IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1116/4/8/09

Victoria House,
Bloomsbury Place,
London WC1A 2EB

4th December 2009

Before:

LORD CARLILE OF BERRIEW QC
(Chairman)

ANN KELLY
DR. ARTHUR PRYOR CB

Sitting as a Tribunal in England and Wales

BETWEEN:

SPORTS DIRECT INTERNATIONAL PLC — Applicant

- v -

THE COMPETITION COMMISSION — Respondent

Supported by

THE OFFICE OF FAIR TRADING

and

JJB SPORTS PLC — Interveners

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HEARING

APPEARANCES

Mr. Mark Brealey Q.C. and Ms Maya Lester (instructed by Berwin Leighton Paisner LLP) appeared for the Applicant.

Mr. John Swift Q.C., Ms Elisa Holmes and Mr. Paul Stuart (instructed by the Treasury Solicitor) appeared for the Respondent.

Mr. Daniel Beard and Ms Fiona Banks (instructed by the General Counsel, Office of Fair Trading) appeared for the Office of Fair Trading.

Mr. Paul Harris (instructed by Herbert Smith LLP) appeared for JJB Sports plc.

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THE CHAIRMAN: Good morning.

MR. BREALEY: Sir, can I just start by making some fairly obvious submissions. I appear on behalf of Sports Direct with Miss Lester. Mr. Nicholas Purnell is acting for Sports Direct in the context of the possible criminal proceedings.

THE CHAIRMAN: These are criminal proceedings that do not yet exist.

MR. BREALEY: Absolutely.

THE CHAIRMAN: And may never exist.

MR. BREALEY: And may never exist.

THE CHAIRMAN: It is always a pleasure to see Mr. Purnell.

MR. BREALEY: Mr. Swift, Miss Holmes and Mr. Stuart appear for the Competition Commission. Mr. Beard and Miss Banks appear for the OFT. Mr. Harris is on his own for JJB.

I know we are short of time, but I need to discuss with the Tribunal (if that is a way of saying it) whether the proceedings should be in public or in private.

THE CHAIRMAN: Yes. We have made an inquiry, anticipating this application, as to whether there are any media represented here. I understand there may be a representative. Is there anyone else here representing the media apart from the gentleman at the back who I think represents, in effect, a news agency, if I may describe your agency so offensively. I do not mean to offend. We have one representative of the media here.

MR. BREALEY: Can I make this submission without his presence, if it is possible?

THE CHAIRMAN: Could you make the submission in very general terms to begin with, with him present?

MR. BREALEY: Of course. There are two aspects. Although we obviously want the proceedings to be in public - almost the golden rule, and certainly for me - there are two aspects of this case which give Sports Direct certain concerns. The two aspects arise from the allegations in the OFT's witness statement. The first is how the stores came to be acquired and whether it was in a broader context; the second, which is new to us, are the allegations made against certain people which are said to form the basis of the public interest. In other words, they are at the end of Mr. Blake's witness statement.

So, the first is whether the acquisition of the stores was part of a wider arrangement and the extent to which, and whether, we should be saying in public the nature of that wider arrangement; the second is whether the public should be aware of the nature of the allegations against various individuals which form the basis of the public interest. I think, sir, without mentioning it - and I can go to the witness statement ----

THE CHAIRMAN: I understand what you are referring to.

MR. BREALEY: If the press got hold of, for example, the second one of those, that these individuals were the sort of people who did the sort of things that are alleged -- Is that something that should come out now, or is this something that should be kept private?

THE CHAIRMAN: Thank you.

MR. BREALEY: As a company and certainly as lawyers, we wish to keep it in public. That is the way it normally goes. But there allegations that are made by the OFT which are possibly defamatory.

THE CHAIRMAN: Does anybody else wish to say anything at this stage? Mr. Swift?

MR. SWIFT: Good morning. We know that the hearing today is in two separate parts. The first part is dealing with prematurity. My submission is that that is pre-eminently a matter to be heard in public. My submissions will not be concerned with the adequacy of the reasoning in the so-called decision. The Tribunal will, of course, have all the material before it, but, in my submission, it is extremely important that the matters relating to public policy and the relevance of the working papers are opened in public and we see no reason whatsoever why the applicant needs to get into any issues in relation to the witness statements, either of the Competition Commission or of the OFT.

MR. BEARD: The position of the OFT is the same. There does not appear to be any need to deal with the details of these matters orally. If there is need to refer to this witness statement it can be a matter that is read by the Tribunal. At this stage it is not the OFT's intention to make any specific or oral submissions in relation to these matters. The matters have been provided to the Tribunal in that witness statement in order to set out what has been said to the Commission, and, as my learned friend Mr. Swift said, these are not challenges to those reasons.

MR. HARRIS: Sir, we adopt the same approach as the OFT.

MR. BREALEY: Sir, just to pick up on Mr. Swift's statement that the working papers are public, they are not ----

THE CHAIRMAN: No. I do not think he said that.

MR. BREALEY: -- or they should be made public. I certainly want to refer to the working papers in the morning. I will be going to those working papers pretty quickly. If Mr. Swift is not saying they are public, but that they are private -- and they are private because they potentially have price-sensitive information -- If, for example, it is said, "Well, you can see the way the Competition Commission is going", that constitutes price-sensitive information. Sports Direct's share price went down by some 16 percent when it was dawn-raided by the

OFT. Now, that is a public fact. These working papers, as we will see, contain statements that I would like to read out in court. Now, if I read them out before the Tribunal and they are noted down ----

THE CHAIRMAN: But you can refer to them without reading them out in court, given that the Tribunal has all these papers, can you not?

MR. BREALEY: But then it is very difficult for me to make submissions on them. I will do ----

THE CHAIRMAN: You are very ingenious, Mr. Brealey!

MR. BREALEY: There it is. The working papers, as I understand it, are private to the parties and the Competition Commission. I can ask the Tribunal to read them. It may well be that I can ask the Tribunal to clear the court at that point. It is going to be difficult to get through these proceedings without referring to those matters that I have referred to.

THE CHAIRMAN: Thank you. You had better read Miss Lester's note before you sit down.

MR. BREALEY: I always read Miss Lester's notes!

THE CHAIRMAN: So you should.

MR. BREALEY: I cannot read it out.

THE CHAIRMAN: Forgive me for addressing you, sir, the representative of the press. I presume the Tribunal can take it that you would much prefer the proceedings to be in public. Beyond that are there any particular points you would like to make?

MALE SPEAKER: (PRESS) There are plenty of people here, more than usual, and if it is easier if I am not here for the working of the Tribunal and the parties I would be prepared to leave.

THE CHAIRMAN: That is very helpful. I think we ought to retire just to consider this for a few moments, if you do not mind.

(Short break)

THE CHAIRMAN: Mr. Brealey, we have considered your application carefully. It is the Tribunal's view that we are going to continue in public, because we consider that all or most of this can be done in public, but we need to be careful about the use of documentation, and so on. If anything arises that any counsel feels should make us change our minds, at least for a temporary period, during the hearing then we will reconsider the matter, but at the moment we will continue in public.

MR. BREALEY: I am grateful.

THE CHAIRMAN: Did you say there was another preliminary matter?

MR. BREALEY: No. Just on timing, I know we have got a timetable, looking at the plan for the hearing, JJB is not going to be making any submissions on what is called admissibility.

THE CHAIRMAN: The timetable is indicative. If people could try and keep to that sort of general timetable, we will be content.

MR. BREALEY: I am grateful.

THE CHAIRMAN: If you want to come back next week it is a matter for counsel. We have made the day available.

MR. BREALEY: I do not have to finish, Cinderella time, at 11 o'clock.

I am going to deal with prematurity. I would like to deal with prematurity under three headings. I am going to first look at the Competition Commission's procedure, then look at the two working papers, and then finally give the reasons why we say the Competition Commission and OFT are wrong.

I will start with the Competition Commission procedure, which obviously is fairly key to this issue. If I could go first to para. 12 of the Competition Commission's skeleton, p.4:

> "The Commission accepts the duty to act fairly in the course of the investigation. But whether or not procedural fairness has been accorded cannot and should not be determined at this pre-provisional stage of the investigation. In some cases a decision taken in the earlier stages of the investigation will immediately affect a party's substantive rights, and could not be reversed at a later stage. One example might be …"

- the *Stericycle* case.

> "This is not such a decision. A decision not to disclose certain information at a pre-provisional stage of the investigation is not a procedural decision that in itself affects the interests of the party concerned. In this case any right of challenge will arise in the usual way, when a provisional finding or a final decision is made and it becomes clear whether the party has been prejudiced by that decision."

In my respectful submission that essentially encapsulates the issue between the parties, and I would like to note two things on this paragraph, first, that the Competition Commission has come off the fence and says that its provisional decision can be challenged, so we could be back in the Tribunal in a few weeks' time. Secondly, as we say the paragraph really encapsulates the difference between the parties, and in essence the issue to be decided this morning is fairly simple. The issue is this: can the company, Sports Direct, act so as to prevent a breach of procedural fairness or does it have to wait until a later stage, a substantive decision?

The issue is essentially quite simple: can Sports Direct act now so as to prevent a breach of procedural fairness, or does it have to wait until a later stage when, as the Competition

Commission says here, it affects the parties' substantive rights, i.e. the provisional decision and the final decision, and at some stage Mr. Swift will have to articulate why a provisional decision is subject to challenge.

With that in mind could I then go quickly to our skeleton argument where we do deal at some length with procedure, that is para. 20 to 30 of our skeleton, and also at the same time go to what is called the "joint bundle of documents", it is the CC's General Advice and Information CC4, and the best way of finding this CC4 document is to go right to the end,

THE CHAIRMAN: This is the document starting "General Advice and Information".

MR. BREALEY: Yes, this sets out the general advice and information relating to the procedures adopted by the Competition Commission in its investigation. I am looking at p.29 .

THE CHAIRMAN: Not a very revealing page!

MR. BREALEY: No, save to say it is advice and information. If we go to para. 6.1, internal p.23, p.51. This sets out the Competition Commission's procedures. It says they are governed by the Enterprise Act, Schedule 7 to the Competition Act 1998. We see there that there is an appointment of groups, we see at the bottom that there is provision for a timetable, then over the page on what is my p.52, internal p.24, we have the major stages of merger investigations.

> "The main stages on investigation (which often overlap and do not necessarily take place in this order) are:
>
> (a) gathering information, including the issue of questionnaires;
>
> (b) hearing witnesses;
>
> (c) verifying information;
>
> (d) providing a statement of issues;
>
> (e) considering responses to the statement of issues; and
>
> (g) notifying parties of and publishing provisional findings;

Then remedies, and then the report. I am going to go through some of the paragraphs in it in a moment, but the one point that I would like to make on the Competition Commission's procedure is that it is fact specific right up to the provisional decision, that is when the Competition Commission makes findings, gathers the information, hears the evidence, that is its procedure. The one big point is that we are now at a stage where the Competition Commission is gathering all its information, testing the information, gathering the evidence, and this all culminates in the provisional decision. I read from para. 22 of the skeleton which concerns the role of the working papers:

"The CC's General Advice and Information states that the CC presents its analysis and findings in working papers, in order to enable it to make 'informed decisions on the competition and remedies questions'."

- informed decisions.

