tells us what the report has to contain.

> "The report shall, in particular, contain (a) the decisions of the Commission on the questions which it is required to answer by virtue of s.134".

So, that includes action to be taken by it, and includes whether it should recommend the taking of action by others. So, we say it follows that any recommendation that action should be taken by others must be contained in the report. S.137(1) - that, of course, was the cross-reference in s.136(1) - the Commission shall prepare and publish its report under s.136 within the period of two years beginning with the date of the market investigation reference concerned.

So, we say it follows from that that any recommendation made by the Competition Commission must be contained in its report and any report must be prepared and published within the statutory time limit of two years. That is Stage 1.

Stage 2 - the Tribunal's powers to refer back. We need to go through to s.179 at p.137 of the printed text. Obviously we are primarily concerned with s.179(5).

> "The Competition Appeal Tribunal may [so, it is a discretion, not an obligation] dismiss the application or quash the whole or part of the decision".

That is fine. We have already dealt with that. Then,

> "(b) -- where it quashes the whole or part of that decision, refer the matter back to the original decision-maker with a direction to reconsider and make a new decision in accordance with the ruling of the Competition Appeal Tribunal".

We first of all make the point that there is nothing in sub-section (5)(b) -- there is no express power to override the time period laid down in s.137(1). So, at this stage of the analysis, Stage 2, there is a potential tension between, on the one hand, the Tribunal's power to refer back and, on the other hand, the obligation of the Commission to specify any recommendation in the report which has to be published and prepared within the two year time limit. We say that as a matter of statutory construction there is no such tension in the Act. We say that follows because of what s.138 provides. Can I ask you next to turn to s.138?

THE PRESIDENT: This is the action by the Commission?

MR. HOSKINS: That is absolutely right. Duty to remedy adverse effects.

> "(1) Sub-section (2) applies where a report of the Commission has been prepared and published under s.136 within the period permitted by s.137 and contains the decision that there is one or more adverse effect on competition.
>
> (2) The Commission shall, in relation to each adverse effect on competition, take such action under s.159 or s.161 as it considers to be reasonable and practicable -
>
> (a) to remedy, mitigate ..."

So, this is action that is to be taken apparently following the publication of the report. That follows when one compares sub-section (2) with sub-section (1). Section 138(3),

> "The decisions of the Commission under sub-section (2) shall be consistent with its decisions as included in its report by virtue of s.134(4) unless there has been a material change of circumstances since the preparation of the report, or the Commission otherwise has a special reason for deciding differently".

I am not going to make any specific submission on (4), (5), or (6), but you may want to cast your eye over them in case Mr. Roth wishes to refer to them.

So, the system under the Act is that in accordance with s.138(3), in the normal course of events, the Commission must adopt remedies in accordance with the findings in its report.

However, it does have power to adopt remedies which are different from those contained in the report where there has been a material change of circumstances or where it has a special reason for deciding differently.

Now, we submit a ruling of the Tribunal quashing all or part of the original report would constitute a special reason for deciding differently.

So, s.138 expressly regulates what powers the Commission has after publication of its report. S.138 is expressly limited to action taken under s.159 or s.161.

THE PRESIDENT: S.138 does not apply to the competition test because that is a recommendation; is that right?

MR. HOSKINS: That is the point I am coming to - because what one has is that after it has prepared its report the Commission can adopt a different remedy, or a remedy on a different basis where there has been a material change of circumstances or a special reason for deciding differently - we say a Tribunal judgment. But, the power is limited to making final orders or accepting undertakings.

THE PRESIDENT: That is the action they can take.

MR. HOSKINS: Absolutely.

THE PRESIDENT: The reason that there is no equivalent, in a sense, for recommendations is because the Commission does not do anything thereafter.

MR. HOSKINS: Absolutely. That is the point, sir. What we say is that the draftsman of the Act has taken account of what can happen after publication of the report with the statement of the remedies in the report. One of the things that is taken account of is, we say, a possible Tribunal judgment - a special reason for deciding differently. So, the draftsman has decided that in those circumstances the Commission can adopt a different final order or accept a different undertaking from that which it had provided for in its report. But, tellingly, there is absolutely no power whatsoever for the Commission to adopt a recommendation which differs from that contained in its original report.

MR. MATHER: A special reason for deciding differently -- Are there any other cases of legislation where decisions of appellate bodies would be described as such?

MR. HOSKINS: I am not aware of any off the top of my head, no. This could cover all sorts of possibilities. It could cover, for example, a final report being published and then one of the major players in the market goes bust, and therefore suddenly any remedy that was put forward on that basis simply does not make sense any more. So, I fully accept that this is not just about a Tribunal judgment. But, we submit that it clearly includes the possibility of a Tribunal judgment.

MR. MATHER: Do you think if the draftsman had meant that - an appellate decision - he would have said so, rather than leaving a sort of vague phrase which covered other things to be extended to that?

MR. HOSKINS: Well, he may have done, but there is no need. A draftsman will be as economic as possible with language. Certainly one of the principal bases upon which legislation is constructed is rather than, for example, trying to anticipate individual situations in which this sort of provision might be required, it is far better to make a general provision that this part shall apply where there is a material change of circumstances or a special reason for deciding differently. But, of course, if the draftsman tries to identify in advance every single possible specific situation he is almost certainly going to miss something out. That is why legislation is drafted in this way.

THE PRESIDENT: Surely you would not need any excuse for deciding differently -- If something had been quashed because it was unlawful you would not need -- You do not need sub-section (3) anyway, do you?

MR. HOSKINS: You do because of the statutory time limit. That is the oddity. This is a special - ---

THE PRESIDENT: That begs the question of whether the statutory time limit applies in these circumstances.

MR. HOSKINS: That is right.

THE PRESIDENT: I do not think sub-section (3) helps you because (a) it is dealing with a different situation which is where the Commission is acting -- Okay. There should be consistency, but why do the authorities not make a new decision sufficient, which is what sub-section (5) of s.179 says? Why do the express statutory authorities not make a new decision?

MR. HOSKINS: With respect, that provision can apply equally when the statutory time period has not expired.

THE PRESIDENT: Well, it can, of course. It can do.

MR. HOSKINS: That is right.

THE PRESIDENT: It does not mean it is limited to that.

MR. HOSKINS: Our submission is that if you read the statute, in the normal construction you have got the statutory time limit of two years; you have got a general power to refer back which can clearly apply in circumstances where the statutory time period has not expired.

THE PRESIDENT: It can do, but as a matter of practicalities I wonder whether it is very likely ever to.

MR. HOSKINS: You have seen the Hansard material we have put in. You understand the reason we put it in. The fact that the Competition Commission happens to take the benefit of the two year period, it is not what Parliament intended, and it is not what the Competition Commission is required to do. But the point here is ----

THE PRESIDENT: The fact is that they are statutorily entitled to take two years. It might be that Parliament envisaged or had the hope that they would do it in certain cases quicker than that. Parliament must have envisaged that there would be cases where they were on the cusp of it and in those cases if you are right the power to remit is simply otiose, in practical terms it cannot be used.

MR. HOSKINS: With respect it is not. The point I am making is that there is a power to remit, it is not futile where we are dealing with a final order or acceptance of an undertaking, but it is futile in relation to the adoption of a recommendation to third parties, because the Competition Commission has no statutory power after the adoption of its report to adopt a recommendation on a different basis from that contained in its report, so the block on referring back, which arises from the time limit, only relates to s.134(4)(b) but that is because 138 expressly deals with the situation after publication of report and is limited to final orders or acceptance of undertakings.

THE PRESIDENT: But is not the reason why it is only expressed as s.138 because it is only in the cases where the Commission is acting that the Commission has to do anything else. If it is merely a recommendation they do not need to have a provision like sub-section (3) because it will be another body doing something, and the other body will have its own power to take something – it depends on the statutory powers it is given. It can reject the recommendation entirely if it wants to, it does not have any duty of consistency.

MR. HOSKINS: Sir, that is exactly my point, because the Competition Commission does not have any statutory power now to revisit that recommendation, there is nothing on the face of the Act that gives it that power, so what are we left with?

THE PRESIDENT: Well sub-section (5) of s.179 seems to give it the power to make a new decision.

MR. HOSKINS: Well only if one interprets that by implying in that it is possible for that to override the statutory time limit.

THE PRESIDENT: Why are you overriding the time limit?

MR. HOSKINS: Because one has s.138.

THE PRESIDENT: I am being very slow.

MR. HOSKINS: I am no doubt not explaining it properly. S.138, if it was correct that s.179 gave a general power one has to ask "What is the purpose of s.138?"

THE PRESIDENT: Because this gives you a power where there is nothing quashed, nothing has been quashed, there is no illegality but you have the power to do something different.

MR. HOSKINS: I understand that, but it also gives you an express power to do something different in a situation where a report has been published. That is why the first subsection is important, s.138(1). This is the only provision in the Act where one sees an express power to do something different after the report has been published, and it clearly is capable of covering, we say, where there has been a Tribunal judgment quashing all or part of the report. Now, one cannot say that this situation, i.e. what happens after a Tribunal has quashed the report, does not fall within s.138; it clearly does. So s.138 has a more general scope, but what it does regulate is the powers the Competition Commission has after publication of its report including, we say, powers it has after a Tribunal judgment which is adverse to the Competition Commission. Against that you have the general wording of s.179(5)(b). Now, with respect, if the Tribunal were to find that the Competition Commission has a power after publication of the report, after expiry of the statutory time limit it will be reading words into the statute which are not merited, because in relation to final orders and acceptance of undertakings it is expressly dealt with. In relation to recommendations there is no equivalent, and we say that is because Parliament accepted that those matters were not to go back to the Competition Commission and the reason we say that, it is precisely the point you have made to me, is because it lies in someone else's hands. The Competition Commission has had the benefit of the two year statutory time period. There is a reason for the two year period, it is because these investigations are potentially very damaging for business, that is why it is simply not the case that the Competition Commission can take as long as it thinks appropriate, that is why there is no possibility for the Competition Commission, for example, if it is running up against the end of the time period to seek an extension. Parliament has decided two years because of the detriment to business.

When, as in this situation, there has been an AEC finding and a recommendation and a Tribunal judgment, what Parliament has decided is that rather than the matter going back to the Competition Commission, which undermines the two year time period, it struck a balance, for matters such as final orders and undertakings it can go back to the Competition Commission, that is what s.138 says. But recommendations cannot go back and the reason is because they are recommendations to third parties. So what happens next? The answer

to what happens next is, and it is hinted at we think, though we could be wrong, at para. 173 of your judgment, is that the Government has seen the report, the Government has seen the Tribunal judgment and the Government can act or not act as it wishes. Its ability to act is not triggered by a valid Competition Commission recommendation. So what happens now is the Government decides whether it wants to pursue the competition test or not and if it does it will no doubt carry out its own cost benefit analysis because that is what Government does. That is precisely the point, the statute anticipates that when it is necessary for matters to go back, i.e. final orders and undertakings, they can go back in the circumstances provided for by the statute, but in relation to recommendations to others there is no provision whatsoever for it to go back – question: why? Because it is for the third party to decide what it wants to do, not for the Competition Commission.

THE PRESIDENT: The two year bites and therefore unless an appeal process is completed, including going to the House of Lords and reference to the European Court if necessary, whatever may arise, that all has to be completed within the two years.

MR. HOSKINS: If there is a recommendation, but not in relation to anything else. The reason why we say that is the case is because Parliament has struck a balance between the need to protect industry from an overly long investigation and the need to ensure an effective outcome of an investigation, even if for example there is an appeal process. Parliament has considered that and has expressly laid down a complete code in the legislation.

MR. MATHER: If I can go back to s.179(5), Mr. Hoskins, you said it had general words in it, but it seems to me they are rather specific, are they not? "A direction from the Tribunal to reconsider and make a new decision in accordance with its ruling", that is not general language, is it? That is very specific, precise language?

MR. HOSKINS: Our point is that you have an express time period for publication of a report. You have an express provision that tells you what must be contained in the report. You have an express provision which tells you what the powers of the Commission are after publication of its report, and against that you have a generally worded power of the Tribunal to refer. We say as a normal principle of statutory construction where there are express provisions, then you should not construe the general to undermine the express, and we say that is a perfectly normal method of statutory construction.

MR. MATHER: I think if we look at it and look at what you have suggested (that Parliament had particular intentions), is it not on the face pretty obvious that the two year timetable, and the provisions for coming to views after that, is not designed to deal with appellate decisions and that the specific 179(5) deals with what happens if there has been an appellate decision?

MR. HOSKINS: Sir, that is why s.138 is so important, because s.138 deals expressly with what powers the Competition Commission has after it has published its report within the time limit, and if I am correct that the language of s.138 covers the appellate process, as we say it clearly does, then as a matter of statutory construction that is what governs, because it is an express provision, and what s.179(5) in its – I do say – general terms has to be read subject to s.138 because it is futile, it is otiose for the Tribunal to refer back a matter to the Competition Commission when the Competition Commission has no power to adopt a recommendation on a different basis under the statute.

MR. MATHER: Well you say s.138 clearly does cover the appellate case, it does not seem to me that that word "clearly" is correct in those circumstances. To me it clearly does not.

MR. HOSKINS: Well the natural meaning of the language "material change of circumstances", we would say that that is certainly capable of - a change of circumstances can include the situation where the Tribunal has adopted a judgment, but more particularly a special reason for deciding differently. Again, as a normal matter of statutory construction one says: "What is the normal meaning of those words?" So let us ask ourselves, is there a special reason here for deciding differently? Answer: "Yes", because the Tribunal has said the original report is flawed.

Now, with respect, that is a basic tenet of statutory construction, and it would have been for the draftsman to say that this does not apply -- that language which is clearly capable of covering an appellate decision, an appellate process before the Tribunal, to carve out the exception because the words clearly cover it.

PROFESSOR PICKERING: Mr. Hoskins, could I ask you a question about s.138 and the link between sub-sections (1) and (2) there? S.138(1) says that the report must be published within two years. S.138(2) may be interpreted as saying that once the report has been published, and so long as it has been published within the two year period, then the Commission may go on to produce remedies outside the two year period.

MR. HOSKINS: That is right. That is my understanding.

PROFESSOR PICKERING: You accept that.

MR. HOSKINS: That is one of the points I rely on. That is why I say that s.138 expressly deals with the situation of the power to adopt -- to take remedies after publication of the report.

PROFESSOR PICKERING: Yes. So, does that then mean that actually there is no ultimate, finite time period within which all this has to be wrapped up?

MR. HOSKINS: Parliament has decided that the two year time period should only be extended in certainly limited circumstances. What are the limited circumstances? You find them in the

language of s.138(3). The time period can be extended where there is a material change of circumstances. It can be extended where there is a special reason for deciding differently. But, my point is that this is consistent with the two year time period because it recognises that it exists and applies, and it allows the Competition Commission to act after the time period only in those express circumstances.

THE PRESIDENT: Forgive me. I am being slow here. The first line of s.138(3) limits that sub-section to consistency with its decisions, does it not?

MR. HOSKINS: Yes.

THE PRESIDENT: But, it does not affect the time period.

