IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1109/6/8/09

Victoria House,
Bloomsbury Place,
London WC1A 2EB

28th April 2009

Before:

THE HONOURABLE MR. JUSTICE BRIGGS
(Chairman)

PROFESSOR PAUL STONEMAN
DR. VINDELYN SMITH-HILLMAN

Sitting as a Tribunal in England and Wales

BETWEEN:

BARCLAYS BANK PLC — Applicant

- v -

THE COMPETITION COMMISSION — Respondent

- and -

FINANCIAL SERVICES AUTHORITY
LLOYDS BANKING GROUP
SHOP DIRECT GROUP FINANCIAL SERVICES LTD
ROSEMARY CLARK — Potential Interveners

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CASE MANAGEMENT CONFERENCE

APPEARANCES

Mr. Matthew Cook (instructed by Clifford Chance LLP) appeared for the Applicant.

Mr. John Swift QC and Miss Kassie Smith (instructed by the Treasury Solicitor) appeared for the Respondent.

Miss Marie Demetriou instructed by and appearing for the potential Intervener, The Financial Services Authority.

Miss Kelyn Bacon (instructed by Herbert Smith LLP) appeared for the potential Intervener, Lloyds Banking Group.

Mr. Tim Ward (instructed by DLA Piper UK LLP) appeared for the potential Intervener, Shop Direct Group Financial Services Ltd.

The potential intervener, Ms. Rosemary Clark, did not attend and was not represented.

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THE CHAIRMAN: Good afternoon. Before we start my colleagues, Professor Stoneman and Dr. Smith-Hillman, out of completeness but not because they feel it in any way affects their independence, wish it to be known that Professor Stoneman has a Barclays Personal Loan without PPI, and a Barclays credit card also without PPI, and Dr. Smith-Hillman has a Barclays' credit card without PPI. If any of the parties wish to make any application as a result of that no doubt they will do so in due course.

You have, I hope, all received the agenda for this afternoon, at the top of which necessarily are the applications to intervene which, unless it is inconvenient to any of the parties or the interveners, I would propose to take in the order – Lloyds, SGDFS, the FSA and Mrs. Clark, beginning therefore with Lloyds.

MISS BACON: Sir, you have our application for permission to intervene?

THE CHAIRMAN: I do.

MISS BACON: I do not understand that it is opposed by any party. Our reasons for intervening are set out in the application that was drafted by Miss Davies who unfortunately cannot be here today. We are very much interested in the proceedings; we are as much affected by the Competition Commission's report as is the main applicant here, Barclays, and we would request that you give us permission to intervene. We will have submissions later on, when we come to it, as to the timetable if we are given permission.

THE CHAIRMAN: We will rule on all the interventions which require us to be satisfied – regardless of the parties' agreement or otherwise – of the relevant interest when we have heard all four of them. Now, SGDFS are next.

MR. SWIFT: May it please you, Sir, I appear for the Competition Commission.

THE CHAIRMAN: Yes.

MR. SWIFT: We do have a point on the scope of the interventions. We do not oppose Lloyds' application to intervene, we are very concerned that the Tribunal controls the extent and manner of that intervention. I do not know whether it would be appropriate to make some points now or whether you prefer me to take it later.

THE CHAIRMAN: Yes, thank you, it probably would be sensible to take them now because it will be convenient, I think, for us to rule in addition to allowing or not allowing an intervention on any conditions which we think it sensible to impose, and I imagine you would want any restrictions about which you persuade us to be reflected in those conditions.

MR. SWIFT: Our principal concern is to comply with the Tribunal's directions to ensure that those who have an interest whether as appellants or making interventions and interventions can make their case properly, but Lloyds could have appealed. In its application to

intervene it states that it is the largest distributor of PPI products in the country, there are references to Lloyds' Judgment contrary to that of the Commission, that the effect of the prohibition on point of sale would have serious adverse effects on the market for PPI, that it would increase adverse selection and several other points. One sees, reading that notice of intervention, that it is looking more and more like a full appeal rather than an intervention ancillary to the Barclays' application which is really what it should be.

There is a further matter, I do not know whether the Tribunal have looked at the application in any detail. Lloyds is also alleging that one of the key findings of the Commission, and that is on the high levels of profitability of PPI resulted from a fundamental misapplication and misunderstanding of a market economic model produced by Lloyds. That is not in the Barclays' application and what is concerning us – if I can use a colloquialism – is that we get into some kind of a PPI "creep", that we have other arguments that are brought in, that are really ancillary to the Barclays case and you find that in a short time you have two appeals rather than a single appeal.

Now, we are happy to listen to other parties' views on that, as I said, our view is not to oppose for the sake of opposition, it is to try and obtain a set of rules as a result of which we have something which is tractable, and our concern is that as the grounds extend we lose that element of "tractability" – if that is the right expression. So we would really be looking for a direction from the Tribunal that the intervention should be strictly limited to those grounds and arguments put forward by Barclays.

We have further arguments in relation to Shops Direct, but those are distinct from the arguments that we have in respect of Lloyds, but those are my submissions.

THE CHAIRMAN: Mr. Cook, do you want to say anything from Barclays perspective about the submission which has just been made.

MR. COOK: Sir, as we set out in our written submissions Barclays position is very much that this is its appeal, the Competition Commission is resisting it and we are very keen that – to use an awful colloquialism – the tail should not wag the dog, and our primary position as appellant should be respected and we should not end up spending a great deal of time, effort and money, on issues that have not been raised in the appeal, so to that extent I would agree with my learned friend.

THE CHAIRMAN: Yes. Miss Bacon, do you want to say anything further in response to that?

MISS BACON: Yes, a problem that we have had is that, of course, my clients have not actually seen the Barclays notice of application so the statement of intervention was drafted on that basis, that all we have to go on is the summary of the grounds of appeal as set on the

Tribunal's website. Of course, we are anxious that we should not duplicate submissions in any way, and our role here is not to seek to unduly prolong the proceedings by adding new grounds of appeal, but it is well established that an intervener may rely on arguments in support of the same ground of appeal that has been put forward by the main applicant and that is what we would seek to do insofar as necessary.

THE CHAIRMAN: Very well, we will consider those matters when we consider all the interventions. Let us move now, please, to the SDGFS.

MR. WARD: Sir, I appear fro SDGFS. Rather presumptuously, as I have not yet persuaded you that we should be participating in the proceedings, if I may just begin by saying what Miss Bacon said about the proper scope of any intervention that the Tribunal should be minded to allow. We entirely accept that an intervener should not be allowed to introduce new grounds or, indeed, to pointlessly duplicate the arguments of others, but that does not preclude fresh arguments which, of course, may beneficially reflect the different scope of the interveners. Indeed, we would submit that that is precisely what the process of the intervention was there for.

With that out of the way, if I may turn then to the question of whether my clients should be permitted to intervene at all? As you will have seen, SDGFS seeks permission to intervene in support of Barclays. We filed both a request for permission and a short skeleton argument which largely responds to the Treasury Solicitor's letter of 20th April. What you will have seen is the Competition Commission opposes the intervention on the basis that SDGFS does not have sufficient interest. The reason it advances that submission is that it says that the key conclusions challenged by Barclays do not relate to the particular findings on retail PPI or, as it puts it in its skeleton argument there is no mention of the parts that specifically address retail PPI. Well, since 11.30 this morning I at least have been in possession of the notice of application; those instructing me have not been able to see it yet according to the terms on which it was disclosed to us, but it does make absolutely clear that SGDFS does have a sufficient interest because if the application succeeds it will lead to the quashing of the point of sale prohibition as applied to all forms of PPI, not just those which are sold by Barclays or, indeed, Lloyds.

As you will have seen SDGFS makes approximately 80 per cent of its sale at the point of sale so, to state the obvious, the application has a strong and direct commercial interest for SDGFS. If it is of assistance I would like to just develop that slightly more by reference to the Barclays' notice of application.

THE CHAIRMAN: Yes, may I say I am grateful to those advising Barclays for making that available this morning, it seemed to me that we were likely to have a more informed debate this afternoon if it had been seen, provided there was nothing in it that raised confidentiality issues and as I understand it there is not.

MR. COOK: Sir, what we have done is there is a single sentence which is the final sentence in para . 120 about which concerns have been expressed by the Competition Commission that relate to matters dealing with the FSA, I can say that without disclosing its contents. We will in due course, should it be relevant, be saying that that is actually incorrect and that sentence is not confidential, and we have asked the FSA for its position, and I understand it is considering its position at the moment. With the exception of that there is nothing confidential within the notice of application itself.

THE CHAIRMAN: Thank you.

MR. WARD: Sir, we are very grateful too and I, at least, have had the benefit of looking at it for the last couple of hours. If I might ask you to turn the application up, p. 49 sets out the relief sought by Barclays. What we see in para. 127(a) the relief sought is to:

> "Quash the Report insofar as it relates to the POSP and the Commission's findings on market definition."

So that is on its face an entirely general application to all types of PPI, and it is fair to say that when one considers the argument which lies behind, that too is of general application. Now, the Treasury Solicitor's letter focused on what Barclays called "The key conclusions challenge" which are set out in appendix 1 to the notice of application, which follows. If I could ask you to turn to p.54 (of the internal numbering) you will see the paragraphs which are challenged, the key conclusions challenged in respect of POSP. If I could just invite you to skim read, you will see it starts:

> "The commission considered the justification for a POSP in the Report at paragraphs 10.34 to 10.156 …"

And I will show you those in a moment, but they are a general application to all types of PPI, because what the Commission did was consider remedies altogether, but in a separate chapter, and that section of s.10 is the entire analysis in respect of POSP – not the "entire" but the bulk of the analysis. Then if you skim read in 2a and 2b just the paragraph numbers that are challenged, you will see that the key findings challenged are from para. 10.40 through to roughly 10.71.

If I could invite you now to take up the Commission's report itself?

THE CHAIRMAN: Chapter 10 presumably?

MR. WARD: Yes, chapter 10, which is p.181– Chapter 10 Remedies. 10.1:

> "We now consider measures to remedy, mitigate or prevent the AEC, or resulting detrimental effects on customers, as set out in our findings …"

And the chapter that follows deals with remedies as they apply to all types of PPI, I am sorry, it is p.181 of the internal numbering of the report.

THE CHAIRMAN: I have p.188?

