IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1110/6/8/09

Victoria House
Bloomsbury Place
London WC1A.2EB

Wednesday, 21st October 2009

Before:

THE HON. SIR GERALD BARLING
(President)

LORD CARLILE OF BERRIEW QC
SHEILA HEWITT

Sitting as a Tribunal in England and Wales

BETWEEN:

BAA LIMITED Applicant

and

THE COMPETITION COMMISSION Respondent

Supported by

RYANAIR LIMITED Intervener

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HEARING
DAY THREE

APPEARANCES

Mr. Nicholas Green QC and Mr. Mark Hoskins QC (instructed by Herbert Smith LLP and Freshfield Bruckhaus Deringer) appeared on behalf of the Applicant.

Mr. John Swift QC, Mr. Paul Harris, Mr. Ben Rayment and Mr. Ewan West (instructed by the Treasury Solicitor) appeared on behalf of the Respondent.

Mr. Daniel Jowell and Miss Sarah Love (instructed by Nabarro LLP) appeared on behalf of the Intervener, Ryanair Limited.

THE PRESIDENT: Good morning, Mr. Swift.

MR. SWIFT: Good morning, Sir, good morning, members of the Tribunal.

THE PRESIDENT: Can we just say, before I forget, the *AMS Shipping* case you mentioned, we did have a glance at that overnight – horrendously complex facts. Also, just so you know, there was a judgment of Lord Justice Longmore in a related decision of the Court of Appeal mentioned in that judgment – we had a glance at that as well, I am not sure any of it takes this matter any further – dealing with a statutory bar to bringing an appeal. I think the phrase you took us to, "or could, with reasonable diligence, have had knowledge of", is the phrase in s.73 of whatever the legislation is. I just mention that we have looked at it in case you wanted to take it any further.

MR. SWIFT: I do not, Sir, but thank you very much for that information.

I do not know whether it falls to me to say, or to Mr. Green to say, but I can now say that Gatwick has been sold.

THE PRESIDENT: So we gather.

MR. SWIFT: That is the news today. I have no further observations to make on that.

On reconsideration after we broke yesterday, I give you the revised structure for this morning, but I am still hoping to be at or about the one hour. I want to go back very briefly and look at the exchange between you, Sir, the President, and myself as to the imputation of knowledge to BAA, and then take you to some other material relevant to that. Then I want to talk about the links, not at great length, the web of links that allegedly link Professor Moizer to MAG. Then I want to take the Tribunal through what we call period three, which is the period when, if at all, an issue arose, in our submission, as to apparent bias, and to put our submissions on that period, because we consider that they have been presented in somewhat imbalanced way. Then fourth, to deal with the separate issue of whether, in the event of a finding of bias against one member of a panel, the decision can stay and, if so, in what circumstances, and then some very brief concluding remarks.

I should say at the outset that in respect of the issue of whether claims have been time barred. I am not proposing to address that orally. It is stated out very fully in our skeleton argument. There is a reply by BAA and I am content to leave that to the Tribunal on the basis of written submissions, unless there are matters that the Tribunal wish to put to me when we get to that, but we will get to it, if at all, later on.

May I ask the Tribunal to refer to yesterday's transcript, day 2, and turn to p.65. At line 17, you, Sir, say:

"So that is relevant to their knowledge – I am just trying to tease out – are you saying because they could have that out, the team in question, they could have found that information out therefore that knowledge is imputed to them for the purposes of a waiver of ----"

Then I rudely interrupted and said:

"Yes, I am making that point ..."

I simply want to draw together what our case is in respect of the materials that are in the public domain. We are saying that they could and should have been discovered, that that is constructive knowledge, but we do not rely just on that proposition. We say that BAA had actual knowledge and that that is beyond dispute after 26th January 2009 when BAA "rediscovered the 2002 notice".

But it does not stop there because (a) BAA was the party to the 2002 BAA Inquiry, and even if BAA was not copied on the letter that went to the relevant director at Manchester Airport, the 2002 notice was undoubtedly put on the BAA specific part of the Competition Commission's website. Then (b) Mr. Herga, who has been referred to significantly in the course of the past two days, personally was "responsible for" the 2002 BAA Inquiry, and he is still there at BAA now even if in a consultant role. Then (c), and this is the new matter that I wanted to raise, during the course of the 2007 market investigation BAA was in the business of investigating Manchester Airport Group and its links, if I may call it that, and certainly, by their own admission, in February 2008.

May I take you to the Competition Commission's skeleton, which is in the core bundle at tab 6, starting at para.62 on p.16. Paragraph 62 is the beginning paragraph in the sub-section "No apparent bias at all in the first and second periods of the Inquiry", and I am not proposing to read out paras.62, 63 and 64, but for the record that is where the Commission sets out its case on why there was no apparent bias.

THE PRESIDENT: Paragraph 64 actually seems to be dealing more with the waiver point.

MR. SWIFT: With waiver, yes. Paragraph 69 is the paragraph I would like you to look at, which says:

"Moreover, BAA recognises that it was required to consider the issue of conflicts in response to the Commission's disclosure notices, albeit that it claims that it did not spot the one conflict that is now said to be acute."

Then there is a reference to Mr. Hanks who said that he concluded there were no conflicts.

Then further down we say:

"BAA was, unsurprisingly, in the business of making internet checks on its close business rivals at MAG and knew a great deal about MAG. For example, BAA itself made extensive admissions to the Commission about MAG and its relations with its local authority shareholders in its '*Response for BAA Limited Manchester's Second Runway*, [with a reference] right in the middle of Inquiry, in February 2008."

That is referred to by BAA in its skeleton, Schedule A, para.48. In that document BAA expressly refers to MAG's local authority shareholders and actually cites in the "About Us, Our Group section of MAG's website.

Just putting that to one side for the moment, and if we go to the BAA skeleton, first of all the skeleton itself at tab 5 of that bundle and para. 26 on p.11. This is part of the over view of apparent bias, the response of the fair-minded observer, and para. 26 says:

"The specific links between the GMPF itself and MAG are also strong. Thus MAG has placed over £250m of pension contributions into the GMPF and investment decisions by the GMPF therefore affect the economic well being of MAG (for example by influencing the level of pension contributions that have to be made pursuant to FSR17)."

And Lord Carlile asked a question to Mr. Green about this part of the evidence.

"The cost of pension contributions to the GMPF is charged to the profit and loss account of MAG."

There is a footnote reference 40, it says "See MAG Annual Report and Accounts 2006/07". Pausing there, plainly the MAG 2006/2007 accounts are matters in the public domain. This is part of an overview relating to the matters that would have been known to the fair-minded and informed observer, as distinct from a disclosure by the Competition Commission to the BAA.

THE PRESIDENT: Yes, we have to distinguish between whether we are looking at knowledge from the point of view of apparent bias issue or a waiver issue because I am not sure ----

MR. SWIFT: This is apparent bias. This is absolutely straight ----

THE PRESIDENT: You are on apparent bias now?

MR. SWIFT: I am on absolutely straight apparent bias, yes. My point is it is not clear from this lengthy identification of documents as to whether these were matters that where, in a sense discovered by the BAA in the course of the presentation of its case, or whether they were known to BAA at the time.

MR. GREEN: I make it absolutely clear, we spent about three months digging around – that is to say "we", Herbert Smith, in order to find out what the facts were, all of this is information we discovered for the preparation of the case.

MR. SWIFT: Thank you, I am very grateful. Now, may I ask the Tribunal to go to the schedule which is tab 5A and to look at p.12, we have arrived at February 2008 – tab 5A, the chronology to the BAA skeleton. At para. 47 it is stated that: "BAA submitted a paper to the CC …" and then there is a reference number. I should go back to para. 46 which says: "On 8 January 2008, the CC published a summary of its 25 October 2007 hearing with MAG", so that was then information known to the BAA after a period of three months, when it went on the CC website. Then we go on:

> "14th February 2008, BAA submitted a paper to the CC [reference no.] providing documentary evidence that (contrary to MAG's claims) MAG had objected to other airports' planning applications."

- with the same internal BAA identification document. That is cited in bundle 3 at 26, and I do not need to go to that, but I would like you to look at para. 48.

> "On 25th February 2008 BAA submitted a response to the CC regarding Manchester's Second Runway (BAA/CC2008/601) in which BAA explained that the reason MAG had been successful in building its second runway was as a result of Government support and local support. BAA stated that in the South East there was no Government support and that local authority stakeholders were opposed to further runways."

We can now put that bundle away and go to a document that I will hand up and that is the BAA confidential response to the Commission in respect of the issue of the second runway – it can only go to the confidentiality ring. It is a BAA document which is not being included in the file before the Tribunal and that is the document referred to in para. 69 of the Commission's skeleton. What I would like to do, obviously without reading it, is to take you to para. 1.2 of the summary.

THE PRESIDENT: Do you want to give us a list now and then we can read them all?

MR. SWIFT: No, that is it. That is it for the moment, this is the *amuse bouche.* (Laughter)

When you come to consider that paragraph 1.2 and para.48 you may consider that para.48 is completely inaccurate, but I make no point on that for the moment.

If one turns the pages of this document and comes to p.5 you will see at para. 4.1, under that heading – I am not going to cite anything just in case it could be taken out of context.

THE PRESIDENT: Shall we read 4.1?

MR. SWIFT: 4.1 and 4.2.

THE PRESIDENT: (After a pause) Yes.

MR. SWIFT: You will see at the end of 4.1 there is a footnote 18?

THE PRESIDENT: Yes.

MR. SWIFT: Footnote 18 you will see is a website reference.

THE PRESIDENT: Yes. We will read that too.

MR. SWIFT: So this is a document, a confidential document sent to the CC in February 2008 which has attached to it that document identified in footnote 18, which of course is a matter in the public domain, and so now I would like you to look at what that document says. We are now at the web link and this is where I am relying on technical help from my left. I am instructed, or advised, if you type that web address into the browser you reach the first two pages of the handout – actually one is on top of the other.

THE PRESIDENT: You can scroll it down, no doubt.

MR. SWIFT: Yes. On the right hand there is a link to useful information. Assume that in February 2008 -- The most recent accounts would have been 2006/2007, i.e. in the upper of the two boxes - if you click on that you bring up the accounts. If you turn the pages you will find at p.47 the directors' report. Are we there?

THE PRESIDENT: Yes, I see. Page 7 of the hand-out.

MR. SWIFT: You have the advantage. My pages are not paginated. That is p.47. That sets out the first page of the director's report, and it shows the shareholding of the local authorities. Nothing new about that. Then, if you turn the page and find the notes to the financial statements -- This is Note 24, headed 'Retirement benefits'. Then you read down. Now we are into a document in the public domain, it seems to me that I can read it into the transcript ----

THE PRESIDENT: So, there is plenty of stuff about the Great Manchester Pension Fund.

MR. SWIFT: There is plenty of stuff about the GMPF, yes - plenty of stuff.

> "The group operates two defined contribution schemes for all qualifying employees. The assets of the schemes are held separately from those of the group in funds under the control of trustees. Where there are employees who leave the schemes prior to vesting fully in the contribution, the contributions payable by the group are reduced by the amount of forfeited contributions".

Then we have the total cost.

> "the total cost charged to income ...represents contributions payable to these schemes by the group at rates specified in the rules of the plans".

Then there is a reference to defined benefit schemes. There are four defined benefit schemes. The East Midlands International Airport pension scheme is one that arose as a result of the acquisition of the East Midlands Airport by Manchester.

THE PRESIDENT: So, the GMPF is one of four, as it is called, defined benefit pension schemes.

MR. SWIFT: Yes, one of four defined benefit pension schemes as follows. Then we have 'total employers pension contributions' as stated. Then, in bold, under the heading 'The Greater Manchester Pension Fund' is a description of what it is.

> "The majority of the employees of the group participate in the GMPF administered by Tameside Borough council. Of the total group pensions contributions noted above, some £17 million related to payments into the GMPF. The securities portfolio of the fund is managed by two external professional investment managers and the property portfolio is managed internally. Participation is by virtue of MAG plc's status as an 'admitted body' to the fund. The last full valuation of the fund was undertaken on 31st March, 2004 by an independent actuary".

Then they explain the method.

> "The purposes of the valuation were to determine the financial position of the fund and to recommend the contribution rate to be paid by Manchester Airport plc and the other participating employers".

Then they state what the market value of the funds is - £35.59 million in March 2004.

> "The funding level of the scheme is measured using the actuarial method of valuations was 93 percent".

Then there are the principal assumptions used in the 2004 valuation there set out by various equities bonds and the cost increases. They conclude,

> "The costs of providing pensions are charged to the P&L account on a consistent basis over the service lives of the members. Costs determined by the independent qualified actuary and any variations from regular costs are spread over the remaining working lifetime of the current members".

Turning over they have a similar disclosure for the other defined benefit schemes. Then they tabulate it on the following page in terms of the defined benefits continued. That is that. That is in a document in the public domain and sent by BAA to the Commission in February 2008. Nothing could be plainer than that link between Manchester Airport Group and the GMPF.

By that stage the inquiry has been running for over nine months. By that stage the Manchester Airports Group has given evidence. That evidence was on the BAA website in February 2008. BAA made its responses to the Commission very shortly thereafter. That is actual knowledge.

THE PRESIDENT: The purpose of the representations - without, as it were, breaching any confidentiality - I think is set out in the skeleton, is it not?

MR. SWIFT: It is.

THE PRESIDENT: Paragraph 48.

MR. SWIFT: What I am saying is not accurate is the third sentence because if you look at the opening paragraphs of the response, it refers to the 2003 White Paper which makes it absolutely clear what government policies were in respect of the south-east - yet that document suggests that the government was opposed. Nothing turns on it.

THE PRESIDENT: Just so that I have it in mind, the purpose of the document was as a response to a point made by the Commission?