MR. HOSKINS: S.138(1) - if a report has been published within the period -- So, if a report has been published, then (2) the Commission shall take such action as it considers to be reasonable and practical. So, what is important is the time period under s.136 and s.137, and that the report must be prepared and published within the two year time period. We know, because the statute tells us, the report has to contain the findings as to relief - s.134(4)(a) and (b). What this section is telling us - s.138(2) - is that as long as the statutory time limit has been complied with - that is, preparation and publication of the report - the Commission can subsequently adopt decisions relating to final orders and acceptance of undertakings (s.138(2)). What s.138(3) tell us is that those decisions have to be consistent with the report unless there has been a material change of circumstances or there is a special reason for deciding differently - otherwise the Competition Commission has to do what it says it would do in its report.

PROFESSOR PICKERING: What is the difference between ‘action’ in s.138(2) and ‘decisions’ in s.138(3)?

MR. HOSKINS: I think it is simply that the Commission has to decide what action it is going to take. So, formally, although one does not necessarily see a published decision, there is a process within the Competition Commission following the publication of the report in which it decides to make a final order to accept an undertaking. I think that is simply the distinction that is drawn - it is a decision to adopt a particular course of action.

THE PRESIDENT: Summing up your submission, to make sure that we have got it absolutely right, in the situation where there is an appellate process there is no second bite of the cherry if you cannot do it all and it all cannot be resolved within the two year period - if it is a recommendation.

MR. HOSKINS: Only in relation to recommendations.

THE PRESIDENT: Yes. Where there is an appellate process in relation to action by the Commission itself, s.179 is not good enough to get you home. You have still got to comply with s.138. But, you need s.138 because, otherwise, if you are outside the time limit you still cannot take the action without s.138. But, the quashing, as it were, would be a special reason for deciding differently.

MR. HOSKINS: I think the point is stronger than that, sir. Imagine that s.138 was not in the Act. Then I can see there would be more force, with respect, in the argument that s.179 gives the power to override the time limit. But, it is because of s.138 that we say that there is a complete statutory code. It is because the Act says, "These are the circumstances in which the Competition Commission may adopt relief after its report. These are the circumstances in which the Competition Commission may adopt relief which is different from that contained in its report". It is precisely because there is an express power which is limited to final orders and undertakings that one has to say, "Well, it's not good enough to simply fall back on s. l79 and say its general language cures all" because the Act is more specific than that. With respect, it is simply glossing the Act to rely on s.179, and one cannot gloss it and do justice to s.138. That is why s.138 is so important - how it has dealt precisely with the situation we are now faced with.

THE PRESIDENT: It has not really because it could have easily said something in sub-section (5). The language of new decision is slightly odd - if in fact it has all got to be done within the same time period. Just tell me this: why is it overriding the time limit? Why have you discussed it in terms of it overriding the time limit if the position is that the appellate process starts time running, as it were? That is the wrong expression -- if it is outside the two year period? I mean, they have complied with the two year period. There is no issue. They have complied with the two year time limit.

MR. HOSKINS: Yes.

THE PRESIDENT: Why is that not, in a sense, spent?

MR. HOSKINS: I understand. That is why I took it in stages. What we are told is that the report must be prepared and published within the two year time period ----

THE PRESIDENT: Yes - and has to contain certain decisions.

MR. HOSKINS: Exactly. It has to contain the findings in relation ----

THE PRESIDENT: Which it does.

MR. HOSKINS: Which it does. Then, s.138 tells us the extent to which the Competition Commission can adopt relief which is different from that contained in its original report. It

can only adopt different relief if there has been a material change of circumstances if there is a special reason for deciding differently.

THE PRESIDENT: Yes.

MR. HOSKINS: It itself can only adopt different relief in relation to final orders and undertakings - not recommendations. Let me take another example. Let us move away from the existence of an appeal. Let us say that the Competition Commission had published its final report and had made a recommendation to a third party. After publication of the report - the example I gave earlier - a major player in the market goes bust. So, clearly that recommendation is not appropriate any more. What Parliament has decided is that that matter does not go back to the Competition Commission. The Competition Commission cannot take it back. The Competition Commission cannot say, "We see it's gone bust. Now we can't take that forward". What it says is that it is not for the Competition Commission. It is for the third party to whom the recommendation has been made to take account of the change in circumstances. So, that is why there is no particular magic about an appeal. Sir, you made this point to me: the magic lies in the nature of the recommendation. That is why the distinction is drawn - because a third party is involved in this process. To complete the circle, you do not need the Competition Commission. Parliament has decided that to complete the circle in relation to recommendations it is not the Competition Commission's role.

THE PRESIDENT: But, there is a distinction, is there not, between a case where there has been a change in circumstances - such as the one you have described. There is nothing wrong with the original action that was to be taken. But, there has been a change of circumstances and the situation where a recommendation, or indeed, action, has been, as it were quashed. In other words, what had originally been there in place apparently is no longer in place. So it is not a matter that circumstances have changed down the road, it is a question of what was done originally is no longer valid. Is that not a distinction that would justify a different approach by Parliament? In other words, there should be the opportunity for the Commission if that is what the Tribunal decides in its discretion, there should be the opportunity to put back into place the original things – not a new action as in s.138, but it is, as it were, putting something in place that should have been there in the first place. Is that not a distinction between the example you give ----

MR. HOSKINS: I have picked one example to show the importance of s.138. The point remains there is no statutory power for a recommendation to be revisited by the Competition Commission after the statutory time period has expired, and the point is – I am sorry

because I do not want to repeat myself – the reason is because, and let us go back to this case, if you like, because as you said our example is not a good analogy, let us go back to this case – what happens next? We have a finding of an AEC in a report which has not been challenged. We have a recommendation which is flawed, for the reasons set out in the judgment, so the Competition Commission says "This is terrible" because there is a gap in the system, to which you say "That is simply not right, there are a number of ways in which it can be dealt with", and it lies in the nature of a recommendation. Government says: "There has been a two year investigation, we see the work the Competition Commission has done, we have the good bits, we have the bad bits, we have the Tribunal's judgment, and now it is for us (Government) to decide where we go next". There is another option, of course, which is the OFT can take a view on the matter because that is another express power in the statute. The OFT has power to make a reference. Now if the OFT is concerned about the situation where the recommendation has been quashed the Act gives the OFT the power to say: "We will look at this and we will decide whether to make another reference on this limited point", but the point is Parliament has given that decision to the OFT. So the OFT might decide we have seen what is said about the competition test, we made our own submissions, the OFT were involved in the process, we see that this may well do harm to business if we allow this to go on for another year and we, the OFT, decide not to make a reference; or we, the OFT, think this recommendation is too important to be left as it is, we will make a further reference. But the point again is: there is a complete statutory code, because it is not simply that you hit the buffers, there is an AEC finding but the recommendation is overturned, nothing can happen, because the OFT can make something happen but under the statute it is the OFT's decision and not the Competition Commission's and, with respect, not the Tribunal's.

Equally, against the general backdrop one knows that the Government can choose to take this up so it is not a lacuna. That is, with respect, the power of our point, which is that the way we describe it is a complete statutory code and everything fits the way we describe it, but the Competition Commission's approach requires one to ignore the way that certain parts of the statute work, particularly the requirement of s.138.

THE PRESIDENT: I think we understand the point.

MR. HOSKINS: I am glad I got there in the end, Sir! Thank you. There is another aspect to this submission which I should make to you and probably now is an appropriate time unless you tell me otherwise. Assume you are against me on the legal construction point that I have just made, that means that the Tribunal has a discretion whether to refer or not, and you

have seen from our skeleton argument our submission is that the Tribunal in this case should exercise its discretion not to refer. It is set out in our skeleton argument, perhaps if I can take you through that quickly, I know you have read it so I do not need to take it in nearly as much detail.

THE PRESIDENT: Yes. Paragraph 36.

MR. HOSKINS: It begins at 36 that is right, Sir. A number of factors we say go to the exercise of the discretion. First, by reference to the *Virgin* case we say it does not follow from the fact that the Competition Commission was under a statutory duty to consider the questions set out in s.134(4) after it had found there was an AEC that the Tribunal must refer the competition test back to them, and that was expressly dealt with in *Virgin*. I do not know whether you would like to see the authority.

THE PRESIDENT: Well just so we can mark it.

MR. HOSKINS: It is our supplemental authorities' bundle at tab 7, and it is para.33, p.12 of the report. Perhaps I could just ask you to read para.33 to yourselves, it is self-explanatory.

THE PRESIDENT: (After a pause) Yes.

MR. HOSKINS: So there is a genuine discretion to refer regardless of the statutory duty that was on the Competition Commission when the original reference was made.

The second point is that the Tribunal has to keep in mind that there are a number of policies at play here which are capable, if you reject our legal submissions, of being in tension. The Competition Commission says that it is important that we should be able to see this through to the end, but as against that there is the very clear statutory policy that Parliament has decided that there should be a time limit imposed. If, in an extreme case, for example, the Competition Commission got to one year 364 days and realised it had made a horrible mistake at the start, too bad, there is no mechanism for it to say "Actually we need another year, we realise we need some more time". Parliament has envisaged by having a statutory time limit that there may be loose ends, and so we say it is very important when you are exercising your discretion, if indeed that is what you have, to bear in mind the detriment to industry and the fact that Parliament has considered it appropriate to have a time limit.

The third point is the competition test is not new. It is not something that popped into the Competition Commission's head late in the day, that is dealt with in the judgment, paras. 59 to 60 and we set out the points at para.40 of our skeleton argument. It had been proposed in 2000, it was first raised in this investigation in October 2006. There were submissions on it throughout 2007 by various parties and the Competition Commission had actually decided that it was a necessary part in the beginning of January, i.e. four months before the final

report. So this is not something that crept up on them, it was something they were aware of from the very start of the report, so we say they had ample time to analyse and consider the competition test.

The fourth point, and this ties in with the Parliamentary point I made about the policy of not subjecting industry to a burden for more than two years, of course we say there is clearly substantial further work to be done, this is not simply a case where it goes back and there is a bit of fine tuning and lo and behold the competition test springs back to life. We have set out in our skeleton argument various paragraphs of the judgment which indicate the sort of work that would have to be done. Taking this quickly, if I just pick up 43(d) – the Tribunal made it clear at para. 126 that "further full and proper consideration" of the risk of adverse effects for consumers would be necessary. And para. 44(b), this is in relation to the second ground: para.150 of the judgment states:

> "… the Report contains none of the specific consideration of these matters which one would have expected to see in a report as detailed and painstaking as this."

So it is not a question of fine tuning, the finding in the judgment was that fundamental matters were simply not considered. So we say if the matter were referred back that would lead to a considerable period of uncertainty and detriment for business, we have already had two years of it. It would almost certainly, it looks like, involve further use of the Competition Commission's investigative powers, because it is going to have to get the information necessary and that of course has significant time and financial costs, economists and, as I was prompted, lawyers as well can be expensive and are necessarily involved in this process. It is important that it cannot simply be assumed that this is simply going back to the Competition Commission for them to rubber stamp the competition test. One thing is certainly clear, although the Tribunal is not going to pre-empt, and it has not in its judgment: is the competition test good or bad? What is clear is that any subsequent decision on the competition test is far from a foregone conclusion. The work has to be done before we know whether it is a good thing or a bad thing.

Finally, it is a point I have already made in the context of the legal submissions, as a matter of discretion if it is decided that it is not appropriate to send this back to the Commission it has had two years, it has not simply missed its target slightly, it has fundamentally failed to deal with this properly. It is not necessarily the end of the road for the competition test, the OFT can decide whether it thinks it is a good idea for the Competition Commission to have another shot. Government can decide whether it wishes nonetheless to take forward the

competition test. So, we say for all those factors that this is a case in which it would not be appropriate to exercise discretion if, indeed, that is the appropriate legal test.

Unless I can help you further, those are our submissions.

THE PRESIDENT: Thank you, Mr. Hoskins.

PROFESSOR PICKERING: Mr. Hoskins, please help me to understand. In relation to para. 36 of your skeleton is it inevitable - and, if so, what is the evidence - that if we were to remit or refer back, then this would be within the statutory time limit as opposed to creating something that was outside the frame of the original market investigation?

MR. HOSKINS: Our submission is that it is the latter. By definition you are extending the time, and the argument would be that if I have lost on the legal construction it is because s.179(5)(b), it is said, gives the Tribunal the power effectively to extend the time limit, or gives the Competition Commission the power to adopt a remedy on a different basis from that which was in its report published within the time limit.

PROFESSOR PICKERING: What we seem to have is that your action presumably can be brought within an appropriate time after the two years is up if you cannot bring it within the two years, depending upon when the report is published.

MR. HOSKINS: Yes.

PROFESSOR PICKERING: But, would not a quashing and a referral back then be part of your action as opposed to part of the original market investigation?

MR. HOSKINS: I think that has already been dealt with by the Court of Appeal, albeit under the Competition Act in *Floe*. That was the debate in *Floe Telecommunications*. It was a complaint about an alleged abuse of dominant position. Ofcom rejected the complaint and said there was not an abuse. The Tribunal then said, "We're going to refer the matter back". Originally it said, "We're going to refer it back and we're going to put a time limit on the amount of time that you, Ofcom, have to reconsider". It slightly palliated that approach in its final order. But, that is the matter that went to the Court of Appeal. It also said that, "We, the Tribunal, are going to fix another CMC at which you will come back and you will tell us how you are getting on with the further investigation in accordance with that remittal". The Court of Appeal held that once the Tribunal had decided the case, it was *functus officio*. It had nothing else to do with it. So, it cannot fix another CMC. So, I think, with respect, that legal point has been dealt with in front of the Court of Appeal and rejected. The Tribunal's powers fall away as soon as it deals with the final orders.

PROFESSOR PICKERING: While, of course, we would take careful notice of the judgment in *Floe*, I am still wondering about where any subsequent work would fit, quite apart

from whether or not there was a time limit. Anyway, thank you for your help on that.

The other matter that you raise is the question of the effect on business of further investigation. Is it not the case that the longer this goes on, the more the status quo exists and this actually gives more opportunity to move in anticipation of what might happen in the future? You are making an argument that says this is bad for business. But, presumably rational businesses will act in the light of the circumstances and what they think may, or may not, happen into the future.

MR. HOSKINS: With respect, sir, there are two points to that: one is a specific point which is that it is not necessarily the case that uncertainty as to what is going to happen with the competition test is good for business. Indeed, I do not think my clients would accept that. It is better for business to know what the position is from a regulatory perspective, rather than to have to try and anticipate a life if it is (a) or if it is (b). There is also a general point which is that it is clear that Parliament has accepted that having, for example, open-ended investigations or, indeed, investigations that are greater than two years is generally to be regarded as not a desirable thing. That is why they have imposed a two year time limit with no possibility of an extension. So, I think it is, with respect, quite a dangerous exercise to go in and try and anticipate, "Is this good for business? Is it bad for business?" because, of course, different businesses, particularly in this investigation which, as we saw at the start, involves the small corner shop up to the large supermarkets who appear before you. There is an awful lot of interest in there. It is difficult to assume that it is good for one person and bad for another. But, the general point is that Parliament has decided that investigation should not last for more than two years.

PROFESSOR PICKERING: Parliament has specified time limits for other sorts of investigations - such as mergers - which are much shorter, of course, for good reason. However, you emphasise the problems of uncertainty and while, if we were, contrary to your submissions, to decide that this should be referred back to the Commission, then they would no doubt, in the light especially of our previous judgment, determine what the agenda was to engage in to produce further consideration and argument as to whether or not there should be a competition test. But, part of that itself is actually going to be about how you handle uncertainty, is it not? With lots of local markets it is going to be very difficult for them - and they may, with good reason say they should not - engage in second-guessing the behaviour in individual local markets. So, they have a problem to address as to how they handle the uncertainty in terms of business response.