"The Chairman of the CC has explained the Competition Commission's practice to share quite detailed working papers with the main parties, in order to set out the investigation team's current thinking, flesh out the rather formal issues letter, and in order that the provisional findings [that is, the provisional decision] should not come as a surprise to the merging parties ... The Competition Commission offers the merging parties continuous and increasing access not only to the evidence emerging during the inquiry but also, and much more importantly, to its thinking [and these are the important words] culminating in provisional findings".

So, everything that is happening now is going to culminate in its provisional decision which is made public.

We are at the stage of the hearing in other words. If we can just look at the main stages -- Paragraph 6.12 - Information Gathering & Handling.

"The Competition Commission requires access to detailed information regarding the companies and markets in question, in order to take its statutory decisions on the competition and remedies questions. Those affected, or potentially affected by decisions made by the Competition Commission, should also have the opportunity to put their views to the Competition Commission and for those views to be considered. The Competition Commission invites evidence from all parties likely to have an interest in the investigation".

So, there is a distinction between the main parties and the third parties. Then, at 6.13,

"At the outset of a reference, the Competition Commission has available to it the information already gathered by the OFT, to which it must have regard. The Competition Commission then collects further information in a variety of ways --"

It sets it out: letters, questionnaires, press notices, publicly available sources of information, surveys. Can I ask you to flag this Figure 1 on my p.54, (p.26): this graph gives a very good illustration of the nature of the Competition Commission's procedure. So, you have the information gathering exercise and analysis, the third party hearings, the statement of issues, issues hearings with the main parties, report drafting. So, everything up to the group's provisional decision. We see in that box the group's provisional decision.

In essence, everything up to that box constitutes the hearing, where the evidence is being gathered and the evidence is being tested. Yes, there is a duty to consult, as Mr. Swift says (s.104) on the provisional decision, but the duty to consult is not this fact-finding exercise up to the provisional decision.

We see that once the provisional decision is decided we are almost on to the question of remedies. In fact, provisional decisions and remedies are often in the same document. We know from Mr. Bethell's statement that the Commission has only reversed its provisional decision three times.

THE CHAIRMAN: Three times out of how many?

MR. BREALEY: Since 2003.

THE CHAIRMAN: Three times out of how many ? Do you happen to know?

MR. BREALEY: No. Sorry.

THE CHAIRMAN: Perhaps somebody could tell us at some point. It is obviously three times out of more than three times, but that is all we know.

MR. BREALEY: Yes, sir. We will do that as a percentage. We go on. On p.56 there are hearings with the parties. The hearing is a very important part of the process. The Competition Commission at the moment seems to downplay it and calls it a meeting. But, its own rules, procedure and guidance talks about 'the hearing'. The hearing is dealt with in more detail at 6.17.

> "Usually hearings are held with one party to the investigation at a time and are thus private".

That is when the working papers are discussed. At 6.19,

> "Hearings provide the members with an opportunity to explore in depth the key issues in an investigation ----"

So, the hearing that was supposed to take place on 24th November was supposed to explore in depth the key issue - for example, the rationale for the transaction.

> "-- and to raise questions arising from the party's written submission and answers to the questionnaire. Companies or their representatives are expected to be able to answer the Competition Commission's questions about matters arising in the investigation, including those raised in the statement of issues. Hearings are not conducted in an adversarial fashion, but rather in the spirit of gaining a sound understanding of the issues raised in investigation".

It is not, as they seem to suggest now, just a question of Sports Direct commenting on the accuracy of the information they have provided. It is an important part of this proceeding.

Then we get to the provisional findings - what they call the provisional decision. Remedies. Final Decisions. If I could go to para. 6.29.

> "The question of disclosure will arise throughout the course of an investigation, in managing information, general correspondence, drafting the issues statement, giving the parties a fair opportunity to comment on the evidence of others ----"

There we have 'giving the parties a fair opportunity to comment on the evidence of others'.

> "—notifying and publishing provisional findings, notifying possible remedies and publishing the final report. The Competition Commission will invite those concerned to comment on the sensitivity of any information they supply. It may ask the parties early in the investigation to provide information in a form which can be disclosed. It will take its final decisions [and we are dealing here with a decision of this nature] on disclosure of information which a person considers to be 'sensitive' by having regard to the three considerations above".

I emphasise those words 'final decision' when we are concerned here with admissibility and alleged prematurity.

At 6.31 - Accountability and Fairness.

> "The Competition Commission aims to keep parties to investigations well informed and seeks to ensure that all information and arguments which it may rely on in reaching its conclusions are put to the relevant parties for comment. The Competition Commission also usually ensures that parties have the opportunity to check the factual accuracy of the information it may rely on in reaching its decisions".

So, all this is prior to the provisional decision.

THE CHAIRMAN: I have noted para. 6.32 as well.

MR. BREALEY: That is a very important point, sir. The reason it is important is the review is on judicial grounds, as we know. It is not a de novo appeal. Unlike the Competition Act 1998 where the Tribunal can re-assess all the evidence, it can require disclosure, hear the witnesses, and actually test the OFT's decision that an undertaking has breached the Chapter 1 prohibition, when it comes to a merger there is a far lighter touch. There is at the moment, even with these rules, a question mark over the Competition Commission's procedure about whether it is Article 1, Protocol 1 compliant because of the absence of any detailed review into the Commission's decisions. But, when it comes to the fact finding process during its procedure the limitation of judicial review, in my submission, makes it absolutely more important that the parties are provided procedural fairness at the stage prior

to the provisional decision. I would also say that, in my submission, it would be quite clear if there was just a 21 day comment under s.104, forget about the oral hearings, forget about testing the evidence, there would be a successful application that procedures were not Human Rights compliant. Telling companies to divest of their property and giving them 21 days to comment on an adverse decision would be a clear breach.

Just while I am on the procedure where we are looking at a fact finding process prior to the provisional decision, if I could ask the Tribunal to go to para.25 of Mr. Bethell's ----

THE CHAIRMAN: Of the skeleton?

MR. BREALEY: -- witness statement. It is section ii, 2. What I have tried to show the Tribunal is the importance of this fact finding exercise, particularly to the main parties. What I would like to pick out in this paragraph is the acceptance by the Competition Commission that at the stage prior to the provisional decision Sports Direct's rights of defence are engaged. We see that from the last three lines. He says:

> "The CC must ensure that its facts are correct, and that it observes the strict requirements placed on it by the Act not to disclose specified information ..."

He is talking about extracts and the extent to which confidentiality and rights of defence are engaged. He says at the end:

> "A process of negotiation may ensue, if we need to disclose such information in order to fulfil our functions and observe the main parties' rights of defence."

That is a clear acceptance that at this fact finding stage, what we, in our skeleton, have called the critical stage, a key stage, Sports Direct's rights of defence are engaged.

Sir, if I could just summarise the points on the procedure and then I will move on to the working papers. I make four points: first, the fact finding is up front and is before the provisional decision. The responses to the working papers are an important part of this process. In our submission, they are critical.

Second, the hearing is an important part of the process. This is the opportunity when senior executives of a company are expected to answer questions and comment on the working papers.

Third, this fact finding process, as I have already mentioned, is the culmination – and I emphasise the word "culmination", it is the word used by Mr. Freeman – culmination of this fact finding process – para.22b.

Fourth, the culmination of this procedure results in the publication of a provisional decision. This provisional decision is published and clearly can have consequences for the company's share price. The public know certainly which way the Competition Commission is

thinking. In many respects the process is the reverse when it comes to the OFT under the Competition Act. When you look at the OFT's procedure under Chapter 1, it investigates, then issues a statement of objections, and at that point the parties have access to the file and test the statement in the statement of objections. They have a hearing after the statement of objections and they try and persuade the OFT why it is wrong, and they are able to comment on the accuracy. It all takes place after the statement of objections, whereas in this procedure it is front loaded. It takes place before.

Sir, if I can make one last important point on the procedure and why Sports Direct has made this application, the application is designed to ensure the integrity of this fact finding procedure. It is designed to preserve the integrity of the fact finding procedure.

That is the procedure. Can I then go to the two working papers?

THE CHAIRMAN: Just before you do, when you get to my age you can pick up a lot of low noises but not high noises, and low noises include vibrating phones. Could those who have vibrating phones, of which I have heard three in the last ten minutes, please put them on silent, not vibrate. Thank you.

MR. BREALEY: The working papers are at the front of this bundle. We need to go to my second green tab, B, B5. It is at the front ----

THE CHAIRMAN: It may be that we have not all got the identical bundles. I have got it.

MR. BREALEY: I want to go to tab 5, because this is the covering letter for the working papers, it is my fault, I am sorry. I want to go to B5, which is the email of 30th October, which attaches the working papers – counterfactual and transaction.

> "Please find attached the Transaction and Counterfactual Working Papers. These set out our thinking on the rationale behind the transaction and on the relevant counterfactual in this case."

So it is telling Sports Direct that this is setting out its thinking. "These documents have been prepared having regard to our published guidance."

It goes on:

> "The Working Papers reflect evidence from Sports Direct and various third parties, third party information considered confidential has been excised and indicated by …"

a scissors sign I think.

The recipient, Mr. David Harrison of Berwin Leighton Paisner is told to read it carefully, and then at the bottom, two-thirds of the way down: "In addition to the above …" so checking for the accuracy of Sports Direct information:

"… if you have any substantive comments relating to our analysis of the transaction and counterfactual please provide your comments by separate submission for each paper."

So it is the current thinking seeking substantive comments relating to the analysis. The working paper, as you know, is then over the page at tab 6:

"**Introduction and summary**

1. This working paper explains the transaction, including its legal aspects, events leading up to and surrounding the transaction, the sale process, and each party's rationale for it.
2. It is normal practice in a merger inquiry to present details of the transaction, in particular its rationale …
3. In summary:"

Then we get (a), (b), (c), (d) was excised, and then we see (e), which I am not going to read out. Then the reader of this saw that belief, saw the following reasons and then noted: "Well, where are they?"

THE CHAIRMAN: So the following reasons were not disclosed at all?

MR. BREALEY: I must say this is not the working paper that is the subject of this application but this is how it all started. "For the following reasons …" – scissor. "Outline of the transaction", 4, 5 – scissor. Page 3 at the bottom – scissor. Then "Rationale for the Transaction" internal p.4. "We have analysed both JJB's and Sports Direct rationale for the transaction. JJB. The next paragraph was para. 32. Then we see at the end, p.55 there is annex 1. All that information was excised, this relates to the stores subject to the acquisition all being deleted, even though Sports Direct had been operating those stores for the best part of two years. It gets worse in a sense, if one goes back in time, because one will see from para. 49 of Mr. Bethell's statement – you do not get this from the OFT we say, but para. 49 of Mr. Bethell's statement, the OFT wanted the whole of the transaction working paper to be redacted, everything to be redacted.

"On 28th October 2009 the OFT replied" – they have obviously been talking, " – and requested that the whole of the Transaction working paper should be redacted as disclosure would be contrary to the public interest …" etc.

It is a point that I am going to make further on, but I make it now. Let us assume that had happened and the Competition Commission had acceded to the OFT's request. The Competition Commission went back and said: "You cannot be serious", but let us assume that the Competition Commission had said "Okay, I will delete the whole lot". Sports

Direct, on the Competition Commission's interpretation of the law, OFT's interpretation of the law could not come to the Tribunal and say: "How on earth can they redact the whole working paper? What are we going to say about this working paper at the hearing?" It is, in my respectful submission, absolutely ludicrous.