MR. SWIFT: I would think it was a point being made by the Commission as to why it was that the BAA had not been investing in sufficient runway capacity to meet the demand for airline traffic in the London and south-east area. The BAA would have been saying essentially, "These are political decisions determined by the government of the day - unlike the position in the regions where the government had followed a positive policy of encouraging expansion at regional airports to meet the demand". Of course that regional demand at Manchester was met through expansion through the second runway which was itself financed through the charges levied under the relevant quinquennial scheme and involving some degree, I believe, of further investment by the local authorities. That was the issue. So, they were saying effectively, "To the extent that lack of capacity to meet demand is a detriment to the airlines and the public, blame government - not us". That is it.

Before I leave that, just to say, for the transcript, that I am very grateful for Mr. Green's observation in relation to the three months that they spent and the reference about 'ferreting in the undergrowth' to provide this information. That is information that they provided to the Commission. They knew about it. That is the missing link. That is the missing link. They said they never knew.

It is a matter that I would like the Tribunal to consider very, very carefully when one considers the information that BAA actually knew about during the course of the inquiry - not simply the information that was produced by three months' investigation by BAA's lawyers before bringing this case.

THE PRESIDENT: We will be considering everything very carefully - not just that.

MR. SWIFT: Not just that, no. I am not sitting down and saying that I am going home. In our view, it is key. It is a key aspect of this alleged lack of knowledge of BAA throughout the period of the Inquiry and the fact that it was only triggered through the information provided to them in January 2009.

May I now turn to the issue of links.

THE PRESIDENT: I am sorry just to interrupt you for one second. I asked you whether this went to apparent bias or waiver, this point. I just ask you again because I want to be absolutely sure. Is this a point to do with what – it seems to me that this is a waiver.

MR. SWIFT: This is straight waiver. This is absolutely straight waiver. The new value(?) did nothing for it.

May we go to April 2007 and we are now going to bring back in this legal fiction of the fair minded and informed observer on day one. On day one the observer knows that Professor Moizer has been appointed as a member of the panel and has certain information to him or her. One is the notice of disclosure in the 2007 Inquiry. We say an accurate brief, Professor Moizer is a strategic adviser to GMPF. Let us assume for this purpose the observer also knows that Professor Moizer was involved in the 2002 Inquiry and that a decision had been taken that he should not participate in joint group workings in respect of the result in relation to allowable charges for Manchester Airport. Let us also assume that the fair minded observer knows everything about the composition of the Competition Commission, the statutory objectives of the Enterprise Act and the duties imposed on the Commission and everything that is related to the performance of those statutory functions. So the observer looks at the context. In my submission, bearing in mind that the fair minded observer is neither unduly suspicious nor complacent, the tests that were developed in the Australian cases and now adopted by our courts, what would the observer conclude on day one? In my submission, the fair minded observer would conclude that the appointment does not raise a real suspicion, that on every issue on which there might be some disagreement as between BAA on the one hand, and Manchester Airport on the other, that Professor Moizer would have a predisposition against the BAA.

THE PRESIDENT: Or in favour of Manchester Airport.

MR. SWIFT: Or in favour of Manchester Airport.

THE PRESIDENT: It does not have to be against the BAA, does it, it could just be unfavourable.

MR. SWIFT: Yes, a predisposition in favour of or against.

THE PRESIDENT: Sorry to interrupt, would the FMO know about the risk of divestiture arising from the Inquiry?

MR. SWIFT: I would say that he would know a number of things. He would know that on day one the Competition Commission would be starting with a blank sheet of paper. He would know that the Competition Commission would then have to determine what are the emerging issues. I would say that the FMO, if we can call him that – I have to agree, FMO is much easier – the FMO would know, let us say, that in the course of a two year inquiry the Commission is going to proceed through a statement about emerging issues, it is going to be taking evidence, and at some stage it is going to be moving to provisional findings which are no more than work in progress to alert parties as to where it might be going. It goes through certain stages ----

THE PRESIDENT: Emerging thinking coming out.

MR. SWIFT: Emerging thinking, then provisional findings. It is a long process, but I am not saying that the FMO wound not have available to him or her the OFT report, but he or she would say, "That is not even a starting point, that is background". It is possible – possible – that there may be divestments along the line. In applying then a *Medicaments* test about consciously or unconsciously being on one side or the other, at that stage the fair minded observer would say, "No, this is a person with experience in finance who has been appointed to a panel to do a particularly important job in the public interest, and being neither unduly suspicious nor unduly complacent my belief is that that person can make a contribution to the panel so as to enable the panel to perform its statutory duties effectively". Any other conclusion would, in my submission, destroy the nature of the objectivity which the FMO brings to these matters – not complacent but not unduly suspicious.

Taking account of the events in 2002, the FMO may well say to himself or herself, "There may come a time in the course of that two year investigation as a result, let us say, of some external event, when there may be an issue involving the Professor, but in the meantime that matter is entirely hypothetical and we may never get there".

That, in my submission, is a very important point for the Tribunal to consider, because on that issue we are diametrically opposed to BAA. You will recall, Sir, that I said yesterday that BAA has needed to change in a material respect the case from that brought in the notice of application so as now to allege that the two conflicts started from day one. It is on that basis that BAA in its chronology and in its skeleton can now build on that conflict base and take it gradually down and down and down so that matters get worse and worse and worse

until we get to the intolerable situation in early 2009. Absent that one has to find some starting point as to whether there is apparent bias or not in accordance with the two year investigation. I would say, and this is in answer to your question – thinking again I did not really answer Lord Carlile very effectively yesterday, I will try better today – when you said to me, Sir, that this was a notice that was put out in 2007, were they not entitled to rely on it? Yes, they were, and they did. They did rely on it. They did rely on the fact that they thought that Professor Moizer would be acting in an impartial, independent manner as a member of that tribunal, even though it was apparent to them that he was an adviser to the GMPF, and that was stated. So, yes, they relied on it. You will remember that I used the vernacular on day two, yesterday, about there being "no big deal". There was no big deal, there was no objection.

So then we had the proceedings in train in a lawful, dispassionate manner, as you would expect from a Commission carrying out these important responsibilities. That, we say, continued until January 2009 when, not known to Professor Moizer before the GMPF had allied itself – I use the word – "allied" itself with the Manchester Airport Grouping to make an indicative bid for Gatwick.

I am still on apparent bias here, I am not on to waiver I am on apparent bias. What he has now said, we are told that – and this is transcript day 1, p.17 – Mr. Green said: "He [Professor Moizer] advises clients who own MAG, MAG's money is under his control and advice." If that had been put to the FMO how would the FMO have reacted. The FMO would have said "That cannot be right; not in a million years would that happen", to say that MAG's money is under his control and advice". How can that be right? There is a pension fund administered by trustees and it is absolutely plain, everybody knows that the duties of a trustee are to the beneficiaries of the pension scheme, they are not owed in any way to those commercial organisations or local authorities who put money into the scheme.

Page 19, line 9 of day one:

> "the pension fund is not a corporate body, in advising the fund you are directly advising the authorities."

How would the FMO have reacted to that? he would have said "I understand that the fund is administered by Thameside and the representatives of the local authority have been attending these meetings, but the advice is essentially on the management of the fund."

This issue of advising the authorities who have then become the clients, you will have heard Mr. Green referring to the authorities as "Professor Moizer's clients", in no way are these clients in the sense that Professor Moizer is owing some kind of a duty, a fiduciary duty to a

local authority or a commercial organisation whose employees are the beneficiaries of the scheme. It does not work that way, but it is very convenient from the point of view of alleging apparent bias that this relationship is gradually tightened as if there is no distinction between Professor Moizer, the Fund, the local authorities and Manchester Airport, it is as if they are a unitary body with no difference between them; that is not how it would have been perceived by the FMO.

Then, according to Mr. Green (p.23 line 20 of the transcript] "It [MAG] has access through its shareholders to a pretty decent pot of funds." One can expect that in the course of oral argument, a skeleton written argument will be elaborated on, but this is more than an elaboration, this is a travesty of the real situation and the FMO would have regarded it as such.

Just to spell it out, the commercial interests of MAG and its shareholders are not the same as the interests of the pension fund, and the pension fund panel carries out a similar role to that of the trustees of a pension scheme. That is set out very clearly in the GMPF governance policy – one of the many documents ferreted in the course of the preparation of this case; it has been cited by Mr. Green as found at bundle 3, tab 25 and you will recall that I said yesterday it is interesting that the one line which Mr. Green did not refer to is the line that referred to trustees. There is no alignment of interest as the BAA suggest.

The fact that MAG and its shareholders were interested in the course of 2007 and expressed that interest to the CC in bidding for an airport cannot support any inference that at that time that would be in GMPF's interest; they are separate.

Secondly, and still on apparent bias, the BAA distorts the position of Professor Moizer within GMPF. Of course Professor Moizer is an important adviser and a valued adviser, nobody doubts that, that is why he has been there for 15 years. He is not paid a great deal of money but money does not come into it, we are dealing here with the quality and the nature of the advice. The fact that he attends only four times a year does not actually come into it, again it is the nature, quality and type of the advice which is relevant. It could be relevant to a particular decision.

The fact is he is independent, he stands as an independent outside adviser, and his function is to give that independent advice to the advisory panel as to what is appropriate for the management panel rather than what others might perceive it to be. So he would be a participant in discussions as to where the fund is going and that is the role that he has occupied for the past 15 years, indeed Professor Moizer has said in his view he was

sceptical as to the possibility that the funds should be invested in a specific asset such as an airport rather than pooled.

Going back to bundle 3 at tab 30, when we went at some length into the Greater Manchester Pension Fund Report for 2008, Mr. Green referred to Professor Moizer being part of a backbone of GMPF's decision making. I do not necessarily accept the use of the word "backbone", we have never sought to conceal the fact that Professor Moizer is a valued adviser to the GMPF. I have never sought to say he is only there four times a year, he only gets £12,500 a year, that is not the point, he is a valued adviser, the question is: "What is the nature of the advice?" It is clear from the GMPF that the advice relates to decision making in the interests of the beneficiaries of the fund. It is not MAG's money, it is the total fund that Professor Moizer is advising in relation to. That is how things were throughout the period from 2007 until the end of 2008.

The matters to which Mr. Green referred in opening, how would they affect the approach of the FMO? There was a lot of emphasis made by Mr. Green on the events of November 2008 and that was in relation to the Special Opportunities Fund and matters like that and a great deal of emphasis on what happened at the meeting of 21st November 2008, and Professor Moizer gave advice in relation to that. I inferred from the way that this was being put to the Tribunal, although I could not infer that from the skeleton, that in some way at that stage Professor Moizer was being either dragged into or was very close to a decision that MAG was about to make to invite the GMPF to participate in a joint bid were MAG to consider it possible. There is no evidence that Professor Moizer was involved in that. The only evidence is that on 2nd December 2008 there was the Taylor-Moizer telephone call, which has been explained to you at length. Professor Moizer was unaware, Professor Moizer made it clear at that stage that he could not be involved in giving any advice to the GMPF in respect of that kind of a transaction by Mr. Taylor compared to Mr. Morris, as far as they were concerned Professor Moizer was conflicted out.

A great deal of emphasis has been placed on this worsening of the apparent bias throughout the whole of 2008 and my submission is it does not stack up. The FMO would have looked at the matter very, very carefully in April 2007 and would not have acted like the unduly suspicious person. The FMO would have been watching and been alert to the emergence of apparent bias throughout the course of 2007 and 2008; would have been aware of the evidence given by Manchester Airport; would have concluded that those matters were entirely hypothetical; and that in those circumstances there was no apparent bias.

In my submission the point at which things changed was when it was brought to the attention of Professor Moizer in January 2009 that GMPF had been identified by the shadow monitoring trustee as a participant, whether before or after indicative bid I cannot precisely recall. Then, I think on 9th January or shortly thereafter we had the process of quarantining, and by that the FMO would clearly have been concerned to say, "Is there apparent bias? Is there a risk of apparent bias? In which case what is the Commission - as the judge here - doing about it?" That was a separate exercise. That period - that we call Period 3 - has been referred to as a rather dark period in the Competition Commission's management of this case. I will come on to that next because it really is important to follow these events through. In my submission at no stage, until we get to Period 3, does the FMO say to himself, or herself, "Things have now changed from the position that I, hypothetically, was looking at in April 2007 to the point where the Commission has to do something or make some further disclosure.

THE PRESIDENT: What would the FMO think that Professor Moizer should have deduced from the phone call a month or so earlier?

MR. SWIFT: He, or she, would have deduced that the GMPF - Mr. Taylor - was putting maybe some hypothetical point to Professor Moizer about what might be a possible use of a fund within a fund. He would have concluded that Professor Moizer acted sensibly in closing the conversation. That is about it. It is very difficult to tie up. I know one has to follow the series of hypotheses about how this legal fiction could work out - because there are a number of things that one might have concluded. The question then is: Which is the most probably inference to have made from the? But, in my submission, being neither unduly suspicious, nor complacent, the FMO would have concluded that Professor Moizer wished to, and succeeded in, not obtaining information that might in any way prejudice his ability to continue his position as a member of the inquiry team. At that stage there was nothing concrete. I think whatever the FMO might have considered about discussions between MAG and GMPF, I doubt whether the FMO would even have known what they were. There might have been some -- Certainly the conversation was so short it is difficult to build up a precise picture. But, the reality is that from that stage on, Professor Moizer had no -- Well, in a sense, yes, he had quarantined himself as a strategic advisor to the GMPF. That is it. It is one of the facts in the course of the 2007/2008 inquiry. It was the beginning of what later transpired to be the joint MAG/GMPF bid. Once it became a reality, then plainly different steps had to be taken.