MR. HOSKINS: Sir, I think we have to distinguish different types of uncertainty because the uncertainty I am dealing with is regulatory uncertainty for business. Now, our submission is that that is an artificial situation in the market because rather than businesses competing on the merits, competing on prices, competing on what they do for consumers, they will have to compete in an artificial situation where they do not know what the regulatory situation may, or may not, be in a year or two years' time. That sort of regulatory uncertainty interferes with the competitive process and is a bad thing. It is that sort of uncertainty that led Parliament to impose a two year period. But, you are absolutely right - wrapped up in the question, "Is the competition test a good thing?" will be all sorts of other types of uncertainty. But, they do not, in our submission, play any way out in terms of the point I am making, in terms of, 'Should there be a reference back which will greatly extend the two year time period?' They are just part and parcel of the exercise.

PROFESSOR PICKERING: I think many economists would argue that it is actually in situations of uncertainty that profits can be made by those businesses that get their analysis right and their decisions in line with that. Frankly, the business world operates in a situation of considerable uncertainty about many other things besides regulation, surely?

MR. HOSKINS: It does, but in this particular statute Parliament has said, "Two years is enough". So, the decision has been made anyway.

THE PRESIDENT: Mr. Hoskins, to make sure I have got it right: was it implicit in your last submission, or indeed possibly explicit, that the Tribunal, on your alternative approach of there being the power to send the matter back for reconsideration, do you submit that *Floe* applies in the sense that we have no power to make any directions, as it were, as to the time limits or anything else?

MR. HOSKINS: I think it does, sir, because the reasoning in *Floe* -- although it is the Competition Act, and it is a different statute -- The reason for that was because the court drew an analogy with judicial review decisions and they said that a court or a tribunal does not have power to direct a decision-maker how to adopt its decision. That includes the resources typequestions. One sees that in the judgment. It is not for a Tribunal or a court, having quashed the decision at judicial review, to say, "You must do it within two months, three months, four months" because the court cannot know what the body's administrative priorities are. So, in our submission, yes, I think that is the necessary implication of *Floe* in the current case.

THE PRESIDENT: Thank you very much. Mr. Hoskins, perhaps I should have said at the outset of your submissions - and I am sure my colleagues would like to associate themselves with

this - that we offer you our congratulations on your appointment to silk. Many congratulations.

MR. HOSKINS: Thank you very much.

THE PRESIDENT: Mr. Roth?

MR. ROTH: I deal first with jurisdiction and then with discretion. On jurisdiction however resourcefully the new Queen's Counsel tries to put it, there really is an Alice in Wonderland quality to much of his argument. The issue, of course, is the proper interpretation of the relevant provisions of the Statute, and the starting point is clearly s.179, which you have in your bundle, tab 1 on p.137. This is judicial review, as you well know, not an appeal. Therefore, in the powers of the CAT set out in the statute one does not find, as in the schedule to the Competition Act dealing with appeals, a power of the Tribunal to take itself a decision which the decision maker appealed from could have taken. You cannot substitute your own decision in judicial review in line with normal principles. So what it says in subsection 5 is that the Tribunal may:

> "(a) dismiss the application or quash the whole or part of the decision to which it relates; and
>
> (b) where it quashes the whole or part of that decision [this case] refer the matter back to the original decision maker with a direction to reconsider and make a new decision in accordance with the ruling of the Competition Appeal Tribunal."

Now, there is nothing there, of course, that precludes a reference back under subsection (b) after the expiry of two years. Tesco seek to interpret subsection 5(b) as if it said: "Save where the time limit set out in s.137 has expired", but that, with respect is reading words into the statutory provision that are simply not there.

I think their argument may be, if I understood it – and I struggled a bit I have to say – a bit more subtle, that they are saying "This is a discretion in subsection 5, there is no obligation to refer back, it would be, as it were, futile to refer back because the Commission would have no jurisdiction to do anything because of s.137" and therefore, as it were, that cuts down the exercise of the power in s.179(5)(b) which is absolutely clear on its face.

THE PRESIDENT: I think they were saying that we do not have power to refer back in these circumstances – Mr. Hoskins can choose which ever interpretation he puts on it – it may be he was saying ----

MR. ROTH: Well if it is "no power" that is simply wrong because there is no such limitation in subsection 5(b) one would be reading in words that are not there.

THE PRESIDENT: Perhaps he could just qualify that now one way or the other. Were you saying we could do it but it would be futile and therefore we must not exercise our discretion in that way, or are you saying we cannot do it?

MR. HOSKINS: I am saying both! (Laughter)

THE PRESIDENT: Right.

MR. HOSKINS: I do not think it makes any difference.

MR. ROTH: I think he is saying whatever he could say that might get him to the result he wants to achieve. The first one is clearly wrong, the alternative takes one back, of course, to s.137, on p.107. Section 137(1) requires quite clearly the Commission to prepare and publish its report within the period of two years from the date of the reference. Here, of course, it has done so, so the question then is whether s.137 prevents any further reconsideration by the Commission of matters in the report once it has been duly published, and thus any supplementary report or revision in accordance with the direction of the Tribunal under s.179. We say that would be a rather odd interpretation of s.137 and he relies on s.138 to supplement that, which I will come to. I suppose it is not completely impossible to say that this is a jurisdictional provision which renders the Commission in effect, to use the Latin term: *functus*, after the report has come out, subject only to s.138. As I say, we would submit that is a very odd interpretation, but quite clearly it is capable of an alternative interpretation which is that this is a procedural time limit that mandates the Commission to publish its report within two years and that there is nothing there that precludes the Commission from acting further in accordance with a statutory direction of the Tribunal under s.179(5).

Ordinary principles of statutory interpretation, we say, should apply. Tesco refers to one in my learned friend's skeleton argument, if you have that, it is at para. 30 of their skeleton argument, on p.7:

> "The Tribunal is required to respect the principle of statutory construction."

We agree with that.

> "… whereby two sections in the same Act should be interpreted so as to avoid inconsistency between them …"

And they cite some cases and they refer to **Bennion**. There is indeed a principle to avoid inconsistency, it is not actually the principle for which the citation to **Bennion** applies. The citation to **Bennion** is the one, and they have given the extract they refer to at tab 6 of this bundle: "**Bennion on Statutory Interpretation**" Fifth Edition, and it is on the page after

the heading, it is s.198 in **Bennion**. "The rule " and it has its Latin phrase, it is p.558 of **Bennion**.

> "It is a rule of law that the legislator intends the interpreter of an enactment to observe the maxim *ut res magis valeat quam pereat* (it is better for a thing to have effect than to be made void): so he must construe the enactment in such a way as to implement, rather than defeat, the legislative purpose."

That is what this rule that they cited is dealing with. In other words, and they comment:

> "An Act must be construed so that its provisions are given force and effect rather than it being rendered nugatory."

Then after quotations:

> "Here it should be noted that, even where the words do 'imperatively require a particular meaning' the court may in an extreme case find it necessary to arrive at a different one."

And so on. That indeed is one principle, and we rely on it. The next page:

> "The *ut res magis* principle requires inconsistencies within an Act to be reconciled."

Quoting **Blackstone**:

> "The principle also means that, if the obvious intention of the enactment gives rise to difficulties in implementation the court must do its best to find ways of resolving these.
>
> An important application of the rule is that an Act is taken to give the courts such jurisdiction and powers as are necessary for its implementation, even though not expressly conferred."

And that very helpful passage can be read with two other passages in **Bennion** which I hope have been put into your bundle.

THE PRESIDENT: We have another long section of **Bennion** yes.

MR. ROTH: I only need really the headlines. On p.943, s.303, "Purposive Construction".

"Presumption that enactment to be given a purposive construction".

> "Parliament is presumed to intend that in construing an Act the court, by advancing the remedy which is indicated by the words of the Act for the mischief being dealt with, and the implications arising from those words, should aim to further every aspect of the legislative purpose. A construction which promotes the remedy Parliament has provided to cure a particular mischief is now known as a purposive construction."

And on the next page, s.304: "Nature of purposive construction":

> "The purposive construction of an enactment is one which gives effect to the legislative purpose by –
>
> (a) following the literal meaning of the enactment where that meaning is in accordance with the legislative purpose (in this Code called a purposive-and-literal construction), or
>
> (b) applying a strained meaning where the literal meaning is not in accordance with the legislative purpose (in the Code called a purposive-and-strained construction)."

Then there is a lot of comment, and if one jumps on, if you would, please, to p.969, s.312: "Presumption that 'absurd' results not intended":

> "(1) The court seeks to avoid a construction that produces an absurd result, since this is unlikely to have been intended by Parliament. Here the courts give a very wide meaning to the concept of absurdity using it to include virtually any result which is unworkable or impracticable, inconvenient, anomalous or illogical, futile or pointless, artificial, or productive of a disproportionate counter-mischief.
>
> (2) In rare cases there are overriding reasons for applying a construction that produces an absurd result, for example, where it appears that Parliament really intended it or the literal meaning is too strong."

The "presumption against absurdity" as it is often referred to, and we rely on both of those, because here – I will come back to s.138 – we say with all respect it really is a complete red herring on the issue that has been raised by Tesco.

Here the statutory scheme is that the Commission shall identify whether there is an adverse effect on competition, the AEC, and if they find an AEC they must consider what remedy to apply or recommend. You may recall in the hearing there was discussion about whether the Commission could say "We found an AEC but we are not going to recommend any remedy", and you address that in paras. 56 and 57 of your judgment, you say it is not necessary finally to decide the point, but you say (para.57):

> "It seems to us that it is likely to be a relatively rare case in which the Commission, having identified an AEC and detrimental effects, will exercise its discretion to take no remedial action under subsection 134(4)(a) or (b) of the Act."

That clearly recognises that the scheme is to decide is there an AEC that produces detrimental effects and if so, consider what remedy is appropriate to apply or recommend, and generally one would expect the Commission to produce a remedy or recommendation. In providing for judicial review and not a full appeal, it is inherent that where an application before the Tribunal succeeds, particularly if it is directed at the remedy and the remedy is annulled it means that the AEC that has been found will not be subject to any remedy at that point, because the AEC finding stands, the remedy is quashed for whatever reason and that then is the situation. The Tribunal cannot itself impose an alternative remedy because this is not a full merits appeal unlike Competition Act appeals where the Tribunal can make any decision that the Office of Fair Trading could have made and, indeed, one thinks of the *Burgess* case where this Tribunal did so.

Thus if the Tribunal cannot refer back in such a case the statutory objective in many cases will not be achieved. Indeed, it may be rather worse than that because the Tribunal may hold that the remedy in the report might have been a proper one for the Commission to impose or recommend, but there was procedural impropriety in the way it was arrived at or, indeed, as in this case, various considerations were not looked at because you are, if I may respectfully say so, careful at the end in para. 170 of the judgment to point out that you have not concluded that a competition test, whether in the form proposed or any other form would be ineffective as a remedy for the AEC, which the Commission has identified. You go on:

> "Our conclusions do not preclude the possibility that the test would ultimately be lawfully recommended by the Commission and implemented."

But if there can be no reference back for the Commission to consider it, and given that this Tribunal cannot modify, qualify, or substitute another test, then by judicial review the applicant has avoided it altogether, indeed achieved something that it might never achieve on a full merits appeal.

Tesco say that that is not really a problem because the Commission can take this into account in the production of the report and have regard to the two year time limit by producing it earlier and this Tribunal can handle cases quickly and it refers to the recent handling of the challenge to the Lloyds/HBOS merger where, sir, you produced your judgment within two weeks of the application. This is para. 33 of Tesco's skeleton argument. At p.7 under the heading, following, 'Fourth --'

> "It is for the Commission to arrange its affairs to take account of the statutory time limit and to plan accordingly. The Tribunal has consistently demonstrated that it

is capable of dealing with appeals on a very expedited basis if needs be [There is reference to the Lloyds TSB/HBOS case] in which the Tribunal received the application on 28th November, 2008 and delivered judgment on 10th December 2008".

With great respect, this really is a bit rich coming from Tesco. The time limit for bringing a judicial review to challenge a report on a market investigation is two months - Rule 27 of the Tribunal's rules. Here, the report was published on 30th April, 2008. Tesco's notice of application was filed on the last day of the permissible time period - 30th June, 2008. Further, this case was heard in mid-November - I think, 11th to 13th November, 2008 - and judgment was on 4th March, 2009, as you know. I do not know if Tesco are really seeking to suggest that you should have, could have produced your judgment by the end of November, in two weeks, but even if you had ----

THE PRESIDENT: It would not have helped, would it?

MR. ROTH: It would not have helped because the two year time period had already passed by the time that Tesco served its notice of application. All this, frankly, is fanciful. The fact is that this is a complex case, and by the standards of the Administrative Court to have judicial review proceedings concluded in eight months must be beyond any criticism. If one adds to that the possibility that there could be, in such case - because the proposition clearly is general - no jurisdiction to refer back, not just this occasion - a further appeal to the Court of Appeal (and there will not be one here, but in other cases clearly there could be), and if there is a reference back, the time required for reconsideration and a supplementary report taking account of the Tribunal's judgment -- Well, the only way the Commission could ensure that it would be able properly to reconsider the matter, including consultation on reconsideration, and produce a supplementary or revised report within the two years of s.137 would be, if that time limit applied to all of that, to produce its report in less than a year.

THE PRESIDENT: That would still mean that all appeals would have to be resolved and a supplementary report, or whatever is required, done.

MR. ROTH: Within two years.

THE PRESIDENT: Within that initial two year period.

MR. ROTH: That is the result of Tesco's submission. I say that if the Commission took more than twelve months to produce its report, that would be impossible. It would have to do it in less than twelve months. Quite how much less might depend on the case. One has only to recall what you say in your judgment, sir, at para. 3, in summarising the nature of the

investigation, the Commission had to conduct in this case. Picking it up at the second paragraph,

> "The scale and scope of the investigation is noteworthy. The Commission collated a data set of more than 14,000 UK grocery stores covering various aspects of competition between grocery retailers, received approximately 700 submissions from main and third parties, and held some eighty hearings with interested parties".

We say this would be totally impracticable. Moreover, we point out the perverse consequences that would follow from applying s.179 in the way that Tesco urge, because indeed adopting their point that statutory sections must be read consistently, the language of s.179 on the Tribunal's order-making power after judicial review is the same as s.120 with regard to merger cases where there is also a judicial review rather than a full appeal. There, of course, much shorter time limits apply. It is the points that we make in our skeleton argument at paras. 25 and 26. We point out that given that the time limit is twenty-four weeks for the Commission to block a merger - a completed merger rather than an anticipated merger - there a successful challenge by way of judicial review to a merger being blocked (it could be on procedural grounds; the Commission have not given the party a proper opportunity to respond - there may be procedural grounds that led to the success in *Interbrew* to challenge), and then if the twenty-four weeks have gone, there could be no reference back, and the Commission could then not re-take the decision and the merger therefore would be cleared. We point to another perverse consequence in para. 25 - the OFT's consideration of completed mergers. There the period is four months. Suppose towards the end of its four month period the OFT issues a decision that it will not refer the merger because it thinks it would not give rise to a risk of substantial lessening competition, and another party challenges that before the Tribunal, and they succeed (as, for example, *Unichem* succeeded on just such a challenge), then one would expect in those circumstances that it would be referred back to the OFT, with, "Well, think again!" because the OFT has quashed. But, on this reading the OFT could not because the four months have expired. That is why we say this is just perverse. The problem did not arise in *Unichem* because it was an anticipated merger, and so the four months did not apply. There was, of course, a reference back in that case.