MR. WARD: I am sorry, I may not have the same ----

THE CHAIRMAN: I am looking in bundle – anyway, let us do it by paragraph numbers, and I am sure we will all stay on the same track.

MR. WARD: It may be slightly different. In any event Chapter 10, headed "Remedies". The first paragraph under "Introduction":

> "We now consider measures to remedy, mitigate or prevent the AEC …"

And then it goes on to consider the various different remedies and essentially in broad terms the same remedies are applied in respect of all types of PPI. There are some wrinkles to that, there is one additional remedy for retail PPI, though that is clearly not the subject of Barclays application.

You can see the remedy summarised at para. 10.31.

> "This next section sets out the package of remedies we have decided to implement …"

And then it lists (a) through to (h) and (f) is specific to retail PPI but otherwise these are remedies for all types of PPI.

Then a remedy we are directly concerned with, the point of sale prohibition begins at 10.34.

> "This element of the remedy package prohibits distributors and intermediaries that arrange credit for a consumer from selling PPI or contacting the consumer regarding PPI during the credit sale period of seven days."

Then what follows is the reasoning applicable to points of sale prohibition, and I am not going to take you through it because it carries on for quite a while, but just looking, for example, at para. 10.36 how the point of sale contributes to addressing the AEC.

> "This element of the remedies package will directly address the AEC arising from the sale of PPI at the point of sale by distributors or intermediaries. It will also address each of the following barriers to search."

Then in 10.37:

> "We have decided that a point of sale prohibition is the only option that will effectively address the point of sale advantage."

Now, the following reasoning over the next 10 or 20 paragraphs contains the key conclusions challenged by Barclays in the annex to its application that I showed you a minute ago. If I may just take one example, para. 10.50, which is certainly strongly criticised in Barclays application, it deals with the effects of the POSP remedy on volumes of PPI business, and a great deal of Barclays application is concerned with this part of the Competition Commission's analysis, and it is quite apparent that it will have general application to all types of PPI.

> "While we acknowledge that this element of the remedies package reduces the convenience of purchasing PPI at the credit point of sale, we consider that the potential reduction in PPI sales has been overestimated by some parties."

THE CHAIRMAN: May I just ask you to pause there? The expression "credit point of sale", does that carry with it an implication they are only talking about credit PPI and not retail PPI, or are they using that as a general definition for PPI, including retail PPI?

MR. WARD: We firmly understand the latter, because retail PPI is about ensuring the credit balance owed to the retailer by ----

THE CHAIRMAN: I am simply asking whether it is being used as a term of art and, if so, defined in any restrictive way elsewhere in the report?

MR. WARD: No. I will be corrected if that is wrong, but we understand it that way.

THE CHAIRMAN: Thank you.

MR. WARD: Sir, I do not want to take up a vast amount of time this afternoon with this exercise, I am simply illustrating the point that the core of the Competition Commission's reasoning on the point of sale remedy is applicable to all kinds of PPI, including retail PPI and it is that core reasoning which is challenged by Barclays in its notice of application.

It is absolutely correct, as the Treasury Solicitor has said in his letter, that there is in addition reasoning which his specific to retail PPI, and one finds that at para. 10.143, through to 10.147 where, in a sense, there is additional justification for the imposition of the retail point of sale prohibition in respect of retail PPI, and perhaps the most useful point to look at is 10.147:

> "We decided that the point of sale prohibition should apply to retail PPI. Our finding was that a point of sale advantage did exist, albeit to a lesser extent …"

and so on, so it was still justified; the same approach was still justified according to the Competition Commission.

MR. SWIFT: The "and so on" is quite important, if you want to read on.

MR. WARD: Well I am very happy, sir, if it is convenient for you to read on.

MR. SWIFT: I will deal with it.

MR. WARD: So there is additional reasoning there and we do not shrink from that at all, and we accept, absolutely right, that that particular paragraph has not been challenged by Barclays, but this reasoning is not the only part of the remedies package, or the remedies reasoning which targets retail PPI, it is an add-on to the core of the Competition Commission's reasoning which is in the paragraphs which proceed it and, indeed, in the paragraphs which succeed it, which also deal with questions of proportionality and the like.

So we entirely accept that Barclays has not challenged this paragraph, but it does not mean that Shops Direct has no interest at all in the challenge which is to the core of the Competition Commission's reasoning.

If there were any doubt about it, as I have already shown you, the relief sought is in entirely general terms. Now, it is right to say that the question of exactly what relief will be granted if the application succeeds is a difficult one, and there may be arguments about that later, as there was in the recent *Tesco* case. But one cannot pre-judge that argument now. All will depend on the form of argument that succeeds, exactly which points succeed, and what view the Tribunal takes in the exercise of its discretion. But as of today the only thing one can fairly say is that Barclays application puts entirely in issue the question whether the point of sale prohibition will survive even for retail PPI.

The other aspect of Barclays application that we seek to make submissions upon is the challenge to the section dealing with market definition, and there it is true to say the Competition Commission dealt with market definition for retail PPI in a separate section of the report. It is in s.6 whereas market definition more generally is dealt with in s.3, but the conclusion reached was essentially the same.

Could I invite you again to turn up the report firstly at para. 3.139? This is the conclusion on market definition as applicable to all types of PPI except retail PPI. You will see:

"We conclude that, for all types of PPI policies …" although not retail PPI:

> "… the relevant product market is the sale of PPI to an individual distributor's, or intermediary's, credit customers by that distributor or intermediary."

Then at para. 3.141:

> "We conclude that the relevant geographic market for each product market is the geographic area within the UK in which the distributor is active."

So in essence each distributor is a national monopolist – if I can put it that way. Those paragraphs do not apply to retail PPI, but exactly the same conclusions are reached in respect of retail PPI in s.6 and here the conclusion is at para. 6.76:

"Because the constraint on retail PPI distributors from each of the three potential sources of substitution was weak, we concluded that a narrow market definition was appropriate, and that it would be inappropriate to include other types of credit insurance, or other combinations of credit and PPI, or other bundles of goods, credit and PPI …. We therefore defined the relevant product market as the supply of retail PPI by a distributor to its own retail customers."

And the relevant geographic market, was the geographic area within the UK in which the distributor was active.

So for all practical purposes the same conclusion is reached and, in fact, for the same broad reason, which is lack of competitive constraint.

This market definition, of course, is an important premise of everything that follows, because the supposed purpose of the point of sale prohibition is to encourage or allow for provision by others, and the driver of that is, of course, the finding that each distributor of PPI is in effect a monopolist.

So as Barclays' skeleton says, quite rightly, these aspects of the report are heavily interlinked, and in my submission it would be quite wrong to allow SDG to address the Tribunal on questions of remedy without even allowing it to address the Tribunal on market definition, simply because the specific part of the Competition Commission's analysis applicable to retail PPI is, in fact, in a separate chapter, even if the conclusion reached is essentially the same.

The final matter I wanted to address you very, very briefly on is the question of what difference it might make to the position that SDGFS could have brought a judicial review application in its own right. Mr. Swift already alluded to that point in respect of Miss Bacon's argument, and the same thing has been said against us – in writing at least.

In our submission it is a thoroughly bad point because the reality is that any party in a position to intervene on the side of an applicant is likely to be in the position to have brought the judicial review application in their own name. One sees that immediately from the statutory test. Might I ask you to turn up the provisions in the Enterprise Act, s.179.

THE CHAIRMAN: Yes.

MR. WARD: Section 179 provides the right to bring an application such as this one. Section 179.1 contains the rule on standing: "Any person aggrieved by a decision of … or the Commission …" may make such an application. So there we have what sounds like a broad and flexible test: "any person aggrieved". One can put it alongside the test for intervention, which is sufficient interest. Neither of those terms are particularly precise, and both have

been interpreted broadly by the Tribunal. As we mentioned in our skeleton argument, in the recent challenge to the HBOS Lloyds merger, an essentially purely public interest challenge was allowed under the equivalent provision that deals with mergers. I will not take up time with that case unless it proves to be useful, but I am simply making this broad point, which is a person with sufficient interest who supports the applicant is very likely to also be a person aggrieved. I dare say one could think of a convoluted counter example, but in the broad ordinary run of things that will be the case. So if that is some sort of knock-out blow then it will, in truth, knock out most applications if they are brought on the side of the applicant. But nor does this give rise to any reason, as a matter of discretion to keep out an intervention, because of course I accept that the role of an intervener is subsidiary, and if an application had been brought in the name of Lloyds or SDGFS, as the case may be, there would have been broader scope for the applicant to make whatever arguments they thought fit. I have already accepted that there is a constraining effect because of the lack of any application in its own right, but there is simply no further reason why this possibility should be used to keep out an otherwise legitimate intervention.

Unless I can assist further those are the submissions for SDGFS.

THE CHAIRMAN: Thank you. I think you are probably next?

MR. SWIFT: We go in reverse order on the person aggrieved. I do not understand this, plainly Shop Direct is a person aggrieved who had the appropriate *locus* to bring an appeal, unless this Tribunal upsets the Commission's findings there will be an order which will take effect in 2010 which will extend to all forms of PPI, including retail PPI and Shop Direct will be subject to that order, so plainly it could have come to the Tribunal to ask for the Commission's decision to be quashed. We are on a separate issue here, which is: what is the role of the intervener? The role of the intervener is, as I have submitted and is to be found in the Tribunal's own very clear guidelines, said to be "ancillary". Yes, there is a lot of jurisprudence on the matter, and I do not think any of us are going to go into it, but the test is: is it ancillary?

When we looked at the request to intervene put in by Shop Direct – I have it at tab 8 of a light blue vol.1 file.

THE CHAIRMAN: It is the application of 9th April you are referring to, is it?

MR. SWIFT: That is it, sir, yes: "Request for permission to intervene". At para. 11, the applicant says:

> "As far as SDGFS understands, Barclays does not sell retail PPI, and so will not be able to assist the Tribunal in this regard. Thus SDGFS' knowledge and experience

as a supplier of retail PPI will undoubtedly assist the Tribunal in determining the application."