I am reminded by Miss Lester I can read this one out, para. 42 of Mr. Bethell's statement:

> "I was contacted by David Rawlings of the Cartels branch of the OFT, who asked me not to insist that JJB Sports explain its reasons for entering the transactions that comprise the subject of the merger."

So the OFT were not only seeking redaction of the whole working paper, but Sports Direct were not even going to get any reasons.

So that is the Transaction working paper. The Counterfactual which is at tab 7:

> "1. This paper identifies what would likely have happened in the absence of the merger, the competitive effects of the transaction can then be assessed against this counterfactual.
>
> 2. This paper is structured as follows:"

Then if we go to para.7, para. 8 it sets out its preliminary views. I accept that these are preliminary views. So are the views, I would hope, expressed in a provisional decision preliminary views, because there is a period of consultation, it is not the final report, but we are here faced with the Competition Commission's current thinking, its preliminary views.

We see over the page at para. 13:

> "We considered the background to the store transfers and the commercial rationale for the store transfers. As set out in the working paper on the transaction we note the following:"

I can read (d):

> "the stores were transferred in a series of 31 legally separate transactions."

I say for the purposes of the transcript there are four reasons and (a), (b) and (c) are all excised.

Then para. 33, more preliminary views: "From the information we have … we think …"

Then finally para. 38: "Conclusion on the profitable stores". A conclusion, I appreciate it is a preliminary conclusion, but this is the way the Competition Commission is minded to go. This is the reason that it is minded to make various conclusions on the rationale. Unless someone - I would assume - can persuade the Competition Commission that its current thinking is wrong, it will, all things being equal, continue with its current view. That is life.

So, Sports Direct gets this, knows it is coming for an oral hearing, is asking itself the obvious question, "How on earth are we going to comment on the Competition Commission's conclusions relating to the rationale?" which form a very key part of this whole exercise.

So, they have the 10th November meeting. Berwin Leighton Paisner seek a meeting on 10th November. I do not need to turn it up, but it is at Tab 12. They complain, "How can we exercise [in Mr. Bethell's words] the rights of defence with these redactions?"

The Competition Commission and the OFT, I think, discuss the matter. We get the new working papers, along with many other working papers. The new transaction working paper is at Tab 8. Hopefully, at Tab 8 you have a paper which has got black and red so that you can actually see what was put back in. Paragraph 3(d) is still missing. (e)(i) is still missing. We now have some red over the page at p.2. Paragraph 5 is still missing. Then, we are now starting to get what JJB said. Look at all the red. For Mr. Harris, this is from para. 12 all the way to para. 31. So, all this has been put back in. When it is coming to the question of prematurity, it is amazing how the possibility of going to the Competition Appeal Tribunal, saying, "You have got to unredact certain things, otherwise we are going to go to the Competition Appeal Tribunal" focuses the mind. I would say that if there were not a recourse to the Competition Appeal Tribunal now this information would not have been put back in, because what the Competition Commission would have done is to have said, "No".

Here we get, in red, para. 12. Taking, for example, para. 17, we still have JJB's stated reasons for the transfer. Whatever is said is still redacted. Then, at para. 18, "Accordingly --" Now, we are getting some analysis of the financial performance ... is still redacted. Then, para. 25 -- Again, I appreciate that these are working papers, but we see the way the Competition Commission is going. "From this we draw the following conclusions -- " at (i), (ii), and (iii). It keeps on going. Then, at para. 31,

> "From the financial information we have seen, we do not believe -- "

Again, I come back to the central point: this is part of the fact finding exercise where Mr. Bethell accepts that Sports Direct's rights of defence are engaged. They were not originally supposed to have this information. The OFT wanted the whole thing redacted. But, there are still parts missing. This is the way that the Competition Commission is currently thinking. How is Sports Direct going to persuade the Competition Commission that its current thinking is wrong if it has only got part of the information that the Competition Commission is relying on? The only reason Sports Direct is here - it is not spending all this

money and time for the sake of it - is because it genuinely feels that it has got one hand held behind its back.

At the same time as Sports Direct received these two working papers - because they knew on 16th November - It got further working papers. So, for example, the co-ordinated effects papers at Tab 10. In my submission, the statements that are made in this paper draw undoubtedly from the statements made in the transaction and the counterfactual.

THE CHAIRMAN: It seems to draw fairly extensively on some well-known history as well.

MR. BREALEY: It does - as we set out in our skeleton argument. To be quite frank, some of the statements in the OFT's witness statement and the skeleton are intended to act as some sort of prejudice. Some of it is little short of poisonous. In our skeleton we set the record straight because there was a dispute in the Replica Football Kit case between the old Sports Direct and JJB. There was a big fall-out. We set it out in our skeleton. We have quoted the passages. The Tribunal have clearly shown that Sports Direct was the whistleblower. It brought it to the attention of the OFT. Mr. Ashley was an honest witness - that is what the Tribunal found. The only reason that Sports Direct continued to act in the scheme is because it was under extreme pressure from its suppliers. That is the reason that it got a massive discount in its fine.

So, yes, there is history between the two. That is one of the dangers of not disclosing the JJB allegations to Sports Direct, because there is history there. That is the two working papers. I will come on quickly to the reasons why we say this application is not premature.

I am informed that since the Act was in force there have been 58 mergers that went to final decision. So three out of 58 is 6 per cent.

THE CHAIRMAN: Thank you very much.

MR. BREALEY: I have dealt with the procedure, I have dealt with the two working papers. We say that this application is not premature, and perhaps I can give the Tribunal three reasons. I will set them out and then expand on them. First, the decision made on 16th November 2009 not to disclose information to Sports Direct is a self-standing decision. In the words of CC4 it is a final decision. It is not a preliminary decision. We are not challenging the working papers, we are not challenging the assessment in the working papers, we are challenging the decision of 16th November. That is the first reason. It is a self-standing decision.

Secondly, we say there are good policy reasons why the 16th November decision should not be regarded as premature.

Thirdly, in the context of the present case, the refusal impacts, we say irreversibly, on the ability of the senior directors of Sports Direct to give evidence at the main party hearing. Those are the three reasons. I can deal with the first, the decision of 16th November is a self-standing decision. The Tribunal is obviously well aware of what we are dealing with here, which is s.120. Basically, s.120 provides that a person aggrieved by a decision may challenge that decision in the Tribunal. The Act sets out two conditions in s.120(1) – whether there is a decision and whether a person is aggrieved by it. We say that those two conditions are satisfied. First, the Competition Commission has made a decision. It was a decision not to disclose the relevant paragraphs on which it is relying; and secondly, Sports Direct is aggrieved by it. It prevents it from commenting on the accuracy of certain allegations, seemingly made by JJB. These allegations are obviously material to the very transaction that is being investigated. It is relevant to key issues such as rationale. Whatever Mr. Swift may say to the Tribunal or what Mr. Bethell may say in his witness statement, we have just seen the working papers and they undoubtedly reflect current thinking. There can be no question, and that is what is said in the covering letter, the email reflects current thinking. We are looking at whether Sports Direct is a person aggrieved, and I think it is entitled to say that it is aggrieved if it cannot meaningfully comment on the redacted paragraphs which seem to form such a key part of these two working papers. Ordinarily, you would expect Sports Direct to be able to challenge this decision. But no, the Competition Commission and the OFT, not, as I understand it, JJB, but the Competition Commission and the OFT say, "No, you cannot challenge it, it is premature, it is inadmissible". How on earth can it be inadmissible? It is premature. Since the Competition Commission now accepts that we can challenge the provisional decision it is premature by a few weeks.

THE CHAIRMAN: The issue really is, is the refusal to give disclosure a decision? Is that not what it amounts to?

MR. BREALEY: Yes.

THE CHAIRMAN: Its prematurity depends upon it not being a decision at first blush. There are arguments to the contrary, but ----

MR. BREALEY: That is the short point. That is the short answer. We say that it is a decision. They have given reasons for the decisions. The reasons are, "Well, it is in the public interest, it is JJB's commercial information", to which we say, "We are entitled to test those reasons".

THE CHAIRMAN: Once it is a decision we move on to ordinary judicial review principles under s.120(4).

MR. BREALEY: Absolutely, but what the Competition Commission are trying to do is somehow wrap up this decision with later decisions. That is why I went straight to para.12 of their skeleton. They say you cannot challenge this decision until later substantive decisions. I would like in ten minutes, 15 minutes maximum, just to illustrate how that is wrong, why that is wrong, forgetting the statutory scheme. The statutory scheme is a statutory scheme. Normal principles allow procedural decisions to be challenged before the adoption of the substantive decision. For example – and these are examples – the Competition Commission concedes at para.42 of its defence that a request for information – a request for information – is reviewable, I suppose even though the information may not ultimately be used by the Competition Commission, but a request for information is reviewable. It concedes that. Then we know from the case of *Elders*. which is in our authorities at tab 2, I do not need to go to it, that you can judicially review a decision to disclose information. You can review a decision to disclose.

We are in rather a strange position that although a decision to request information can be challenged and a decision to disclose information can be challenged, a decision not to disclose information cannot be challenged.

Then a couple of cases to illustrate how the exercise of procedural powers which result in decisions can be challenged in their own right, could I go to the "Bloody Sunday" inquiry case – we rely on it but it is actually in the OFT's authority at tab 6.

THE CHAIRMAN: Lord Saville of Newdigate. We do not need to go to the facts, it is just the principle here. You probably have the passage well in mind, it is decision of the Court of Appeal, the Master of the Rolls, Lord Woolf, it is paras. 42 and 43:

> "Mr. Clarke, in his submissions, argues that while there is an entitlement to procedural fairness, this does not encompass a right to anonymity. Fairness requires no more than that the soldiers can apply for anonymity and be given a decision on the merits of their application reached by a fair procedure. Mr. Clarke's approach to the decision whether to grant or withhold anonymity is that it is not an issue of a procedural nature. He submits that this conclusion is supported by the fact that a decision to withhold anonymity could not result in the ultimate decision of the Tribunal being quashed."

So similar arguments are being made here.

"43. We cannot accept Mr. Clarke's approach. The fact that a court would not quash the final decision of a Tribunal on a procedural ground does not mean that a preliminary decision would not be quashed. The unfair refusal of an interpreter or an adjournment are very much the type of decisions which, if the subject of an immediate application for judicial review, will be reversed by the courts although the final decision would not be. The concern of the court is whether what has happened has resulted in real injustice."

The parties can argue what is the difference between real injustice or injustice, but the point is that the exercise of a procedural power which results in a procedural decision which is procedurally unfair can be the subject of an immediate application for judicial review. Even though the breach would not necessarily result in the final decision being quashed. We say that we are on even stronger grounds.

Another example – I do appreciate the Tribunal has been through this, but if I can just quickly go to our authorities, tab 16 of our authorities, *R(Crest Nicholson Plc)*, it was a judicial review of the OFT not to reopen the fast track offer, but I emphasise para.47:

"If enforcement authorities have wide discretion in conducting an investigation, it hardly needs to be said that they must still act with procedural fairness. It is well established that the constraints of natural justice apply to preliminary steps in an investigation, which in themselves may not involve legal consequences, but which may lead to acts or decisions which do. For example, in *Re Pergamon Press Ltd* [1971] Ch 388, 299C-H it was said that company directors had to be given an adequate opportunity to meet the criticisms of inspectors appointed by the Board of Trade, even though the object of inspection was to issue a report. In *Bushell v Secretary of State for the Environment* [1981] AC 75, 96 C-E it was said that fairness required objectors to a draft scheme to be given information and reasons relied upon by the Department even though a final decision was some way off."