So, we say there are all sorts of reasons that support giving s.179(5) its ordinary meaning, and not treating s.137 as a fundamental jurisdictional provision that renders the Commission *functus*.

May I deal with s.138 on which Mr. Hoskins seeks to place such emphasis, and on which his argument, I think, was, frankly, rather circular. What s.138 (p.107 of the statute), as I think both you, sir, and Professor Pickering were picking up the point I am about to make very quickly in the course of Mr. Hoskins' argument -- S.138 is what enables the formal order prohibiting something pursuant to the decision in the report to be made after the report has been published and after the two years has expired. It is dealing with, in sub-section (2),

> "-- such action under s.159 or 161 as it considers to be reasonable and practicable ----"

Sections 159 and 161 are the orders that are made - which you will see if you turn on to p.123 -- One is final undertakings and the other is the order-making power. Indeed, that is what always happens. The report contains the decisions of the Commission as to what action should be taken - that is, published in two years - and after the report is done, separately, the formal orders are made. They are always made separately. The point of s.138 is saying that that two year time limit does not apply to those orders. They are made after the two years.

If one goes to sub-section (3),

> "The decisions of the Commission under sub-section (2) [that is to say, the taking of the order, the making of an order] shall be consistent with its decisions as included in its report by virtue of s. 134(4) ----"

One knows - and Professor Pickering was, as I say, on to this, if I can put it that way - that those decisions are the decisions referred to in s.134(4), namely, whether action should be taken and what the action should be. So, the order you make afterwards must be line with the decision in your report as to what order it ought to take, unless there has been a material change or some special reason. That is clearly looking - and Mr. Hoskins gave you an example - at something dramatic happening, with somebody going out of business and the whole market has changed significantly in the interim. It has got nothing to do, with great respect, with a reference back from the Tribunal.

THE PRESIDENT: You clearly need a provision like this because of the fact that the Commission has got something else to do in these circumstances.

MR. ROTH: Absolutely.

THE PRESIDENT: The implication is that it cannot just make a completely different order, or one that is not related to what it has already decided ----

MR. ROTH: Absolutely.

THE PRESIDENT: -- subject to certain let-outs.

MR. ROTH: Exactly. All I was wanting to go on to say is that on Mr. Hoskins' analysis, if that were right, suppose the Commission finds an AEC in its report, and that finding is challenged. Here, of course, Tesco accepts there is an adverse effect on competition. It is unchallenged. But, suppose it had been challenged and the Tribunal annuls the finding of AEC because it has not been properly reasoned or procedural unfairness, or whatever. Then one would assume it would go back to the Commission to reconsider the matter of AEC. But, if Mr. Hoskins is right, that could not happen because sub-section (1) would not be engaged because the finding of AEC had been annulled and so there is no report published within two years with a finding of AEC, and sub-sections 2 and 3 deal with the remedy and not the AEC, and everything is stifled at that point. That cannot be right. Again, it is quite absurd.

If one is treating this as looking at Parliament's intention, the Parliamentary scheme, and so on -- We noted that Tesco put in an extract from Hansard on time periods. Mr. Hoskins referred to it. I am not sure, frankly, that there really is such ambiguity here that *Pepper v. Hart* is justified. We say s.179(5) is very clear. But, if there were ambiguity there is a rather more material bit of Hansard which we have added to at Tab 2. This is from the debate on the Enterprise Bill. The pages are not numbered, but if you perhaps start at the end and go from the end of Tab 2, three pages in ----

THE PRESIDENT: Clause 169?

MR. ROTH: Clause 169. In fact the heading is 'Review of Decisions under Part 4'. If I take it two-thirds of the way down, Mr. Waterson, "I beg to move amendment No. 326, in p.123, leave out lines 10 and 11 and insert, 'be entitled to review the substance of the decision, as well as the procedure by which that decision was reached'".

Mr. Waterson explains, "This deals with an altogether more substantial concern that we have touched on before in a different context. In response to my previous amendment, the Minister confused an appeal with a review, which, however similar they appear to a lay person, are two different things. A review deals only with complaints about points of law or the procedural aspects of a decision. It allows no investigation into the substance of the case. There is no justification - we are emboldened in our view by the support of the CBI - for limiting tribunals to judicial review alone. It must be possible to review the substance of the matter as well as the mere procedure or points of law. That would give greater confidence to all involved in the procedure. It is a simple natural justice issue that the entire

matter - I include procedural issues and points of law, but not only them - be capable of being examined again".

So, he explains that his proposed amendment is to enlarge the jurisdiction of the Tribunal to effectively become a full appeal. Whether he is right is another point.

Then, at the bottom of that page Mr. Djanogly,

> "Is the Minister saying that the findings of the investigation cannot be wrong?"

Miss Melanie Johnson, the Minister of State,

> "No, I am not saying that. There is a mechanism for challenging decisions taken in relation to market investigation references. We must ensure that the process followed by the authorities in a market investigation was fair, and that the parties were given the opportunity to put their case. If the CAT considers that the challenge to the decision is justified when it applies the principles of judicial review, the original decision taker can be asked to reconsider. That is the most appropriate way to deal with the type of decision that will be taken under the clause".

I rely on those words.

THE PRESIDENT: It does not add much to s.179, does it?

MR. ROTH: It does not, but it makes it clear that it was envisaged that there would be a reconsideration. That is the only point. If, therefore, that could only take place within two years, it would have been expressed very clearly in the language.

So, we say on jurisdiction that Tesco's argument clearly fails.

I turn to discretion. The position here is that the Commission found an adverse effect on competition, unchallenged by Tesco in these proceedings - that there was consumer detriment of about £105 to £120 million a year in additional profits in large grocery stores and higher prices at national level. That is the result, the Commission found, of the existing levels of high concentration - existing levels of high concentration. One aspect of the competition test that Tesco accepted would have an effect is in preventing further detriment because it would clearly prevent new areas of high concentration from developing.

Given this level of AEC - clearly a very significant level of AEC - to say that it would be appropriate to leave that significant level of AEC with only the very limited remedy of controlled land sites in place, we say would be to frustrate clearly the purpose of this important and wider-ranging inquiry which the Commission has been charged with conducting, and would leave unfulfilled the statutory purpose of an effective remedy to an AEC that has been found.

The *Virgin* case, with great respect, helps not at all. The *Virgin* case says that you have a discretion. That is clear. There is no arguing about that. What the *Virgin* case held - and the President will of course recall this - is that the Tribunal should not exercise its discretion to make a reference back where that would be futile. Why was it futile? It was futile because the remedy for the substantial lessening of competition which remained in place, it was clear, would also take care of the public interest issue - what was referred to in the hearing as 'plurality'. Therefore, there was nothing to be achieved by a reference back. Therefore it need not be made. At para. 36 of the *Virgin* judgment, at Tab 7 -- Mr. Hoskins read you para. 33 which makes clear that there is a discretion because the statute says 'may' and not 'must'. Paragraph 36,

> "Regardless of whether Mr. Gordon [counsel for Virgin] is correct in submitting that the views of the decision makers are irrelevant to our decision whether to remit, what is not in dispute ... is that if the Commission and Secretary of State are right that remittal would be otiose, that is a relevant factor. We consider they are right, and that if we were to remit the plurality issue, and if having reconsidered the matter in accordance with our ruling the Commission were to find that the merger resulted in insufficient plurality of media owners for the purpose of sub-section 58(2C)(a) with effects adverse to the public interest, there is no realistic prospect that the Commission would recommend or the Secretary of State would impose any additional or different remedy from that which has been imposed".

Then you explain how you have reached that view. In those circumstances one can well see that you exercise your discretion not to refer back. But, that is very manifestly not this case. On the discretion point I do very much emphasise what this Tribunal says in para. 170 of your judgment in this matter where you say,

> "We have not concluded a competition test, whether in the form proposed or in any other form, would be ineffective as a remedy for the AEC which the Commission has identified, nor that such a test would be unreasonable, disproportionate or otherwise inappropriate or unlawful".

So, clearly it would be far from futile. What is needed is further consideration - not abandonment - of any remedy at all to the AEC other than the controlled land sites which would clearly leave a substantial aspect of AEC unchecked.

As for the prejudice to supermarkets of further inquiry and submissions, the uncertainty -- Well, uncertainty, as Professor Pickering pointed out, is a fact of business life. The interveners - quite a large number of large supermarkets - were obviously not concerned

about this because they do not support Tesco's resistance to reference back. No doubt, we say, however unenthusiastic Tesco might be about it, it has the resources to withstand the burden of making further submissions to the Commission. It has never been shy or reluctant in putting its case.

On time limit and directions -- Sir, your question about whether you could impose a time -- The Floe case is materially different because the Floe case was an appeal. It was a Competition Act Chapter II case. The whole point of the discussion in the Court of Appeal was whether, when referring back under Schedule 8 of the Competition Act, there was no power in Schedule 8 to issue any direction at all. The Tribunal held that such a power should be implied, and the Court of Appeal said, "No".

Here, there is a power to make a direction - an express power - which you do not have in Schedule 8 for appeals. But, in any event, I am instructed that the Commission is prepared to undertake to the Tribunal - and we have regard to the fact the additional work that has to be done - that there would be a need to consult before producing any revised or reconsidered remedy. Tesco say in their skeleton argument that the Commission could not just rubber-stamp what it has done before. That is quite clear. It certainly would not rubber-stamp. It would have to properly reconsider it and have further submissions. We would complete the task within six months of the reference back. So, whether you can formally include in the direction that you clearly can make a time or not, we can undertake that that is what would be done.

THE PRESIDENT: S.179(5) says 'refer back the matter with a direction to reconsider and make a new decision in accordance with the ruling ----' So, there is a bit of ambiguity really there, is there not, as to whether that is the only direction that can be given. But, even if it is, whether the ruling can somehow ----

MR. ROTH: It was exactly because of that ambiguity that I am saying it is clearly different from Floe. So, I do not think Floe applies. It is a question of whether that is the only direction, or could it say 'within six months', 'within eight months', within four months', or whatever? It is to avoid having to address that that -- Clearly we can offer an undertaking. There is no problem there.

THE PRESIDENT: On any view, any interested party could judicially review if they thought that an excessive time was being taken or -- So, there is that.

MR. ROTH: There is that in any event, but it may give comfort if you do that.

THE PRESIDENT: So, how do you envisage that being dealt with? Simply your statement is sufficient if it is recorded, for example, in a ruling?

MR. ROTH: It would be an undertaking to this Tribunal. We would have to do it. If we could not, we would have to come back and seek to vary it, and persuade you that we need more time.

Those are our submissions on reference back, unless there are any further points.

MR. MATHER: There is just one point which Mr. Hoskins raised which I think was concerning discretion, which picked up para. 173 of our judgment and said that essentially there would be no problem if we did not refer back because the Secretary of State could pay attention to the proceedings. Can you address us on that?

MR. ROTH: Yes. Thank you. I had meant to. I am very grateful. I omitted it. As to that, we say that it is a slightly odd submission. There is a recommendation which you have held has not been adequately reasoned and supported, and conceded for reasons you explain in your judgment. It would put the Secretary of State in a very strange position where he is receiving a recommendation which has now been quashed, saying, "Well, he can proceed in any event. Yes, he has to do his own costs benefit analysis, but notwithstanding the judgment of this Tribunal". He would, if one put it colloquially, be rather setting himself up for a judicial review if he took a decision to that effect. That would be a wholly unsatisfactory situation. Clearly, the whole scheme is that where there are people receiving a recommendation and acting on it, to act when it has been held to be a flawed recommendation and annulled would be wholly unsatisfactory. We say it is not the way that the scheme of recommendation to others is intended to work..

Thank you for reminding me of that.

THE PRESIDENT: Thank you, Mr. Roth.

Mr. Ward, do you want to add something?

MR. WARD: If I may, I would like to just add some very brief points on both jurisdiction and on discretion, and then I will say something about the question of whether there should be an indication as to time if the matter is remitted.

On jurisdiction, first of all, Asda's submission is that s.179(5) is the power that provides the Competition Commission with the ability to reconsider if so directed by the Tribunal , and that that power is not just concerned with cases where undertakings and orders have been made, but also applies where a recommendation has been made and is quashed as is anticipated in this case.

The essential point is that the time limit in s.137 just does not apply at all to s.179(5). It is concerned with the publication of reports. It is common ground here that the report was

indeed published within time. So, now we have moved on to an entirely different stage in the process.

The principal argument this morning by Tesco concerned s.138. But, it is our submission that this has nothing at all to do with this case or the circumstances in which we now find ourselves. S.138 deals generally with the Competition Commission's powers post-publication, but is not concerned with remittal. It is striking, as was put to Mr. Hoskins in argument, that it talks about change of circumstances and special reasons, but makes no reference at all to s.179(5) or the powers of the Tribunal.

On Mr. Hoskins' case one is left with a curious and really anomalous position where if there is remittal back in a case that concerns undertakings or orders, there can somehow be reconsideration. But, where the only question relates to a recommendation there is apparently a gap in the statutory scheme. He had no real explanation at all as to how or why that gap should have arisen, other than in our submission as a result of the wholly strange construction he places on the Act. It does raise a further question arising from the logic of what Mr. Hoskins said, could a recommendation ever be remitted on Tesco's case? Is this really a case about time limits at all? Because on his analysis if the matter is not dealt with in s.138 once the report has been published on Mr. Hoskins' case there is simply no way to go back to it. In our submission that flies in the face of the language of s.179(5) because that says – I will just turn it up.

THE PRESIDENT: As I understood it what he was saying was that you can use s.179(5) to send a recommendation back for reconsideration provided, as it were, everything happens within that two year period.

MR. WARD: That was part of what he was saying, Sir, but he was also saying that the power that would be needed when the matter had gone back was s.138. He said at that stage s.138 comes into play and it is that that allows the Competition Commission to continue to act on the matter.

THE PRESIDENT: I am not quite sure he was saying that.

MR. WARD: Well perhaps he was not, Sir. If he was saying that it would be completely wrong. If he was not saying that then we do not understand actually how he is saying the power to revisit the recommendation would arise in another case.

THE PRESIDENT: Again, I may have misunderstood, but it is just as well if I have misunderstood we clarify it. You can use 179(5) provided everything, including the new decision that the Commission would take, on its original recommendation, takes place within that two year period?

MR. WARD: Yes.

THE PRESIDENT: You would not have to use s.138 because that is only dealing with action by the Commission itself rather than recommendations to others?

MR. WARD: Well it may be then that Mr. Hoskins' case is that 179(5) does provide a power to recommend, provided it is within the time and on that our primary submission I have already made is that really the time limit in question (s.137) simply does not bite on s.179(5) and we adopt the submissions of Mr. Roth in that regard, I will not repeat them.