We have in this case so much of the -- I will not say 'the benefit of hindsight', but when a chronology is written and presented, as it is in Tab 5A, it is always with the benefit of hindsight. The Tribunal will recall - I think about para. 27 of the BAA skeleton in Tab 5 - the point put to me: Would the FMO really be considering that in April 2007 there might be a possibility that GMPF, which had never in its life invested directly in an asset of this kind, would itself be involved in a joint bid with MAG. That is such a far-fetched matter in April 2007, yet my learned friend does not shrink from that. Even in April 2007 the prospect of GMPF being itself involved would have been a matter taken into account by the FMO. That is the true distortion of a picture because the FMO can only look at things having regard to the facts as they are at the time. In my submission, at the time it was "Nothing might have happened", or "Anything could have happened". In fact, what did happen -- We know what happened, but it might not have happened. Would the FMO have said, "That is such a radical change there is now apparent bias? In my submission, no. Professor Moizer could still validly continue as a member of the panel.

As you know, sir, in a sense that is the main gist of our case in respect of Period 1 and Period 2. There was no apparent bias. This is a case which has been constructed after the event. The FMO had no reason to doubt the continuing impartial discharge by Professor Moizer of his functions throughout that period. There is no reason to consider that the development of the Commission's case by the end of 2008 - which was by then well-developed - had been in any way infected by Professor Moizer's participation in that panel. That is (if I can borrow an expression) the bare bones of our argument in respect of what I call Periods 1 and 2, Period 1 being up to the date in October 2007 when MAG gave evidence, and in 2007 up until the disclosure of the GMPF interest in the bid for Gatwick.

I am now on what I would call, sir, the management of the process in Period 3.

THE PRESIDENT: Period 3, just to remind us, is from January through to March.

MR. SWIFT: January through to March. Let us almost fast-forward to 26th January. There is no dispute then. I am now on knowledge. There is no dispute then that BAA knew the connection between Manchester Airport Group and the local authorities. I would say that is so much public domain knowledge that the local authorities own Manchester Airport. Anyway, the MAG local authority connection. The second connection is the Moizer/GMPF connection. That was disclosed in 2007. The next is the GMPF/MAG connection, and that is at least from the February 2008 public document and it is also in part from the disclosure in 2002. Also the Competition Commission have considered that there was conflict concern due to Professor Moizer's connection with GMPF because Mr. Peel of the Commission

telephoned Miss Pengelly of BAA on 22nd January 2009 to the effect that "Moizer, adviser to GMPF, likely to be stood down". That is Louise Pengelly's note at bundle 4, tab 69. For the record, that is Peel's conversation reported by Mr. Jones, respondent's bundle, which is tab 8, para.11, and a further reference is Mr. Hawkins, bundle 5, tab 83, para.10.

That information was sufficient for BAA to raise concerns in its 6th February letter, which I read out to you yesterday. We went through those admitted concerns which are essentially whether Professor Moizer had advised GMPF about the Gatwick sale.

In that letter, again repeating what I said yesterday, the concerns of the BAA were specifically about GMPF participation in the MAG bid, and that there were concerns about whether Professor Moizer would be favouring the MAG bid because of GMPF's participation in the bid. Maybe I did not express myself too clearly yesterday, that was the transaction that I referred to, the business in which BAA was at an early stage of inviting bids for the sale of Gatwick.

There was no mention then of the, we say, much more remote connection between Moizer and MAG on which they now rely to say there was a true conflict from the outset of the Inquiry. Our submissions as to what those links are and the tenuous nature I have sought to explain in my opening this morning. They are also developed at our skeleton at para.76 and following – core bundle, tab 6, para.76 *et seq*.

BAA seeks to explain in its skeleton at para.104 that its concerns in 2009 are still based on limited information, it had no knowledge for the duration of the Inquiry of the true nature of the connection between Professor Moizer, the local authorities, the GMPF and MAG. Well, they had, they knew of some connection. They were now back to the FMO position and the question of whether the information I have referred to in November 2008 and 2nd December 2008, on which you put questions to me, would have affected the position of the FMO, and I have replied to that. They do not effectively alter the essentials of the position of which BAA was aware in January 2009, let alone constitute part of the essential facts. Indeed, what they do appear to be showing is that Professor Moizer was doing what he was paid to do, and that is playing an active part in giving strategic advice to the GMPF in their role as trustees.

That was the letter of 6th February. Can we move just to look at the chronology in the meeting of 12th February. This was a decision taken by the group, and the reference is the respondent's bundle, tab 4, p.10, where the group asked Mr. Jones, who is the legal adviser, to clarify BAA's worries. He spoke to Mr. Herga and invited him to follow up after the meeting.

THE PRESIDENT: It was a pretty informal way of doing it, was it not? Obviously the Commission is relying upon this to some extent, but you have a meeting about something completely different and then you have asked someone to stay back and have – how significant is this?

MR. SWIFT: The fact there was a meeting between – however it was organised, it was a meeting voluntarily attended by the chief legal adviser to BAA, a person who, from his own witness statement, is quite plainly capable of looking after himself and the interests of his client, not a man to be browbeaten by the legal adviser to the Competition Commission. The idea that, as Mr. Green has suggested (transcript day one, p.69), that BAA was in some way set up and pressured is not fair comment and is extremely unfair on the individual involved at the Commission in the meeting. Meetings do take place.

THE PRESIDENT: I am not sure how much reliance is placed on what was or was not said at that meeting. That is the only thing.

MR. SWIFT: I am sorry, I missed that, Sir.

THE PRESIDENT: I am not quite sure how much reliance is placed by the Commission on what was said, and there are slightly different versions of what was said. I am not sure to what extent the Commission relies upon that as part of any waiver case, or whether it is, as it were, just part of the history?

MR. SWIFT: It is related to the issue of waiver. It is related to seeking to establish whether BAA had any material concerns other than those set out in the letter of 6th February – in other words, essentially it was a clarification meeting. What is informal is still part of the record, and, yes, we do place emphasis on the fact that BAA chose to be represented at that meeting by Mr. Herga. He chose to be present. He was not under any pressure. Critically, nothing happened after 12th February in any formal sense from BAA such as to suggest, as I said yesterday, that these are really intolerable conditions from the middle of February to the end of the Inquiry and seeking some form of action from the Commission. Effectively they did nothing.

THE PRESIDENT: This was a matter of a month or so from the publication of the report following on a two year investigation, was it not, that this took place. What could have happened at that stage that did not happen? Your clients took a view themselves having thought about it very carefully and stood Professor Moizer down shortly after this.

MR. SWIFT: Yes, he had been quarantined, of course, before that.

THE PRESIDENT: From BAA's perspective what could they have sought that you should do? This is a very, very late stage, is it not in the investigation and presumably most of the work

had been done and conclusions reached and matters had gone out to the printers, I do not know. One knows that it is a long process preparing something.

MR. SWIFT: This is where you are putting to me in a sense the hypothetical question: what would they have done, or might they have done had they had the concern which is now demonstrated in the case that they are now putting. It could have been that in those circumstances it would have been – had they said for instance, and this is fully hypothetical: "It is quite plain to us that this inquiry has been handled in the most outrageous manner. This man should never have been appointed. You never gave us full disclosure in 2007, everything that is in the chronology, that is on the record. Now tell us what you are going to do about it because unless we get a satisfactory answer we are going straight to the Competition Appeal Tribunal." The Tribunal might then have been faced with a decision as to what to do. The fact is they did not because that was not the concern, the concern was the removal of any possible problem in respect of Professor Moizer being involved in advising the GMPF in respect of the sale of Gatwick. The hypothetical question was never tested but at least if there had been that concern one might have seen something on the record from BAA before this case was brought. I am not suggesting something done forensically, I am saying something done from a sense of real grievance that has been a pre-disposition in favour of Manchester, or against BAA, or both, throughout almost the entirety of a two year investigation and this represented almost a breach of proper administration of justice; they did not do it. That does raise, in my submission, an issue as to the credibility of the entire case which has been brought.

LORD CARLILE: Mr. Swift, if BAA are to be imputed with the knowledge of Professor Moizer's involvement with the GMPF and therefore the connection with the Manchester Airport Group at a relatively early stage, never mind precisely when, why is it that Simon Jones is making an inquiry with the GMPF on 18th February 2009 to find out for himself the nature and extent of Professor Moizer's activity with the GMPF. I am just looking at the defence bundle, tab 9, the last document. It is Tribunal's bundle 6. There may be two points here. First, you may be able to help us as to whether there is any document that shows Mr. Jones of the Competition Commission or anyone else there saying: "Good heavens! Didn't you know that information all along; it has been glaringly obvious to you, you should have known this from day one?" Secondly, why is Mr. Jones making this extremely detailed inquiry saying: "I wanted to ascertain GMPF's interest in acquiring airports, and I wanted to explore with GMPF the nature of its relationship with Peter Moizer"?

MR. SWIFT: Well the legal director at that stage – this was a stage at which Professor Moizer had been quarantined, and Mr. Jones wished to identify in more detail the nature of the relationship, or to be satisfied, and this was the telephone conversation with Mr. Taylor. It was a form of natural double-checking that you would do as the legal adviser to the Commission so as to hear from the MGPF point of view, as distinct from the Moizer point of view, what their position was. It was a double check, in my submission it was a perfectly reasonable matter for the Competition Commission to have done. I cannot at the moment see what the inferences are from the fact that that conversation was thought to be important.

THE PRESIDENT: Can I ask you another point relating to the waiver point? You and Mr. Green showed us some of the authorities relating to this and a decision on waiver has to be taken freely and in a non-pressurised way and so on, and so forth. I think the suggestion, if I have understood it, is that a month before this report was due out it was possible for BAA to, as it were, make any complaint they wanted about Professor Moizer's participation in the investigation, in other words, that they were no pressures or constraints on them at that stage. I think there is some evidence, is there not, from I think Mr. Herga – which you have not commented on – relating to the fact that they were about to get the report. Is that an atmosphere in which one can take a free and non-pressurised, unconstrained decision as to whether to go ahead? Is it not a bit like when the judge says in the middle of a trial: "Oh, I have just remembered that I have some shares in such-and-such a company, is that all right?" Is it analogous to that?

MR. SWIFT: I have to submit, sir, it is a long distance from that; it is a long distance from that. We are talking about something in January and February 2009 which is something within a very small compass, and that is: what should the Competition Commission be doing in respect of Professor Moizer's position as an adviser to GMPF? He has been quarantined out of that – or as an adviser to the Panel in respect of the sale of Gatwick Airport? That is an issue in respect of which there is an issue of waiver, and it was put to the BAA that Professor Moizer had been quarantined, and then Professor Moizer had been stood down and the BAA said that they did not know about that until after the report. I am going back now to the FMO, because this is the key thing, if the FMO considers that apparent bias has been removed voluntarily by what the judge has done then we are not into waiver; that is the essence of a precautionary move which is taken just as it was in 2002.

So the case presented by BAA of course is *Porter* para. 29 comes in – we should have had the full opportunity, and all the rest of it – the fact is the CC had acted first; it had cut off the problem, it had made sure that throughout the decision making process that related to

Gatwick that Professor Moizer was not a participant in that, that is a critically important part of that process, critically important. Then the question was: is there some other problems you have, and there is no doubt at all that there was no other problem. To the extent that Mr. Herga said that he had concerns he never raised them. The way the case is presented this is all now jumbled up, it is as if the concerns to bias go right back to the conflict in 2007. Put that way of course it is put very attractively, that "right towards the end of the inquiry you hustled us, you did not give us chance", they had an informal meeting, they were under pressure. What was happening in January and February 2009 was not concerned with the AEC, it was not concerned with the forced divestment of three airports, it was concerned with how do you handle, from the Competition Commission's point of view an impartial process in monitoring what BAA has done voluntarily, and that is to put Gatwick on the market, that was the issue, and it is very important that we look at the issue of FMO throughout this process because if the Competition Commission, as I submit, did act reasonably in responding first to an almost immediate quarantine and then, as Mr. Saunders has said very clearly, looking ahead it would have been, in a sense, intolerable to have had Professor Moizer on the decision-making side when the Competition Commission has been involved in what I showed you yesterday, for example, which is the confidential material relating to the May discussion -- Those two move together and were logical developments of a decision that had to be made. The way that it has come in -- This is an FMO issue. Did we act sensibly so as to take any possible infection out of that last process? They just said, "We did". So, that is the point.

The second point is: no other concerns. They had their opportunity. It may be, as I said to you in answer to your question, that they would have said, "Oh, what is the point? It is too late". But, to the extent that a company has been aggrieved by what it says now to have been a conflict - an acute conflict - which has been there at the beginning and which has got steadily worse, and on the basis of information which has been in the public domain - for example, the evidence given by MAG to the Competition Commission - they did not. There was silence. It does go, in my submission, to the issue of credibility. They had no real concern as to Professor Moizer's participation in this inquiry, their only concern at the late stage of a matter that was important. As to the earlier period, no big deal. That is why they never raised it in February 2009.

That was my brief resume of what I would submit is a reasonable process undertaken by the Commission for Period 3 to remove any possibility of apparent bias so the FMO would

have been satisfied that we had, at all stages, retained complete impartiality in the process which led to the report in March 2009.