Clearly, there is a duty to act fairly throughout the whole process, right at the beginning we looked at the fact finding part of this investigation, there is a duty to act fairly. Here there was a judicial review of a failure not to reopen the fast track offer, and on the Competition Commission's analysis we probably should have waited until the end of the hearing and then challenged the final penalty.

THE CHAIRMAN: I am ashamed to admit that very late last night I was looking at a very old edition of **De Smith** and comparing it with the post-Human Rights Act situation. Is there

any real difference between the rules of natural justice position as expressed in old editions of **De Smith** that we used to use and the post-Human Rights Act situation, or is it simply that the language has changed slightly?

MR. BREALEY: Sir, I was doing more or less the same thing last night.

THE CHAIRMAN: I am happy to share that nocturnal experience with you, Mr. Brealey.

MR. BREALEY: I am not sure whether it is good or bad for me, but I do not actually perceive there to be a huge difference. I see a shift in the degree of intensity, so, for example, with the Human Rights Act I think that the Tribunal gets slightly more involved in the decision making process, but looking back at some of the old cases, the rules of natural justice, the right to act fairly, do involve very similar considerations – the right to know the material that is being relied on, to have a fair chance to comment on material which is being relied on. There is a slight change of emphasis, but I do not actually see a huge sea change.

THE CHAIRMAN: I should have added that I have an up to date copy of **Lester & Pannick.**

MR. BREALEY: I am sure Miss Lester is going to tell me there is a sea change. (Laughter) I do not think the concept of fairness has necessarily changed.

THE CHAIRMAN: Quite, that was my point.

MR. BREALEY: The last authority I refer to before I come to the second reason – I do not have to turn it up, it is at tab 6, it is the *Medicaments* case, which I know, Sir, you will be very well aware of. Clearly there was the issue of bias, they challenged it, it was not a judicial review, but they raised it during the course of the proceedings and the appeal, as you know, was successful. The only point I take out of this is you do not have to wait until the final decision, you can act now, as the Court of Appeal said in the "Bloody Sunday" inquiry, there can be an immediate application in order to prevent procedural unfairness going forward, and that is what I say, the big difference between the Competition Commission, the OFT and Sports Direct is can Sports Direct act now to prevent a breach of procedural unfairness, or does it have to wait somehow until the end. That is my first reason why we are not premature, there is a decision, let us move onto the next stage.

The second reason, we say there are two good policy reasons why the 16th November decision is not premature. The first concerns the implications of the Competition Commission's and OFT's submissions. Their "wait and see" argument, is really a James Stewart: "*What a Wonderful Life*" type argument. What an ideal world for them that they can conduct their whole procedure with the utmost unfairness, and wait until the end to see whether the company has the resources or the power to challenge it. So, if the same principle is applied to the OFT: "The statement of objections - the company wants access to

the file." "No." "Well, that is a bit unfair, is it not?" "Well, you will have to wait till the end, and challenge the decision then."

Again, the OFT's approach to the transaction working paper on 26th October was, "Excise the whole lot. Redact the whole lot". A terrible state of affairs if the company could not challenge a decision to redact the whole lot and cure the breach.

So, the implications are quite dangerous in my submission. The second policy reason is that essentially what the Competition Commission and the OFT are seeking to do is seeking to force Sports Direct to challenge the whole decision. If there has been a breach of procedural fairness and you have to wait and see, then you are going to have to challenge the whole decision. You cannot just take that discrete decision. You are going to have to seek a much wider and more intrusive order, which is to challenge the whole thing. So, the Competition Commission then has to reconsider in the light of the evidence or the material that should have been put to it. I say to that, "What a waste of time and money". The old adage, "Prevention is better than cure". That is my second policy reason: prevention is better than cure.

I said there were three reasons why it is not premature. The first is that this is a self-standing decision. The second reason is that there are good policy reasons. There is a third reason which I will be very brief with, which is this: the Competition Commission places great store on senior executives explaining rationales for their transactions and giving evidence to them at the main party oral hearing. Here, as we know from the OFT's witness statement, there are certain allegations that are being made. There are other investigations on foot. In my submission, by failing to accord Sports Direct the redacted material it puts those senior directors in a very difficult position because they are being asked questions on issues which could affect them in other investigations.

THE CHAIRMAN: It is cut-throat, but they cannot cut back. That is what it amounts to. That amounts to what you are saying, does it not?

MR. BREALEY: Yes. Those are our submissions on admissibility. We say the issue of admissibility does not arise.

(Short break)

THE CHAIRMAN: Mr. Swift?

MR. SWIFT: May it please the Tribunal; on a point of fact on the question of the extent to which provisional findings have been confirmed in final decisions, the information which the Commission has is that since 2003 there have been 52 completed ----

THE CHAIRMAN: How many, 62?

MR. SWIFT: Fifty two completed merger reports, in 25 of those there was a finding of a substantial lessening of competition, and in 26 they were cleared. We agree with the figure of three, and it may be that the Tribunal will think that three as a percentage of 25 is the more relevant percentage, having regard to the circumstances of this particular case.

Mr. Brealey has clearly saved the time of the Tribunal and my time by taking you through the sections of the Competition Commission's internal guidelines.

It is important for me to state at the outset that when we have satellite or collateral litigation of this kind, whatever the decision this Tribunal comes to, and subject to any appeal by either side, the parties to the Commission's current inquiry must have confidence that the Commission will continue to carry out its statutory functions fairly, in full compliance both with its statutory duties and with any common law duties of fairness which, in the useful expression by Mr. Justice Collins in the *Stagecoach* case, he described as grafted on to the statutory scheme. Indeed, sir, and members of the Tribunal, you may recall from the case of *Mordens* – it is about 20 years old, Mr. Justice McCullough pointed to the importance that after interlocutory hearings are determined, whichever way, the decision maker goes back to being above each of the parties rather than being placed, as we are today, in opposition to one of them. But it is extremely important, both for a public hearing and generally, that I should make it clear that whatever the outcome of this case the Commission will continue to do its job fairly and in full compliance with the law.

Mr. Brealey divided his comments to you under three headings, starting with the Commission's procedure, then moving on to the working papers and then concluding with the reasons which really amounted to a set of public policy reasons why this Tribunal should continue to treat this as a decision amenable to judicial review according to the ordinary principles.

I have got to take issue with one critical point at the outset, and it is in response, sir, to a point that you appeared to be taking, at least provisionally, and that is, if it is a decision in respect of a letter or an email in November 2009, as a result of which the Commission takes a decision that it will not supply all or part of the redacted material in two working papers, then do we not move, as it were, immediately then to issues of whether they are right or they are wrong in terms of judicial review principles.

I did not spend last night reading old editions of **De Smith**, nor watching a re-run of "*What a Wonderful Life*", but I did have another look at what we said at p.9 of our skeleton which is current **De Smith** in respect of prematurity. Sir, members of the Tribunal, you will find it at p.9. I have to say I have got my skeleton as self-standing. I do not know whether it is

part of a bundle, but it is certainly not in my bundle of authorities. Just so we can place this into context, if the Tribunal would turn to p.8, which is headed at the bottom "Prematurity", starting at para.32, our case is that. Any assessment of whether a party's rights of defence have been infringed can only sensibly be made when a decision affecting that party's substantive rights and interests has been taken. In the case of merger investigations the rights of defence are enshrined in s.104 of the Act."

Mr. Brealey referred to s.104, he did not take you to it. I am not intending to take you to it now, but just to say that s.104 is a new provision in the merger control legislation and is not to be found in the old Fair Trading Act of 1973, even though some of those provisions in the 1973 Act have been brought over into the current Enterprise Act of 2002, and it is when the Tribunal comes to consider the key issues of policy that we have here on prematurity, it is important to note that Parliament has established here a clear duty on the Commission – a statutory duty – to have regard to what effectively are the rights of defence before any relevant decision is taken and Mr. Brealey said in opening that our position had been made clear in I think it was para. 12 of the defence, in respect of provisional findings, whatever the position as to 21 days and the Article 1, or the ECHR provisions, the fact is that Parliament has decided that, irrespective of any common law duties of fairness which the Commission may, of its own volition or subject to review by the court, undertake, it is important that those who may be affected by a relevant decision had that statutory right, and so plainly a decision by the Commission that failed to have regard to that statutory right would plainly be amenable to judicial review. I mention it there, not that s.104 supplants in any way the whole of the common law duties of fairness, but it is an important aspect of the statutory regime which, in my submission, the Tribunal should be considering not simply at the substantive hearing, but also in respect of prematurity.

THE CHAIRMAN: Section 104 goes to remedy, does it not?

MR. SWIFT: Yes, it goes to that point when it says the rights of defence have been crystallised, that this looks as if a relevant decision is going to be taken against a party, for example, in respect of the stores, the property right to which Mr. Brealey refers. Again, I appear to be going into parenthesis, but since we are dealing with the property rights, of course, we have under the merger provisions of the Enterprise Act 2002, as we had in the Fair Trading Act provisions, a voluntary system of pre-notification to the OFT in respect of any mergers that fall for consideration under that Act, and the *Somerfield* case has established, if it needs to be established, that being a case of this Tribunal, that were a party knowingly enters into a transaction which is subject to review by the Commission and acquires property, then that

would be a consideration that the Commission would take into account; I just make that point.

However, let us go on to paragraph 32 of our skeleton and on p.9. Whilst the obligation to accord procedural fairness applies generally to the conduct of the investigation, whether there has been in fact a contravention of the principles of fairness on the basis alleged by Sports Direct is not yet ascertainable. That is an extremely important part of our submission.

Then at para. 33: The reasons why a court might decline an application for judicial review on the grounds of prematurity are set out in **De Smith's Judicial Review** (6th edition) at paragraph 16-057", and I think it is worth reading this into the record:

> "Judicial review may be premature for several reasons: the decision-taker may not yet have determined the facts; or completed assessment of relevant factors (though in cases involving deprivation of liberty the court will be cautious in rejecting a claim as precipitate); or the impugned decision is merely preliminary to a final decision . The court's general approach is to reject challenges made before the conclusion of a hearing in formal proceedings."

That, I think, is all I need to draw your attention to, perhaps I can just ask you to read through – I will not read it all out – the following paragraphs: 34, 35 and 36.

THE CHAIRMAN: The general rule is broken fairly frequently, is it not? If you take the analogy of planning decisions, objectors can, and frequently do, judicially review the failure of the relevant local authority to consult local residents, even though there is going to be a planning appeal which will issue a final decision or recommendation to the Secretary of State.

MR. SWIFT: I would not say, with great respect, the general rule. There are qualifications or exceptions to the general rule. The Lord Saville of Newdigate inquiry is a classic example, where both the decision to remove anonymity from the soldiers would plainly, in the view of the House of Lords, have resulted in real injustice, and once that disclosure had been made there would have been no going back. The Court of Appeal, Lord Justice Carnwath's decision in the *Shrewsbury* case, which I think you may have in mind, yes, a clear example of where they disagreed with the views of Lord Justice Richards in first instance who reviewed the appeal and said "No, you are out of time", and they said "No, no, you are in time. On the other hand you can appeal these."