With that, if I may, I would like to turn to discretion. This submission is that as a matter of the Tribunal's discretion it is appropriate to remit this case and I wanted, if I could, to refer back to the ordinary position in judicial review, because in the *Sky* case that you have been shown already this morning, the Tribunal said it would apply normal judicial review principles when deciding whether to exercise its discretion as to relief. On that occasion you were shown an extract from **Fordham**, and I would like to show you the same extract again, I wonder if I might hand that up. I am sorry, it is not in front of you. Before I do I want to make an observation about the cases which are in **Fordham** and the question of the discretion to remit, because there is something very, very unusual about this case which is not reflected in the ordinary case law, because usually a successful litigant is seeking relief and sometimes encounters resistance from the body that has been subject to successful judicial review. Most, if not all, of this case law is about a struggle along those lines. The peculiarity about this case of course is that Tesco has succeeded in its argument that certain things were not properly considered or, at the very least, were not properly set out in the report itself. The Competition Commission is positively volunteering to go back and do again that which Tesco says has not been done properly, but Tesco itself is actively trying to prevent that, and that is, to put it mildly, anomalous.

So when one looks at the case law summarised in **Fordham** it does not typically deal with this kind of situation, but nevertheless there are principles which can be very usefully read across. The first one which was mentioned by Mr. Roth and, of course, was very much in play in the *Sky* case is that there should be no remittal where a remedy would serve no useful purpose, that is 4.4.1 of **Fordham**. This case simply could not be further away from that situation and indeed, the *Sky* case itself dealt with a wholly different set of circumstances, as Mr. Roth rightly said. Here, obviously the potential is there for the remedy to be extremely important in practice.

Then at 4.4.2 over the page, Mr. Fordham summarises the proposition: "No material capable of producing a different decision". Of course the basis of the Tribunal's decision in

this case is that there were factors in play which might have influenced the outcome, not that they were irrelevant. If you had thought they were irrelevant no doubt the appeal would have been refused.

Finally, over the page, 4.5 encapsulates a general proposition which we again submit is relevant:

> "Dangers of materiality, prejudice and futility. Judges will not readily accede to the argument …"

usually made by the defendant it must be said –

> "… that a public law flaw was non-material or non-prejudicial, or that a remedy would be futile. Public law standards matter, and public bodies should not be encouraged to breach them in the belief that they will be 'let off'..."

Here the Competition Commission does not want to be let off, it is the successful party that seeks to have it let off the hook of redoing its task. I just wanted to address one aspect of what Mr. Hoskins said in support of his submission that as a matter of discretion relief should not be granted, which is that a huge amount of additional work was required. We do not accept that is the case at all. The whole inquiry took two years as, of course, you know. The issue of adverse effect on competition is not going to be opened up at all and nor are any of the other remedies. All that is in issue here, of course, is the competition test. You will have seen from Tesco's skeleton that that remedy was dealt with fairly quickly by the Competition Commission in the course of its inquiry. The timetable is set out at para. 40 of Tesco's skeleton, if I can just read it out to you:

> "The competition test was the subject of various parties' submissions in response to the Commission's Emerging Thinking (23 January 2007) and the Provisional Findings report (31 October 2007).
>
> The CC decided the competition test was a necessary part of the remedies package on 10th January 2008."

That of course was doing it all for the first time. Here, what the Tribunal has done is allow the appeal on two relatively narrow grounds as you yourselves described them. So they are not new issues that the Competition Commission has not thought about at all. In large part the reason why the appeal has been allowed is because of insufficiencies in the reasoning itself, as expressed in the report, even though Mr. Roth addressed you on the substance of those issues during the course of the appeal. So we do not accept that a vast amount of additional work was going to need to be done, or that the inquiry has to be repeated on a large scale. It is for that reason that Asda has also asked for an indication from the Tribunal

as to what the timescale should be for this reconsideration and you will have seen that we asked for the period of three months. We have heard Mr. Roth's suggestion that an undertaking be given as to six months, and we of course welcome that as a constructive step but we do still urge that a shorter period would be appropriate, whether in the form of an undertaking as Mr. Roth says, or indeed just in the form of an indication from the Tribunal.

Can I assist further?

THE PRESIDENT: Thank you very much, Mr. Ward. Anyone else? (After a pause) Mr. Hoskins, do you want to come back on any of that?

MR. HOSKINS: It is telling that very early on in his submissions Mr. Roth played the purposive construction card. As I said this morning, our submission is based on normal principles of statutory construction, by which I mean black letter, look at what the words say, look at the structure of the Act, look at the sections with each other. Our submission, as it comes out in the wash does not require a purposive construction – whatever that may mean. We say it is clear from the wording and the structure what the answer should be, just look at the Act to get the answer to this question. What is Mr. Roth's statutory purpose? Well not surprisingly it is very one-sided. His statutory purpose is that the Competition Commission should identify whether there is an AEC and if it finds an AEC it must consider what remedy to apply or recommend, and it should be given the time it needs – I am paraphrasing – it would be given the time it needs to get to that result, because otherwise the statutory purpose is defeated. That is not correct, that is the problem with Mr. Roth's submission, with the Competition Commission's position; that is the problem with Mr. Ward's position. There is another statutory purpose here which is the two year time period. The Act is not: "The Competition Commission shall have as much time as it wants". You have seen from our skeleton argument there is a two year time period and the exceptions to it are express in the Act, and they are very limited. So with respect the statutory purpose of the Competition Commission should have as much time as it needs is wrong, because it has to be balanced, and it has to act within a certain reasonable period, and there is an illogicality in the Competition Commission's approach because if one goes under the Act, if the Competition Commission behaves properly it has no real opportunity to get an extension except in the limited circumstances we have indicated in our skeleton, and yet here the Competition Commission in this case has made fundamental mistakes and the two year time period is to be overridden by six months, which is 25 per cent. There is an illogicality, there is a tension there. The worse job the Competition Commission does, the more Parliament's intention to

limit uncertainty for industry is undermined - that is if you like the illogicality in the position.

We had, of course the sort of *in terrorem* argument: "It is all terrible because if Tesco is right nothing is going to happen". With respect , our submissions were more focused on that. I am going to endeavour not to repeat myself. I pointed out that again this is catered for in the Act. If the Competition Commission has run out of time in any circumstances then the OFT is the gateway under the Act to allowing it further time by making a further reference. That is expressed in the Act. Government action – well Mr. Roth picked that up and said "Well the Government would be in a strange position if it has this half –firm recommendation". But the whole point about recommendations is the world does not turn around the Competition Commission in terms of recommendations. It may well be the Government, looking at this, says: "We are not going to go on because the Competition Commission has had two years to deal with this, we have seen the submissions made by other public bodies, by the OFT, by the planning bodies, etc., and we decided we are simply not going to carry on with this." If they decide that then actually that is doing everyone a favour, because rather than having another six months of the Competition Commission trying to justify a competition test and the Government saying: "No thanks", the Government simply says: "No thanks". Alternatively, the Government may look at it and say: "It is very helpful. We see there is an AEC, we see what the Competition Commission has said but we also see what the OFT has said, we see what the different planning bodies have said and we think it is a good thing, and what will the Government do then? It will carry out its own CBA and irony of ironies it will be in accordance with the Green Book. So, with respect, the notion, this *in terrorem* argument that everything runs into the sand and the statutory purpose is defeated is simply not correct.

There is a point made about merger cases, again this is an extension of the *in terrorem* argument, it is all terrible for market investigations, it is terrible for mergers, again it is simply not correct. Section 41 of the Enterprise Act is the equivalent of s.138 for merger cases. Of course, the notion of recommendations is not really at play in merger cases so there you have an even more complete statutory framework for final orders and undertakings.

It is said by Mr. Roth that we are trying to draft words into s.179. Well with respect he is the one who is drafting words into the statute, because if I am correct that "change in circumstances" or "a special reason", in its natural language, covers a Tribunal judgment then what he is asking the Tribunal to do is to add (in brackets) "without prejudice to

s.179". Potentially the Competition Commission are trying to read words into the statute. What we are doing is we are taking the provisions of the statute and we are seeking a way which is consistent so that they provide a complete statutory code. It is the Competition Commission that wants the Tribunal to read words in, to imply words in. He said if an AEC was quashed then s.138 would not be engaged. We say that is simply not correct. If one looks at the language of s.138(1) and (3) it is clearly apt to cover that situation as well, so that is not correct.

So the bottom line is on one side you have our approach, black letter construction and looking at the sections, all the sections, and to see how they interrelate to each other. We have the Competition Commission's purposive construction and we say it is quite clear that the result intended is the one that we advocate, and that is because the recommendations there are different, the world does not turn around the Competition Commission, third parties are in play and therefore the scheme is perfectly understandable, particularly if one remembers the two year time limit, and the Competition Commission throws that out of the window.

In relation to discretion, Mr. Roth says: we have found an AEC, our remedy will prevent new areas of high concentration. Well that is right, and that is why there is no problem if the Government comes to look at this it can take all that into account, it is not that that reasoning disappears again, it is simply taken account of by other people. It is taken account of by the Government, or it is taken account of by the OFT but that is how the statute is supposed to work.

With reference to the *Virgin* case, I do not need to comment on that, my submission was not: "Look at what happened in *Virgin*, this is our case." I only referred you to *Virgin* to show that the existence of a statutory duty does not mean that there is not a discretion, so that was really tilting at windmills with all due respect.

The offer of an undertaking to complete the task within six months – our understanding of the law is that would be acceptable under the *Floe* principles, because the point *Floe* was the Tribunal was seeking to impose a time limit on Ofcom that Ofcom was not prepared to accept, indeed that is how the dispute arose.

If a public body such as the Competition Commission wishes to offer an undertaking, it is perfectly entitled to do so, because then the Tribunal is not interfering with, for example, the prioritisation of cases by the Competition Commission. So if the Competition Commission wishes to offer that undertaking then it can and should be reflected in the order, because it would be wrong for the Tribunal to act on the basis of "We will try and do it within six

months" and then it goes away. If that is the basis on which the discretion is exercised, then the Tribunal should retain control over it, and we say it is best to do that by reflecting it in the order.

THE PRESIDENT: Just while my mind is on that, Mr. Hoskins, supposing they did not manage it within the six months, what would be the effect of that undertaking?

MR. HOSKINS: Well it may not be very attractive to you but I am afraid you will be hearing similar submissions to the ones I have made this morning, which they have had two years and they did not do a good job, and they have had six months and still have not done it, time really is up now, that would be the effect of it.

THE PRESIDENT: So we would say "In that case we withdraw the referral back" – I am just wondering whether an undertaking has any effect.

MR. HOSKINS: The undertaking would have one effect which is this: it would put an onus on the Competition Commission to come back and justify any further extension of time it needed and in the order, recognising the undertaking, the order could be that any new decision is reached within six months, and if the Competition Commission fails to reach it within six months, and if it chooses not to come back and ask for extra time then, yes, that will be an end of the matter, but that is simply a question for how one formulates the order, but yes, we say if one gets the undertaking of six months then the *quid pro quo* must be that the referral back is to allow them to come to a new decision within six months, because that is what they have asked for and if they fail to do it then the statute finally takes its effect. Mr. Ward suggests encouraging a shorter time, we are not very keen on a shorter time. If, despite all my other submissions, this can go back, this does go back, we would like it done properly next time, please. So certainly forcing the Competition Commission to do it in less than six months we say is not at all attractive.

THE PRESIDENT: Well then we are putting them under a time limit, are we not?

MR. HOSKINS: It is a matter for the Tribunal, our submission is that it is possible under *Floe* because it does not cut across the principles in *Floe,* and then the question is: what happens if they need more than six months? We say that is precisely why the Tribunal should be building a mechanism into the Order to take control because it is not good enough for it simply to go off into the ether, particularly when Parliament has said that ideally these things should be dealt with within two years and we are already well over that period. Mr. Ward's suggestion that all it was was a question of the reasoning being tidied up, I am sorry, that simply will not wash in light of the findings in the judgment. The flaws were central in terms of matters that were not considered and the fact that the Competition

Commission itself has asked for six months shows it is simply not correct, as a matter of discretion, for the Tribunal to proceed on the basis that there is not going to be much work to be done, that is simply not right in light of the judgment or, indeed, in light of the offer of a six month undertaking.

Unless I can help you further, those are our submissions.

THE PRESIDENT: Thank you very much, Mr. Hoskins. We have heard submissions then on relief, the only matter we have not heard any submissions on are questions of costs, which are also covered in your very helpful written observations. Do people want to say anything about those today? Shall we deal with that now, if you do? Or shall we have a short break while you think about it?

MR. HOSKINS: I can tell you I certainly do want to say something about it today. I am very happy to have a short break before we do so.

THE PRESIDENT: We will take 15 minutes.

MR. HOSKINS: So that is 25 past.

(Short break)

THE PRESIDENT: Mr. Hoskins, before you deal with costs, we have obviously had a chance now to talk about the matters we have heard submissions on. We felt that it would be appropriate to give an indication. We are against you on the jurisdiction insofar as remittal is concerned, and we are minded to refer the matter back for reconsideration in accordance with s.179. We are not in a position to give a reasoned judgment at the moment. We will do that as soon as possible. But, in the circumstances we thought it was appropriate that we should, as it were, put the parties out of their misery on that issue now.

MR. HOSKINS: That does raise one practical point which is that there is the possibility of an appeal in relation to that. Obviously we would say the time should not start to run until we see the reasons.

THE PRESIDENT: I think that must be right.

MR. HOSKINS: I just want to make sure that is the position.

MR. ROTH: It is Mr. Hoskins who has been eloquently pursuing points about concern of time and certainty, but I do not know if there needs to be any further hearing - I would hope not - after you deliver your judgment, but we would seek an abridgement of time for an application for permission to appeal. There would have to be an application to you in the first instance for permission to appeal. We would ask for time for that to be abridged to seven days. It is under Rule 58 of your Rules. That is in the Purple Book at p.314. As you see, it shall be within a month. That is sub-rule (1)(b).

THE PRESIDENT: I am not sure that the time has come really.

MR. ROTH: I accept what Mr. Hoskins said - time would run from delivery of your written reasons. But, I just indicate now that when you do deliver the written reasons, it may be that we do not need another oral hearing at that point.

THE PRESIDENT: If you make your submissions now, then we can deal with the matter when we hand down the reasons.

MR. ROTH: It is, of course, quite simply that we would want the Commission to get on with it. One noticed that Tesco put in its notice of application on the last day of the two months after the report. There may be some resonance in what Professor Pickering remarked about - that sometimes dragging the matter out can suit the commercial convenience of certain parties. One could anticipate such an application on the last day of the month. Then you would have to consider it. Then if it is refused there is another application to the Court of Appeal, and so on.

THE PRESIDENT: I think what we have done in the past is make a direction that any application for permission be made orally at the time we hand down judgment ----

MR. ROTH: That would be another way of dealing with it. That would be even quicker and perhaps more satisfactory. (After a pause): If it is dealt with orally -- It is a short point obviously. If it is decided orally, then you can also, I think, deal with the question of abridging time for an application to the Court of Appeal, which obviously only arises once you refuse permission, if you do.

THE PRESIDENT: I think it may be that who turns up is very much for the parties to decide, but they are quite short points, are they not? Thank you.

MR. HOSKINS: I think we are comfortable with that as an approach. The position might change if it were to be done in writing. With Easter coming up, that makes matters difficult. For abridging terms, the Court of Appeal, of course, is not quite straightforward. You have to put in your notice plus the skeleton argument fourteen days thereafter. It is not quite as straightforward.