Let me make it clear at this point that if, contrary to all my submissions, the Tribunal concludes that this is what I might call a *Medicaments* case, despite all the differences, and that there has been an acute bias, acute conflict throughout this inquiry from Day One, such that the observer has been seriously concerned from the outset as to bias, and increasingly concerned -- in other words, if the Tribunal accepts the entirety of the BAA case it would be difficult to argue that despite all those findings the report remains intact in March 2009 despite the strong evidence that independently the five members would, and could, have come to precisely that decision. But, contrary to that, if there was some apparent bias in the closing stages of the inquiry, then in my submission there no grounds for concluding that because the Commission might have done something extra - for example, might have stood down Professor Moizer earlier, that that in some way has some kind of enormous retrospective effect so as to affect the validity of the entire report. That would be an entirely different matter. The legal principles do contemplate that the observer, the FMO, would go and consider that even if one member of a collective decision-making body were tainted by bias whether that bias would affect other members and it would know that under the Commission's procedures this would be a collective decision - not just by Professor Moizer, but by five other independent experts drawing on the evidence and expert analysis, and would have understood that the Competition Commission's decision-making was at an advanced stage by January 2009. So, my submission to you on that if to the extent that contrary to my submission you were to find that the FMO had concluded there was apparent bias in the third period, which had not been adequately either dealt with by the Commission in a precautionary manner, or there would be no appropriate waiver, there would be no justification in those circumstances for quashing the entire report.

THE PRESIDENT: Does the Commission accept that absent standing down or quarantining Professor Moizer as they did, there would have been an apparent bias in relation to the issues in question?

MR. SWIFT: I think that would be an inevitable inference to draw - inevitable. He would plainly have been seen to be judge in his own cause. They turned a blind eye to it. Yes, plainly. Without going through it I will ask the Tribunal to read in particular the evidence of the Chief Executive of the Competition Commission, who sets out very clearly the responsibilities that he was discharging when he first became aware of the issues and how

he moved swiftly to resolve them - not least for ensuring the impartiality in the critical remedies stage of the Commission's investigation.

Those really are my submissions on proportionality and on bias. This is, as the Tribunal will appreciate, a report which is, on its face, legal, well-reasoned, critically important for the future of airport competition, airlines and passengers in this country. Allowing it to be enforced is going to make a substantial difference to consumer benefits in this country. The prospects of it being quashed are truly daunting for all concerned.

THE PRESIDENT: We are not allowed to take account of that, are we? If the issue is -- If there is an unwaived bias, does it matter that it is going to be expensive, undesirable, disastrous? Do we have any choice? Is there a discretion?

MR. SWIFT: It would be difficult to submit otherwise. The old Latin principle of *fiat justicia ruat caelum* appears to be one of the legal maxims ----

THE PRESIDENT: One can well understand why it is thought necessary to point that out, but, actually, it is difficult to see how, in the light of the case law, it can be relevant.

MR. SWIFT: Which takes one on to the key issue which is the credibility of BAA's case in respect of the two issues, each of which – each of which, I would say – it has built on and created after the event. Whether we are into territory of an FMO – I think the FMO has now gone back to where FMOs come from at this stage, but in terms of the credibility of the argument, this Tribunal would take into account that the outcome of the Inquiry did not suit them. They did not get what they wanted in terms of the divestment remedy. Now, of course, they argue the case only in respect of timing.

In my submission, you are fully entitled to conclude that the Commission acted reasonably in the appointment of Professor Moizer. The FMO would have had a concern only in period three, but that matter was dealt with, and there has been no prejudice whatsoever, actual or perceived, to BAA in any of the matters that they raise throughout this Inquiry, or the manner in which they have been dealt with in due process and this report should be supported and the application should be dismissed.

Those are my submissions.

THE PRESIDENT: Thank you, Mr. Swift. We are planning to have a ten minute break some time soon. This is probably as good a time as any, is it not?

MR. SWIFT: I think so.

THE PRESIDENT: It will give Mr. Jowell a moment to juggle his papers.

(Short break)

MR. JOWELL: May it please the Tribunal; I should say at the outset that I gratefully adopt Mr. Swift's submissions. There is bound to be some overlap of the subject matter with what I have to say but I will try not to repeat matters. My submissions will be divided into four categories, the law, the application of the law on bias to the facts of the first stage identified by BAA, essentially 2007 and 2008, the application of that law to the second stage, 2009, and the proportionality challenge. In the interests of expedition, I will on certain occasions just be giving references to the cases and I will not actually invite the Tribunal to turn them up. I hope that is a course that is reasonable.

THE PRESIDENT: Just as you wish.

MR. JOWELL: If I may commence but just seeking to clarify the law in this area, first in relation to bias and then in relation to waiver, the Tribunal will hopefully have received a further bundle of authorities, a small black file. This has been provided to my learned friends yesterday with one exception, a one page extract from **Chitty on Contracts** at the back.

Turning to the law on bias, when considering the law on bias, it is important, I think, to keep very clearly in mind that the authorities show that there are three distinct categories of bias that are capable of vitiating a judgment or a decision. First, there is actual bias; secondly, there is automatic disqualification or what is called in at least one of the authorities "presumed bias"; and thirdly, there is apparent bias. It is in this latter category where the courts have developed the informed observer test. Although automatic disqualification, the second category, is sometimes referred to as "apparent bias", it is actually a separate sub-category that is completely distinct from the ordinary type of apparent bias where one applies the informed observer test.

Automatic disqualification arises in a very extreme scenario where the judge or decision maker is either directly or in effect himself a party to the cause, or has a financial interest himself in the outcome. It is understandable that in those types of cases the judge in question is considered to be automatically disqualified because the judge is himself a party, or has a direct pecuniary interest in the outcome of the case, subject only to the possibility of waiver. In those cases there is no need for any further examination of the fact, no need for any informed observer test because bias is simply presumed. One does not have to consider whether there was objectively a real possibility of bias.

By contrast, in the third category, where there is only an allegation of apparent bias in the ordinary sense, the court does have to go on to consider whether there is a real possibility that the Tribunal was biased by which is meant prejudiced, or pre-disposed irrespective of the merits.

As Mr. Swift observed, it is important to note that it was this second category, automatic disqualification, not apparent bias in the ordinary sense, that was famously applied by the House of Lords in the *Pinochet* case. Pausing there, it was the *Pinochet* case that Mr. Green referred to on many occasions in the course of his submissions as exemplifying the very remote connection, he suggested, that may justify putting aside the decision on the grounds of bias. It was suggested by Mr. Green that because Lord Hoffmann was just a director of a charity and, as he put it, the object of the charity included the suppression of extra-judicial torture and execution – hardly a surprising or controversial object – that was somehow a remote connection. The critical point that Mr. Green did not make clear is that Amnesty International, an unincorporated association, was actually an intervener in that very case; it was a party to the case, and Lord Hoffmann was a director of Amnesty International Charity Ltd, a company that was effectively regarded by the House of Lords as being a part of Amnesty International.

As I have said, Amnesty International was a party to the case so this was not a remote connection. If I may just take up that authority just quickly to make the point clear – it is in bundle 1 of the authorities' bundles, at tab 8. If I could quickly ask you to turn up Lord Browne-Wilkinson's speech at p.132, and the Tribunal will see just below letter G:

> "The fundamental principle is that a man may not be a judge in his own cause. This principle, as developed by the courts, has two very similar but not identical implications. First it may be applied literally; if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a judge in his own cause. In that case, the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the principle is where a judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial, for example, because of his friendship with a party. This second type of case is not strictly speaking an application of the principle that a man must not be judge in his own cause, since the judge will not normally be himself benefiting, but providing a benefit for another by failing to be impartial.

In my judgment, this case falls within the first category of case, viz where the judge is disqualified because he is a judge in his own cause. In such a case, once it is shown that the judge is himself a party to the cause, or has a relevant interest in its subject matter, he is

disqualified without any investigation into whether there was a likelihood or suspicion of bias. The mere fact of his interest is sufficient to disqualify him unless he has made sufficient disclosure."

If you read on in the case you later on you will see that Lord Browne-Wilkinson refers to the *Dimes* case. In that case Lord Cottenham had substantial shareholding in one of the defendants, which was a Canal company, and the court applied the principle that you cannot be a judge in your own court and the judgment was set aside.

What happened in *Pinochet* was that the House of Lords made a limited extension to the automatic disqualification rule beyond cases where the judge either was a party or stood to make a financial gain from the consequences of his decision to cases where the judge was involved in promoting a particular cause together with one of the parties. One can see the essence of Lord Browne-Wilkinson's reasoning at p.135 A to E, I will not invite you to look at that but for your note.

What the court did not do is to apply the informed bystander test to see whether there was a real danger of bias. One could see that again if one looks between G and H on p.135 and also one can see that in Lord Hope's judgment at 143D. I will not take you to those passages.

The point I am making is there was no need to explore the second category of apparent bias in the pure sense in that case because they hung their decision solely on the peg of the first category. Just to be clear, I believe in the later case, *Meerabux* which is in the bundle, Lord Hope indicated that the same result could have been reached in *Pinochet* also by applying the ordinary apparent bias test, but that is not my point for present purposes.

I am simply keen to establish two things. First, the important distinction between automatic disqualification cases and apparent bias cases, and secondly to show that *ex parte Pinochet* was not a case of a remote connection of the type described by my learned friend. In his submissions Mr. Green accepted that he was not alleging actual bias, but it was quite unclear to me whether he was alleging automatic disqualification or apparent bias in the ordinary sense.

THE PRESIDENT: I think I raised the point that somewhere I saw – and it might have been in the 2002 notice – that the Commission itself characterised the interests that they then referred to as being a financial interest in the outcome in relation to the ----

MR. JOWELL: In relation to the 2002 Manchester inquiry?

THE PRESIDENT: Yes.

MR. JOWELL: The short answer to this is that the Commission could have said that until they were blue in the face ----

THE PRESIDENT: It does not make it so.

MR. JOWELL: It does not make it so, and when looking at the facts in this case Professor Moizer was paid a regular retainer by the Greater Manchester Pension Fund but he does not have any financial interest in the outcome of either the MAG inquiry in fact, and certainly not the BAA inquiry, certainly not this inquiry. The fact is that this is not an automatic disqualification case, there cannot be any doubt about that. I appreciate that the Competition Commission used very loose language in their 2002 statement, but as I have said that simply does not make it the case.

THE PRESIDENT: Suppose he had been on a commission?

MR. JOWELL: That might be different, quite, exactly. I should just add that there is also high authority that it is undesirable to extend the automatic disqualification rule beyond its current ambit, I just refer to the *Locabail* case – I will not ask you to turn it up – it is in vol.1 at tab 9, p.474 at paras 13 to 14. It is not desirable to extend automatic disqualification any further.

So that leaves us with apparent bias. The test in this area is indeed beyond dispute, it is the test finalised in *Porter v Magill* but the test is not that which Mr. Green described in his oral submissions. Mr. Green, you will recall, put the point this way: "The essential question for you on the facts of the case is whether there is an appearance of bias viewed objectively from the standpoint of the fair-minded observer, and you will ask in relation to the facts as they unfold, what the fair-minded observer would have been concerned about, what he or she might have thought at the time." Put that way one might think that the test is one whether the informed observer thinks there is an appearance of bias, but that is not the test, there is a very important difference. The actual test is whether a fair-minded and informed observer having considered the facts would conclude that there was a real possibility that the Tribunal was biased. So the Tribunal should not be asking whether a fair-minded observer would detect a mere appearance of bias, but whether a fair-minded observer, an informed observer would consider there to have been a real possibility that the Tribunal was - actually was - biased. The test demands a realistic approach in at least two ways. First, it demands realism in the sense that it requires that there should be a real - i.e. realistic - possibility that the decision-maker has been biased. It is not enough that there should be a mere fanciful or remote possibility. The real possibility does not have to be better than

evens, but it does have to be substantial. It has to be a realistic chance - not an outside or a minimal chance.

The second sense in which the test is concerned with reality rather than appearances is that it asks whether an informed observer in light of the complete facts actually would perceive that there was a real possibility of bias. It is not enough that there might have seemed to have been biased, or that bias could have been reasonably suspected on first impression. It is necessary to conclude that the decision-makers could realistically have been biased in view of all the objective facts.

My learned friend has had frequent recourse to Lord Hewart's famous statement that justice must not only be done but must be seen to be done, or manifestly and undoubtedly be seen to be done. The truth is that the real possibility test applies that principle, but only up to a point. In the final analysis that principle also has to be tempered by considerations, as Mr. Swift observed, of realism and common-sense. That is essentially in order to allow the wheels of administration, the wheels of justice to roll freely. That is why the test is objective and requires there to have been a real possibility against all the facts as found, rather than a mere superficial appearance.

I think it is important to just bear in mind how the present test evolved. I do not want to go on a lengthy trawl through all the authorities, but by way of brief summary, and at the risk of considerable over-simplification, I would endeavour to summarise it as consisting of essentially five stages. The starting point is the *Sussex Justices* case in 1924, which is the case where Lord Hewart made his famous statement. That was the high watermark of the test of apparent bias. Based on one reading of Lord Hewart's judgment, it was enough to show that there was just some reasonable suspicion of bias. In short, any remotest snip, any whiff of bias would do. That, unsurprisingly, led to a slew of unmeritorious claims and attempts to quash decisions on the flimsiest of pretexts of bias.

That led to the second stage, which is when, in *R v. Cambourne Justices (ex parte Pearce),* the Divisional Court, presided over by Lord Goddard, CJ, swung the pendulum all the way back to the opposite extreme. In that case the court held that the test was a real likelihood of bias. That test was essentially followed in a number of other cases. So, the pendulum has swung all the other way, and then we see it slowly swinging slightly back.

The third stage is *R v. Gough*, which is in the bundles. In that case the court effectively approved the *Cambourne* approach over the *Sussex Justices* approach. So, a mere suspicion was not enough. There had to be a real likelihood, but it did slightly temper the *Cambourne*

approach because it said that a real likelihood meant a real possibility - not bias on the balance of probabilities.

Again, I am not going to invite the Tribunal to take it up, but I just give the references to *R v. Gough* - Bundle 3, Tab 12, pp.662 to 664. I would also ask you to look at p.668A to D and also to Lord Woolf's very short judgment with which Lord Goff agreed. That judgment was then followed in *Locabail*, Bundle 1, Tab 9. This is still the third stage. This is simply following *R v. Gough*. What they say in *Locabail* is that the law has been decided in *R v. Gough*. You will have seen *Locabail*. My learned friend took you to it already. I just draw your attention to the passages at 476A to C and at 479, paras. 22 to 24. What comes out of those authorities very clearly is that they are looking at an objective test of whether there is a real possibility, and that a mere suspicion is absolutely not enough. One is not looking at appearances in the sort of simplistic sense.