We thought, "Well, hold on", does that mean that what is in issue before the Tribunal is now the whole of PPI including retail PPI, that includes the whole of chapter 6, which is devoted to retail PPI, and it did not appear to us – and does not appear to us now – that that is ancillary to the main grounds fought by Barclays and if the Tribunal were to allow this notice of intervention as it stands it appears to us to be inevitable the Tribunal will have to get into the detail of paragraphs like para. 10.147 because as I hope is clear from the report and as will be made clear in the defence, one of the failings of Barclays is to consider the remedies' package as a whole. We say when you are looking at the economic effect of what is going into an order you cannot isolate the point of sale prohibition and say that certain consequences will flow from that alone. The whole of the remedies' package has been designed so as to produce the effects which the Commission believes will follow, and that is to bring about an effectively functioning market.

Now, if one gets into retail PPI the Commission drew a distinction as to the particular remedies' package that should be adopted in respect of retail PPI and that is what is in 10.147, where I suggested that Mr. Ward might want to read on, but it is in there. It shows that because of the differences in the retail market as compared with the other markets it was necessary to devise a different and more relaxed package in respect of retail PPI.

So what is going to come before the Tribunal at the hearing inevitably is going to be debate as to whether that element of the package was appropriate, or at least we are uncertain as to the scope of the intervention.

I do not want to labour this point at all, because I said at the outset it is very much for the Tribunal to decide what it regards as fair and just having regard to its own procedures, and we do not want to appear to be obstructive. We are concerned, however, about this extension of the investigation before the Tribunal and the consequent effect on costs and on time.

Finally on this, and I am going to be corrected – in fact, I may be stopped – because the Tribunal also has ----

THE CHAIRMAN: Not by me, I hope you understand!

MR. SWIFT: -- a volume 2 of the light blue folder which is the confidential material.

THE CHAIRMAN: Yes. I am sorry, say that again, would you?

MR. SWIFT: Volume 2 contains certain confidential material what has not ----

THE CHAIRMAN: Which has not been sent to any of the interveners.

MR. SWIFT: -- been sent to the interveners. The interveners have only received the redacted notice of application. But maybe I can say this, that our concern as the Commission – I believe I can say this in open court – is that we are still not clear as to what part of the report Barclays wishes this Tribunal to quash. In the Tesco report, to which reference has been made by Mr. Ward, Tesco made it absolutely clear that they were not contesting the adverse effect on competition, the critically important AEC, which provides the jurisdiction for the exercise of the Commission's remedial powers. So the only issue in the Tesco appeal was remedies, and were they proportional and were they properly argued and so on and so forth. I do not know, as I stand here before the Tribunal, whether Barclays is asking the Tribunal to quash and, if so, on what basis and which particular features of the AEC are under review. Chapter 5 of the report, which I need not refer the Tribunal to, contains an exegesis of the Commission's analysis of the whole of the PPI market, excluding retail PPI, as a result of which it concludes that there was a serious adverse effect on competition, which requires serious remedy. But, as I said, I do not know whether what is at the moment ground 4 of the Barclays application provides any nexus between the particular grounds it relies on and the adverse effect on competition which is critical to the party proposing the remedy. The Tribunal will have seen in the confidential bundle where we have got to on that, and I do not think I can say much more without going into improper disclosure.

But the Tribunal will understand that when we now see Lloyds wishing to intervene and Shop Direct wishing to intervene my concern is that we are going to get a series of assertions aimed at particular findings of the Commission without establishing the materiality of the alleged error to the critically important finding of the adverse effect on competition, and the Tribunal is going to get into a very difficult position unless that is resolved at a pretty early stage if not at this CMC at some subsequent one.

Sir, those are my submissions.

THE CHAIRMAN: Yes, my understanding is in relation to that, that a response from Barclays to that is still in preparation and therefore inherently, I think, incapable of being finally dealt with today. We will have to come back to it at a further CMC or something of that kind, if necessary. Before you do sit down, can you help us on one matter, which is this: suppose, for example, purely hypothetically, ground 1 were to prove to be persuasive, which is an attack on the POSP on proportionality grounds based, obviously contentiously having heard your brief submission, on the proposition that there should have been but was not, an analysis of package benefits against incremental benefits, and suppose that in fact – and I do not pretend at this stage to have studied the report in sufficient and comprehensive detail to

know whether or not this is right, but suppose that there is not in fact such an analysis in relation either to credit PPI, or retail PPI and the effect of a POSP on either, such that it would appear on the face of it that if Barclays succeeded on that ground it would have implications for the POSP proposed in relation to retail PPI?

MR. SWIFT: Yes.

THE CHAIRMAN: Can you say on behalf of the Commission whether or not in those circumstances, let us suppose there be no permitted intervention by Shops Direct, that nonetheless the Commission's case would be: "Well, nobody has appealed the retail POSP and therefore even though that ground has succeeded that part of the report stays entirely in tact, even though an aspect of the underpinning of it had been successfully attacked?

MR. SWIFT: It would have to depend, plainly, on the nature of the reasoning given by the Tribunal.

THE CHAIRMAN: Indeed, and I am asking you to approach it on a hypothetical assumption that we were persuaded by the gist of the reasoning in ground 1.

MR. SWIFT: Adopting that hypothesis then the Commission would plainly take the old report away, look at it and see whether there was a break in the reasoning that applied to retail PPI as the Tribunal hypothetically had found was relevant in the case of the other forms of PPI, that is something it would do as a matter of course.

THE CHAIRMAN: Would it in that analysis, in that part of the analysis, be assisted or not assisted by an intervention from a retail PPI seller such as Shops Direct?

MR. SWIFT: In my submission it would not, this is why we effectively we object to the argument which is set out in para. 14 ----

THE CHAIRMAN: Yes, you have showed us.

MR. SWIFT: It is the para.14 point in Shop Direct's application.

THE CHAIRMAN: Yes.

MR. SWIFT: You do not need to intervene in order to influence that future outcome in a hypothetical circumstance. It would just naturally follow that the Commission, on a remittal, would consider all of the report and decide how much of it could stand, having regard to the Commission's hypothetical quashing of the reasoning in respect of the PSOP, either in respect of its lack of effectiveness in producing an effectively functioning market, or the lack of proper appreciation of the detriments alleged by Barclays to flow from the prohibition itself.

THE CHAIRMAN: Yes, thank you.

MR. SWIFT: Sir, I should say I had indeed anticipated that question and discussed the matter with my client before coming today.

THE CHAIRMAN: Thank you for being well prepared. Just before you reply, do Barclays want to say anything about this aspect of the matter. I have your submissions about 'ancillarity'.

MR. COOK: Yes, there are a number of points about 'ancillarity', and obviously timing that we will come back to if they are granted.

THE CHAIRMAN: Of course, they are at large.

MR. COOK: But beyond that the only point was as it was alluded to with a request for further information which we have said that we will answer ----

THE CHAIRMAN: That may or may not arise later in the agenda as well, it is not strictly a Shops Direct point I think. Thank you.

MR. WARD: Very briefly, if I understood it correctly Mr. Swift has essentially conceded that depending on the face of this application the relief granted may indeed impact directly upon the position of retail PPI distributors such as SDGFS. In my submission, that is clearly sufficient to establish an interest for the purpose of an intervention. But then dealing with the question of whether retail PPI could bring anything to the party – if I can put it colloquially – may I just offer a very simplistic example, taken again from the notice of application itself?

THE CHAIRMAN: Yes.

MR. WARD: If I could ask you to turn to p.23, which is para. 46 of the notice of application. This is the core of the argument that there was insufficient evidential basis for the conclusion POSP was justified. You will see at 46a the allegation is made that the Commission:

"Made no attempt to assess the extent of the detriment arising from the POSP"

"detriment" in terms of lost sales in a nutshell, and then at para. 47 it says:

"The relevant section of the Report is to be found in paragraphs 10.46 to 10.52".

Pausing there, they are of general application. Then Barclays gives a list at para. 48 of instances where various parties put forward evidence on this very issue.

THE CHAIRMAN: These are all – are they not – what I might call credit PPI ----

MR. WARD: Yes.

THE CHAIRMAN: -- rather than retail PPI examples?

MR. WARD: Yes, but the short point is that SDG also did this. If one were getting into an argument about the sufficiency of evidence that was before the Tribunal SDGFS would also have something to say about it. It is a simplistic example, but the broad point is simply this:

if relief is contemplated that will knock out, or potentially may knock out the point of sale prohibition for all types of PPI providers, it is appropriate for the Tribunal to hear from representatives of those types of PPI provision.

Sir, can I assist further?

THE CHAIRMAN: No, thank you very much. Very well, now the application by the FSA I think comes next?

MISS DEMETRIOU: Sir, I represent the FSA.

THE CHAIRMAN: Thank you.

MISS DEMETRIOU: You should have a copy of our application to intervene.

THE CHAIRMAN: That is Miss Demetriou, is it not?

MISS DEMETRIOU: That is right.

THE CHAIRMAN: Yes, we have.

MISS DEMETRIOU: The FSA submits that it plainly has a strong and direct interest in these proceedings. I would like to highlight the three key points that we say give us that interest and in doing so I will deal briefly with the points in response made against us by Barclays in their own written submissions. I should note that the Commission positively supports our application to intervene.

The first point is that the FSA is the regulator responsible for PPI sales, so these proceedings have a direct impact on its regulatory functions. The FSA has carried out significant work identifying problems in the market and considers that the point of sale prohibition will be a fundamental tool in addressing some of these problems, so it clearly has a strong interest in Barclays application because if it succeeds the FSA will have to consider what, if any, alternative action it takes as a regulator to address the problems it has identified in the market, if the point of sale prohibition is quashed.

THE CHAIRMAN: But is the fact that a party may have homework to do if an application succeeds a sufficient interest?

MISS DEMETRIOU: Sir, yes, in my submission it is, because the test in the rules is a test of sufficient interest. The rules require those claiming a sufficient interest to explain why they have an interest in the outcome of the proceedings. We say that we have an interest in the outcome either way. So if the application succeeds then our interests are affected because the problems we have identified will not be addressed by the tool proposed by the Competition Commission because *ex hypothesi* if Barclays succeed then the prohibition will have been quashed. So we will then, as regulator regulating PPI sales have to look at alternative means of addressing the problems we have identified, so clearly a successful

outcome from Barclays' point of view will affect us. Equally, if Barclays does not succeed then we are again affected because the prohibition on the point of sale positively assists us in exercising our regulatory functions. So either way we say that we have a direct interest in the outcome of the proceedings, whatever that outcome is.

Barclays says in relation to this that it employs a floodgates argument saying that if the FSA's position as regulator *per se* were to give it sufficient interest, this would entitle it to intervene in all Competition Commission matters concerning financial services.