THE PRESIDENT: The main thing is to get our side of it done as quickly as possible.

MR. HOSKINS: That is what Mr. Roth is probably hinting.

THE PRESIDENT: One always hesitates to give an indication, but we hope that that is a helpful indication in the circumstances. However, I think it is better if we re-visit questions such as that when we hand down the judgment, which I hope will be in the near future.

Shall we turn to costs then?

MR. HOSKINS: I have handed up a speaking note in relation to costs. I hope it will save some time, but also there are some detailed references when I come to deal with some of the specific points made by the Competition Commission. I thought it would be easier to have the references in a document for everyone's note. Basically we say we have won and we would like our costs, and the Competition Commission's position is that there should be no order as to costs. They say that on two main grounds: first of all, they rely on their role as a public body. Secondly, they refer to the way in which we conducted the litigation and the fate of certain of our arguments. I will obviously deal with both of those aspects as we go through.

First of all, what is the proper approach to the question of costs? Well, it is often said, and it is trite, but it is correct, that the rule as to costs is that there is no rule as to costs. That comes out very clearly from the Tribunal's own judgments.

The Competition Commission has actually referred to four authorities in its relief submissions. It suggests that as it was acting in the public interest and had not acted unreasonably or in bad faith, it should effectively be immune from costs. There are a number of reasons why that should be rejected, both as a matter of principle and, indeed, on the facts of this case. First of all, if one looks at the authorities that the Competition Commission itself relies on, it is quite clear that each case must be considered on its own facts and that there is no general rule that a public body will be immune from costs whenever it has acted reasonably and in good faith.

If I can take you very briefly to one of the Competition Commission's authorities - in their supplemental authorities bundle - the *Vodafone* case at Tab 1 -- Paragraph 14 at p.5 sets out Rule 55, which is the general costs provision in the Tribunal rules. At para. 15,

> "The question of whether to award costs in a particular set of circumstances, coupled with the issue of the amount of any costs to be awarded, is a case specific exercise involving the exercise of judicial discretion, largely dependent on the conduct of the proceedings before the Tribunal".

There is a quote from the *Hutchison* case, which is quite important in this context, where the Tribunal said, "The correct approach in this case is not to proceed by way of analogy with other cases, but to apply the clearly established principle that costs have to be determined on a case by case basis, relying on authorities for principles where appropriate".

There is then a reference to *City of Bradford v. Booth* which was a licensing authority case in the general public law field. Similarly, at para. 17 -- Perhaps I would ask you simply to read paras. 16 and 17 to yourselves. Again, it is self-explanatory. (After a pause):

Paragraph 16(ii) talks about, "--the need to encourage public authorities to make and stand by honest, reasonable and apparently sound administrative decisions [and I will come back to that, and why this case is different] made in the public interest ----"

Then, at para. 18, "In each of those cases, the following considerations emerge: the regulatory authority was under a statutory duty; while it acted honestly, reasonably and properly in exercise of its public duty, the court struck the balance reached by the authority differently; there existed the need to encourage public authorities to make and stand by sound administrative decisions in the public interest without fear of exposure to undue financial prejudice if the decision was successfully challenged; and it was necessary to consider the financial prejudice to the applicant ----"

So, basically there is no rule as to costs. It is all very well to refer to these licensing authorities, but, of course, we see from the Hutchison judgment from the Tribunal, it is not appropriate to proceed by way of analogy. It is slightly odd to refer to these cases when it is quite clear from the Tribunal's own case law that we should not be doing that.

THE PRESIDENT: These were appeals. I do not know whether that matters, but these were appeals from the licensing justices, were they not? The local authority made a decision and then the appeal was to the justices, and the justices had a complete discretion to do what they thought was right.

MR. HOSKINS: Some of the authorities relate to the basis upon which they acted. I think at least one of the judgments was overturned because the justices had presumed that the normal rule was costs follow the event.

THE PRESIDENT: Yes.

MR. HOSKINS: There are elements of principle in that sense.

THE PRESIDENT: I do not know whether this matters, but they were not in the nature of judicial review challenges to the decisions in question. They were complete re-hearings where the new decision-maker, as it were, had a complete discretion to do what they thought was right.

MR. HOSKINS: I think I would put it more simply: as the Tribunal has already said, you should not go by analogy. If that is right, then clearly you should not go, by analogy, to completely different statutory frameworks and say, "Well, look what happened in the licensing case. That must be the approach here". That is clearly not correct. I am not saying you cannot refer to them and see how other courts approach the issue, but it is not a read-across. That is certainly not the case.

Of course, the notion that somehow where you have a public body and it has acted reasonably, so it should not have a costs order against it -- It is certainly not a rule. It is not even a presumption because the daily business in the Administrative Court shows that that is not the case. It is not a strong argument to come as a public body and say, "We are a public body. Please spare us costs". There are umpteen immigration cases which are heard every day in the High Court, and regularly costs sanctions are visited upon the Secretary of State if his decision is overturned. Indeed, in the Tribunal itself, there is still not a general presumption that public bodies do not escape sanction from costs - MasterCard being perhaps the most significant example, where the OFT had a significant costs order made against it because it had lost the litigation - it withdrew its decision. So, really it is important not to over-egg this particular notion that has been put forward: "We are a public body. Please be kind to us", which is really all it amounts to.

The second point which ties into this is that it is not appropriate to go by way of analogy, but there is a direct precedent for the Competition Commission on costs. That is the *Interbrew* case, which admittedly was under a different regime, but it was the Competition Commission as a public body which was not said to have acted unreasonably or malafides and it had to pay costs to *Interbrew* (our authorities bundle at Tab 8). This is in the context of merger proceedings under the Fair Trading Act 1973. The divestiture order was challenged. *Interbrew* were successful. The order is at the very end of this extract at p.983. There was a percentage of the costs order to reflect the outcome of particular arguments before the court. But, there was no suggestion that the Competition Commission had any particular need for protection as a public body when exercising a public duty.

THE PRESIDENT: That was a specific merger case, was it not? Could it be said that where you have got a challenge to a market investigation, where, by its very nature, the Competition Commission has got to make a whole myriad of judgments and decisions and where it is particularly vulnerable, in a sense, to someone saying, "Well, that bit of it is wrong" because there are so many decisions that have to be made and judgments that have to be made -- Could it be said that that particular vulnerability is a factor that weighs in its favour?

MR. HOSKINS: You will not be surprised to hear that my answer is, "No". It is actually the next three points in the notes which deal with that.

First of all, the Competition Commission has made the point that it is under a statutory obligation to act. But, with respect, that is a point in our favour because if it were the case that the Competition Commission had a discretion whether to pursue a market reference - a

market investigation reference - then you can see the beginnings of an argument that there should not be a costs sanction against it because that may deter it in the first place from taking on the market investigation reference. It might say, "Oh, well, this looks like a tricky one to us. If we do it and we lose at the end of the day, we might lose a lot in costs. We're not going to take it on". But, none of those considerations apply here because once the OFT makes a reference they are under a duty to act. So, a costs threat at the end of the day has no impact whatsoever on the conduct of the reference. They have to pursue it.

The fourth point is that it is all very well here as well to say, "Well the Competition Commission's acting in the public interest" -- Well, with respect, Tesco was acting in the public interest because we are the ones who stuck our head above the parapet and said, "Something has gone wrong here". If we had not brought this challenge, the recommendation would have gone ahead to government on the basis that there had been, on the face of it, in the report a proper assessment of whether the competition test was a good idea. So, with respect, when we are talking about public interest, Tesco really should get some credit for saying, "There's something wrong here" and for doing something about it.

The fifth point - and this is the last point in answer to your question as well - is that this is not an area where matters are finely balanced. As the Tribunal's judgment quite correctly records, this is an area in which the Commission has an wide margin of discretion. So, it is not a case of, "Yes, they've lots of detailed questions to consider", but when it comes to the question of legal challenge, the Tribunal will not interfere unless there has been a manifest error. So, again, that legal framework says that, yes, you might have a lot of things to consider, but generally speaking you are not going to be open to challenge unless you make a manifest error, and when you do make a manifest error then it is quite correct that you should pay costs. That is the legal backdrop. So, that legal backdrop in our submission, far from actually militating against a costs order, is a reason why, when they have made a fundamental error there should be a costs order. We are quite an extreme case, having won a case of this sort where there is a wide margin of appreciation.

The sixth point is the conduct of the parties. I will come on to this in a bit more detail. At the outset, yes, the conduct of the parties clearly is a relevant factor. It is something the Competition Commission seeks to pray in aid. But, the truth about this case is that it was the Competition Commission that sought to introduce new material and new arguments after the report. I will make that good. I will take you to the particular passages. But, in particular, as we know, it sought to introduce a new justification for the competition test, i.e. the facilitative objective. It would encourage new entry which had not been mentioned in

the report. That is recognised in certain paragraphs of the judgment. I have given the references: 114, 119, 120, 124, and 125. The judgment records that it was not until the defence that this new argument was clearly articulated. So, that is the conduct on one side. The Competition Commission is trying to introduce new material when it should not. It is not allowed to.

On the other hand, Tesco was actually narrowing its argument as the case went on. Again, I will go into this in a bit more detail. But, we saw the shifts in the Competition Commission's case and we took account of them. We did not simply pursue all the arguments we had put forward in the first place willy-nilly. We said, "Well, how do those arguments look in light of the Competition Commission's shift in position?" As things went on, we reacted.

Now, far from Tesco being the one in the dark for its conduct of these proceedings, with all due respect, we are the ones who have behaved exactly as one would hope litigants would expect by reacting to developments and focusing the arguments. If anyone is to be penalised in costs for its conduct, with all due respect it is the Competition Commission because it was the one that broadened up the scope of the proceedings. I will come to that now.

The seventh point in the note are the specific allegations made by the Competition Commission about Tesco's conduct. We say there is simply nothing in them in any event, but it is instructive to work through them. One has to turn to p.4 of this note for the detail.

There are three main arguments that the Competition Commission has put forward. The first one is that Tesco argued that the Competition Commission was obliged to deploy a specific formal method of cost benefit analysis. Secondly, a very large amount of work on the Commission's part was involved in responding to Tesco's third Ground 2 argument relating to the lack of robustness of the AEC and also a complaint about having to deal with our witness statements; and, finally, that we abandoned the argument in our notice of appeal that the competition test would not address the barriers to entry created by the planning regime. I will take you to those in turn.

First of all, the suggestion that we submitted that there should have been a formal method of cost benefit analysis adopted. It is said in their skeleton that this was a key part of our submissions on the second ground. Well, with respect, that is simply not right. We did not at any stage make that submission. We make that good in the paragraphs that follow. The notice of appeal -- The point was the one made at the beginning of the case, and it was the same at the end. We said that the Competition Commission failed to properly assess the

economic benefits of the test and had ignored economic and welfare costs of the test. Those were high level points. They were the points throughout.

There was a footnote to para. 24 in the notice of application that said, "The Commission's analysis falls far short of satisfying Treasury guidance on how policy proposals should be reviewed".

That is as far as it goes. The point that we were making was that if this had been a government process you would not get anywhere near what is required. But we are not saying that you have to adopt the Green Book - we are saying, "Use the Green Book as a touchstone to see how other people conduct cost benefit analysis". Ironically, it was actually the Competition Commission that picked up on the Green Book because they came back in their defence at para. 105 and said,

> "Far from falling far short of satisfying Treasury guidance on how policy proposals should be reviewed, the Commission's approach to quantification is consistent with the Green Book guidance".

So, it was not us saying, "You must comply with the Green Book", it was actually the Commission who came back and said, "We did comply with the Green Book". We saw that when we got Mr. Johnson's witness statement. You will remember, he had previously been employed in government. He explained why the Commission had not complied with the Green Book. Lo and behold! That point was never made again - that is because Mr. Johnson's evidence was absolutely correct.

So, that deals with Mr. Johnson's witness statement. It was in response to the Commission. It was never responded to. We have to assume that his points were correct.

The other point is that at no stage prior to the hearing did Tesco submit that the Competition Commission's failure to comply with the Green Book or any other particular method constituted a ground of review. We see that in what followed in our skeleton argument at para. 78 and following (para. 10 of the note). We said,

> "The Competition Commission should have assessed ... costs and benefits is supported by case law, the Competition Commission's own guidelines on market investigation references, and previous Competition Commission decisions, the practice followed by the regulators [you will remember, we put forward the Ofcom guidance on this] and the Green Book published by HM Treasury".

Clearly we are not saying, "You must follow the Green Book. You must follow Ofcom". We are saying, "You have failed to conduct any sort of acceptable cost benefit analysis and

here are a number of sources to show that it has to be done, and ways in which it can be done". There is no suggestion that they had to adopt a specific methodology.

At the hearing, again, it was put the same way. I have set out an excerpt from the transcript. If I can simply go to the emphasised words? Mr. Green:

> "There is no magic in the word CBA. It just means that you take the costs and you measure its benefit in an appropriate way. It is not a term of art".

Finally, in the Tribunal's judgment at para. 132, it refers to the sources we had referred to - so, the Green Book, Ofcom, the Competition Commission's own guidance - and then,

> "Tesco argues that these sources demonstrate the sort of exercise that the Commission should have undertaken when evaluating proportionality in a case such as the present".

So, insofar as the point made against us is, "You alleged that the Competition Commission should have adopted a specific methodology and you lost on that point", it is a very simple and short answer -- Well, maybe not so short, but simple: We never made that allegation. That is no. 1.

No. 2 is the suggestion that the Competition Commission did a very large amount of work in response to our AEC robustness point. You will remember that is the point where we said that if you looked at the findings in the AEC, we said they were not cast iron; they were not clear-cut, and that should feed back into proportionality assessment. The Tribunal found against us on that point. They also said that extensive efforts and expenditures were expended in dealing with Tesco's witness statements.

I have dealt with Mr. Johnson's witness statements. I will not go back to that. First of all, Competition Commission says, "A very large amount of work", but it does not specify what the work was; what the nature of the work was. So, it was a wholly unspecified allegation.

Again, let us see how this point came to be, because the point made by Tesco in its notice of application was a legal one, made by reference to the notice of application. When we filed our notice of application we did not file any witness evidence at all. Our intention was that the matter would be dealt with by way of submission in terms of law and the content of the report. Indeed, in our notice of application we specifically referred to the *Somerfield v. Competition Commission* case. Then reason we did that was because that there says that the judicial review should be looking at what is contained in the report. There is actually a warning from the Tribunal there that the Competition Commission should not generally seek to supplement the report with witness evidence. That is why we put into our notice of application. We said, "We are giving you this as a challenge on the basis of the report. You

should not put in witness evidence to broaden it any further". But, of course, that is not what the Competition Commission chose to do.

I am sorry if this is an obvious, and cheap, shot. Bundle 1 - that is our notice of application - all twenty-odd pages of it. Bundle 5 - the defence and witness statements of the Competition Commission. If you are asking which party tried to bring in expert evidence there is only one answer.

What the Competition Commission actually chose to do was to serve two substantial witness statements with its defence. The first one was Dr. Durand - do you remember? - on economic evidence. He said, at para. 9 of his statement, that he intended to explain in more detail than in the report how margin concentration analysis came to be applied. So, rather than saying, "This is the report. This is what is said in the report. It's enough because --", the Competition Commission decided to try and go beyond the report, to add flesh to it.