So much depends on the context and planning law involves one set of decisions, competition law involves another set of decisions, and so do other aspects involving

statutory inquiries. Mr. Brealey has quite rightly referred to the *Elders*' case decided by the Court of Appeal, it was 22 years ago. That was an interesting decision, it was one where Elders, the Australian brewery company had made a bid for Allied Lyons. Elders was a highly leveraged company, and the Board of Allied Lyons considered that there was a public interest issue in what would happen if, as a result of high leveraging it did not have the cash necessary to invest in Allied's business, as a result of which there could be expected to be a fall off in Allied's competitiveness and thus in the competition in the market. That was the argument they were putting. Allied would say that in order for us to comment on this we would like to see Elders' financial information that was put to the Commission, and Elders objected saying that this is highly confidential information and should not be disclosed. The Commission concluded that it was information that ought to be disclosed, in other words, the Commission was entitled to use one of the gateways that is now found in s.244 and that was the issue, that was an interlocutory decision. So much depends on the particular context of what I would say is the particular decision – with a small "d" or a large "D" – but it does not follow that every decision (with a small "d") that is made along the road of what Mr. Brealey described as the "fact finding", he described it as his one big point, does not mean that this Tribunal should be entertaining every decision is amenable to judicial review simply because an applicant disagrees with the Commission in respect of a judgment which the Commission has made along the way. It is therefore, in my submission, extremely important for the Tribunal to look at and understand what the working papers are there to do. They are called "internal working papers". They are, in my submission, work-in-progress. I cannot put them like scaffolding, where they all come down once the provisional findings have been made, because, as Mr. Brealey has quite rightly considered, they form part of the thinking as the Commission goes through its fact finding stage. But, it is very important not to make the wrong inferences as to the status of those documents simply by picking up one or two expressions that are made in them - such as views; such as conclusions. "Ah!", says Mr. Brealey, "Here we have a conclusion - a conclusion as to the fact. If that is a conclusion, and it is not adequately reasoned, or there are lots of scissors marks underneath it so that we do not know why it is being concluded in that way, we must appeal it". That is to misunderstand the nature of what I am going to call that part of the decision-making progress. It is very close to a *déliberation.* It is the officials of the Commission working with the group as they work their way through this mass of material, seek to synthesise what is relevant, seek to exclude what is irrelevant, and so the picture builds up. There are two important aspects of the internal working papers. If

those internal working papers had stayed internal to the Commission it is very difficult to know what the basis of this claim would be. Indeed, I was suggesting to the Tribunal that one of the serious public policy problems that will arise, if the Tribunal does not take the prematurity point, is the risk - and we have seen it in these proceedings - that every decision with a little 'd' is going to be seized on sequentially throughout the inquiry - and not just by this main party -- Here we are dealing with a merger involving Sports Direct, the main party - because we know JJB has divested itself for the purpose. One can well envisage a circumstance in which you have four parties merging. Four parties get working papers. The working papers are going to be redacted for the reasons which are apparent to the Tribunal. They are redacted so that the Commission stays within the four corners of its statutory duties in respect of the specified information where it is a criminal offence to disclose, subject to the gateways.

There is a serious risk in elevating the decision to redact, the decision not to redact, the decision to refuse to supply the information which is redacted into a series of decisions which automatically then become amenable to judicial review. Where the line is to be drawn is, I would say, pretty clear. It is at the level of the working papers - so long as there is no real injustice to the party of the kind which Lord Woolf identified in the *Lord Saville of Newdigate* case. Plainly, this Tribunal is not going to be attracted to an argument where, as you put it, there was either a lack of equality of arms (in some of the cases) or where one fights with one's hands behind one's back, or there is some lack of even-handedness in the system. At the preliminary stage we are not dealing with that. We are not dealing with that at all. We are dealing with the Commission's control over its own processes so as to find out what it can disclose and whether the information which it is putting back to the parties is reliable. Mr. Brealey referred you to an e-mail from the Commission of 30th October. A large chunk of that e-mail is to do with put-back. It is not just to deal with, "We would like your comments on this". It is, "Please tell us whether the information which is contained in this working paper, which must necessarily be a summary of the vast amount of information you put in, is accurate". That is part of the put-back process. If anything happens to stop that put-back process - in other words, the disclosure to relevant parties of what is said there - that is going to adversely affect the general conduct of the way the Commission carries out its inquiry.

Taking Mr. Brealey's first reason why we are wrong, and his analysis of the Competition Commission's processes, my submission on that key issue is that there is here a judicial policy for this Tribunal to take - that is, whether you draw the line in the sand at the level of

the working papers absent some proof that the rights of defence are going to be substantially and irreversibly adversely affected. There is no such evidence here about that. We are now in December. This inquiry is going on until mid-February 2010 with a possible eight-week extension. There is going to be a series of iterations as between the Commission and the main party, and others, as a result of which there will be a further synthesising of the relevant facts and a clarification as to what the key issues are. At that point the rights of defence are going to be observed.

When I referred to s.104, sir, and you said, "Does this go to remedies?" -- Of course, it goes to the whole of the decision-making process of the Commission ----

THE CHAIRMAN: I agree.

MR. SWIFT: -- relating to SLC, and obviously only if there was an SLC do we have a problem with remedies.

THE CHAIRMAN: Can I just go back just a few sentences, please? You referred to rights being 'substantially and irreversibly' affected. What of the position where the rights of a party are substantially affected, but it may be reversible at a later stage as a result of a later process? Do you mean 'substantially and irreversibly' or do you mean just 'substantially'? That is really the question.

MR. SWIFT: I would say that there is a combination of the two. If it is substantial then I say it must be material. It must be something more than *de minimis*. The irreversible is when they say, "This is our only chance. This is our only chance to come to the Tribunal - just as the soldiers did in *R v. Saville of Newdigate*. If we lose this chance now, it is lost for ever". That is what I meant by the irreversibility. When you have an inquiry process - an investigating process, nothing really crystallises until you get to provisional findings. There cannot be that kind of real injustice, or something which is irreversible.

THE CHAIRMAN: But 'substantial' is not a standard, is it? It is an elastic concept.

MR. SWIFT: I would prefer to use the word 'flexible'. Flexible, having regard to the context.

THE CHAIRMAN: We will not split hairs over that.

MR. SWIFT: Or even 'real', as in -- But, they all seem to come together in the sense of, "There must be something of substance, real -- Flexibility goes more to the process.

THE CHAIRMAN: So, is it not a broad and general principle of fairness that where there is to be a hearing which may be a public hearing from which rights may be determined, the person whose rights may be determined has a right to know the legal and factual basis of the allegations made against him, subject to issues like PII obviously?

MR. SWIFT: If there are substantive legal and factual allegations made against that firm, then they would be put to that person at the hearing.

THE CHAIRMAN: That is my point.

MR. SWIFT: But it is not the case here because as Mr. Brealey's flow chart, or the Commission's flow chart, demonstrated, one is still at the factual stage. His one big point is, "We are seeking to establish what are the facts". We are not at the stage of putting to someone who is not really a defendant at all -- We are not in the area of criminal law in the Commission. We are dealing with someone who has acquired assets and having acquired those assets the issue is whether there is an SLC and, if so, whether there should be remedies. So, the stages are critical.

So, that is my point about there having to be something more than just a decision. There has to be something more than just, "I would like, or need, to see this information". There must be at that stage what I call the injustice argument.

What one sees - and this is not a floodgates argument ---- Unless you are with us in this case, then nothing can ever happen in the Commission. It is real because if the Tribunal has seen the second witness statement of Mr. Oliver, which is not referred to by Mr. Brealey, not even in general terms, there you see that another working paper has come to light or may be in existence, and this is, for those aficionados of merger control, the unilateral effects as opposed to the co-ordinated effects. Because Mr. Oliver has found some reference to that he thought, "Why did we not see that as well", and one can see how this goes on. I am not exaggerating – I am not going to use the word forensically, at least I hope I am not – but if you can recall the transaction working paper and the counterfactual working paper, stage one and stage two – I will come to the difference between stage one and stage two in a minute – what you will see is there is another set of remarks all over the place. They are in footnotes, they are in brackets, they are all over the place. Is it really going to be suggested that if an applicant, if a party, says, "I want to know why that footnote has been redacted", the Commission have got to provide a fully adequate reason for every scissor mark in every paragraph, because that decision is amenable to judicial review because it has been asked for the applicant and has been refused. That really is the way in which, in my submission, public policy would work strongly against the interests of allowing that kind of application to be accepted by this Tribunal. I am not talking about the vexatious litigant, he is covered by the provisions of the Enterprise Act. He can be dismissed. What I am talking about is the applicant who, for good reasons – and this is not directly Sports Direct - any person who believes he is or may be likely to have his property

divested will have an incentive to test and try everything. He should be able to test and try. He should be able to go back and say to the Commission, "I would like to know why this has been redacted". Heavens above, this is exactly what happened in respect of the transaction paper.

Mr. Brealey was audacious – I will put it as gently as I can – and suggested that because of the mere existence of this Tribunal and the ability of the adversely affected applicant to appeal to you, the Commission went out of its way to adjust the transaction working paper so as to provide more of the reasons that had previously been provided. All I can say is that we must have failed because here we are today trying to argue the point.

The answer is that it does not need me to say that if one looks at the Commission's guidelines, the statutory guidelines, the guidelines that it is required by Parliament to impose, and one also accepts that it is the duty of the Commission objectively to comply with those guidelines, then you see fairness written throughout. One can be fair, one can be responsive, while at the same time retaining the ultimate authority to say, "No, you do not need it, or you should not have it without being before this Tribunal seven days after that". Sir, in my submission, Oliver 2 is worth some thought by this Tribunal. It is not fanciful, I have not made it up. It comes in late and of course we have objected and said it is an abuse of process. It is an indication of what can happen.

THE CHAIRMAN: Can I say that my reaction at least to Oliver 2, and I think probably the reaction of my colleagues, is that it does not read terribly like a witness statement, it reads more like a submission. I think our view would be that we would take Oliver 2 into account in so far as it relates to submissions received earlier rather than in so far as it involves any new submissions.

MR. SWIFT: Sir, I am grateful. That is entirely our submission, and I believe that of the Office of Fair Trading as well. It is an indication – Mr. Oliver could have stayed quiet, but he decided not to, he decided, "No, there is more there that we want to be looking at" – of why this issue of prematurity, having regard to those general principles in **De Smith** are quite critical, and why I am very grateful that you decided to take it as a separate issue this morning.

THE CHAIRMAN: Subject to argument, but it had a bit of a feeling of throwing the kitchen sink as a document.

MR. SWIFT: It is not for me to comment on that at all, sir, it is not my sink.

THE CHAIRMAN: And you do not often go into the kitchen, do you!

MR. SWIFT: I should have realised that, I must not ever seek to have the last word on that one!