The fourth stage is *Re. Medicaments*, where the Court of Appeal shifts the test from one being the real possibility of bias from the standpoint of the court to the real possibility of bias from the standpoint of the informed observer. That slight adjustment brought the test broadly into line with the Strasbourg jurisprudence, but what the court did not do was to adjust the test from an objective, real, realistic approach. You can see this from *Re. Medicaments* itself and from what they note comes out of the Strasbourg jurisprudence. It may just be worth turning that up very quickly in Bundle 1, Tab 11. You will see from p.712 there is a review of the cases in the three previous stages that I have mentioned, including *R v. Gough* (paras. 42 and 43, and the first part of para. 45, 54, and 62). You will see they go through the order of the various stages there. Just picking it up at para. 62, p.720, they note,

> "Sir Thomas Bingham MR, remarked, at p.162, that the effect of the decision in R v. Gough was that: 'The famous aphorism of Lord Hewart, CJ that "justice ... should manifestly and undoubtedly be seen to be done" is no longer, it seems, good law, save of course in the case where the appearance of bias is such as to show a real danger of bias'".

Then, going on to the Strasbourg case law, it is important to know what comes out of that because one can see at para. 73, for example, if one just picks it up there, they are talking about the Strasbourg case of *Delcourt v. Belgium*. You will see the quotation in para. 73, just next to G. They quote the court as saying,

> "The preceding considerations are of a certain importance which must not be underestimated. If one refers to a the dictum 'justice must not only be done; it

must also be seen to be done', these considerations may allow doubts to arise about the satisfactory nature of the system in dispute. They do not, however, amount to proof of a violation of the right to a fair hearing. Looking behind appearances, the court does not find the realities of the situation to be in any way in conflict with this right".

You will see at the next paragraph,

"This decision shows the Strasbourg court is concerned to look at the reality behind a situation that might give to the litigant an appearance of injustice and supports the approach of the English court in reviewing the risk of bias having regard to material circumstances that may not be apparent to those observing the trial. It does not go so far, however, as to formulate a test of real danger that the tribunal under review was actually biased".

You will see from that, and from the later review of the Strasbourg jurisprudence, particularly at paras. 83 to 85 - and, again, I do not think I need to read - that what come out of it is that the Strasbourg court was also looking at an objective test, looking behind appearances at the reality.

Then the final stage is in *Porter v. Magill* where the House of Lords essentially approved *Re Medicaments* but it makes a very slight adjustment. It say that it prefers the use of the term "real possibility" rather than the alternative of "real danger".

The point I am making is that although the pendulum has swung back a notch or two from the *Cambourne* test, it has not swung back all the way to the *Sussex Justices* test of "mere suspicion or appearances" in the pure sense. One still has to find that there is a real possibility that the decision makers have actually objectively been biased.

The objective approach is reflected in the fact that what we are concerned is the decision maker's actual knowledge. Could I just ask you to turn up the *Locabail* case on this point, which is in bundle 1, tab 9, and go to p.477. You will see at 18 to 19 they say:

"When applying the test of real danger or possibility (as opposed to the test of automatic disqualification under the *Dimes* case ...) it will very often be appropriate to inquire whether the judge knew of the matter relied on as appearing to undermine his impartiality, because if it is shown that he did not know of it the danger of its having influenced his judgment is eliminated and the appearance of possible bias is dispelled."

Then they quote from another case. Then they refer to the *Gough* case, and just picking it up below F:

"While a reviewing court may receive a written statement from any judge, lay justice or juror specifying what he or she knew at any relevant time, the court is not necessarily bound to accept such statement at its face value. Much will depend on the nature of the fact of which ignorance is asserted, the source of the statement, the effect of any corroborative or contradictory statement, the inherent probabilities and all the circumstances of the case in question. Often the court will have no hesitation in accepting the reliability of such a statement; occasionally, if rarely, it may doubt the reliability of the statement; sometimes, although inclined to accept the statement, it may recognise the possibility of doubt the likelihood of public scepticism. All will turn on the facts of the particular case."

If one just turns forward to p.487 of the judgment they say at para.55:

"This is a question that we have put to ourselves. In our view, once the hypothesis that the judge 'did not know of the connection' is accepted, the answer, unless the case is one to which the *Dimes* case applies, becomes obvious. How can there be any real danger of bias, or any real apprehension or likelihood of bias, if the judge does not know of the facts that, in argument, are relied on as giving rise to the conflict of interest."

So if you do not know you cannot be biased. It does not matter what the appearance is. By demanding a real possibility in the actual world, the courts avoid an unworldly and puritanical approach. It recognises the fact that conflicts can and do arise, but not every conflict, however remote or fleeting, will lead to striking down a decision.

I should just say that the agnosticism that the court can take as to the question of the decision maker's knowledge, or lack of it, cannot extend to other findings of fact, other relevant findings of fact. For example, when the court has to determine what was said by the Tribunal in relation to whether there has been proper disclosure or not, the court is not absolved of the need to determine that fact or all of the other facts in the ordinary way. I will just give you a reference for that, which is the *Jones v. DAS*, para.23, which you will find in your bundle A2 at tab 17.

THE PRESIDENT: You do not want to look at that now?

MR. JOWELL: I do not want to take you to it, but I just make the point that the Tribunal reviewing the question of apparent bias must determine all the facts. It is only on this point of knowledge that one may say, "We are agnostic, we are not going to determine it".

THE PRESIDENT: Was there a page reference?

MR. JOWELL: It is para.23. The Tribunal should bear in mind that when it makes a finding of apparent bias, therefore, it is determining that on the facts as found a fair minded observer would conclude there was a real possibility that the decision making body was actually predisposed or prejudiced against one party's case for reasons unconnected with the merits. That is a serious finding to make, and it is not one that should be made at all lightly.

I will not take you to the test of what "bias" means because Mr. Swift has already done that, but it does actually mean "predisposed or prejudiced irrespective of the merits", and that would be perceived to be a real possibility by the decision makers.

The final point on bias, and it is not an unimportant one, is that it is the decision making tribunal that must be found to have an appearance of bias, the decision making tribunal as a whole. Contrary to Mr. Green's submissions, it is not necessarily the case that where one member of a tribunal, or one member of a tribunal that was a member of the tribunal but is then recused or resigns for it, it is not the case that that means automatically, or even necessarily, that the whole tribunal is tainted by apparent bias. It is a question of fact in each case. Can I just take you to authorities bundle 3, tab 22. This is the case of *AMS Shipping v. Bruce Harris*.

THE PRESIDENT: Yes, the one we have had a glance at.

MR. JOWELL: Yes, you have had a glance at it. This is the point I wanted to make. You will see it is a decision of Mr. Justice Andrew Smith. Essentially what happened was there were two arbitrators and a third was appointed. Just picking it up from para.7 of the judgment, you will see:

> "In October 2004 the three arbitrators conducted a hearing of what were called preliminary issues but effectively were the pleaded issues relating to liability for the charterers' claim. In the course of the hearing, in circumstances which are fully described in a judgment of Morison J, a question arose whether Mr. Matthews ..."

who was one of the three arbitrators, Mr. Matthews QC –

> "... should recuse himself, but he did not do so.
>
> In October 2005, after the hearing was concluded but before the interim award was published, the owners notified the tribunal that they applied to amend their pleading to introduce an allegation that they made the charterparty because of an actionable misrepresentation made in the course of the negotiations by the charterers ..."

Then there is some detail about that. It goes on:

"On 23 December 2004 the tribunal of three arbitrators published their interim award on the preliminary issues. It was substantially in the charterers' favour."

Here is the important bit:

> "In January 2005 the owners challenged the award under [the Arbitration Act]. Their only complaint relevant for present purposes was that Mr. Matthews should have recused himself from the reference because the owners' principal witness at the hearing of the preliminary issues was a broker called Mr. Petros Moustakas and on a previous occasion Mr. Matthews, instructed by Waterson Hicks, who acted for the charterers on this application and in the arbitration that gives rise to it, had appeared as an advocate on an application under s.43 of the 1966 Act for disclosure of documents by Mr. Moustakas, who had apparently been involved in broking a charter the terms of which are in dispute. Mr. Matthews disclosed this matter at the hearing of preliminary issues after Mr. Moustakas had given evidence, but stated, 'I am satisfied that there is no basis for any objection to my continuing and considerable basis for objecting to my ceasing to do so. I consider it would be wrong in principle for me to recuse myself and the Owners dealing fairly with the situation should now acknowledge the same'."

But Mr. Justice Morison did not take the same view because you will see over the page that he held that Mr. Matthews should have recused himself from the reference, but that by taking up the award at the very least the owners had lost any right that they may have had to object to the interim award, so there was apparent bias, and possibly automatic disqualification – I think it is apparent bias, but there was waiver.

In para. 14 you will see:

> "After the judgment of Morison J Mr. Matthews resigned from the reference on 24 November 2005. He was not removed by any order of the court, but at the end of his judgment Morison J had said this:
>
> > 'In my view, given the facts and conclusions I have stated, Mr. Matthews Q.C. should not continue to act in this matter. I have not heard argument about the continuation of the other two arbitrators but would express the hope that they could continue'."

What happened then was an application was made to say that the whole thing should be set aside, rather that the other two arbitrators were tainted by the bias of the first, and if I could ask you to pick it up at para. 42 which is a few pages on:

"However, Mr. Zaiwalla also argued, that … when one member of a tribunal is tainted by (actual or apparent) bias the whole tribunal and each member of it is tainted. It follows, the argument runs, that there will be justifiable doubts about the impartiality of each member so that the matter must continue in front of a tribunal composed entirely of new members."

In support of this Mr. Zaiwalla referred to *R v Sussex JJ* to *Pinochet* and to *Re Medicaments*. There is a citation from Lord Phillips' judgment in *Re Medicaments*. Then at para. 44 the judge says:

"I am unable to accept that there is an invariable rule, or it is necessarily the case, that where one member of a tribunal is tainted by apparent bias the whole tribunal is affected second-hand by apparent bias, and therefore should recuse themselves, or should be excluded, from the proceedings. After all, it is common practice when a juror has to be discharged (for example, because he or she recognises a witness) for the judge to consider whether there is a risk of 'contamination' of other jurors, and if there is no reason to think that there is, to continue the trial with the remaining jurors."

He then cites the *Sussex Justices* and the *Pinochet* cases, and the *Re Medicaments* case, and he says in para. 45 ----

MR. GREEN: Could you just read that bit in?

MR. JOWELL: Certainly.

"In the *Sussex Justices* and *Pinochet* cases, the tribunal had already reached a decision and in those circumstances it is not surprising that those who had committed themselves to the decision should not be on the tribunal who conducted a re-hearing. In the *Pinochet* case Lord Browne Wilkinson said:

'It was appropriate to direct a hearing of the appeal before a differently constituted committee, so that on the rehearing the parties were not faced with a committee, 4 of whom had expressed their conclusions on the point at issue'.

45. The position was rather different in the *Re Medicaments* case, but the passage that I have cited from the judgment of Lord Phillips makes clear the relevance of the fact that there had been discussions involving Dr. Rowlatt about matters upon which there was to be a re-hearing. That is to say, the tribunal would be re-hearing matters, issues which presumably they would have discussed with Dr. Rowlatt.

> 46. This is not to say it is irrelevant to the question that I have to decide that the two arbitrators will have had discussions with Mr. Matthews in relation to the preliminary hearing, and I shall refer to this later in my judgment. However, I reject the suggestion that it follows from the authorities cited by Mr. Zaiwalla or it follows as a matter of law from the finding of apparent bias on the part of Mr. Matthews that the whole of the original arbitral tribunal and each member of it are tainted by apparent bias. The enquiry depends upon the particular facts of the case."

Then leaping ahead to para. 59, if I may he then concluded:

> "Any objection to the two arbitrators continuing with the reference because Mr. Moustakas will be a witness would not be on the basis of any involvement they themselves have had with Mr. Moustakas. It could only be made on the basis that there was a risk that they would be other than impartial because they have been influenced by discussions that they had with Mr. Matthews. It seems to me that this suggestion would be fanciful. The question is one of apparent bias, not actual bias, but it is to be considered against the background that Mr. Matthews stated during the hearing that he recalled nothing relating to the previous case that gave rise to any doubt in his mind as to the propriety of Mr. Moustakas' conduct, and there is no suggestion that that was not the case. This being so, I cannot accept that a fair minded and informed observer would conclude that there was any real possibility that there have been discussions between Mr. Matthews and the two arbitrators that might improperly influence their assessment of Mr. Moustakas' evidence or detract from their impartiality."

So I take from that the principle that there is no automatic rule, it is a question of the facts in each case.

Can I now turn to waiver. I want to make five points on the law of waiver, if I may, and I will get to the facts eventually, but I do think it is very important to get clear in one's mind what the principles are because there has been some vagueness on this.

The first point on waiver is the question that you asked Mr. Green about the legal position where the affected party does not know everything that might be relevant, either does not give any thought to it or sits tight; there is no disclosure, but as it happens they know, and you asked whether that could be an implied waiver. The answer is: "Yes", there is indeed. Mr. Swift showed you some authorities yesterday and I would like to take you to some further authorities on that, but before I do I should just mention the second point on waiver,

which is that the authorities actually go further than that, they stipulate that someone who knows and sits tight has waived, but they also say that the burden is on the objecting party to assert and provide evidence that it did not know the facts it alleges give rise to an appearance of bias.