The other witness statement was Mr. Freeman's witness statement. This was the one which sought to introduce new material which was not in the report - in particular, two types of new material: first of all there was the suggestion that it was impossible to predict the benefits of the competition test. One finds that at para. 67 of Mr. Freeman's statement. That was the first time that that point was made. Secondly, the suggestion was made, as I have already referred to, that a key thrust of the competition test was that it would facilitate or encourage new entry. That is the facilitation objective point. That is paras. 68 to 74 of Mr. Freeman's witness statement.

THE PRESIDENT: You are off your note now?

MR. HOSKINS: I am sorry. I am up to para. 19 on p.7. The only bit I have added in that is not in here are the references to Mr. Freeman's statement. It was suggested that it was impossible to predict benefits of the competition test (para. 67) and the suggestion that it was a key thrust of the competition test that it would facilitate or encourage new entry (paras. 68 to 74). Those were both new points.

Now, if the Competition Commission had not decided to introduce those new witness statements we would not have put in any witness evidence. In fact, I am sure that if we had tried to in the absence of Competition Commission statements we simply would not have been allowed to. It is somewhat ironic that, of course, there were howls of inadmissibility when we sought to respond to the Competition Commission's statements. But, the simple point is that it was the Commission that opened these particular cans of worms.

Having introduced the Durand statement, we felt we simply could not leave it unchallenged. We did not know what the Tribunal's approach would be to this matter. We had to respond

to it. We did. The Competition Commission did not make any further reference to the Durand statement in the proceedings. So, they put it in. We responded. They drew back. What they actually did was they went back to saying, "Well, it is a matter of legal submission and principle" and that we should look at the report. That is right. But, that is where we started from, and that is where we wanted to remain. So, the simple point in relation to this is that any costs engendered in dealing with the AEC robustness point -- any costs engendered in having to deal with our witness statements are entirely the fault of the Competition Commission for trying to open up the scope of the argument beyond its own report.

The third and final point is the alleged abandonment of the argument we put in our notice of application that the competition test would not address planning barriers. Again, if one looks at how the matter developed, this argument simply falls away. The argument appeared at para. 18 of the notice of application. It was actually in response to this argument that the Competition Commission introduced its new point that the competition test would facilitate new entry. That is the defence at para. 80(i) and (v). They expressly cross-refer back to para. 18 of the notice of application. As found in the judgment, as I said before, that was the first time that this new justification was put forward.

THE PRESIDENT: Can we just have a quick look at para. 18?

MR. HOSKINS: The first substantive bundle at p.12. (Pause whilst read): Perhaps we can look then at the defence as well at bundle 5?

THE PRESIDENT: Is it not also in the core bundle?

MR. HOSKINS: It may be. I have just been working from bundle 5.

THE PRESIDENT: It is the next tab in the core bundle.

MR. HOSKINS: Page 25 of the internal numbering at para. 80. This is expressly dealing with the notice of application,,paras. 18 and 19. One sees the heading above para. 79. (After a pause): One sees the new argument come in at para. 80(i) and para. 80(v). It is clear that these are in direct response to para. 18 of our notice of application. (Pause whilst read): So, we say that there is a flaw in the competition test because it does not address barriers to entry. The Competition Commission comes back with its new point which says that it does, because it facilitates new entry. At that stage, rather than just ploughing headlong with our argument originally, we take account of that and we attack the new argument. So, the idea that somehow we should be penalised in costs for moving our argument along to take account of the Competition Commission's shift in position simply does not have any merit in it whatsoever, with all due respect.

The short point is that, yes, the conduct of the parties is relevant, but, if you like, the debit side of conduct is all on the Competition Commission because it is the Competition Commission that sought to bring in new arguments, new issues, new justifications, and new witness material.

If I can return to the body of the speaking note at para. 16, p.3, "Even if any of the specific allegations--" We say there is nothing in the allegations about our conduct. In fact, they cut the other way. But, even if there was something in them, we say they are peripheral matters in the grand scheme of things and they certainly would not justify no order as to costs. We have been entirely successful in obtaining the relief that we sought. We have been entirely successful on the main issues - that is, that the Competition Commission failed to conduct a sufficient analysis of benefits, and conducted no analysis of relevant costs. We say it is quite clear then that we should have our costs. At the very most, if you are against me on these points, this is a point where you might get a reduction in our costs of 5 to 10 per cent, but we strongly reject that even that is appropriate, but it certainly does not bring it down to no order as to cost, that flies in the face of what happened in this case and how it was conducted.

The final point I should deal with, because it has been raised in correspondence is, that the Competition Commission asked us to produce a schedule of costs for today. The simple answer is that it is not ready. If Mr. Roth wants to make the point that these were heavy, complex proceedings, that the costs will be significant, of course they will be significant – I am not going to suggest otherwise; having a schedule for costs is not going to help that, but it has simply not been possible to produce it in the time available. But, in any event, it is very important, the question of the principle of who should pay costs is separate from what the level of those costs should be, that is a matter of taxation, that is quite clear and we say it is wrong for the Competition Commission to try and bring in through the back door the *in terrorem* argument – either we are entitled to our costs or we are not on the basis of normal principles.

Unless you have any questions those are our submissions on costs.

PROFESSOR PICKERING: Mr. Hoskins, could I refer you to para.4 of your speaking note on the first page, this is just one place where the reference to "acting reasonably" is made. I wonder whether you could help me by indicating what is, and what would not be reasonable conduct on the part of the Commission in relation to this investigation?

MR. HOSKINS: There is obviously a distinction with good faith, so you do not have to be acting in bad faith to be acting unreasonably. I would hesitate to make a general submission about

what "reasonableness" means but if I can in the context of this case, and it echoes something I said earlier, I would say that the Tribunal is entitled to take into account the fact that this was an area in which the Competition Commission benefited from a wide margin of discretion and yet failed to meet the standard. So the flaw here was fundamental; it was not finely balanced. So if it is helpful to refer to a notion of "reasonableness" – whatever that may mean, I would prefer to put it that way, which is they had a very great deal of comfort here that the errors were fundamental.

PROFESSOR PICKERING: Would "reasonableness" include "competence"?

MR. HOSKINS: In terms of jurisdiction or in terms of getting things right?

PROFESSOR PICKERING: The conduct of the inquiry and the presentation of the argument?

MR. HOSKINS: It certainly would, it would come in any way I was going to say in terms of the notion of the conduct of the parties, but that is in the context of the proceedings, but yes, equally the conduct of the parties and the investigation must be relevant. If we had behaved in a particular way before the Competition Commission, for example, by ambush tactics or we might well find our conduct being relied upon as a matter for costs. Indeed, that is quite often how a party will be sanctioned in a way. If a party misbehaves during an investigation at the end of the day it may well be visited with costs and we say the same should apply across the board to the body making the decision, yes.

PROFESSOR PICKERING: If you advanced a bad point I do not think you would necessarily expect to have costs awarded against you, and I am just wondering, it is not in dispute that the Tribunal has agreed with Tesco that there were some quite important deficiencies in the way in which the case for a competition test was made. What I am struggling with, and you will understand I am not a lawyer, is whether that amounts to unreasonable conduct or bad faith, or anything else or whether this is just an error which, you know, is regrettable.

MR. HOSKINS: My primary submission is that one should not be judging this by the touchstone of what is reasonable or in good faith, because my primary submission is that is not actually the test, it is a factor that the Tribunal might take into account, but the principle on costs one starts with is there is a general discretion, but if one party wins and another party loses then that is an important element of discretion. The Tribunal said that there is not a rule that costs follow the event but clearly it is still highly relevant that one party has been successful and one has not. When one looks then at the nature of the success, one finds this in some of the telecoms cases. Again my primary submission is one should not go by way of analogy, but one sees there that these are quite finely balanced issues that Ofcom has to deal with and at the end of the day the Tribunal has come out differently, but this was judicial review, and

what the Tribunal has found is that the Competition Commission fell far short of the relevant legal standard and we say that is a very important factor in discretion.

PROFESSOR PICKERING: Thank you.

THE PRESIDENT: Following on from that "unreasonableness" in this context includes in relation both to the investigation and to the conduct of the proceedings, or is it limited to …

MR. HOSKINS: Sir, I am getting nervous, if you excuse me, because the legal test is not did the Competition Commission act reasonably.

THE PRESIDENT: I know, I fully understand that.

MR. HOSKINS: So if you are asking me is it relevant to discretion, the way in which the inquiry was conducted? Yes. Is it relevant to discretion, the way in which the proceedings were conducted? Yes. But that is the appropriate framework.

Again, unless there is anything further I can add.

THE PRESIDENT: Thank you, Mr. Hoskins. Mr. Roth?

MR. ROTH: The Tribunal has clearly a broad discretion under rule 55 of your rules – you deal with this under two heads, first the general approach to costs, secondly your judgment and the outcome of this appeal. First, the general approach: this is of course the first time the Tribunal has had to consider costs in the context of a judicial review of a market investigation. I am not suggesting there is or should be a rule as to costs, as Mr. Hoskins says the rule is that there is no rule, but the Tribunal clearly is seeking to achieve a consistency of approach and in that respect we adopt and pray in aid, what the Tribunal said in its judgment very recently (last month) in *The Number*, a panel chaired by Mr. Justice Warren, which is in our bundle at tab 4. That was, of course, a telecoms case and it is para. 5, I can perhaps just read it:

> "It is, we think, important that differently constituted Tribunals adopt a consistent and principled approach if the discretion is to be exercised judicially, as it must be. It would, to put the matter at its lowest, be unsatisfactory if different Tribunals placed radically different weight (or perhaps no weight at all) on OFCOM's unique position as regulator. It seems to us that if any significant weight is to be given to this factor, it must follow that the starting point will, in effect, be that OFCOM should not in an ordinary case be met with an adverse costs order if it has acted reasonably and in good faith. Of course, the facts of a particular case may take the matter out of the ordinary so that an adverse costs order would be justified even in the absence of any bad faith or unreasonable conduct; room must always be left for the exercise of the discretion in this way where the facts justify it."

So we accept that and say it should, with respect, apply similarly to the Commission when conducting a market investigation. In *The Number* as in the case last year of *Vodafone*, the Tribunal adopted as a guide, and I think no more than that, the approach of Lord Bingham, then Lord Chief Justice – it was originally in *City of Bradford v Booth*, it was then itself adopted and applied in the *Cambridge City Council v Alex Nestling Limited* case by Mr. Justice Toulson sitting with Lord Justice Stephen Richards. That is where one gets these considerations which are set out and quoted by this Tribunal in both *The Number* and the *Vodafone* case. One can take it, for example, from the *Vodafone* case, which you have at tab 1. Mr. Hoskins referred to the quotation from the *Hutchison* case in para.15, and then below that in para.16 there is Lord Bingham's formulation:

> "Where a complainant has successfully challenged before justices an administrative decision made by a police or regulatory authority acting honestly, reasonably, properly and on grounds that reasonably appeared to be sound, in exercise of its public duty, the court should consider, in addition to any other relevant fact or circumstances, both (i) the financial prejudice to the particular complainant in the particular circumstances if an order for costs is not made in his favour; and (ii) the need to encourage public authorities to make and stand by honest, reasonable, and apparently sound administrative decisions made in the public interest without fear of exposure to undue financial prejudice if the decision is successfully challenged."

Then refers over the page to Mr. Justice Toulson in the later case, where he points out that it is not an absolute rule, but a most important factor. Then paragraph 18:

> "In each of those cases, the following considerations emerge: the regulatory authority was under a statutory duty; while it acted honestly, reasonably and properly in exercise of its public duty, the court struck the balance reached by the authority differently; there existed the need to encourage public authorities to make and stand by sound administrative decisions in the public interest without fear of exposure to undue financial prejudice if the decision was successfully challenged; and it was necessary to consider the financial prejudice to the applicant if an order for costs is not made in their favour. In each case, ultimately costs were refused."

The *Booth* case was a licensing case where the authority had to decide what to do about the licence, not that they had a discretion, they said, but "we are not interested". What one is

talking about as a public duty is that, like the licensing authority, the Commission is acting pursuant to a public duty, that is the point we make.

THE PRESIDENT: As the Tribunal noted in para. 18, those were cases where the appeal court, as it were, could strike the balance differently. In other words, it could make its own mind up, they were not a judicial review court.

MR. ROTH: They were not a judicial review court, but the point being that the need to balance various factors and there the appeal court could do it differently. Here, as Professor Pickering, pointed out a few moments ago, this is market investigation where there is a very wide range of factors that have to be balanced by the original decision maker, and there are quite difficult factors then to be taken into account. The point we therefore make is this: there is certainly no requirement or obligation that costs must follow the event in this Tribunal, or in such jurisdiction, judicial review. There is no suggestion of bad faith, and I think in answer, Sir, to your question, bad faith would be where a decision maker is motivated by malice, or bias, or is not conscientiously trying to do a job and that has never been suggested here by Tesco. We say, as a public authority, although the Commission have been found to have failed to do certain things, which we accept and have to redo, we are not seeking to appeal, but we should not suffer undue financial prejudice as a result. Whereas, one looks at the actual parties before you and Tesco is not an applicant, unlike other applicants that can appear before you, that is unable reasonably to bear the costs of these proceedings, its own costs.

We do say it is a bit unfortunate that unlike the Vodafone case no schedule, or even estimate of costs has been produced, not even any indication of a ball park figure so you can see what it is that is involved, because we do say that the extent of the burden on the public authority of having to bear costs, if they are very substantial is relevant.

Mr. Hoskins says that one should not go by way of analogy and then gave the analogy of the *Interbrew* case. The problem with *Interbrew* is one does not actually have the reasoning of Mr. Justice Moses' decision. One notes that it was under the old Fair Trading Act regime, but as he has not given his reasoning it is very hard to see what lay behind it, and in any event this Tribunal now, under the Enterprise Act is developing its own jurisprudence on costs, as shown by these two very recent judgments in *Vodafone*, a Tribunal chaired by Lord Carlile; in *The Number* the Tribunal was chaired by Mr. Justice Warren.

Turning to these proceedings, and my friend's speaking note, we really take our stand in terms of the judgment that you delivered. There were three grounds of the application, they are summarised at paras. 82 and 83 of your judgment.

> "Although Tesco's set out in the Notice of Application was rather more widely drawn, there are now essentially two main grounds for its challenge, both of which have at their heart an alleged failure by the Commission to take account of relevant considerations."

Then you summarise them. You say at the end of the paragraph that they are interrelated, and then you go on:

> "It should be recorded that in the Notice of Application Tesco had raised a further ground of review, namely that the competition test is not sufficiently related to any AEC identified in the Report, and is for that reason *ultra vires*. Tesco argued that the AEC to which the competition test is addressed is the combined effect of high concentration in local markets and barriers to entry arising out of the planning system. In seeking to focus on one feature of the market giving rise to the AEC (highly concentrated local markets) but not the other (the barriers to entry created by the planning regime) the competition test was *ultra vires*. In other words, the Commission did not have the power to recommend the competition test to prevent the creation of highly-concentrated local markets unless it also took steps to address the barriers to entry to which to which the planning system gives rise. However, this ground was not mentioned by Tesco either in its skeleton argument or at the hearing. At both those stages Tesco pursued only the two grounds referred to above. In its skeleton argument the Commission (which had responded to the *ultra vires* ground in its Defence) interpreted this omission as in effect an abandonment by Tesco of that argument (see paragraph 9 of the Commission's skeleton argument). At no stage did Mr. Green demur from the Commission's interpretation, and no further mention has been made of this point. Whether the argument has been abandoned or simply reformulated and folded into the remaining two grounds probably does not matter. In either case it is not necessary for the Tribunal to deal with it as a distinct ground."