Now what we say to that is that this is in fact the very first time that the FSA has sought permission to intervene in proceedings before this Tribunal. As can be expected of a public body it considered whether or not to make this application extremely carefully and did not take the decision lightly. It makes this application not because it has an interest *per se* but because it considers that this particular challenge to this particular decision will have a significant and direct impact on its own functions, responsibilities and activities.

An example of the impact that these proceedings have is illustrated by the link between the Commission's report and the FSA's own rules. We have addressed that in our written application and, as we have pointed out, this was recognised by the Commission in its report, we have given an example at para.12 of our application.

In opposing our application Barclays say that the FSA's role is limited to ensuring that its rules are adapted to the structure arising from the report, whatever that turns out to be. We say that, far from being a point against the FSA, that in fact acknowledges the FSA's sufficient interest, it has a direct interest because the outcome of these proceedings will impact on its rules, whatever that outcome is.

THE CHAIRMAN: By "rules" do you mean, for example, the ICOBS Rules?

MISS DEMETRIOU: We mean the ICOBS Rules. The second point I would wish to emphasise is that the FSA participated actively in the Commission's investigation and, in so doing, it argued for a more restrictive form of prohibition than that ultimately adopted by the Commission in its report. Contrary to what Barclays seems to suggest in its written submissions, the FSA of course does not seek in these proceedings to reassert its position before the Commission, that would plainly be inappropriate; these are proceedings which are akin to judicial review proceedings and so the question for the Tribunal is not whether the FSA's proposed solution would be appropriate, but simply whether the Commission's proposal is lawful.

However, having said that, the fact that the FSA took the view that a more restrictive prohibition was nonetheless proportionate to the objectives of the prohibition is plainly of relevance as a matter of law to the proportionality ground raised by Barclays.

Having seen this morning Barclays application a key plank of Barclays fourth ground of challenge is the allegation that the Competition Commission took no account of regulatory changes ----

THE CHAIRMAN: We have seen that.

MISS DEMETRIOU: -- and we see that – if you could turn that up, it is the section beginning at p.45.

THE CHAIRMAN: Yes.

MISS DEMETRIOU: And it is paras. 117 onwards.

THE CHAIRMAN: Yes.

MISS DEMETRIOU: The Tribunal will have seen that the regulatory changes referred to are, of course regulatory changes brought about by the FSA itself. So what Barclays says at para.118 is that the main change was the FSA's introduction of the amended ICOBS Rules in January 2008. The second change referred to in the next paragraph was the launch by the FSA of the comparison tables. Barclays goes on in the following paragraphs to make submissions about, first of all, the alleged objectives of these regulatory changes, secondly about what the FSA did or did not tell the Commission about the changes ----

THE CHAIRMAN: Are these contentious?

MISS DEMETRIOU: Well my client has not seen this application yet ----

THE CHAIRMAN: Yes, I appreciate that, you may not know.

MISS DEMETRIOU: -- and so I cannot, I am afraid, answer that question now at this stage. But my point is much more limited, it is that they make submissions about these issues. The third point they make is they make submissions about the effect the regulatory changes had already had on the market and finally they make submissions about the effect the regulatory changes could potentially have – we see that, for example, at para. 126.

Those are submissions on which the FSA is best, perhaps uniquely placed to assist the Tribunal because they are submissions about the FSA's own changes, and the impact they could be expected to have and the impact that they did actually have up to this point. The FSA is plainly in the best position to assist the Tribunal on those points.

Clearly, Barclays have to show that the regulatory changes would have either had, or would have potentially the impact they suggest, because otherwise they would not be relevant considerations for the Commission to have taken into account, and the essence of their

complaint is that they are highly relevant considerations which the Commission failed to take account of. So we say that we are in the best position to assist the Tribunal on that.

The third point I would like to emphasise is that the FSA offers a different perspective to that of the Commission because it fulfils a different though complementary regulatory function. It has conducted its own investigations into the market and has reached its own conclusions on relevant issues. For example, pertinently here, whether remedies, such as informational remedies, would be adequate to tackle the problems it has identified. Now, that is plainly critical to the proportionality question.

Again, of course, we are not intending to adduce evidence before this Tribunal that was not before the Commission, that would be inappropriate given the nature of these proceedings. But our point is that we have conducted significant work which is complementary to the Commission which we put before the Commission and which is relevant to Barclays challenge and which we are the best placed to explain and to assist the Tribunal in relation to that material.

On this point Barclays appears to take the view that because the FSA put its perspective to the Commission there is now no need for it to participate in these proceedings. It says that it has explained its views to the Commission, the Commission is perfectly capable of protecting the FSA's position in this challenge, but we say that is a very bad point because if correct it would almost always lead to applications to intervene being rejected. A person with sufficient interest for the purposes of intervening is by virtue of that interest, in my submission, very likely to have participated in proceedings before the Commission below. So one cannot say that you have had your chance to put your perspective to the Commission, that is all taken care of and you have no interest now in participating in the appeal; we say that is just a bad point.

Finally, Barclays expresses the doubt that the FSA can add anything to the position of the Commission. We say that we can for the reasons that I have outlined. In any event we say that is an issue for case management. We do not want to duplicate what the Commission puts in and we would endeavour to tailor our submissions to ensure there is no duplication, and that can be ensured by means of a direction and by giving us some time to consider the Commission's submissions before putting in our own to ensure that there is no overlap between them.

Unless I can assist any further, those are the reasons why we submit that the FSA has a sufficient interest to participate.

THE CHAIRMAN: Thank you.

PROFESSOR STONEMAN: Is there any precedent within the Appeal Tribunal for one regulator actually intervening on behalf of another regulator, or would this be a first time?

MISS DEMETRIOU: Others can also assist, but I think in the *GISC* case, a general insurance case, Gisk was an intervener, the Tribunal granted GISC permission to intervene on behalf of the regulator in that case, recognising that its rules were directed affected by the challenge and that it had interest. So that is an example I can think of off the top of my head, so there is certainly a precedent. It may be that others are aware of further examples.

PROFESSOR STONEMAN: The other point is, we like to think of our regulators as offering joined up regulation, and therefore there should not be any difference in attitude between the Competition Commission and the FSA, and therefore how can the FSA have a voice different to the Competition Commission or why can the Competition Commission not express the views of the FSA as one would expect with joined up regulation?

MISS DEMETRIOU: Of course joined up regulation is the aim which all regulators attempt to meet. However, here the regulatory functions of the Commission and the FSA are different, the FSA brings a different perspective, and there is clearly an impact. The Commission's investigation and report plainly has an impact on the FSA's functions, so the FSA in carrying out its work has identified various problems in the market place. It, as a regulator, cannot address structural and competition problems, but nonetheless structural and competition remedies suggested by the Commission can in turn assist the FSA in its work. So it is true that they are both aiming towards the same end, but that does not mean to say that there is not an interlinkage between their two functions and action taken by one clearly has an impact on action taken (or not taken) by the other, and it is a sufficient interest, it is an impact that we have to demonstrate.

In terms of why the Commission cannot speak for the FSA – on some issues no doubt it can, on some issues we will have the same submissions to make and so we will not duplicate what the Commission says – but the FSA's perspective is different because its regulatory function is different.

I have given the example of during the course of the investigation the FSA actually argued for a more restrictive form of point of sale prohibition than that adopted by the Commission, so it took a different view on the proportionality question and it is consistent with joined up regulation for regulators to take different views where it is a discretionary area on which views might legitimately differ. That, in my submission, is of great relevance to the proportionality point, because in making its submissions before the Commission the FSA of course took the view that the more restrictive form of prohibition was nonetheless

proportionate to the particular objectives and that is plainly of relevance as a matter of legal submission to Barclays proportionality challenge.

PROFESSOR STONEMAN: Thank you.

THE CHAIRMAN: Now, Mr. Cook?

MR. COOK: Sir, we start from the proposition that while there are obviously legitimate circumstances in which interveners should be allowed into proceedings in general the multiplication of parties leads to delay, additional costs and lengthens the final hearing. So the Tribunal is obviously looking for a reason why one should add to the list of parties from those that are there at the start, and in our submission the FSA has fallen short of meeting that hurdle. It has accepted that they are not interested *per se*, the point is made that which ever way the appeal goes there will be a job for the FSA to do in terms of tailoring its rules to whatever the structure of the market is at that time. In our submission that cannot be a sufficient reason to be interested in this appeal because that will make any form of homework, as you rightly put it, sir, a sufficient reason to be involved. But "sufficient reason" is not our principal point. Our principal concern is the question of what the FSA brings to the party, what it can add that the Competition Commission cannot recognising, as one must, that the issues here are not about – and we are not asking the Tribunal to determine – whether, as a matter of fact, the FSA's particular interventions, the ones that were mentioned in terms of introducing comparison tables, updated ICOBS Rules in January 2001, the Tribunal is not going to be asked to make a ruling as a matter of fact, whether those were likely to have fundamental effects upon the market. The question is – those interventions are a matter of fact – did the Competition Commission gather all necessary evidence and carry out all necessary inquiry? And there will obviously be disputes about each of those tests about what evidence it should have gathered, what inquiry it should have carried out, but the question is simply one of did they do enough in both regards to proceed to make the findings they did at the end of the report on that basis.

It is difficult to see, Sir, how the FSA can add anything to that question that the Competition Commission cannot, because the FSA is not here to provide evidence about how effective it thinks they may be. In reality the FSA's views on how effective they may be – it is one of the issues, we would say with little weight to be attached it, that the Competition Commission needed to consider. But now we are at the level of considering whether the Competition Commission's views were correct or not it is really difficult to see that the FSA can add anything at all. So that is our principal concern, that the FSA is pointing to the fact that something took place that the FSA did. That is not a matter of dispute, the FSA

took those actions. The consequences again are not a matter for this Tribunal. What is relevant is whether the Commission's analysis was satisfactory, was it sufficient taking account of all the judicial review tests we have set out in our notice of application.

Sir, that is the principal concern, and again when one comes to the FSA's point that it proposed a more strict, a more aggressive form of intervention into the market, again that was a proposal that was made, that is not in dispute, the FSA does not have anything to add there, the question then is simply: that proposal was made by a party – it does not matter whether it was the FSA or not, it was made by a party. Barclays made its own separate proposal, it was less restrictive. Again, did the Commission carry out the necessary analysis with the necessary evidence to reach the view that it did, that its middle ground was necessary, was proportionate and was appropriate. Again, it is difficult to see how the FSA can add anything to the Competition Commission's arguments on that issue.