So **De Smith**, policy issues – I have got to say and I hope this is consistent with what I have been saying, and that is that if the internal working papers are to be subject to, as a matter of right, and that is the other side's case, judicial review on any dispute where an applicant says, "I need to see the information in order to protect myself", then the Commission has got to have considerable regard now to how it conducts its processes so as to ensure that it can (a) maintain standards of fairness; and (b), and most important, comply with the statutory duties which Parliament has imposed on it, and that is to conclude whether or not relevant mergers do have a substantial lessening of competition and, if so, whether the damage to consumer welfare is to be remedied through some form of relief. One must always bear in mind the statutory context that the Commission is part of a system to ensure that competition is maintained within the United Kingdom and that that, subject of course to its procedural requirements, must never be lost sight of when the Commission carries out its own fact finding procedures and then proceeds to a provisional conclusion.

Sir, I think, just summarising, I am putting my main case on the status of the working papers. The second point is that this is a policy decision for the Tribunal, there is not an automatic right to appeal on the basis of a decision (with a small 'd'). There will be opportunities for SDI, in the event that, which at the moment is entirely hypothetical, any provisional conclusions are made in respect of relevant decisions affecting their rights, to exercise them. We are dealing with, again, matters that are not Bloody Sunday anonymity, but matters which are more academic and hypothetical. This Tribunal knows that the Commission is also complying with all the safeguards that are set through its own guidelines so as to ensure fair process throughout the inquiry. I do not dispute the general argument that a right of defence can exist in favour of a person from the beginning of an inquiry. You have got my point. The nature of the way in which those rights can be enforced is a matter for judicial policy and does not mean that every decision that the applicant does not like can be appealed by him to this Tribunal.

Those are my submissions.

THE CHAIRMAN: Thank you very much, Mr. Swift. Mr. Beard? That looks ominous!

MR. BEARD: No, I am not going to be referring to much or any of it.

Members of the Tribunal, this is an appeal under s.120. The Office of Fair Trading intervenes in relation to this matter because it is concerned to ensure that the way in which the principles of judicial review that are required to be applied under s.120(4) are fully and properly applied notwithstanding, of course, the difference in the structure of arrangements that exist in this Tribunal as compared to the Administrative Court where there is a

permission stage. Effectively one is dealing in all cases with a rolled-up hearing, as it is called, where one is dealing with issues that do arise on permission and the substantive matters. We are obviously conscious of the way in which the time has been indicatively allocated today, but it may be that having thought about matters concerning prematurity in fact this Tribunal does not want to take an interim decision in relation to those matters in the round and decide prematurity just as an Administrative Court might do in relation to a rolled-up hearing.

As to the way in which the principles of judicial review apply, there are obviously a number of authorities of this Tribunal and of the Court of Appeal setting out that there is no modification of those principles by dint of the fact that this Tribunal in so many ways is very special. Obviously, we have referred to, in our statement of intervention, the *BSkyB v Competition Commission* authority, at tab 10 of our authorities and in particular para. 63, for your notes, and in addition *IBA Healthcare v OFT* tab 7 of our authorities and in particular Lord Justice Carnwath who was in particularly acute form in that case in dealing with the manner in which this Tribunal should consider judicial review matters, and stressed at para. 100 that the essential question will be the same before this Tribunal and the Administrative Court.

With that in mind it is perhaps worth just taking one step backwards and remembering what the important role of judicial review is. It is of course to ensure that public authorities in taking decisions are subject to the rule of law and those bodies exercising executive functions are subject to scrutiny by the courts. Of course, it is not the role of the court to substitute its judgment for that of the decision maker, a matter emphasised in the Lord Saville of Newdigate case, (tab 6, para. 31). That function is of course focused upon the outturn of final decisions which affect people's rights and of course there have traditionally been thought to be three heads of review dealing with that. There are perhaps now three and a half.

The first is unlawfulness, it speaks for itself, the second is irrationality where of course there have been many an arcane discussion about the role of proportionality and it is not necessary to go there today. The third is procedural impropriety and under this rubric the questions whether or not a decision has been reached fairly and is adequately reasoned are important, and it is with those in part that we are dealing today. The third and a half head is perhaps material error of fact, again not relevant to today's challenge – for reference the terms of when there can be a material error of fact challenged again were discussed by Lord Justice Carnwath in *E v The Secretary of State for the Home Department* [2004] QBD 1044.

We are all familiar with those heads of challenge, so when a decision maker has taken a decision it is clear that it can be challenged on whether or not you are misapplying a statutory scheme under which you are operating, whether your conclusion was irrational in the sense you failed to take into account material considerations, or took into account immaterial considerations or, as occurred in the case of *Interbrew v Competition Commission*, the reasons do not stack up.

Then, of course, turning to the third head of review, you can be challenged on the basis that what you have done is not procedurally proper, you did not give a fair chance to make representations or you gave no reasons at all so the decision cannot be properly understood and challenged.

Now, all of these sorts of challenges, as I say, are familiar, but are focused on the final decision. You cannot really decide whether a decision is lawful until it is finalised, you cannot decide whether a decision is rational until you see it concluded, and all the matters taken into account. You cannot decide whether a decision is procedurally improper until it is finally taken. You cannot decide whether or not reasons for a decision are sound until you have that final decision.

As the Tribunal has already recognised and has been recognised by my learned friend, Mr. Swift, there are of course, exceptions to the way in which challenges under judicial review should be focused only on the final decisions. Those exceptions will primarily relate to procedural impropriety challenges. The general principles which apply in deciding whether or not a matter of procedural fairness can be raised as a challenge before a final substantive decision, i.e. to steps along the way in a procedure, are rather neatly described by David Elvin QC in his article: "Hypothetical, academic and premature challenges." It is at tab 11 of our authorities bundle. If the Tribunal would move through the article to p.13, there, under the heading: "Prematurity" is consideration of the very issue that falls to be considered by this Tribunal. I will briefly paraphrase what he has dealt with here, but it is worth stressing – David Elvin, a leading planning Silk, makes various observations about the point that you, Mr. Chairman, raised about preliminary challenges in the often lengthy planning procedures that exist, in particular it is perhaps worth referring to *R(Burkett) v Hammersmith and Fulham LBC* in footnote 9 in that regard, although it is not an authority in the bundles, Mr. Chairman, you may recall that that case concerned a situation where there was a provisional planning decision and then a final planning decision. There was actually an argument when a challenge came in to the final planning decision whether or not it was necessary to have challenged the provisional decision. In other words, it was one of

those funny challenges that was arguing about whether or not something was premature, too late or both, that can occur in judicial review because of the tight "three months or promptly" time period that exists. In that case it was well recognised that in the context of that sort of planning procedure you could bring a challenge to the provisional decision because it was perfectly sensible, enough of the decision making was crystallised at that point to enable a sensible challenge on fairness to be brought.

If you turn over the page, also in relation to planning at footnote 12, there is a brief synopsis of why there are a range of difficulties in relation to early challenges within the planning scheme, notwithstanding there has been recognition that such early challenges should be brought. So I only avert to that simply as a counterweight to the suggestion that actually the exception is now the rule in relation to planning matters. It is not the case that things have moved in that way, and certainly they have not moved more generally in that way.

Now what Mr. Elvin more generally sets up here simply expands in many ways the rather neat and terse quote from **De Smith** to which my learned friend, Mr. Swift, has already taken the Tribunal, that there are good reasons for the courts not to hear premature challenges. First, any error might be corrected during the decision making process or, indeed, may never arise, and the example that Mr. Elvin gives, and we have included in the bundle of authorities at tab 1 is that of *Draper v British Optical Association*, unusually for a case concerning public law, a pre-War case where the authority is still good, sound and sensible. It was a case where the court dismissed a claim for a declaration that the threatened removal of an optician from an Association's list of members was unlawful on the basis that the Association had not yet met finally to decide the matter.

The second good reason that Mr. Elvin highlights for not permitting premature challenges is that an error might not in fact affect the final decision or – and he puts this neatly in parenthesis – that the affected person may not in fact be unhappy with the final decision.

The third reason he gives which I think is perhaps less applicable here, that it may be more appropriate and relevant to planning situations is that in certain cases premature challenges can circumvent statutory appeal schemes. I do not think that arises in relation to this matter.

So the consideration of any preliminary challenge, he says, should only be considered if the error is such as to undermine the whole of the decision making process and/or it would significantly save expense rather than waiting and quashing the whole decision making process. Of course, those criteria were quite properly applied in the Lord Saville of Newdigate *ex parte A* case which is at tab 6 of our bundle, to which, Sir, you have already been taken. The Court of Appeal, in the context of considering an interlocutory decision,

noted that the concern of the courts, as you have seen, is whether what has happened has resulted in real injustice. The case, of course, concerned the Bloody Sunday inquiry decision not to grant anonymity to military witnesses. The court recognised that the decision at that stage could result in unfairness to soldiers because they would have to undergo a continuing unnecessary risk. The exceptional reasons in that case justifying the court's review at that stage are then further encapsulated in para. 59. I will not take the Tribunal to it, but quote it,

> "The problem about the risk to which they are subjected is that once their identity is revealed, the die is cast and it is too late for the protection provided by anonymity to be restored"

Therefore, any error could not be reversed. You could not re-anonymise people.

In our statement in intervention we have given a couple of further examples of situations where the courts have specifically explained why what would amount to interlocutory judicial review should be rejected, at Tab 8 we have referred to the case of *R (Wani),* an immigration case. There the High Court dismissed a claim for judicial review of a reasoned decision of the AIT to remit an appeal, it being premature and inappropriate to challenge a decision where all issues remained open for argument. There was therefore no prejudice to the aggrieved party. For your note, at para. 24 the court said,

> "The court undoubtedly has jurisdiction to consider claims such as this, but will not in general entertain challenges to interlocutory decisions on the ground that the challenge is premature".

The other case to which we have referred is at Tab 5 of our authorities. My learned friend has referred to it - *ex parte Mordens Ltd.* The High Court there noted, the general rule is that the court does not give relief at the interlocutory stage.

What is important to draw from this is that the principles of judicial review that this Tribunal is to apply pursuant to s.120(4) do include this concept of prematurity. It is not simply a question of whether or not there is a decision. There are many, and multifarious, decisions taken by decision-makers all along the way of their decision-making process. Each of those can sensibly, in ordinary language terms, be termed a decision. It does not mean that the Administrative Court or this Tribunal, applying ordinary principles, should accept that all of those decisions are judicially reviewable.

So, if those are the basic principles, how do they apply to this challenge? It is important to consider the assessment of whether or not a decision is ripe for judicial review by considering the nature of the challenge that is being brought to it. Here, we have two

dimensions to the challenge. The principle dimension is a general fairness challenge under the head of procedural impropriety. It is unfair to maintain the redactions in the working papers.

The second dimension is, of course, a lawfulness challenge effectively to the exercise of the Commission's discretion under s.241 by the Commission that somehow that was unlawful. I focus on the general fairness challenge. When the challenge is just one of general fairness it is relatively easy to see why, given the nature of the process that is undertaken by the Competition Commission - one of the most detailed processes laid down in guidance that one will see outside, perhaps, the planning context, and even there in the level of disclosure of material and interaction with the parties, and perhaps it may even go further than the planning context - what we have is a situation where trying to assess the standard of fairness in relation to these matters is simply too soon.