On the three grounds that you have in those two paragraphs summarised, the position is on the first ground Tesco succeeded, on the third ground, which I have just been referring to, the *ultra vires* ground, which we addressed fully in our skeleton, for all practical purposes it was abandoned. On the second ground, proportionality, you addressed that in the judgment

starting at para. 129 in a long section of the judgment from 129 to 168, the position was this: it was brought on various bases or under various heads, in part they overlap with ground 1, but it included a distinct basis which you have summarised at para.166 which I would please ask you quickly to look at because it is important:

> "Tesco's third complaint under Ground 2 was that although it does not challenge the finding of an AEC by way of the margin-concentration study, the Commission's proportionality analysis did not take into account the lack of robustness of the AEC that it found at the local and national level. In particular Tesco argues that it was clear that, in the light of the conflicting evidence before the Commission, there were material uncertainties as to the existence of the AEC which should have been waived. Tesco also relied upon the Provisional Decision on Remedies …"

- and there are quotes from that. Picking it up three lines from the end:

"Tesco submitted that the uncertainties inherent in the Commission's finding of an AEC should have been taken into account, and the alleged benefits of the competition test discounted accordingly.

167. Mr. Green did not develop this point at all at the hearing, and indicated that it was a relatively small, legal point which, although Tesco did not abandon it, he was happy to leave it as it stood in his skeleton argument.

> 168. In the Tribunal's view this aspect of Tesco's challenge is misconceived. The Commission made a clear finding of AEC in the Report, and expressed itself satisfied that the finding was robust. That AEC finding is expressly not challenged in these proceedings. Moreover, in the Report the Commission explained in some detail why it had decided to place limited weight on the results of the GfK NOP and Tesco studies (which cast doubt on the AEC), and to rely instead on the margin-concentration analysis. The reference in the Provisional Decision … does not appear in the Report, which has instead 'gravity and prevalence'. There is force in the Commission's point that Tesco's argument in this respect amounts to an attempt indirectly to challenge the AEC finding and the margin concentration analysis on which it is based - indeed, some of the economic evidence filed by Tesco –

I emphasise this passage:

"… some of the economic evidence filed by Tesco was expressly to the effect that the margin concentration analysis was fundamentally flawed. At any rate, in the light of the unequivocal and unchallenged finding of AEC the point falls away."

The reason for referring you to that in some detail is this: it was to that complaint, and only to that complaint, that the evidence of Dr. Durand was presented. He was dealing with the robustness of the finding and the suggestion that the other surveys should have been used instead or undermined the finding of the robustness of the AEC, it is quite clear from his witness statement, if you could kindly, very quickly look at that, it is in bundle 5 from the hearing at tab 2. You will see at para.7:

"I have been asked to provide this statement to provide some background about the economic analysis undertaken in the course of the Investigation and, in particular, the development of the margin concentration analysis which was used by the Group to assess detriment arising from highly concentrated markets."

Then para. 9 at the top of the facing page:

"Since Tesco has sought to criticise various aspects of the economic analysis undertaken (including the use of margin/concentration analysis in preference to the studies submitted by Tesco and obtained by the Commission from GfK it seemed appropriate to explain in more detail how margin concentration analysis came to be applied."

All of it is directed, as he explains, in para. 10 to that issue.

THE PRESIDENT: I suppose the point that is being made, whether it is a good point is another matter, by Tesco is that they would have just relied upon arguments based on the report to show the shortcomings, where you have sought to open it up a bit more, to which they then have responded.

MR. ROTH: I think that is indeed what they say, and our answer to that is this: where there is a small couple of sentences in the report saying: "We do not place weight on these analyses, and we consider our margin concentration more reliable", if then that is challenged in judicial review it is entirely legitimate for the decision maker to explain, not in that sense to bring in new material, and I take Mr. Hoskins' point on ground 1 where he says new material and [I mean no] criticism of the judgment but here we are just explaining more fully the process that the Commission went through in deciding that it would not rely on those other surveys but rely upon its own margin concentration analysis and that it is indeed robust, and the conclusion is that they found it robust. Tesco are challenging it saying: "No, you should not have come to that conclusion because of these other surveys", so he is

explaining why indeed, when you look at the margin concentration analysis, and the other surveys it was robust and what the thinking was therefore that led to that conclusion, and that we say is entirely legitimate.

It was in response then to Dr. Durand that we had the witness statement, you will remember, of Professor Hausman, which was all about margin concentration and really saying effectively there was not an AEC at all, or at least it was never proved – and indeed Mr. Gaysford from Frontier Economics. I accept Paul Johnson goes to the cost benefit analysis, although I see it is delightfully referred to as the "cross-benefit analysis" in the speaking note.

This aspect not only of course, Dr. Durand's witness statement and the time he had to spend analysing Professor Hausman's witness statement, the Tribunal – if you ever glanced at it – would be, I am sure, delighted and relieved that you never had to be taken through it or hear argument upon it, but we did have to prepare it.

THE PRESIDENT: You won this point, did you not?

MR. ROTH: And we won this point. So we say if it is appropriate now to make an order for costs and I fail on the first point it should be on an established basis of being an issues' basis, that Tesco's costs as put out in your judgment is ground 1, and ground 2 – I think in the application they are numbered differently – excluding the issue of the robustness of the AEC and therefore excluding the evidence of Professor Hausman and Mr. Gaysford should be paid by the Commission and the Commission's costs of what is put in your judgment as ground 3 and of the issue of the robustness of the AEC and therefore including the costs of Dr. Durand should be paid by Tesco. That would be the appropriate issues based order. It is in those circumstances, we say, taking a broad brush approach to costs, that costs should lie where they fall.

If I am wrong on that and you think we should make a contribution to costs then we do say in those circumstances without a schedule of costs that that becomes difficult and that should be adjourned until you have a schedule and can see ----

THE PRESIDENT: Well do we need to see a schedule to deal with the basic approach to costs? There are two possibilities that arise then, are there not? One is that we assess the costs – I think there is power to do that?

MR. ROTH: Yes.

THE PRESIDENT: And the other is that, subject to any agreement, it goes off for a detailed assessment.

MR. ROTH: Yes, I think you have assessed in previous cases, the Registrar will know better than I, but I think you have. He is nodding, which is helpful. It is really because of the role of the experts.

THE PRESIDENT: Do we need to adjourn before we decide in principle?

MR. ROTH: No, you would not need to adjourn.

THE PRESIDENT: We would not need the schedule for that, would we?

MR. ROTH: No, but you might need, with respect, to rule on the particular expert because one does anticipate that some of these experts do not come cheap, and they can account for a very significant element of costs which, when just doing it in overall percentage terms, can look ----

THE PRESIDENT: It may not produce ----

MR. ROTH: But one can rule that excluding the costs of Professor Hausman, Mr. Gaysford, X per cent or something, yes, one can certainly do that.

THE PRESIDENT: I am conscious of the time. I think you have covered the ground where Mr. Hoskins says basically in relation to the abandoned ground, that folded into the argument about the facilitating effect, because that was your answer to it – para. 80 of the defence point.

MR. ROTH: Yes, the abandoned ground itself had two parts.

THE PRESIDENT: He took us to paras. 82 and 83 of the judgment, was that on that?

MR. ROTH: I think he read you para. 18, he did not read you – of the notice of application – para.

THE PRESIDENT: He responded at para. 80 of the defence, 79 and 80?

MR. ROTH: The response – yes – starts at 78, or 77 really. There were two aspects, as I say, to the attack, one was paras. 16 to 17 that we dealt with, and 77 and 78 of the defence. The other was paras. 18 and 19 and that is what we dealt with at para.18. So the strict *ultra vires* ground, which was that it is not meeting all aspects of the AEC was one that I think remained, but was not pursued. The other aspect was merged into the other ground, so it is a bit murky is the short answer.

MR. HOSKINS: I will be as brief as I can for obvious reasons. The level of principle: Mr. Roth took you to *The Number* in his authorities' bundle at tab 4, he took you to para. 5, he read para. 5 where the Tribunal referred to Ofcom's "unique position as a regulator". That tells you all you need to know. These are particular cases dealing with Ofcom obligations, again "do not do it by analogy", so Mr. Roth's *crisde coeur* that there should be consistency

across the Tribunal's case law, well I am sorry, these are very particular telecoms' judgments and they are so on their face.

The licensing cases, Sir, you made the point they are not JR cases, they really do not take us much further because what the Competition Commission is actually trying to do is it is relying on isolated statements taken out of context, and there are a number of us in this room who have experience before the Administrative Court costs' rules in judicial review, which is not very far removed from what we are dealing with today, and the idea that public bodies regularly turn up and say: "We are a public body, we acted reasonably, therefore no order for costs" I am sorry, that is simply fanciful for anyone with any experience of this field, and it should not apply here. If the Tribunal is to be consistent it should be consistent with our brothers in the Admin Court and not with Mr. Roth's suggestion of consistency. There is a terrible unfairness, a terrible imbalance here in these arguments. Tesco took a significant cost risk in bringing this case. If we had lost the Competition Commission would not be saying: "This was a public interest case, you, Tesco, brought; we are very grateful you brought this case because now it is well established that what we did was right, of course we will not ask you for costs". Again, let us inject a bit of reality, if the boot was on the other foot the argument would be Tesco should pay costs and there is really nothing in what the Competition Commission has said that should reverse the position, it would be terribly unfair on Tesco to reverse that position. So that is the level of principle.

Then application to this case: well Mr. Roth invites an issues-based approach – that is the first time that has been said, but that in reality is what he is trying to do. The reality is that if one looks at the judgment at paras. 82 and 83, let us just see what the grounds were. Paragraph 82 – "essentially two main grounds .." The first ground – failed properly to take into account detrimental effects. Tesco won – full stop.

Second ground –

> "… the Commission failed properly to take account of relevant considerations when considering whether it was proportionate … In particular the Commission failed properly to consider how, when or to what extent the test would address the existing AEC which it had identified."

Tesco won that ground. What it lost was one argument that formed part of that ground. So in terms of the main grounds in the case identified by the Tribunal, we won on both. Now, obviously the modern way is to have an issues-based approach. But, that really, in our submission, does not mean that what the Tribunal or the Administrative Court is supposed to do is to go to particular arguments, because one could spend an awful long time

analysing a case and saying, “Well, there was this ground with five arguments, and this ground with six arguments. Let’s just look and see who won each argument”. The reality is that that is not how costs is approached. One needs a certain degree of robustness.

We won on the first ground. We won on all of the second ground, apart from one particular argument contained therein. The costs of that argument were inflated by the Competition Commission. That is the robustness of the AEC point. You only have to look at our notice of application and look at their defence to see where the blame lies. Indeed, we come full circle again with the Tribunal’s judgment at para. 168. Mr. Roth has taken you to it. The Tribunal showed exactly how to deal with our argument. That is the basis upon which we intended our argument to be dealt. We hoped to win on it, but we did not intend to have to refer to expert evidence. We simply look at the report. In the report the Commission explained in some detail why it had to place limited weight on the results of the GFK, NOP and Tesco studies. Mr. Roth said, “Well, where there are just a couple of sentences in the report dismissing some surveys, then we are entitled to supplement it”. Well, with respect, it was not a couple of sentences. There it was in the report. The fact is that the Commission, for whatever reason, overlooked the quite clear indication in the *Somerfield* case that it should not be going behind its report and supplementing. It should stand or fall with its report. So, this costs escalation is entirely the fault of the Commission.

Professor Hausman related to the robustness point. Mr. Gaysford went to two points: he went to the robustness point, but he also went to the new suggestion in Mr. Freeman’s witness statement that it was impossible for the Competition Commission to assess the benefits of the competition test. Mr. Roth effectively said, “Yes, I accept that there were new arguments raised”. So, half of Gaysford goes to that.

So, where does this take us? We have got the second ground. We won on it all - apart from one argument. Johnson: the Commission has accepted that they raised the point, we put it in, we won on the point. Hausman - we put it in. They say we lost on the point. So, there is Hausman as an issue, if you want to go to that level of depth. Gaysford - he dealt with two aspects, one of which was in response to a new point. It has not been suggested that we should not have our costs on that. So, you have got one Hausman and half of Gaysford. Now, is it really suggested that (a) one should do that sort of analysis, and (b) that if one does it, the proper result is no order as to costs? Again, let us inject some reality into this. Tesco won this case. It won on both grounds. If we are talking about reductions in terms of percentages, I say we are talking about percentages at the level of 10 percent. That is all we are talking about in terms of how this case has panned out. No more. Our primary

submission is that we should just simply have our costs because we have won. This suggestion, somehow, that matters should be adjourned, to go off, and they are going to pore through a schedule again -- That is the danger with these sorts of arguments. One ends up spending as much on settling costs as one does on fighting the case. That is a submission which is not one which the Tribunal should encourage, just as a matter of principle. Has Tesco won the case? Answer: Yes. Tesco should have its costs.

Unless I can assist further, those are our submissions. Thank you.

THE PRESIDENT: I think that is enough for one morning. Just so there is no doubt -- If it requires a direction, then we do direct that any application for permission to appeal against the judgment in relation to jurisdiction and discretion should be made when we hand down the reasons. If necessary, we make that direction now. That is how we would propose to deal with that.

MR. HOSKINS: Sir, can I just make one point, and this may fall on unwelcome ears. Of course, there is then the question of listing. I think it is important, if that is the case, that someone should be available to deal with it.

THE PRESIDENT: We will give as much notice as we can, but we obviously want to deal with it quite quickly.

MR. HOSKINS: I understand that. If I can just put that down as a marker, and if there is a real problem obviously we will come back. Hopefully there will not be a real problem. I just raise the point.

MR. ROTH: Perhaps if Tesco can give advance indication of whether it intends to apply at the hearing when you hand down judgment.

THE PRESIDENT: You can ask. He does not have to.

MR. ROTH: If he is not going to pursue an application for permission ----

THE PRESIDENT: You mean give notice at the point where ----

MR. ROTH: No. If you follow your usual practice of disclosing a confidential version a day or two before -- I am just saying that if Tesco say, having read that, "We are not going to pursue the application", then it affects attendance at the hearing.

THE PRESIDENT: Yes. It is obviously a possibility. We may just hand down the judgment. Yes. I am sure that Mr. Hoskins' clients will have heard. If they can give us an indication ----

MR. HOSKINS: My problem is that if we are to make the application orally - which we are happy with - we need to know ----

THE PRESIDENT: You need to read it.

MR. HOSKINS: Exactly. That involves us in getting it in advance, or the Tribunal will have to read it out old-style, and we will have to take a view on the hoof.

THE PRESIDENT: What we have done in at least one other case is to hand it down and then give you half an hour to have a look at it. The arguments are familiar. I imagine you would probably have a good idea what the reasoning might contain.

MR. HOSKINS: Absolutely. I just simply say that we need some time to take a decision.

THE PRESIDENT: Good. Thank you all very much indeed for your help.

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