If I can try to make good those points by reference to the authorities. If we can take up vol.3 at tab 8, this is an old authority which is referred to in the extract of *de Smith* that is in the bundle; I think it is still a good authority. It is *R v Byles*, in my version it reads like Arabic or Hebrew from right to left rather than left to right. You will see that it is the Chief Justice, Lord Alverstone and others. Essentially the issue here was that there had been a decision of the Magistrates and one of the justices, a Mr. Elgood was a chairman and a prosecutor; he sat on the Bench, he took no part in a hearing it is said, he did not accompany the other justices to their private room when they retired to consider their decision, but he did sit on the Bench and apparently he smiled during the giving of the evidence, and he was responsible for the institution of the prosecution.

They express very strong views that what happened was completely wrong and effectively that there was an appearance of bias, but I just want to take up the actual decision they reached, which was that there was waiver. If you take it up in Lord Alverstone's judgment – I am afraid it is very unclear. Do you see the passage that starts "What I am perfectly clearly about --", just about six lines up from the bottom.

> "What I am perfectly clear about is this, both Mr. Hollidge and his solicitor knew of the presence of Mr. Elgood upon the Bench, and made no protest against it. They kept this point in reserve. When an application like the present is made, it is necessary for the applicant to satisfy the court that he has no knowledge of the point at the time when it might have been raised. This is clearly not so in the present instance and for that reason the rule must be discharged".

So, there was waiver. The critical words here are,

> "It is necessary for the applicant to satisfy the court that he has no knowledge of the point at the time when it might have been raised".

In the judgment of Mr. Justice Avory, two sentences in, he says,

> "I am satisfied that both the applicant and his solicitor knew of the position occupied by Mr. Elgood and were well aware of the fact that an objection might have been raised in the first instance if there was the slightest suspicion of an appearance on his part that he was taking any part in the hearing. No objection was taken, and therefore the point was distinctly waived, possibly with a view to

> raising it later on when questioning the proceedings in the petty courts. I agree that the rule must be discharged".

So, both of those first two points come out of that authority, the first being that indeed you can have implied waiver if you sit tight and you know; secondly that it is on the applicant to negative knowledge to say, "I did not have knowledge at the relevant time".

If I could just make good that second point? You will see that in, I believe, *King v. Williams* in the supplemental bundle of authorities that we provided this morning. There was apparently a rather extraordinary law at the turn of the twentieth century that a baker, for some reason, I have no idea why, could not sit as a magistrate. A baker was charged under Section 4 of the Act with selling bread otherwise than by weight. I suppose that is the equivalent of our modern day metric martyrs. He was convicted in the presence of two justices. He then applied to quash the conviction on the ground that one of the justices alleged to have taken part in the conviction was a person concerned in the business of a baker. If I can just ask you to turn to the judgment of Mr. Justice Channell at p.613,

> "The court is of opinion that this rule should be discharged. No objection was taken to the jurisdiction of the court below at the hearing before that court; that being so, it is the rule of this court not to grant a writ of certiorari except upon an affidavit which negatives knowledge on the part of the applicant when he was before the court below of the facts on which he bases his objection. The rule is established on good grounds".

Turning to Mr. Justice Rowlatt's judgment at p.615, he says,

> "It is a very salutary rule that a party aggrieved must either show that he has taken objection at the hearing below or state on affidavit that he had no knowledge of the facts which would enable him to do so".

I say that there is a very sound policy reason why this principle enunciated in these old authorities should hold as good today as it ever did. The reason is that it is very easy for a disgruntled litigant to allege after the event that this or that conflict arises, particularly with the accessibility of information in the modern world. It would be quite wrong for decisions to be overturned if the litigant knew that information all along. It is contrary to common-sense to expect the decision-maker to be able to prove the litigant's knowledge of these facts. It is bad enough that a litigant can just assert a lack of knowledge, even if the information may be somewhere in the public domain, but to permit the litigant to challenge a decision without at least having positively and clearly to affirm that he, or she, did not

have the requisite knowledge at the relevant time would be a recipe for unmeritorious claims and wasted resources - re. a litigant's charter.

If I can just quickly show you a more recent Australian authority? I do so purely because it is referred to in the extract of *de Smith* that we have in the bundle, as casting a question mark over the need to prove on affidavit that there is no knowledge. It is in the supplemental bundle at the next tab. *R. v. Magistrates' Court at Lillydale (ex parte Ciccone).* One can pick up the facts really from p.127, at the very bottom of the page. He says,

> "In my view, the conduct of the magistrate in travelling from the courthouse to the subject house in company with counsel for the respondent in a car driven by one of the witnesses for the respondent was most indiscrete".

I should add here that there is nothing to indicate at the stage when the magistrate accepted the lift from Mr. George that he was aware -- and so on. The rest of the paragraph just describes the situation, but you get a flavour of the nature of the conflict from that. If you then turn forward to p.131 and onwards, you will see that he undertakes a detailed review of the authorities on waiver. I can pick it up at p.134 where he reaches his conclusions.

> "For myself, I doubt whether any one test should be regarded as exclusive test. Certainly, if a case of 'lying by' is made out, certiorari would be refused. Equally, if a clear case of election is made out, that is, the applicant knowing of the facts and knowing what alternative courses are open to him on those facts, intentionally chooses one way rather than the other, he will be held to that choice (or election). In my view, however, an applicant for certiorari may also be refused relief if it is shown that with knowledge of the facts entitling him to object to a continuance of the legal proceedings he has not objected but has taken an active part in the proceedings right down to judgment".

Then he cites from an Australian case. He says, "When such an objection is taken, if it be a real one, it can be at once yielded to. Even, however, if the judge or magistrate should know the objection to be ill-founded he would serve the interests of justice beast by declining to adjudicate if there be any colour for the objection, unless, indeed it be clearly vexatious, or unless yielding to it would work injustice to others. But if the objection be not taken there is no opportunity of yield, and no one is so much to blame as the litigant or his lawyer who, while aware of a disqualification in the Bench, says nothing. A litigant who knows (as the applicant did here) that there may be some objection t the constitution of the Bench is bound to mention it at once, in fairness both to the magistrate and to the other side,

and even if the objection be a good one the litigant cannot afterwards be allowed to complain if with knowledge he remains silent".

This is a quote from the other Australian case of Hood, J. He then says, "The same view is expressed --" I am sorry. I skipped over. I should have said he was there quoting from the judgment of Mr. Justice Hood. He says, "This same view is expressed in *R. v. Justices of Rankine River* --" and the case is cited there.

> "In a case such as that referred to by Hood, J., it may be that an intention to waive or forego his right to object must be imputed to the objector or applicant even if he has no such actual intention.
>
> In the present case the affidavit of the applicant does not disclose whether or not he was aware, at the time when the hearing was resumed, of his right to object, but the absence of knowledge of such right does not seem to have been treated as material in *Re. McCrory; ex parte Rivett*, where, indeed, the case was one of an unrepresented litigation Ordinarily, when a party is represented by a solicitor and counsel, one would expect the knowledge and advice as to the legal rights available to come form them. As I have said, I have no evidence as to their state of knowledge but I consider I must impute to them the extent of knowledge which a reasonably equipped solicitor and counsel would have ----"

THE PRESIDENT: He is talking there about knowledge of the right to object rather than knowledge of the underlying fact.

MR. JOWELL: Yes, that is correct. That is correct. I am not on the point though, which I will come to, about what is the scope of the knowledge that the applicant is said to have. I am sure you will read this at your leisure, but picking it up at the last two paragraphs,

> "Mr. Batt suggested that once an irregularity was established, the onus was on the respondent to prove waiver or election or other conduct disentitling the applicant to relief, and that on the material before me I could not be satisfied that the respondent has discharged that onus. I doubt if Mr. Batt's analysis as to the onus of proof is the correct analysis. I think the ultimate question is whether on the whole of the facts the applicant is entitled to *certiorari* and I think this is particularly true where the challenge to the order is based on an allegation of a denial of natural justice. In such a situation the Court might well look to the overall question of the justice of the whole situation. It is also true that in a case such as this, where the error does not appear on the face of the record and what is

relied on is an alleged denial of natural justice, the issue of the writ of *certiorari* is discretionary."

Finally he says:

"... I think that even if the evidence does not establish a case of 'lying by' or 'nursing a point' (and it does not), it would be wrong to allow the applicant – his advisers having chosen to go on with the hearing up to judgment before the magistrates – to raise this point now. I do not think they should be allowed to thus to eat their cake and have it, to approbate and reprobate."

We say the principles are this: a party that goes forward with a case, or in our case an inquiry, who is legally represented and knows of facts which give rise to an appearance of bias must raise any objection and must do so immediately. If you fail to do so you will be regarded as having waived your rights or elected to proceed.

Whether there has been incomplete disclosure or disclosure in an unsatisfactory form is ultimately completely irrelevant, if the applicant knew of the relevant facts himself and chose to go forward.

Those are the first two points. Point three on waiver is this: the knowledge required and the disclosure that has to be made in the absence of prior knowledge, is of all the essential facts, all the material facts, not every bit of detail. Mr. Swift has already made that point on the back of the case of *Jones v. DAS* and *Baker v. Quantum*. They both make the point very clear. In *Jones v. DAS* of course the member of the tribunal told Mr. Jones that her husband had occasionally been instructed by the respondents but did not say that he had worked for one of the five chambers that was on the DAS list and the barrister was also on the panel, that he had been instructed on eight occasions between March 2001 and November 2001 and that he had been paid £3,000. None of that was told to the claimant, but the tribunal still considered there was waiver.

Point four – again this is illustrated by the *Baker v. Quantum* case and also I think by some of he authorities I have already taken you to – is that it is not open to a party which thinks it has grounds for asking for recusal to take a leisurely approach to an objection. Applications for recusal go to the heart of the administration of justice and must be raised as soon as practicable. That is what is said in *Baker v. Quantum*.

Point five is the interesting point that the Tribunal has already raised about the extent to which knowledge includes some degree of what might loosely be called "constructive knowledge". The point is made in **Chitty**, which is the final authority in our bundle. It is at the very end, after the extract from **Snell**, it is two pages at the very end. You will see that

it is a section of **Chitty** discussing the differences between waiver by election and waiver by estoppel. It is section 24-008. It says at the very top of p.1545:

> "But there are also important differences between the two types of waiver. In the case of waiver by election the party who has to make the choice must either know ..."

and here are the important words –

> "... or have obvious means of knowledge of the facts giving rise to the right, and possibly the existence of the right."

We have not taken you to the cases which are referred to in the footnote because they really do not illuminate it any further. They simply refer to that as the test. They "must either know or have obvious means of knowledge".

If it is said that that is in a book on contracts, although it is, of course, dealing with waiver and election, then could I ask you turn to the second authority which is in the new authorities bundle, which is *The Crown and Toovey*.

THE PRESIDENT: Which kind of waiver are we dealing with here? Which kind of waiver is this?

MR. JOWELL: In the present case?

THE PRESIDENT: Yes, is it election or is it ----

MR. JOWELL: The extract goes on to say that in cases of election you do not need to show knowledge at all. I think I have to accept that this is waiver by election. It is not waiver by estoppel, because neither knowledge of the circumstances or of the right is required. I think this is ----

THE PRESIDENT: This is waiver by election.

MR. JOWELL: Yes. Your election is through conduct, through continuing to participate in the proceedings.

In *The Crown and Toovey* the claimants were solicitors who were, like all solicitors, required to pay into the Solicitors Indemnity Fund, and contributions could be adjusted by applying a loading or a discount based on the claims records of the principals in the firm. The Law Society had the power to, and has the power to, waive contributions. The claimants applied for a waiver on the basis that they had been denied a discount and their premiums had been excessive and the claim was rejected. The claimants appealed and the appeal by the Professional Standards Board. The claimants asked for and were given the names of the members of the sub-committee of the Professional Standards Appeals Sub-Committee that they were appealing to who would consider their case. The sub-committee

then rejected their appeal. They then applied to have that decision quashed. Can I just ask you to pick it up at para.52 – I am told that I should go to para.27 first just to make clear the facts:

> "27 The Claimants were provided with a copy of the draft report to go to the Appeals Sub-Committee, and given an opportunity to comment on it and to suggest amendments. They took advantage of this opportunity. In addition, by letter dated 30 March 2001, Mr. Toovey asked for the names of the members of the Sub-Committee who would consider the Claimants' case. Those names were provided to the Claimants by the Law Society by letter dated 2 April 2001. The Claimants did not object to any members of the Sub-Committee."

Then at paras.52 to 54 Mr. Justice Stanley Burnton says:

> "As mentioned above, the Claimants were informed by the Law Society who the solicitor members of the Appeals Sub-Committee would be. It must have been obvious to the Claimants, as solicitors and members of the Law Society, that the members of the Sub-Committee or some of them would be principals in private practice. Whether they were so could have been ascertained by enquiry from the Law Society, from the Law Society's internet site or from a number of publications, such as Butterworths Law Directory. Mr. Toovey did not address this issue in his first affidavit. It was referred to by Ms. Ursula Marsay-Jones, a professional indemnity consultant and a former employee of the Law Society, who has advised the Claimants and sworn affidavits on their behalf. She submitted that 'the argument that the Appeals Committee is not impartial or independent is credible' but did not refer to Mr. Toovey's knowledge of the members of the Sub-Committee. Mr. Toovey did not refer to the matter in his second affidavit. In her witness statement Ms. Marsay-Jones made the following points:
>
> (1) The claimants did not know that their matter would not receive proper or fair consideration.
>
> (2) The law Society did not advise the Claimants as to the Committee members' status within private practice.
>
> The first point is irrelevant to the claim of waiver. The whole point of waiver is that a party must decide whether to object to a tribunal before he learns of its decision. The second point does not meet the fact that the relevant information was available to the Claimants had they sought it. Ms. Marsay-Jones noticeably did not assert that the Claimants were unaware of the status of the members of the

Sub-Committee, although I was told by Mr. Juss, on instructions, that the Claimants had not actually known their status.