Finally, it is said that the FSA have a different perspective. It is true to say that obviously the FSA has a different remit and it is concerned about different kinds of issues from the Competition Commission – that is obviously right – and the FSA has quite extensive powers in order to ensure that to the extent it has concerns about the particular issues it focuses on in the market they are, through its powers, corrected to the extent that they can be corrected in accordance with those powers.

It is not something that can be properly done, or that the FSA can make submission to this Tribunal about, to say: "Fine, that was not an appropriate approach t o be taken by the Competition Commission in accordance with these powers, but it happens to provide a very effective background effect in the context of the concerns that we have. So the FSA's concerns about whether particular aspects of this report may correct concerns it has is neither here nor there. So while there is an additional interest it is not an interest that adds anything to these proceedings, concerned as we are simply with the question of whether the Competition Commission has carried out its statutory duties in accordance with all of the tests that need to be met. So, Sir, that is the reason why we say really the FSA adds little.

Now, of course, a limited intervention may recognise that and add very little. However, from reading the proposal, the reason why the FSA considers it should come in and what has been said today, it is quite apparent that the FSA does intend to inject a great deal of material and that material is necessarily either going to be duplicative or adding nothing to the issues that are before the Tribunal.

Sir, those are the reasons why we say the FSA should not be permitted to intervene.

THE CHAIRMAN: Anything you want to add, Mr. Swift?

MR. SWIFT: Very briefly, Sir, Members of the Tribunal. The FSA has a consumer protection role, and the Commission has an overall duty to do what it can to make markets work effectively, but there is a read across that in the present case FSA found aspects of mis-selling. When the Tribunal comes to analyse all the reasons why the Commission arrived at its conclusions that there was an adverse effect on competition one can see that part of the reasons included the manner in which PPI was sold at point of sale, it is obvious that is the connection between FSA interest and Competition Commission interest. My submission is very simple, maybe I should not say "I have a feeling" that in the course of a three or four day hearing this Tribunal is going to ask the question: "Why did the FSA consider that the regulatory changes they had imposed in 2008 were not going to go far enough in what it sought to achieve?" It is an impact point, it is the point of para. 117 of the notice of application. One of the issues that is absolutely central, if it is still there when we get to trial is whether the Commission took no account of regulatory changes. Here, Barclays is saying:

> "During the course of the Commission's investigations certain important regulatory changes took place which were intended to have an impact on a number of features which the Commission identified as limiting competition within the wider market."

They go on to say:

> "If these changes were successful then the entire basis upon which the Commission considered the market and decided whether remedies were necessary would have been fundamentally altered."

And that, in my submission, brings the FSA in as an actor, as the proposer of the changes and as someone who can explain to the Tribunal why they thought that approach was limited, and those are questions that the FSA is best in a position to answer rather than my second to second guess the FSA in any submissions that I make.

THE CHAIRMAN: Thank you. Anything you want to say by way of reply?

MISS DEMETRIOU: Very briefly, Sir. Mr. Cook, at the end of his submissions, sought to draw conclusions from our written application to intervene as to the nature of the material that we would submit but it is not appropriate in my submission for the Tribunal to draw any conclusions from that because my clients and I until this morning had not seen Barclays application at all, and I can reiterate we would, if permitted to intervene, seek to ensure as far as possible that there is no duplication of material, and our intervention respects fully the limited nature of these proceedings.

Secondly, Mr. Cook appeared to acknowledge that we do have a sufficient interest, but that as a matter of discretion our intervention should not be permitted because he says we do not have anything to add to that of the Competition Commission. Again, I say that that is something which is not appropriate to second guess at this stage. We think that we do have something to add, but in any event that could be dealt with by way of case management direction, and our intervention can be constrained by way of direction.

Unless I can help any further, that is what I wanted to say in reply.

THE CHAIRMAN: Yes, thank you. Now, is Mrs. Clark here, the fourth intervener? (No reply)

So be it. We have a written application by Mrs. Clark to intervene. Have any of the parties received a copy of it – Barclays have, the Commission has, good. My next question is, is her application either supported or opposed by any of the existing parties, by which I mean the Commission and Barclays?

MR. COOK: Sir, it is resisted by us.

THE CHAIRMAN: Right, and how about the Commission?

MR. SWIFT: I think we are in a position towards neutral and resisting.

THE CHAIRMAN: Well if the more vigorous resistance is going to come from Barclays than from the Commission it is probably sufficient for me to listen to Barclays first.

MR. SWIFT: Yes, I think our position is very much taken as a public authority we are very concerned that we should not be seen denying individuals the right to approach and be represented here, so it is one of very much restraint. We would prefer to have a neutral position but if we can help, the Commission, on any points raised by Barclays we will.

THE CHAIRMAN: Yes, well let us hear from Barclays. You can take it fairly shortly I think.

MR. COOK: I am grateful for that indication, Sir. I do not have any knowledge, I must say straight away, of the individual proceedings that Mrs. Clark is involved in, but it is apparent from her request for permission to intervene that she is involved in proceedings against Barclays which relate to the particular individual sale some time ago of a PPI police alongside a loan.

Now, sir, whatever the specific facts of that individual sale the Commission's findings that it does not view PPI being sold at point of sale, and single premium products as being desirable in the light of the efficient operation of the market, really cannot add anything to the question of whether that individual PPI product was mis-sold some years ago when it is not in dispute at all that both point of sale selling and single premium products were lawful. There may be individual factors associated with that sale and that is what that individual case will be about. However, the Commission's findings one way or another in terms of the

features which do or do not help the market operate effectively cannot be relevant to that process and, consequently, the views of an individual based on their individual experience of one sale some years ago will not assist this Tribunal because in many ways that is what we are more fundamentally concerned with, as to whether anything can be brought by Mrs. Clark to these proceedings. She obviously has an interest at the level of she is interested in the result and this outcome, but is that sufficient interest to be entitled to be involved in these proceedings, and there really is no connection we would say between her individual claim for mis-selling and the Competition Commission's findings.

THE CHAIRMAN: Thank you. Mr. Swift do you want to add anything?

MR. SWIFT: I have been passed a note by the Treasury Solicitor, to the effect that Mrs. Clark called the Treasury Solicitor yesterday to say she would not attend, she lives in the North West, but she simply wanted to check that we had her application, so it is in no sense a discourtesy to the Tribunal that she is not here today.

THE CHAIRMAN: No, well thank you for that, we did not take it as any discourtesy.

MR. SWIFT: When I said my position was neutral verging towards opposed, it is, I have to say, quite difficult to see how the intervention would really assist the Tribunal in the resolution of the current issues as they stand, but that is our position.

THE CHAIRMAN: Yes. Thank you, well I think that covers all the applications to intervene. It is plainly essential that both we and all those present know our decision on those applications before we go any further with this CMC because it will fundamentally affect the directions which in due course we will have to give. What we therefore propose to do is to retire and we will let you know a few minutes before we are ready to give our decision. I anticipate it will take us something in the region of 15 minutes.

MR. COOK: Sir, before you retire, I was wondering if the Tribunal has any indication at this stage about likely dates for the final hearing on the basis that while the Tribunal was considering their decision we could be discussing two timetables depending on what decision you reach and come back with something broadly agreed.

THE CHAIRMAN: Well, the timetable itself and the dates would be greatly affected, I think, by the outcome of the intervention applications.

MR. COOK: We could come to two timetables, one with and one without.

THE CHAIRMAN: I think the most that we can usefully say at the moment is that we have considered timetables among ourselves, for reasons which if necessary in due course we can explain, and we do not think July is practicable, and therefore in the ordinary course in which these proceedings would not ordinarily take place in the vacation we are looking at

early October, in relation to which the week beginning 5th creates a difficulty for one of us on the 7th, but the week beginning 12th is entirely clear. I think provisionally at the moment, regardless, I think, of the intervention outcomes, that it would be prudent to set aside a working week, although both the time estimates of the existing parties are for less than a week. It is possible that if there were powerful considerations to the effect that early October would be too late, something might be fitted in in early September, but we are conscious that the parties themselves will have an intensive process of preparation as the hearing approaches which would leave them in the perhaps unenviable position of preparing in August, and therefore although September is, as it were, possible, we doubt whether it is preferable, unless overriding considerations of urgency intervene to make that month better than a month later. That is as much as we, I think, can usefully say at this stage before coming to our decision on the intervention questions which we will now do.

MR. SWIFT: That is very helpful, Sir.

THE CHAIRMAN: That gives you enough to discuss among yourselves.

MR. SWIFT: We did have discussion, a sort of intra-counsel discussion before we came in this afternoon, and we had our diaries open around about July 13th but it looks as if that is not practical.

THE CHAIRMAN: We fear not, we will explain why in due course.

(Short break)

(For judgment see separate transcript)

THE CHAIRMAN: Unless any of the parties want time to consider where they are going next, we propose now to move to the second part of the CMC in accordance with the agenda. It is probably, in our view, sufficient for the parties now to know who has successfully applied to intervene to proceed in the way done, for example, in the TCC in the High Court, and look at a hearing date first and work backwards, rather than the other way around, unless anyone urges us to take a different course.

MR. COOK: Sir, the only point I would say is what does arise on the Tribunal's agenda under point 2, under ... interventions was the issue of confidentiality, and that might properly be dealt with first. What we suggested is a confidentiality ring – it should be very short, I hope, Sir, as a point.

THE CHAIRMAN: Yes, very well, you are quite right that I have jumped it; I had not intended to ignore it. You may want to go first on that, Mr. Cook. You have made a confidentiality application?

MR. COOK: That is correct, we have made a confidentiality application; that does not seek confidentiality for any part of the notice, it does not seek confidentiality for any part of our expert report, but does make extensive requests for confidentiality in relation to the witness statement of Miss Northway and some of the exhibits to that statement.

I should mention that there is one sentence that I alluded to earlier, which is one sentence of para. 120 of the notice of application, where the Commission does take the view that it is confidential.

THE CHAIRMAN: Now before we get involved in the trench warfare which might arise from a detailed consideration of confidentiality today, it seemed to me that it might be sensible first to consider two preliminary matters for which I may want Mr. Swift's assistance and, indeed, that of the other parties. The first is this: it struck me, and I do not think I am breaking any confidences in saying this, that the purpose of the introduction of the affidavit was essentially defensive in the sense that it is not material being advanced in support of your grounds so much as material in opposition to a suggestion that the arguments have not been advanced before. Is that right?