Mr. Brealey has tried to suggest that the Commission and the Office have been seeking to maintain some sort of bright line at which judicial review can be brought under s.120 and that prior to that there was none. In his skeleton it is suggested, that we are insisting he must wait until the final out-turn report before any judicial review challenge can be brought in relation to any matter. That is not the Office's position. The Office's position is that in line with the great exhortation which is no doubt the plague of all undergraduate essays, but the statement made by Lord Steyn in Daly, "In law context is everything". There are no bright lines in administrative law almost anywhere one looks. Indeed, the fact that we break the heads of review down into three/three and a half heads does not mean that they do not overlap, of course. In those circumstances one has to consider the particular circumstances of the challenge and the decision under challenge in order to decide whether or not it is right. Applying that Elvin rubric, is there an error here which might be corrected during the decision-making process, or, indeed, might never arise? The error alleged here is the alleged error of non-disclosure of information, but it is, as Mr. Swift has stressed, only in working papers. Now, SDI has striven hard to pretend that these working papers will be the Commission's decision, or its provisional decision, but it is just not true. There is something in the working papers of the Ronseal variety about them. They do what they say on the tin. They are working papers. Until the provisional decision is published, there is no provisional decision. It is a bizarre, indeed slightly perverse submission on the part of SDI to be suggesting, and wishing, effectively, that these working papers are more concrete than they really are in order to get traction for a challenge here. That is plainly the wrong way

round. Until the provisional decision is published, there is no provisional decision. When that is published, it can of course be tested.

One can look at the provisional decision and consider whether or not there is any redacted material in that provisional decision. What is the Commission actually relying upon there? There is a sort of miasma in these submissions of SDI, saying, "Ah, well, once you have seen this stuff you are tainted in perpetuity". But, of course, that is not right. If the Commission puts out a provisional decision or a final decision, it is under a statutory obligation and, indeed, reinforced by common law public law principles to set out its reasons in answer to its questions. Mr. Swift has already emphasised the fact that a specific statutory step is put in place in s.104 to ensure that a provisional decision is properly provided. In those circumstances if the Commission were to be relying on material that is redacted in working papers, then the matter might require revisiting. It might require consideration as to whether or not comments, observations, criticisms of that provisional decision could properly be made, and, indeed, whether at that stage it was right to bring those challenges because it was sensible to do so because challenging a provisional decision or redactions in a provisional decision would be appropriate because it would be alleged that those would fundamentally flaw the final decision.

Mr. Chairman, you asked Mr. Swift about whether or not irreversibility was a component of the assessment of prematurity. That must be right. Even in relation to a provisional decision, a judicial review challenge can only properly stand if the faults in the provisional decision that are alleged cannot be cured in the interim period between the provisional decision and the final decision. It is, of course, recognised that if those faults are, "We do not understand what is going on here; we cannot possibly answer these matters" when it comes to the final decision this is plainly going to be unfair, then it may be that at that point a challenge is permissible, but not now, not prior to that point. It is important to stress that in circumstances where the balanced exercise, the assessment of fairness, the nature and context of any redaction may be very, very different in a provisional decision and, indeed in a final decision. Of course, we do not know what the Competition Commission is going to say either in its provisional decision, let alone its final decision. Mr. Brealey has said there have only been three times when it has changed its mind from provisional to final decision, so be it. That does not mean anything in terms of the ability for the process in question to be fair. What it does show is that there is not an immutable transition from provisional to final decision. Of course, what Mr. Brealey cannot say is the extent to which the Competition Commission in gathering its evidence, in analysing that evidence, in

generating working papers, in having discussions within its panel with its staff develops and changes its ideas as it goes along before it reaches the provisional decision. Of course this happens all the time for all decision makers, not just the Competition Commission. So in relation to Mr. Elvin's first consideration: is there an error that might be corrected during the decision making process? If on SDI's case there is an error plainly it can be corrected. Secondly, in accordance with the second criterion of Mr. Elvin's rubric, that error might not affect the final decision or the affected person might not be unhappy with the final outcome. It seems to be the working assumption on the part of SDI for the purposes of this application that their merger is going to be blocked; that is not an assumption that can properly be made. It is quite wrong to make that presumption. If it is not blocked one assumes that SDI would be happy; I am always cautious of predicting the happiness of parties in proceedings; I am conscious, of course, that the Lloyds' shareholders, I imagine they were not particularly happy in the end when the merger got cleared, although at the time their happiness may have been enormous.

So the error in this case might not affect the final decision at all, and it is clearly open to the Commission to reconsider all of the matters that have been traversed in working papers prior to the outturn, provisional decision and the final decision.

The third criterion, as I have said, in Mr. Elvin's rubric, the circumvention of statutory appeal schemes does not appear to be applicable here. So when one turns to the flipside of the Elvin rubric and asks oneself is the error such as to undermine the whole of the decision making process – plainly not. Has it saved expense rather than waiting? I think it is pretty obvious from the content of the Tribunal today that will be a difficult submission to make. So considering this is a fairness challenge in those circumstances, the principles of judicial review under s.120(4) which recognised this notion of a decision not being ripe for judicial review clearly indicates that in this case there is very good reason why this Tribunal should not consider the decision in question ripe for judicial review, and neither of the cases referred to by SDI in this context really assist – *Stericycle*, a very different matter. There we are talking about a situation where a hold separate manager is being put in place, so what you are talking about is a decision for the interim period and the challenge was to the reasonableness of the Competition Commission in making that interim order. Now although the directions in question were made before the investigation into the completed merger, so if we were creating bright lines they would be a long way before them notionally, they had the effect of altering the rights and obligations of *Stericycle* during the currency of that investigation and therefore they fall squarely within the identification of a

real injustice being done as articulated in Lord Saville of Newdigate, or indeed in light of the observations made in the *Shrewsbury Borough Council* case, which is referred to in the statement of intervention. Indeed, it would be somewhat perverse and bizarre if a decision to hold the ring during an inquiry could not itself be challenged until the end of the inquiry because the matter would have become academic by that point, so actually *Stericycle* does not support the position suggested by Mr. Brealey at all.

As for *Crest Nicholson*, Crest Nicholson had been offered the fast track option in the context of the construction cartel investigation. This was an offer made to parties who had not accepted leniency that if they came in and made certain admissions they would benefit from a discount to any final financial penalty, but it was time limited, the door shut on the FTO, and the door shut on the FTO in relation to Crest Nicholson in December – a statement of objections was subsequently issued and Crest Nicholson subsequently came back and said: "We would like you to re-open that decision." Well it was a final decision that had been concluded, that was the approach the court took in relation to those matters, and therefore at para.54 of the decision it recognised that in those circumstances there was properly no alternative remedy to be dealt with and in those circumstances a judicial review should proceed, but again it was a finalised decision and one that was not going to be capable of correction during the course of that decision making process because the OFT had then decided you would not get that extra benefit when it came on to making any final findings of infringement and imposing financial penalties. So those authorities that have been referred to do not assist Mr. Brealey and in the circumstances when one considers this is a general challenge to fairness there is a very good case that this Tribunal should step back and consider the challenge is premature.

Given that the challenge could be seen as premature under the general challenge, when one turns to unlawfulness it is not surprising that similar considerations apply.

Clearly the decision to redact is a completed decision under Part 9, there is no doubt about that and no issue is taken with that. The Competition Commission has decided under s. 241 of the Enterprise Act that the general prohibition on disclosure that is imposed under Part 9 should apply to the material in question and it should not pass through any of the statutory gateways and in doing so it took into account the fact that the Office considered the disclosure of certain material would be contrary to the public interest, and I leave aside for the moment various observations made by Mr. Brealey in passing about that, it can be dealt with in due course.

But in considering whether to allow the material through the gateway the Commission clearly considered (a) the requisite statutory consideration in 244(2), that is the public interest consideration, the need not to disclose material contrary to the public interest and also the impact of SDI not seeing the information. Now, leaving to one side the public interest concerns for the moment, which plainly existed and were communicated and discussed with the Commission, on the other side of the balance, and the matter which is the fulcrum for Mr. Brealey's challenge is a general allegation that the matter is unfair. In other words, the unlawfulness challenge, such as it exists, collapses back into the fairness challenge, because the gravamen of the unlawfulness challenge is it was unfair, you did not take sufficient account of that issue of fairness, but in circumstances where that challenge to fairness is premature, clearly the unlawfulness challenge does not go anywhere, it is clearly unripe for review. In the circumstances the Office's position is that those principles of judicial review that do say that prematurity is a concern, which are normally raised at a permission stage but can properly be dealt with in a rolled up hearing, mean that here the nature of the decision, although completed and discrete, is such that when one considers the nature of a challenge being brought in the context of the procedure being considered overall, and to which Mr. Brealey has referred the Tribunal in relation to CC4, although there was a degree of barristerial blindness in the omission of certain passages as they were being read out, in particular the fact that it is a final stage in the process that there will be redaction of material in the final decision by the Competition Commission, and that that process will be undertaken at the end.

More particularly, it may well be just worth highlighting the fact that in relation to para.6.19 – this is CC4, tab VB1 in the joint bundle, p.52 – if one looks at para.6.10 – the Tribunal was taken through this – unfortunately, Mr. Brealey's eye drifted when he turned over the page. He mentioned (h) notifying and considering possible remedies. Then (i) did not get mentioned to the Tribunal. There is a process of considering exclusions from disclosure at the end of the process.

THE CHAIRMAN: But I had underlined it myself.

MR. BEARD: Although I will not take the Tribunal through this in any more detail, the depth of detail of structure of process here is, as has already been submitted, remarkable for a decision maker.

Then 6.17, the hearings as characterised by Mr. Brealey were suggested to be hearings at which allegations were being made. It is perhaps worth stressing that final sentence. "Hearings are not conducted in an adversarial fashion, but rather in the spirit of gaining a

sound understanding of issues raised in the investigation". Again "investigation" has a Ronseal flavour about it, it is an inquisitorial exercise in which the Commission is engaged and is not an adversarial challenge and it is not a court in that sense.

Then, finally, paragraph 6.29, again I was not entirely clear which bits the Tribunal had been taken to, but midway down:

> "[The Commission] may ask the parties early in the investigation to provide information in a form that can be disclosed. It will take its final decisions on disclosure of information which a person considers to be 'sensitive' by having regard to the three considerations above ..."

which it carefully adumbrates in paragraph 6.28.

> The Act requires that the CC's reports should contain the information necessary to understand its decisions and the reasons for those decisions. Ultimately the CC decides what information should be disclosed in a report and throughout the investigation in order to fulfil its statutory functions. For further information, see CC7 ..."

which is further, more detailed guidance on the disclosure of information. I would ask the Tribunal, if it has not already had the opportunity to do so, to consider those matters.

So the Competition Commission is going to consider throughout its investigation what sort of material to disclose, but it is conscious that in the out-turn decision the report must contain information necessary to understand its decisions and the reasons for those decisions. In other words, at that point, when one comes to the final decision the balancing exercise that has to be struck by the Commission may be vastly different from that which it will be striking in relation to working papers at that stage. Of course, as I have already suggested, at the point of the provisional decision again, the balancing exercise will be different.

So Mr. Brealey casually says, "Well, we might be back in a few weeks if the provisional decision were to rely on redacted material", and it were to be a decision that was otherwise adverse to SDI, and at that point it would be complaining that it did not understand what was being said against it. Perhaps that will be the case, but it is no substitute today to be considering a different exercise in relation to different materials. The truth is that they should have waited until at least that point.

Unless I can assist the Tribunal further, those are my submissions.

THE CHAIRMAN: Thank you very much, Mr. Beard. Mr. Harris, I presume you want to make your cameo appearance after the intermission?