53. In my judgment, the Claimants, having been given the names of the members of the Sub-Committee, being on notice that its members would be likely to include principals, and being able to ascertain whether or not they were principals if they considered that fact material, and having failed to object to those members participating in their appeal, waived any objection to those members of the Committee on the ground of their interest as principals in the outcome of the appeal."

THE PRESIDENT: I suppose it is a bit nuanced that, is it not, because what they knew was enough as it were ----

MR. JOWELL: To put them on notice.

THE PRESIDENT: Well it was said that they must have realised that those people would have been principals in the firm, they could have confirmed it by looking at the website.

MR. JOWELL: Yes, but there is also the passage that you will see on instructions from counsel who says they had not actually known their status – it is at the bottom of para. 52: "I was told by Mr. Juss, on instructions, that the Claimants had not actually known their status."

So the principle I draw from that is where a fact is disclosed and a reasonable person would draw an obvious inference from the fact that it has been disclosed then that inference will also form part of the facts that are known to him, or taken to be known by him.

Equally, where a fact puts a party on clear notice that there may be some matter of detail that is capable of very easy resolution by a simple inquiry from matters in the public domain, then again the party is fixed with knowledge of those further details.

I do not go as far as to say that every fact in the public domain is taken to be knowledge, but I do go that far. As we will see, I think, when we come to the facts that is enough to dispose of the claim in relation to the first stage.

Can I now turn now on to the facts. Mr. Green's submissions create a lot of heat about the facts in 2007 and 2008, but I think it is important to appreciate three key considerations.

First, there can be no serious doubt but that someone at BAA did see the 2002 notice, which he takes as his benchmark for the type of disclosure that he says should have been made. That was a point that Mr. Swift made, and I am not going to repeat it. Secondly, and this is the point that I would like to focus upon, which is that even absent the 2002 notice the essential facts were either already known to BAA or were disclosed to them in April 2007

or, at the very least, they had knowledge of information from which the essential facts were a clear, if not a necessary, influence.

Thirdly, the entire basis for the acute and intolerable conflict that Mr. Green referred to was a fundamental misconception about the nature of a pension fund and those who advise it. When that misconception is dispelled the nature of the links that the conflict is said to give rise to are very remote, certainly not the acute conflict that was referred to.

I am not going to repeat the first point, but it is not suggested that the responsible individuals in BAA did not see the 2002 notice at the time, and it is perfectly obvious that they did because it was on the Commission's website in relation to the 2002 BAA inquiry; it is inconceivable that they did not look at it. We have not seen any statement from the head of the 2002 inquiry that he did not see it. We say that the burden is on BAA to show that he did not have knowledge, negative knowledge and it has not done so. Whether Mr. Herga recalls seeing it is neither here nor there. Someone who was an agent or a representative of BAA with sufficient authority plainly did see it. It has been on the Competition Commission's website since 2002, it never came off it and it is just inconceivable that the people responsible for the inquiry did not see it.

THE PRESIDENT: What are you saying? You are saying the people responsible for which, the original inquiry?

MR. JOWELL: For the 2002 inquiry, and BAA is corporate entity and it is fixed with the knowledge of relevant officers and employees; that is not a question of constructive knowledge, it is just the application of the ordinary principles of knowledge to a company, which always has to have knowledge through its agents which are its officers and employees.

THE PRESIDENT: Just take a case, and it is purely hypothetical, five years earlier there had been disclosure for the purposes of the inquiry which finished then, all the people had left – that is not this case necessarily – but supposing all those people then had left in the ensuing period, would the corporate entity still be fixed with the knowledge?

MR. JOWELL: I think it would, they were sent the information. It cannot depend upon the vagaries of personnel or individual's recollections, that is my submission, it cannot. What one would need is a clear statement from the person who was responsible for the 2002 statement that he did not see it, but in any event as you say ----

THE PRESIDENT: On this hypothesis they did see it.

MR. JOWELL: As you say, Sir, yes, they did see it.

THE PRESIDENT: Let us assume that they did see it and, as it were, everybody has forgotten about it, people have left, but BAA, the corporate entity ----

MR. JOWELL: I would submit does have knowledge but, as you say, Sir, that is not this case, because one is talking about a notice that was on the website for the entire time.

There is no injustice about this – this is the second point – because all the essential facts were known to BAA and brought to their attention in 2007. I would suggest that if there was any conflict on the part of Professor Moizer in this period it arises from four facts. The first fact is that the local authorities of Greater Manchester owned MAG. Secondly, MAG was a possible bidder for any airports that the inquiry might order BAA to divest. The third fact is that Professor Moizer advised the Greater Manchester Pension Fund and the fourth is that the Greater Manchester Pension Fund was the Pension Fund for the employees of the local authorities of Greater Manchester.

If BAA knew those four facts then they knew of the link, such as it was, between MAG and Professor Moizer. The rest is a matter of detail, and I will come to that in due course. If they knew of those four facts they knew the link, and the link is the essential fact. What I will hope to turn to after the short adjournment, if this would be a convenient moment, will be to show that BAA did know all of those facts.

THE PRESIDENT: Yes, thank you. 2 o'clock.

(Adjourned for a short time)

THE PRESIDENT: Mr. Jowell, Mr. Swift, Mr. Green, just to let you know, we have to rise today at about 4.20. As I said yesterday, we can, if necessary, sit a bit tomorrow morning. But, we have not got much lee-way beyond 4.20, if any, this afternoon.

MR. GREEN: I asked Mr. Jowell before lunch as to how long he might take. I know he is fleet of foot. But, he tells me he will be a good hour and a half.

MR. JOWELL: I do not know that it will be a good hour and a half. But, it will be no more than an hour and a half.

MR. GREEN: That means that I might well not finish unless he is fleeter of foot. I have given him the invitation, but he is not taking it.!

THE PRESIDENT: We tell you that not, as it were, to hurry anyone, but -- I am grateful. Of course, I will be as expeditious as possible.

MR. JOWELL: Sir, may I quickly turn back to a point that you mentioned before the adjournment - the point about the knowledge of the 2002 notice? You posed to me a hypothetical question about a company in which the team had entirely gone. It was absolutely right that that is hypothetical. If I may just make that good very briefly -- If I

could ask you to look at Bundle 5, the statement of Mr. Herga at Tab 82. In the first two paragraphs he says he is a legal consultant. He says,

> "Between 2007 and 16 March, 2009 I was General counsel and Company Secretary of BAA. I held a similar position at BAA plc between 1996 and 2007 (as Head of legal Services form 1996 - 2001 and as Legal Director from 2001 to 2007)"

Then he mentions his background before that. In para. 2 he says,

> "In my role, I was ware generally of the main issues which arose during the Competition Commission 2007-2009 BAA Airports market investigation and also the Civil Aviation Authority price control references to the Competition Commission under the Airports Act 1986 (the quinquennial reviews) in respect of Heathrow and Gatwick airports in 2007 and Stansted airport in 2008. I was responsible for and involved in the legal aspects of these inquiries".

I have been asked to read para. 8.

> "Although I have now seen the Competition Commission's 2002 disclosure notice concerning Professor Moizer which related to the BAA London Airports and Manchester airport quinquennial reviews, I do not recall having seen that disclosure prior to 26th January, 2009. although I was Legal Director of BAA plc in 2002, I was not closely involved in the London Airports 2002 quinquennial review".

The point we would make is that he was Legal Director and, as such, he was responsible. Turning back to where I left off, I mentioned the four facts. I will not repeat them. The difficulty that BAA faces is that they were all known to it. The first point - MAG as a possible bidder for any divested BAA airport - was a matter that was in the public domain form at, or near, the onset of the inquiry. Mr. Green spent some time showing you articles to that effect. So, they cannot say that they did not know that MAG was a possible bidder.

THE PRESIDENT: For any airports?

MR. JOWELL: For any airport.

As to the second point - who owned MAG? - they were silent on this in their application. In our statement of intervention we pointed out that the fact that MAG - BAA's largest single competitor in the United Kingdom - was owned by the local authorities in the Greater Manchester area would be something that would be known to everyone in the aeronautical industry. It would be like not knowing that Ferrovial owned BAA. Not even BAA can act so independently of its customers and competitors as to not know who owns its major

competitor. Now, the acknowledgement comes tucked away at para. 97 of their skeleton and in Mr. Hawkins' second witness statement at para. 8 ----

THE PRESIDENT: Just give me those references again?

MR. JOWELL: In para. 97 of their skeleton they acknowledge that they knew that the local authorities of Greater Manchester owned MAG, and in Mr. Hawkins' second witness statement at para. 8, which is your bundle 10 at Tab 35. Of course, you have seen the document this morning that shows that they expressly referred to it in their submissions to the Competition Commission.

As to the third fact - that Professor Moizer advised the Greater Manchester Pension Fund - BAA, of course, cannot suggest that it did not know that Professor Moizer advised the Greater Manchester Pension Fund because they were told that on two occasions in April 2007 first in the e-mail which is at Bundle 3, Tabs 13 and 14, and then in the letter of 18th April. Could I invite you to turn that up? Mr. Green spent some time on this. It is to be found in Bundle 3, Tab 15. I would ask you just to hold this open for a moment. You will see that it is sent to them. It says,

> "I am writing regarding the interests of members and staff of the Competition Commission who will work on these inquiries".

This is a disclosure of interest letter, precisely for the purpose of disclosing potential conflicts. It is sent to Miss Louise Comer. It is cc'd to Kyran Hanks and Maureen Davey. It is also copied to Elizabeth McKnight of Herbert Smith. You will see that on the second page. It is clear from this, the second paragraph announces Professor Moizer's connection with the Greater Manchester Pension Fund.

The fourth point is: what about BAA's knowledge that the Greater Manchester Pension Fund is the pension fund for the employees of the local authorities of Greater Manchester. If they did not know that, then that is tantamount to saying that they did not know, or take the trouble to find out, what the Greater Manchester Pension Fund was. Mr. Green referred to the statement at the bottom of the letter:

> "The members mentioned above and the Competition Commission do not believe that these matters will prejudice the ability of the group to discharge its functions in an independent and impartial manner".

He referred to that as 'barmy'. He suggested, I think that as a result BAA could be expected not to do a conflicts check; not to inquire any further. That is a superficially attractive submission, but actually it is a completely false point for two reasons. First of all, this is a disclosure statement. It is made precisely to highlight interests of staff members that may

be thought to give rise to some potential conflict. BAA knew that this was its purpose. We can see that Mr. Hanks expressly considered whether this information gave rise to any conflict. You can see that in Bundle 5, Tab 82, para. 6 of Mr. Herga's statement. I do not ask you to take it up for the moment. You will see at para. 6 he refers to receiving the details of the panel. He says,

> "These were circulated within BAA by Kyran Hanks who was responsible for BAA's conduct of the quinquennial reviews and the market investigation. Kyran Hanks identified no conflicts in relation to the members of the Competition Commission panel including Professor Moizer."

I take "identified no conflicts" to mean that he carried out a conflict check. Of course, the statement is copied to a senior partner at Herbert Smith. Herbert Smith would certainly understand the purpose of this kind of disclosure statement and they would be expected to carry out a conflicts check, a routine conflicts check, regardless of any platitudes contained within it.

The second reason why this is a false point is that the Competition Commission puts this statement on all of its disclosure statements. If you go to the Competition Commission's website, as I did last night, you will see that that statement, or something like it, appears on all of the Commission's disclosures of interests in any inquiries over recent years. It is simply a pro formal statement. BAA would obviously know that. The idea that BAA and Herbert Smith would somehow be put off by this pro forma statement at this bottom just does not stand serious scrutiny. If there are any doubts about that one just needs to think their terrier like conduct in pursuit of the perceived conflicts of Mr. Earwaker. One sees about five or six letters going back and forth with lots of balm being applied by the Competition Commission, but BAA are not deterred.

To return to the main point, having been told that Professor Moizer worked for the Greater Manchester Pension Fund, did BAA know, or is it to be taken as knowing, what the Greater Manchester Pension Fund was, namely a pension fund for the employees of the local authorities of Greater Manchester.

Having received the application and the evidence in this case Ryanair thought that the answer to this question was absolutely blindingly obvious. Of course they knew that the Greater Manchester Pension Fund was the pension fund for the employees of the local authorities of Greater Manchester. It is perfectly obvious from its name. I would invite the panel to carry out an experiment, ask someone whose opinion you respect, the informed observer, if you like, who does not know anything about this case, and say, "If I was to say

that someone worked for the Greater Manchester Pension Fund what would you think that organisation was? What would you think it was about?" I think you will find, I would wager, that four times out of five the person will say, "It must be something to do with the local authorities or local government in Greater Manchester", because that is what the name implies. There has to be a limit to the extent to which there is spoon-feeding. It is the obvious inference from its very name.

Can I just ask you to quickly turn up our statement of intervention.

THE PRESIDENT: Can we put the 18th April letter away now or do you want to keep that open still?

MR. JOWELL: Perhaps if we could keep it open for a minute. The statement of intervention is in your bundle 9, I believe.

THE PRESIDENT: Is it an annex you are going to?

MR. JOWELL: No. We could take it from the pleadings bundle.

THE PRESIDENT: Do as you like, but I have got it in the ----

MR. JOWELL: I understand it is also tab 4 of the core bundle. If one just turns to p.19, para.52.

This is what we said:

> "In Ryanair's view, the very name 'Greater Manchester Pension Fund' conveyed the essential nature of the organisation. Greater Manchester is, of course, a metropolitan county in north-west England comprising ten metropolitan boroughs or local authorities. The obvious inference from its name is, therefore, that the Greater Manchester Pension Fund is a pension fund for the officers or employees of those boroughs. It is hard to imagine what else it could be.
>
> Moreover, if after receipt of the 17 April letter, BAA and its many advisers were in any doubt what the 'Greater Manchester Pension Fund' was, they would inevitably have looked at its website."