MR. COOK: That is broadly fair, Sir. It fulfils two purposes, the principal purpose is, as you say, defensive. It does also make a number of points about some of the events in the market simply to confirm points the Commission has raised. We do not expect those to be contentious; it is not advancing new evidence, but merely tying together in one place some of the new developments, but most of those are to be public record in any event.

THE CHAIRMAN: It occurred to me that if those materials are in substance public record it may be that the part of the application materials of Barclays in relation to which their existing confidentiality application refers is not a part that necessarily needs to be ventilated if the underlying purpose for which it is adduced, namely to fend off an argument that these points have not been taken before is not contentious. I do not know whether, Mr. Swift, you are in a position to help us on whether that is contentious or not, and whether it is likely that that evidence is going to be needed therefore?

MR. SWIFT: Sorry, where you addressing the issue of the expert evidence?

THE CHAIRMAN: No, no, I am on the affidavit. My understanding was there was nothing confidential in the expert evidence at all.

MR. COOK: That is correct.

MR. SWIFT: We do not oppose the confidentiality application at all. We hear what Barclays have to say and we are not contesting each of the separate items set out in that affidavit.

THE CHAIRMAN: Now, of course, the other parties – the intervening parties – do not know anything about this at all and, for all I know, may or may not be happy with Barclays confidentiality application. My question in relation to that is, is this something that could be dealt with best procedurally by a confidentiality ring such that after the inside the ring representatives have looked at the confidentiality application – and any confidentiality sought in relation to any materials adduced by any of the other parties the Tribunal would have to deal only with matters of confidentiality which cannot be agreed, or with such matters as, even though agreed, strike the Tribunal as going too far in the public interest?

MR. SWIFT: Yes, that would be our strong submission. It does work, it works very effectively and we would suggest the sooner that could be put in place the better.

THE CHAIRMAN: Well in that case, can I ask whether any of the parties oppose the setting up of such a ring? It may have to include, at least in relation to Lloyds, I think, in-house lawyers, but subject to that ----

MISS DEMETRIOU: Certainly in relation to the FSA the in-house lawyer.

THE CHAIRMAN: Yes, but unless any objection is taken to including in-house lawyers within the ring our inclination would be to leave it to the parties to set that ring up but on terms that they report back not less than a month before the hearing on what position has been agreed on confidentiality; what, if anything is not agreed, so as to enable the Tribunal to consider, first, whether they are content with what has been agreed; and secondly, to resolve any points of disagreement.

MR. COOK: Sir, there is one submission I would make in relation to that and that relates to the position of in-house lawyers. It obviously relates most primarily to the position of Lloyds' in-house lawyers who you can readily imagine will or may acquire information that is properly confidential to Barclays which they will subsequently see as being useful for their own internal purposes, and I make no criticism of that – once they know a piece of information it is very difficult to forget it in the future, so we would submit that the confidentiality ring is limited to external legal advisers, that is a common practice in this Tribunal. In reality, subject to the single sentence point, that will be the whole of our application bar a sentence, potentially; the whole of the expert report would be available to everybody.

THE CHAIRMAN: Yes, I understand that.

MR. COOK: The witness statement would then be seen by counsel, a lot of that is not, in fact, confidential, it is a very limited restriction.

THE CHAIRMAN: Mr. Cook, may I ask this: bearing in mind that that might lead to the necessity to instruct outside lawyers for that and for no other reason in these proceedings ----

MR. COOK: Sir, with the greatest respect it is very unlikely – counsel should be in a position to consider what are relatively limited issues.

THE CHAIRMAN: Let us hear from Miss Bacon, she wants to help.

MISS BACON: Sorry, can I just clarify any misunderstanding, we have now instructed external solicitors, so I think that that concern can go away. We are happy for the confidentiality ring to be limited in that respect. Can I ask however that it extend to external economists or other expert advisers as is the norm in Tribunal proceedings?

THE CHAIRMAN: I am sure that is not going to be objected to, is it, Mr. Cook?

MR. COOK: We have no objection on that basis to the FSA's internal legal adviser.

THE CHAIRMAN: I did not understand your objection to extend to internal lawyers at the FSA who have no commercial axe to grind, good.

MR. COOK: Sir, if you will give me a moment I just need to check that.

THE CHAIRMAN: Please.

MR. SWIFT: We certainly have no objection to the extension to the in-house lawyer at the FSA.

MR. COOK: (After a pause): Sir, we have no objection.

THE CHAIRMAN: Well the confidentiality approach therefore being agreed in principle, I would invite the parties to get together and to agree a draft to implement the outline which I have identified and which has, I think, been agreed, for submission back to the Tribunal for approval and to be made the subject of a direction.

PROFESSOR STONEMAN: Having established the confidentiality ring, I would like to raise the issue of what is judged to be confidential and what is not judged to be confidential. I think in terms of the public interest we want as much information in the public domain as possible and, in particular, we do not want to classify as "confidential" information that is already out of date, and is imprecise. We have, for example, a list of proposed extractions which only a few of us have got. This is the request by Barclays for confidential treatment and schedules of excisions from exhibit MN1 to the statement of Nicola Jane Northway. I definitely have not gone through all of these, however, there are one or two excisions in here that I think are quite inappropriate but I do not actually have my copy here. For example, there is an excision that says: "up to a year is to be removed". Now, up to a year is not a precise piece of information and I do not see how it can be secret. Other information is put in as "more than a half", that is not precise information and cannot be

secret. "Between A and B" – those are the sort of statements you put in Competition Commission Reports when you want something to be secret, it is not secret in itself. I do not think that we should go through every line here and say: "Is this, or is this not information?" This very much to me, if you will excuse the analogy, looks as if somebody has said to the office boy: "Go through here and list any number in the report and call it secret." I cannot actually see what judgment has been used in deciding what and what should not be excised. I think it is important that the excisions should be minimised – really minimal; if nothing else, it makes the proceedings so much easier, because otherwise people have to keep leaving the room as a number comes up. So I would very much like to say: "Let us have a confidentiality ring – fine, but let us play the confidentiality game fairly and that only information that is really confidential and really is a business secret is excised.2

MR. COOK: I heard what you said, sir, without going through it in detail, I do not think I can take it any further forward to day. We will obviously review our schedule of excisions. The reality is though that at the moment at least I cannot foresee any number that has been excised here needing to be referred to at any point during the course of the proceedings, and the rationale is, the advantage we have is that the entirety of our application bar one sentence in our entire expert report does not include any confidential information and those are the points we will be seeking to address the Tribunal on, the minutiae for the most part is not going to be relevant to the question of whether the Commission has done the right job or not, but we will review our schedule of excisions and come back with a new version taking account of the points that have been made today, we nonetheless persist in that and should anyone subsequently take issue with it we will address those detailed submissions as and when they are made.

THE CHAIRMAN: Thank you. Professor Stoneman's observations do reflect the view of the three of us, and of course it is not limited to Barclays, it may be that Lloyds and Shops Direct will need to conduct their own analysis of that which they would wish to have confidential. The observation is, however, that business secrets have a secrecy shelf life, which is worth bearing in mind.

MR. COOK: I would say formally that an attempt has been made to identify information where, even if it is above a number that that number is in itself something that we are concerned about, but we will review it again.

THE CHAIRMAN: Now, timetable – the hearing date. If I can start the discussion off by suggesting that with that many interventions July is not merely very difficult from the point

of view of the Tribunal, so the parties will need to look therefore at the later options and make any submissions they want to make about the hearing date and, indeed, time estimate.

MR. SWIFT: There is a serious public interest issue in having the Tribunal examine and review this report as soon as practicable for obvious reasons: there are findings as to adverse effects on competition, findings as to detriments on a very substantial scale, it is recognised that the remedies are themselves interventionist and will take some time to bed down. Our original timetable was to have these in place by April 2010 with the orders coming out in September/October 2009. So therefore we would like, if at all possible, for the Tribunal to hear this appeal in early September, and I have discussed that with Mr. Cook and he is also strongly supportive of that if that can be accommodated by the Tribunal. Our view was three/four days with the controls established by the Tribunal on the role of the interveners. My own view is that it should not go beyond day four, but if the Tribunal has put aside provisionally a week – if we could do that, have a fixed date in early September, then we will organise the dates for interventions and skeletons so that they would conclude before the end of July and that would mean that the Tribunal would have the complete package to store away. There would be no further exchanges during August, August would be a dead month in terms of duties to produce more information and everything would be done by July. Mr. Cook and I, when we were discussing this before we started, thought we could get all the written material, the skeletons done in time for a hearing say on 13th or 20th July. So if it were possible to have a start, say, on 2nd September or 3rd September and then work back that would be our respectful proposal.

THE CHAIRMAN: It sounds like you agree with that.

MR. COOK: There is a large measure of agreement on this, Sir. Just to reiterate the point from Barclays slightly different perspective of why we consider this to be so important: there is an enormous amount of work that needs to be done, and if I can allude to something that maybe Mr. Ward may come on to say, there is a process here whereby we have the hearing, the Tribunal obviously take time to consider and produce a judgment. Once a judgment is produced there will then be a need, unless it is entirely clear one way or the other, to consider exactly what the consequences of that are for the report, and which issues go, what proposals still stand in place; that may take a little while. That uncertainty period would therefore extend somewhat beyond the hearing and an enormous amount of effort needs to be made to be ready to bring these proposals into effect, and that is an enormous amount of money as well as the Commission itself said in the report, the total package of proposals is going to cost upwards of £100 million to implement, and so it becomes very difficult if we

do not hear this as soon as practicable because money is either wasted or people have to withdraw PPI because they are not read in time.

THE CHAIRMAN: On the assumption that there will have probably to be a two stage process, judgment followed by a remedies' session as there was, for example, in the Tesco case, that is not going to happen in any event earlier than October, the second stage, bearing in mind that we have to consider and give a judgment after the hearing. Does the Commission have any current view as to what it is going to do about the timing of its proposed order? Is it contemplated that that would go ahead notwithstanding that these proceedings have not been finally resolved or that it would only go ahead if they are resolved in a way that does not impinge on them?