MR. HARRIS: That is correct, sir, I would, but if I may just detain the Tribunal for 20 seconds or so. JJB wishes to make no substantive submissions on this first issue. We are strictly neutral, and for the record nothing should be read into the fact that we do not ally ourselves for this preliminary issue with Mr. Beard and Mr. Swift, but equally nothing should be read into the fact on this or any other occasion that we have not allied ourselves today with Mr. Brealey. That is about as neutral as you can possibly be.

Sir, I have nothing further to say.

THE CHAIRMAN: Mr. Brealey?

MR. BREALEY: Three points in reply: first, on whether it is necessary for us to prove that the error can be corrected. Mr. Beard relies on an article, I rely on the Court of Appeal in the Bloody Sunday Inquiry. Could I go to that. It is at tab 6 of the OFT's authorities bundle, para.43, a submission that the final decision would not be quashed because of the procedural unfairness:

Paragraph 43:

> "We cannot accept Mr. Clarke's approach. The fact that a court would not quash the final decision of a Tribunal on a procedural ground does not mean that a preliminary decision would not be quashed. The unfair refusal of an interpreter or an adjournment are very much the type of decisions which, if the subject of an immediate application for judicial review, will be reversed by the courts although the final decision would not be. The concern of the court is whether what has happened has resulted in real injustice."

So how it can be submitted to this Tribunal that I have to prove that this breach of our rights of defence somehow has to be irreversible, I am at a loss to understand how they can get round para.43. That is not the law.

Secondly, the floodgates argument: the notion that a decision maker should in some sense be immune from successful applications that it has been acting unfairly is not an attractive one. I take the point that satellite litigation may be a nuisance to the Competition Commission, but there are safeguards. These may have to be worked out. The safeguard is in the definition of a person aggrieved. Mr. Swift himself said there could be a gateway where, if the breach had been materially and irreversibly – we know "irreversibly" is not a lawful, legitimate consideration, but "materially", "substantially" may be. It may be fed into the definition of the phrase "person aggrieved". It may have to be worked out in the future, but I do not think anybody could deny that Sports Direct is a person aggrieved.

The very last point concerns the timetable. That is set out, and again I apologise, I do not know if you have got the joint bundle of documents open, in tab E(ii)(3).

THE CHAIRMAN: "Revised Administrative Timetable".

MR. BREALEY: Yes. Essentially, replying to what has been submitted, if one looks at that, merger reference made, gathering information, third party hearings, issue statement, main party hearing, then the deadline for all parties' responses, this is to the working papers. That stage, according to Mr. Bethell, for the Competition Commission, engages Sports Direct's rights of defence at which point we say that we should be given a chance to properly dissuade the Competition Commission from its current thinking. One sees that after 27th November we are almost into the provisional findings and any remedies notice. That is why I say that the fact finding process right at the beginning here, which includes the main party hearing, is a vital and critical part of the process, which, as I say, engages the company's rights of defence.

THE CHAIRMAN: Thank you. What we shall do during the adjournment is decide, first of all, whether to make a ruling on prematurity and if we decide to make a finding on prematurity, then we will certainly indicate what that finding is, though probably not with reasons immediately.

(Adjourned for a short time)

THE CHAIRMAN: We are going to give a ruling on the prematurity issue, but a full reasoned judgment will follow.

Our ruling is as follows: We have decided that it is appropriate for us to determine the issue of prematurity at this stage. Our decision is not a statement of Tribunal policy let alone judicial policy - rather, as Mr. Beard reminded us of the importance of context in litigation, our decision is in the context of this case.

The challenge by SDI is as to the extent of disclosure and redaction prior to a hearing of a non-adversarial kind, but one at which assertions seriously adverse to their interests were to be investigated and inquired into without SDI having full knowledge of the underlying material or issues forming provisional propositions. That inquisition would include questioning of directors founded upon some assertions which they are in no position to answer or comment upon.

In our judgment there is in this case potential for inherent unfairness in the Competition Commission's intended procedure. We are of the view that the potential unfairness is such as to fall within the proper scope of judicial review under s.120 of the Enterprise Act 2002,

despite this arising well before the end of the Competition Commission's full procedure and determination.

It occurs to me that counsel might find it helpful to have a little time to consider the implications of the ruling we have just given, in which case, within reason, you can have as much/little time as you would like.

MR. BREALEY: I think all parties would be grateful for that. Thank you.

(Short break)

THE CHAIRMAN: Yes, Mr. Swift?

MR. SWIFT: May it please you, sir, members of the Tribunal, I have the following statement to make. The Commission has given careful consideration to the Tribunal's decision on prematurity. In the light of that decision and the brief reasons given, the Commission has decided to withdraw its decision letter of 16th November 2009. Indeed, that decision letter has now been withdrawn. The Commission remains committed to the principles of fairness throughout the conduct of its inquiry. The Commission will determine as soon as possible the appropriate disclosure to be made to SDI for the purposes of the future conduct of the Inquiry.

That is the statement, made with the authority of the Chairman of the Commission.

THE CHAIRMAN: We knew he was present at some points in the day, yes.

MR. SWIFT: The reasons for the delay since you rose are due to decision making by the members of the group responsible for the inquiry.

THE CHAIRMAN: We have given our brief ruling. It is entirely a matter for you, but I presume you want a reasoned judgment?

MR. SWIFT: We would like a reasoned judgment.

THE CHAIRMAN: You will get it, and fairly quickly.

MR. SWIFT: I am obliged.

THE CHAIRMAN: Anyone else? Mr. Brealey?

MR. BREALEY: Things are never easy. What I would be very grateful for is just a few minutes. We have just got this text and we were in the room trying to work out the implications of it. I would be most grateful if the Tribunal could just rise for a further five minutes so that my clients can discuss the implications. If I can give you a flavour – obviously, they are delighted that there is going to be a reconsideration of the material. One of the questions that arises is the nature of the redactions: how much? Is it just that we are going to get one paragraph or something like that? Also there is the question of the hearing. I do take the point that Mr. Swift cannot guarantee anything, but it may well be that the Tribunal can

indicate something about the hearing. For example, the decision has been withdrawn, what happens if there is a provisional findings decision tomorrow?

THE CHAIRMAN: I think we have to take things as they come, Mr. Brealey, but I think I can safely say this on my own behalf and that of my colleagues. We have absolutely no intention, if this matter comes back here, of usurping the role of the Competition Commission. We are not going to be the blue pencil.

MR. BREALEY: No, but what the Tribunal can do is it can quash and direct, in the sense that it can tell the Competition Commission to consider in the light of the judgment.

THE CHAIRMAN: I am inclined to *festina lente*, if I may say so. I think we should just take things as they come. If there are any more applications to be made, they have to be made and considered on their merits. At the moment, the Commission have withdrawn their letter and that is where we are.

You can certainly have a few more minutes if you want to keep us here for a time. We were due to be here for the whole day anyway. We will just have another cup of tea.

MR. BREALEY: Can I ask for costs for today? We have come here. Obviously they have fought bitterly and they have fought hard on admissibility, they have lost, and we do ask for our costs of today.

THE CHAIRMAN: The answer to your question is, yes, you can ask for your costs.

MR. BREALEY: May I have my costs?

MR. SWIFT: We would prefer that matter should be adjourned until we have the reasoned decision and then we can put our comments in in writing.

THE CHAIRMAN: That seems pretty reasonable to me. Do not read anything into it being delayed. It seems a perfectly reasonable request.

MR. BREALEY: As a great indulgence, can I just ask for a further five minutes?

THE CHAIRMAN: You certainly can. Mr. Beard, you disappointed me. When you talked about "Ronseal", I thought you should have said "Farrow & Ball"!

MR. BEARD: That does not do what it says on the tin!

(Short break)

THE CHAIRMAN: A point has been raised with us about what we do about these extant proceedings. What occurs to me is that the appropriate course might be simply to stay these proceedings with liberty to apply in respect of costs. Does that sound sensible? You are shaking your head, Mr. Swift.

MR. SWIFT: It is just nerves! It does not accord with the way we understand it. We understand the position to be, whatever may have happened in the past with *Association of*

Convenience Stores, this is a case where the decision has been withdrawn. It no longer exists. There is nothing to bite on. There are no proceedings to be stayed because the decision has gone. In our submission, and I have discussed this with Mr. Beard and he agrees, the appropriate order is that the application should be dismissed. Of course there will be a separate representation in respect of costs, but because this is a s.120 application for JR and the decision to which that application was directed no longer exists, that is the appropriate end to this proceeding.

THE CHAIRMAN: Mr. Beard, why is it not more appropriate for the application to be stayed with liberty to apply in relation to costs? For the application to be dismissed when SDI have actually won on the prematurity point seems a touch perverse to me.

MR. BEARD: I think, and Mr. Swift obviously will correct me if I am wrong, the position is akin to a situation where there had been a permission hearing under Part 54, and it was decided that permission was going to be granted. In the circumstances, the public body goes away and thinks, "Actually, we are not going to go and have the full fight, we will do a reconsideration because that might be the much more sensible approach". At that point, the decision can get withdrawn. There is an application pending with the Tribunal or the court in that case that is then dismissed in due course. Obviously in relation to the matter of costs, if the Tribunal's only concern is that it needs to remain seized of the matter long enough to deliver its reasons and deal with matters of costs, the Tribunal will continue to be seized of the matter until it has delivered its reasons, and indeed can say at that point that it will accept submissions in relation to costs. There is no need for there to be a formal order as to stay because you are still seized of the matter until you have finally disposed of all matters pertaining to the judgment. Then the natural order would be merely a dismissal of the application in the circumstances, because there would not be anything left. By then you would have dealt with it on costs. You do not need a formal stay order now. I think that may well be the position that Mr. Swift is averting to.

THE CHAIRMAN: Do you want to say anything, Mr. Harris?

MR. HARRIS: Sir, may I just wave my Swiss neutrality flag!

THE CHAIRMAN: Thank you, Mr. Harris. Mr. Brealey?

MR. BREALEY: We would prefer the stay route. Mr. Swift has already asked the court to adjourn the costs. There will be a ruling on admissibility, because that was the preliminary issue that the respondents wanted. Until the order on the ruling has been drawn up this Tribunal is still seized of the matter. The fact that they have unilaterally withdrawn the decision does not affect the fact that the Tribunal is still seized of the matter because it has

got to give a reasoned judgment and it has got to draw up an order. We would ask that the Tribunal do stay the matter until such time as we find out what the respondents are going to do.

MR. BEARD: To be clear, the position that I was articulating is merely that you are seized of the matter. Until you have disposed of the reasoned judgment and costs you do not need to make any stay order in order to remain seized of the matter until then. There is something slightly strange about staying an application in the circumstances because it sounds like there is general liberty to apply in relation to it. When the target of the application has been withdrawn, effectively judicial review entirely falls away, which is what happens in the Administrative Court.

(The Tribunal conferred)

THE CHAIRMAN: What we have decided is that we will adjourn this matter generally, pending giving our reasoned judgment and dealing with any application for costs. So the case will stand adjourned rather than stayed or dismissed.

MR. BREALEY: I am very grateful.

THE CHAIRMAN: Mr. Swift?

MR. SWIFT: May I just say, we are very happy with that.

THE CHAIRMAN: We are very glad you are happy! I hope everyone is reasonably happy.