MR. SWIFT: The general intention is to move ahead. It is a difficult one to judge. I have not prepared a statement to hand in to the Tribunal on precisely what the next steps would be in part because we were waiting for the outcome of the first CMC. Generally speaking, we would not ordinarily consider the initiation of proceedings as putting a stop on the process of consultation that the Commission would engage in.

THE CHAIRMAN: I was thinking in terms of the order in particular, because that sets, if you like, wheels in motion in terms of preparation to deal with the consequences. Anyway, I have heard what you have said. Do any of the other parties have anything they want to say about date – the interveners?

MISS BACON: Sir, we are in more or less the same position as Barclays, in fact, we are essentially two banks. We are subject to exactly the same constraints. We do not share quite the urgency that has been urged upon the Tribunal by Barclays. We would be content with any date in September, including something towards the latter part of September, but we are content with the early part of September.

MR. WARD: Sir, we would be happy with that as well as long as the timetable we are left with is a workable one.

THE CHAIRMAN: Yes, we will have a look at that when we have dealt with timetable. Miss Demetriou?

MISS DEMETRIOU: We are neutral on this question.

THE CHAIRMAN: Thank you. We are going to decide all these matters when we have heard all the relevant submissions but we have a clear steer as to what your preference is in that regard. Now, timetable: at this stage I think we would wish to know what, apart from the expert witness and possible factual witness which Barclays wish to introduce is/are contemplated by way of evidence by any of the other parties at the moment. I fully

understand that only the Commission has seen Barclays notice of application until this morning and that therefore time may not have been available to form precise views about these matters, but some indication is going to be, I think, essential for us to get any reliable feel for how long the proceedings are likely to take.

MR. COOK: Sir, in relation to this, consistent with this being an application for judicial review essentially, and the practice in those courts, we would not anticipate that either witness will be brought to give evidence, that their statements would stand for what they were.

THE CHAIRMAN: Whether they will or will not depends on whether somebody wants to cross-examine them.

MR. COOK: Yes, but I would be very surprised if there were issues that were susceptible to cross-examination in this context; it is going to be a question of legal submission, but that is obviously a matter for my learned friend more than me.

THE CHAIRMAN: Let us look at the applicant. Those who are siding with Barclays first. Yes, Miss Bacon?

MISS BACON: Obviously, Sir, as you know, we could not take instructions from my clients at all because they still have not seen the notice of application.

THE CHAIRMAN: I understand that.

MISS BACON: We anticipate that we may have an expert and a factual witness. Obviously within the constraints set by the conditions imposed by the Tribunal, I cannot say for sure whether we will or not, but that is the upper bound rather than a definite.

THE CHAIRMAN: Shops Direct?

MR. WARD: Sir, we do not anticipate calling any witness evidence. It may be that we will want to refer the Tribunal to something that was said in the course of the Competition Commission's inquiry, to material put before the Competition Commission but not fresh evidence.

THE CHAIRMAN: Thank you. Now, the FSA, let me take you last, Mr. Swift?

MISS DEMETRIOU: Because I have not been able to take instructions I cannot give a definitive answer, but at the moment I anticipate that we will be making legal submissions only.

THE CHAIRMAN: And neither seeking to adduce evidence or cross-examine?

MISS DEMETRIOU: At the moment that is the indication that I can give, but it is not definitive because my clients have not seen the application.

THE CHAIRMAN: I understand that. Yes, Mr. Swift?

MR. SWIFT: As Mr. Cook says, it is judicial review and one would not ordinarily be seeking cross-examination of expert witnesses. As the Tribunal will know Barclays ground 3 is heavily dependent upon the expert opinion of Professor Yarrow.

THE CHAIRMAN: Yes.

MR. SWIFT: But we have not properly finalised our position again until today, but there is a very good principle and that is the report should stand and speak for itself, and that is what I am basing my defence on – the report speaks for itself. There may be some technical points we may need to clear up but I was not proposing to burden the Tribunal in this case with, for example, a detailed background paper from the Chairman of the Panel, or detailed econometric analysis.

THE CHAIRMAN: Your present perception is minimal evidence and no cross-examination.

MR. SWIFT: Absolutely, and therefore I just gasped when I heard from Miss Bacon that Lloyds might be considering not just factual evidence, but expert economic evidence as well. But it may be that in the course of the hearing that the Tribunal will say: "We would like to know more from the Commission on this point".

THE CHAIRMAN: Yes.

MR. SWIFT: It is very difficult when one is dealing with a report of this length to anticipate precisely the issues that the Tribunal focus on.

THE CHAIRMAN: Indeed, yes.

MR. SWIFT: Indeed, that happened in a recent case that I was involved in last year with *Sky* in which the Tribunal said to the Commission: "We really would like to know in more detail the material that you relied on when you arrived at those conclusions", and that facility must be open to the Tribunal as I think it must be open to us. We tend to approach it flexibly but the main message is the report will stand for itself.

THE CHAIRMAN: Thank you. Now, procedural directions: our provisional view, but we will hear submissions on it, is that rather than have application and defence from Barclays and the Commission first, followed by material from interveners, it would be better to have all Barclays and supporting interveners material in first, followed by all defence material, which is essentially Commission and FSA second, to avoid, as it were, the Commission having to re-do its defence when it sees what Lloyds and Shops Direct have to say, so they can take one shot at it. Does anybody want to argue against that general structure? (After a pause): Good, in that case the next stage, as I see it is the input from Lloyds and Shops Direct – I am putting on one side the further and better particulars of ground 4, which you

have requested and which has been promised and which can continue unaffected by this afternoon's deliberations.

MR. COOK: The other point it might be helpful to establish as a matter of structure is whether the Tribunal will be happy with – a direction is often given here when we do not have a reply but our skeleton argument is permitted to make points in reply.

THE CHAIRMAN: Well we will get to replies, if we may, when we have dealt with the previous two ----

MR. COOK: The only concern, Sir, is in the context of thinking about a timetable. If there needs to be a reply phase in there then obviously that will lengthen matters.

THE CHAIRMAN: Yes. The first stage I think is for Barclays to serve its non-confidential materials on the other interveners, and its confidential material on the ring members of the other interveners. We do not want to lose time while a ring is being put together and negotiated, and therefore we would hope to direct an early date for Barclays to serve its non-confidential material, including, all importantly, Professor Yarrow's report on the other interveners – the end of this week?

MR. COOK: Sir, I suspect we could probably do it slightly quicker than that.

THE CHAIRMAN: Good, tomorrow!

MR. WARD: Sir, could we also have a direction that the notice of application itself, which has already been shared with counsel, can be shared more widely ----

THE CHAIRMAN: I am sure now you are in that is no longer opposed.

MR. WARD: We would like to share that immediately.

THE CHAIRMAN: Of course.

MR. COOK: Sir, there is no problem with them sharing immediately the copy of the notice of application they have; there is equally no problem with providing the expert report more quickly.

THE CHAIRMAN: And on the basis it goes to the parties not just the ring.

MR. COOK: Absolutely. I am thinking here about the mechanism of document production, particularly in relation to the report, that would take a little bit longer, but there is no reason why the notice of application cannot go immediately, the expert report can be sent through ----

THE CHAIRMAN: Can we say notice of application and expert's report by close of business tomorrow? Main report – end of the week? Would that be for you to do, or for the Commission to do?

MR. SWIFT: No, that is for Barclays, it is their bundle.

THE CHAIRMAN: And main report, which I agree is a bulkier document, by the end of the week. Now, the next stage, supporting interveners, i.e. Barclays supporting interveners – Lloyds and Shops Direct – how long do you need for your non-duplicative ancillary support.

MISS BACON: Sir, we do have a concern about that, that we should have sufficient time in order to ensure that we do not duplicate, and we have a particular problem given that following the submissions to the Competition Commission that were made separately by Lloyds and HBOS, the two merged, so effectively we have two parties to deal with – two sides of the business – could we put in a plea that we have until the end of May. I think it will be very difficult to deal with that before then. The Competition Commission has already had the notice of application for a month now, I think that we do need at least a month so that we can put in a proper submission which is as focused as possible and does not duplicate any submissions made by other parties. Working backwards from the September date I think that should be easily accommodated to allow all of the other submissions to proceed between then and the end of July.

THE CHAIRMAN: Shops Direct?

MR. WARD: We would welcome that too, sir.

THE CHAIRMAN: I detect some possible opposition to that. What do you want to say, Miss Demetriou first – what time are you asking for?

MISS DEMETRIOU: Well I think our ----

THE CHAIRMAN: You are opposing it because you are way down the line.

MISS DEMETRIOU: Exactly.

THE CHAIRMAN: Yes, we can leave you on one side for the moment. Mr. Swift?

MR. SWIFT: If I can use a colloquial expression, can we just "park" that until we go through the rest of the timetable, because if the interveners want until the end of May, we will then have to consider their interventions and how they affect the Barclays case, that then affects our defence, and if we are now talking about an intervention that is going to take six weeks to consider after, I assume, that Lloyds are fully familiar with the terms of this report and the Barclays notice of application will take probably half a day to read a period of five – anyway, let me go back to the point, it is a question whether an extension to the end of May, and then allowing us to put in a defence, say, 14 days after that, and then FSA coming in maybe five days after that, will permit time in July to go through the skeletons. Working back from, let us say, 2nd September or 3rd September, that seems to be rather a tight squeeze.

THE CHAIRMAN: I think your submission was that actually all the papers should be in by the end of July, so August is a dead period while the Tribunal can find corners during their holiday arrangements to read the papers.

MR. SWIFT: By "the end of July", I suppose I did not mean 31st July.

THE CHAIRMAN: So you say that is too long. Miss Demetriou?

MISS DEMETRIOU: My only concern is to make sure that we have sufficient time after the Competition Commission's defence to make sure that we do not duplicate, and if we are permitted only a few days then effectively we would have to do all the work in advance which would not be very efficient in terms of costs. We do not want to make any particular submissions as against the other interveners but we need to be accommodated.

THE CHAIRMAN: Am I being naïve in assuming that there will be some communications between the FSA and the Competition Commission during what has already no doubt started, namely, the Commission's consideration of its response to the Barclays application?

MISS DEMETRIOU: Well so far that has not been the subject of discussion between us.

THE CHAIRMAN: There is no gateway reason why it should not be, is there?

MISS DEMETRIOU: There is no reason why it should not be, but it is sometimes hard to organise in practice. My only concern is to make sure that we have a sufficient period of time, say, 10 days after the Competition Commission to put in our statement of intervention.

THE CHAIRMAN: Yes. Leaving aside the question of when we fix the deadline for the supporting interveners, you want 14 days clear?

MR. SWIFT: Yes, I would say at least 14 days after the receipt of the two interventions with their factual statements and expert reports.

THE CHAIRMAN: What were you looking for in terms of clear blue water between the Commission and your ----

MISS DEMETRIOU: Well ideally 10 days.

THE CHAIRMAN: Mr. Cook has hinted at a reply process in which skeletons and replies would be simultaneous.

MR. COOK: Well we would be entitled to make points in reply in our skeletons; there will be no need for a separate document.

THE CHAIRMAN: But it is a question of skeletons with you going first?

MR. COOK: Yes.

THE CHAIRMAN: So how long do you think you are going to need after the FSA, bearing in mind you will have had the Commission, if Miss Demetriou gets her 10 days, 10 days earlier.

MR. COOK: I would certainly seek at least 10 more days after the FSA.
THE CHAIRMAN: So that is for a skeleton including reply?
MR. COOK: That is correct.
THE CHAIRMAN: And on the assumption they are going to be sequential, how long after that – I suppose we have to go through, theoretically at any rate, the same staggered process supporters? So we are on to the supporting interveners, how long?
MISS BACON: Five days.
THE CHAIRMAN: Five. Now, we are on to Mr. Swift again for opposing skeletons.
MR. SWIFT: I have done the calculation and we have got to 15th July already.
THE CHAIRMAN: I have not assumed any particular dates at the moment, I am just looking to see, following your line of thought, Mr. Swift, how long everybody needs ----
MR. SWIFT: 10 days.
THE CHAIRMAN: 10, so that is for the Competition Commission skeleton. No rejoinders – I hope.
MISS DEMETRIOU: Five days.
THE CHAIRMAN: And five there, and that should have everything complete. Carriage of the hearing bundle will be in the hands of Barclays presumably, with appropriate liaison with all the other legal representatives. That probably gives us enough, unless anybody wants us to say anything else, for us to go out and work out a timetable.
MR. SWIFT: All I can say, and I know that counsels' convenience comes pretty low down the list of priorities in this Tribunal ----
THE CHAIRMAN: Just ahead of the Tribunal's convenience, Mr. Swift! (Laughter)
MR. SWIFT: If the two interventions are put back by 31st May that really makes it very difficult for me to make any contribution to the defence in the first two weeks of June, I shall be out on other matters. There has to be some fall out somewhere along the line but that would be difficult.
THE CHAIRMAN: We will bear that in mind. Any other input to the timetable, on the assumption that we look at the end of July, if possible, as a deadline and work backwards with those sort of time gaps in mind.
MISS DEMETRIOU: Not in relation to the timetable as such, but it might be useful to have a direction as to when the bundle should be agreed, so that is in advance of the skeleton arguments, because it would make sense for the skeleton arguments fully to refer to the hearing bundle.

THE CHAIRMAN: Yes, I am bound to say that strikes a very receptive chord in my mind, the sooner the hearing bundle is agreed the better.

MR. COOK: I do not see any problem with that. In practice it is simply going to be adding additional volumes to what the Tribunal already has.

THE CHAIRMAN: The normal time to agree a hearing bundle would, I think, be somewhere pretty close to the date when the FSA puts in their responses, their defensive response, and then anything else can be added on at the end. The process of trying to agree it should, as it were, start now obviously. Yes, anything else anybody wants to input following which we will, bearing in mind the time, go out and devise a timetable – I cannot guarantee that everybody will get all the days they have asked for.

MR. COOK: The only issue, Sir, is if we are going to be listing the final hearing – and I suspect the intention is that – whether you would wish to hear any submissions about when that should be in terms of availability late September.

THE CHAIRMAN: Well my understanding was everybody wants early September. It is going to have to be a clear working week that gets set aside, and if you do it in four days it will give the Tribunal a day afterwards to advance their own thinking. I do not, unfortunately, have my diary in front of me.

MR. SWIFT: The August bank holiday is 31st August.

THE CHAIRMAN: Is that the Monday?

MR. SWIFT: That is the Monday. The first full week ----

THE CHAIRMAN: My inclination would be to go for something like the 7th September. Any objections to 7th September as the first day of a working week – 7th to 11th?

MR. COOK: Sir, the only point I would make is that Miss Northway is probably unavailable that week.

THE CHAIRMAN: Does that matter if there is no real risk of her being cross-examined?

MR. COOK: Sir, I do not believe there is, I just flag it up now as being a theoretical possibility. The evidence in practice could be given by somebody else.

THE CHAIRMAN: There is no reason why somebody else could not depose to the truth of what she states.

MR. COOK: No, Sir, those are all matters within the knowledge generally of the ----

THE CHAIRMAN: She is simply a convenient person for producing this information, is she not?

MR. COOK: Correct.

THE CHAIRMAN: I do not mean that disrespectfully, of course, but that is the position. Unless anyone wants to suggest otherwise we will go and consider that week, and see if we can

accommodate you and we intend to take on board the suggestion that August ought, if at all possible, to be a period when everybody has everything and can squeeze such reading of it into their holiday plans as they think fit.

MR. SWIFT: Just looking at my own diary, I have the same problem with my National Health Service Competition Panel that I am sitting on which always sits on the first Monday of the month, but I have had to give that up today. If it were possible to begin on Tuesday that would just suit me.

THE CHAIRMAN: The 8th?

MR. SWIFT: The 8th.

THE CHAIRMAN: I think that may be difficult, Mr. Swift ----

MR. SWIFT: Right, well let us go for the 7th.

THE CHAIRMAN: -- because we have I think already, in advance of any decision to permit any interventions, thought that working week is a prudent necessity.

MR. SWIFT: Well I fully accept that and respect that.

THE CHAIRMAN: Yes. Unless there are any other observations, we will go and devise a timetable which we will come back and tell you about.

(Short break)

THE CHAIRMAN: Thank you all for your helpful submissions. The directions which we propose to make are as follows:

* by 5th May there be lodged with the Tribunal an agreement as to a confidentiality ring,
* by 29th May there be lodged the Lloyds and Shops Direct statements in support of their intervention, together with any evidence and other materials they wish to rely upon,
* by 19th June there be lodged the Competition Commission's defence and any supporting materials,
* by 3rd July there be lodged the FSA support of the Commission and an agreement as to bundles, and a confidentiality report to the Tribunal that is identifying what, as a result of the ring process, has been agreed or not agreed as confidential,
* by 13th July there be lodged the Barclays skeleton inclusive of any points of reply,

* by 17th July the Lloyds and Shops Direct skeleton – in that context we acknowledge that is a tight timetable, it is what you asked for and we invite you to co-operate in advance of the final draft of the Barclays skeleton,
* by 27th July there be the Competition Commission skeleton; and
* by 31st July the FSA skeleton,

The hearing we fix for the week beginning 7th September and we note the parties' estimate of four days and the usual obligation to notify any revised estimate applies as from today. There be liberty to apply, that is in relation to the ground 4 issue raised by the Competition Commission in relation to any matters about confidentiality which have not been agreed, and only if necessary for a second or adjourned CMC, but if application of any of those three types is to be made it must be lodged with the Tribunal by the end of June with a view to it being heard in July – in practice that probably means by me alone in the last week of July.

MR. SWIFT: Just on a point of clarification, Sir, in respect of the liberty to apply, what the Tribunal plainly has in mind – and we certainly have in mind – is the possibility that the notice of intervention and statements in support will be non-compliant with the direction, that is when they are served on 29th May ----

THE CHAIRMAN: I did not have anything in particular in mind, in fact I had it in mind that everybody would comply with the various directions and conditions that had been imposed.

MR. SWIFT: I am just looking at it, we may be in difficulty in putting in a defence on the 19th if, in our submission, those statements in support are non-compliant but, as you say, Sir, liberty to apply could cover a number of issues arising between now and September.

THE CHAIRMAN: Well I am not anticipating that dissatisfaction with the form of the application material is of itself a ground for putting in a defence later than indicated in these directions. There may be an issue as to whether something contained in the materials you have by then received ought to be excised for non-compliance, or may be subject of further information so as to make it clear, but save in exceptional circumstances it seems to me that the defence should nonetheless be in on time, otherwise the process is in danger of being debagged.

MR. SWIFT: That is very helpful; I fully support that.

MR. COOK: One point I would flag – a very minor point – does the Tribunal have any view about A5 bundles, trial bundles, on the basis that they certainly can be quite convenient in terms of bringing the report down instead of something dramatic to something more user-

friendly. I was thinking about people taking it away during the course of August, they might find that convenient.

THE CHAIRMAN: I seem to be in a friendly minority of one, I am afraid, Mr. Cook, for reasons which I do not think need to be gone into. It is always a trade-off of weight against visibility. Although I have in the past found mini-bundles to be enormously helpful ----

MR. COOK: Sir, there is no problem with us providing you with mini-bundles if that would assist you?

THE CHAIRMAN: Yes, it might actually help me since I shall be moving around during August quite a lot and would appreciate being able to compress what I have to take with me into the smallest possible box. So yes, one set of mini-bundles, yes, please, sets two and three, normal size, please.

MR. COOK: Double sided is obviously acceptable.

THE CHAIRMAN: I suppose so. Can I say this? Double-sided, please, yes for things like the report, evidential materials, but skeletons and materials of an argumentative type preferably not. The difficulty with double sided in things of that kind is it is so much more difficult to make notes on the document, and I would urge those responsible for preparing skeletons to apply a sense of brevity to the word count rather than the page count, the object being the better spaced – the more loosely spaced – on the page the easier it is to make notes around skeletons, and that is a far more useful process than having to do so on a separate document. I find that in practice to be helpful. I am not going to impose a word count limit, but I trust that the parties will bear in mind that brevity, particularly in a skeleton – as its name implies – is normally beneficial, rather than the opposite. For my part I expect to hear oral submissions, of which the skeletons are genuinely a skeletonic introduction rather than one full set of written submissions in the skeletons followed by another slightly different set orally. Thank you.

Any other applications or observations? (After a pause): Is any application for costs made at this stage, otherwise they will be no doubt picked up at the end of the day? (No comments)

As to forum, we formally direct that the forum is England and Wales; I think that is non-contentious.

Thank you for your help.

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