Then we attach copies of its website at annex IV, and we do not need to turn it up. It says on the front page:

> "*Greater Manchester Pension Fund is the staff pension scheme for the ten local authorities in Greater Manchester and a host of other kindred bodies ...*'"

Over the page:

> "BAA's evidence about its understanding of GMPF is rather coy. It does not acknowledge expressly whether it did or did not draw the obvious inference about the nature of GMPF from its name. Nor does BAA expressly say whether it looked at GMPF's website or other public documents at the time. In particular ..."

and then we quote from the evidence. We say that Mr. Herga says:

> "... [they] '*identified no conflicts ... As far as I am aware, no one within BAA threat the CC's 2007 disclosure in relation to Professor Moizer was a cause for concern ...*' One presumes from this (and from the active manner in which BAA scrutinised other disclosure statements in the inquiry) that either Mr. Hanks or someone under his supervision carried out a 'conflicts check' in light of the information provided in the CC's disclosure. Even the most cursory check of its website would, of course, have identified the precise nature of GMPF to him. Timothy Hawkins says: '*As far as I am aware, no one within BAA thought the CC's 2007 disclosure in relation to Professor Moizer was a cause for concern at this time. I did not identify a link between the GMPF and Manchester Airport Group.*' But of course, as noted below, there was no link between GMPF and MAG ..."

at least not in the sense that they were directly bidding for an airport. That only comes much later. The only link is through the local authorities indirectly:

> "What Mr. Hawkins specifically does <u>not</u> say is that he (or others in BAA) did not realise that GMPF was a pension scheme accessible to employees of local authorities in Greater Manchester. The omission is revealing.

We then say it is obvious that they must have known that and we then say:

> "If BAA seriously wishes to advance a case that it did not know this, it should adduce evidence on oath from all of those responsible within BAA and its legal advisers (including those who saw the letter of 18 April 2007) (i) stating clearly that they did not know, by October 2007, that GMPF was a pension scheme accessible to, among others, employees of the local authorities in Greater Manchester and (ii) explaining what they thought GMPF was. Unless such evidence is adduced, the Tribunal is entitled to draw the clear, obvious inference that BAA knew from the outset that GMPF was a pension scheme access to employees of the local authorities of Greater Manchester."

So we threw down the gauntlet, "If you are serious about maintaining that you did not know what the GMPF was, then please provide us with unequivocal evidence". What did we get in response? We got Mr. Hawkins' second statement which you will find at your bundle 10, tab 35, if we could just go back to that. At para.8, second sentence, he says:

> "I was aware from the disclosure made by the CC to BAA at the start of the Market Investigation ... that Professor Moizer was an adviser to the GMPF. I took the

CC's letter of 18 April 2007 at face value and believed in particular that Professor Moizer had no involvement in and no knowledge of the share investments of the GMPF."

That is entirely true, but there we are.

"I was aware that Manchester Airport was owned by a group of local authorities in the Manchester area ..."

so he admits that –

"I was not aware that of the GMPF's membership and governance arrangements. I was not aware that Manchester airport employees were members of the GMPF. I was not aware that in 2002 the CC itself considered that the links between Professor Moizer and MAG were sufficient to preclude his participation ..."

That is a mealy mouthed formulation, "We did not know GMPF's membership and governance arrangements". It does not say, "We did not realise the Greater Manchester Pension Fund was the pension fund for the employees of the local authorities of Greater Manchester".

THE PRESIDENT: Can you read para.13.

MR. JOWELL: Paragraph 13:

"In the circumstances, I can confirm I was aware, following the publication in January 2008 of the CC's October 2007 hearing with MAG, that MAG could be a potential bidder. This did not cause me any concerns since I was not aware of the links between MAG, Professor Moizer and the GMPF."

- but I do not know what the means, I am afraid. I do not find in that an unequivocal statement from him or anybody else that he did not realise what the GMPF was.

I would suggest that even if he did not realise that, or even if the others did not realise that, this is a case where the court can draw an obvious inference. If you are told what the organisation is you are entitled to assume that you have disclosed that information and the fundamental fact of its nature to someone. To use an extreme example, if a member of the Tribunal were a director of Ryanair it would be sufficient to say "I am a director of Ryanair", it would not have to be explained that Ryanair was Europe's largest airline. You are assumed to know the basic nature of things, and if you say: "I am an adviser to the Greater Manchester Pension Fund", then people can draw the obvious inference from that. The only alternative explanation of the evidence the statement that Mr. Green just wanted me to take you to that he was not aware of the link, is that the link just was not a cause of concern and if that was the explanation I would submit that it was correct.

The next point that I am coming to, it is the nature of Greater Manchester Pension Fund as a pension fund. Mr. Swift has already referred you to the numerous references in the documents that say that the management panel of the Greater Manchester Pension Fund carries out a similar role to the trustees of a pension scheme, and I would also refer you to Professor Moizer's statement to that effect which is in bundle 3, para. 10, and to Mr. Morris's statement to that effect, para. 8, which is at tab 10 of the defence bundle. I know I do not need to tell a judge of the Chancery Division what a fiduciary duty is, but if I can very briefly take you to the extract from **Snell**, which is in the new authorities' bundle, the final tab. This is the chapter from **Snell's Equity** on fiduciaries. You will see at section 7-05:

> "(b) *Settled categories of fiduciary relationship*. The paradigm example of a fiduciary relationship is the relationship between trustee and beneficiary: an express trustee owes fiduciary duties to his or her beneficiaries. A resulting trustee or a constructive trustee may owe fiduciary duties to the beneficiaries of their respective trusts, but only once he or she is aware of the trust."

This is an express trustee, so it is the paradigm case of a fiduciary relationship. If one turns over to para. 7-13 under the heading "**Duties of loyalty**":

> "'The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary'. The obligation of loyalty has several facets …"

- and then he refers to the classic statement by Lord Justice Millett in *Bristol & West Building Society v Mothew*. He says:

> "'A fiduciary must act in good faith; he must not make a profit out of his trust; he must not …"

- and this is critical –

> "… 'must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third party with out the informed consent of his principal'."

It then goes on to discuss those, in particular the principle that you cannot place yourself in a position where you are in a conflict of interest, and you will see that in para. 7-14, you have to act as a fiduciary single-mindedly for the beneficiary, for the principal.

In our case, the trustees were the local authorities and the governance of the pension fund, people that Professor Moizer was advising, the trustees, and they owed a fiduciary duty to the employees to safeguard their pensions. They could not even put themselves in a

position where they were in a conflict of interest wearing their other hat as local authorities, they could not act for the benefit of the local authorities, that would be in breach of their fiduciary position.

If one turns to 7-88 which is at p.171, stating the general principle of conflicts between duty and duty:

> "A fiduciary who acts for two principals with potentially conflicting interests without the informed consent of both is in breach of fiduciary duty.
>
> In many of the earlier cases regarding conflicts between inconsistent duties the fiduciary was a party to the impugned transaction, although in a representative capacity, so that the general principle prohibiting conflicts between duty and interest could be applied. The courts recognise that the concern about temptation where a fiduciary has a personal interest in a transaction also applies, in a moderated form, where a fiduciary is involved in the transaction on behalf of another party."

Then he cites:

> > "… if the principle be that the Solicitor cannot buy for his own benefit, I agree, where he buys for another, the temptation to act wrong is less: yet, if he could not use the information he has for his own benefit, it is too delicate to hold, that the temptation to misuse that information for another person is so much weaker, that he should be at liberty to bid for another … That distinction is too thin to forma safe rule of justice.
>
> Over time this concern led the courts to develop a separate principle, prohibiting a fiduciary from acting where there was a conflict between duties owed to multiple principals at once, even where the fiduciary was not a party to the transaction.
>
> Thus, modern fiduciary doctrine requires a fiduciary to avoid acting, not only where there is a conflict between duty and interest, but also where there is a conflict between duties owed to multiple principles."

So this idea that somehow this was a pot of money for Manchester Airport Group or for the local authorities to use is tantamount to an allegation that the fund was in clear breach of its fiduciary duty. A trustee of a pension fund owes a duty of single-minded loyalty to the beneficiary, in this case not the local authorities but their employees, and this is an absolutely fundamental distinction that cannot be ignored. This was not some sort of slush fund, for the local authorities to invest in what they wanted, that is simply to ignore the fact that this was a pension fund, and the persons running the fund were in fiduciary positions.

There are, of course, companies that have invested the pension funds of their employees in other interests – Robert Maxwell is the person who comes to mind. That is not an approach to the sums of the Greater Manchester Pension Fund that would be readily foreseeable to and reasonable observer, not least where I am talking about a local authority. There is no doubt in this regard that it was MAG who approached the Greater Manchester Pension Fund at the end of November with a proposal to invest in the fund buying Gatwick. It was not the reverse, it was not the fund that approached MAG. Having received that approach I am sure that the trustees of the fund would have taken careful steps to ensure that the consideration of the proposal by MAG was motivated only with the interest of the fund in mind, and not the interests of MAG. It was their fiduciary duty to do so.

That is why nobody perceived a conflict because they saw that he was acting for a pension fund not for the local authority.

MR. GREEN: I am sorry to interrupt my friend, just so that he is factually correct, Mr. Morris para. 19 said it was the local authorities as shareholders who contacted the fund, not Manchester Airport, that is Mr. Morris, para. 19.

MR. JOWELL: It makes absolutely no difference for my purposes whether it is the local authorities or the Manchester Airport Group itself. The point is that wearing a completely different hat they had to consider that approach on its merits for the benefit of the employees, not the benefit of the local authorities.

Turning then to the other matters that are referred to in the 2002 notice. On analysis we find it impossible to see what further details they add of any material value. They say they did not know the size of the fund. That is very similar to saying in *Jones v. DAS* that they did not know the number of cases or the amount of money that was to have been paid. It is just not a material factor. It is a detail. Then they say in this vague statement that they did not know the governance structure. I just do not understand what is meant by that, or what relevance the precise governance structure is supposed to have. Once it is accepted that this is the pension fund of the local authorities, that is where the link is. The rest is just irrelevant detail.

It is said that they did not know that the MAG employees were members of the fund. Well, that is very questionable because my learned friend, Mr. Swift, has already taken you to the website that they refer to. It is only one click away. But, that statement is absolutely set out in black and white. In any event, MAG's assets -- or, the assets of MAG's employees, as it were, in the Greater Manchester pension fund were just a mere 2.8 percent of the value of the whole fund. That is referred to in my learned friend's chronology at Tab 5A. I cannot

see any significance in that. The fund would not be invested at the behest of a small proportion of the members. What about the other 97.2 percent? It would be a clear breach of their fiduciary duty to that much greater proportion to do so.

It is said that they did not know about the fleet of foot proposals or the special opportunities fund. But, the evidence on that is that they were not created for the purpose of making a bid for Manchester Airport. I will not take you to the passages, but one simply needs to read Mr. Morris and Mr. Taylor's statements to see that.

There is a suggestion that it could reasonably be anticipated, or even expected, that the Greater Manchester Pension Fund might participate in MAG's bid for Gatwick. Well, the very clear evidence is that at the time neither Professor Moizer, nor the other members of the Greater Manchester Pension Fund, anticipated that GMPF might participate in a bid. That is entirely plausible evidence because the historic investments that the fund has made - and, again, you will see this -- you do not need to take this just from Professor Moizer; you can take it from Mr. Morris as well -- They essentially invested in shares and bonds and the occasional bit of property in Greater Manchester. Nothing like an airport. The evidence is that neither the fleet of foot proposals, nor the special opportunities fund were designed with the participation of a bid for an airport in mind. My learned friend's suggestion that GMPF was gearing itself up to bid is directly contrary to Mr. Morris' evidence at para. 17. It is just an unsupported assertion.

The suggestion that Professor Moizer himself knew of a bid in advance -- Well, it is just flatly contrary to the evidence, and also to the documents because, as my learned friend, Mr Swift said, once one sees the December e-mail saying, "Professor Moizer is conflicted out", one can see that he obviously did not know -- he certainly did not know in advance of that of any bid.

You have seen Professor Moizer's own evidence that he did not in fact, even on that occasion, draw any inference that the Greater Manchester Pension Fund were about to indirectly participate in Manchester Airport Group's bid for Gatwick. His evidence is very clear - he did not realise the matter until January.

THE PRESIDENT: He was worried about it in December, was he not? He was clearly worried about it because whoever it was rang him -- I think it was Mr. Taylor - up and said, "You can stop this conversation" -- He said, "If it is anything to do with Gatwick or an airport, the conversation has got to stop". So, he clearly -- Why would he think that?

MR. JOWELL: We can turn to his evidence, which is behind the defence bundle -- One just needs to have a look at a few of these paragraphs. In para. 11 he explains that the panel meets quarterly. He is invited to participate and to comment. He says,

"Meetings are not concerned only with investment business. Every aspect of the management of GMPF may be discussed at the jointly held meetings, though my role is as explained herein".

Then, going forward to para. 34 he talks about MAG's bid for Gatwick. It is really paras. 35 to 37:

> "35. At lunchtime on 2nd December, 2008 I was called at my office at Leeds University. The call was from Steven Taylor of GMPF. This was in itself a rare occurrence. He began the call by saying: "*You can stop this conversation at any point ...*" I replied: "*If this is anything to do with airports or Gatwick, the conversation can stop now*". In saying this I reacted instinctively. The only reason why Mr. Taylor would begin a conversation in this way would be if it might cause me prejudice. The only source of prejudice would be my work at the Commission which, at that time, was concerned only with BAA's airports. Mr. Taylor replied: "Fine, I understand". Our discussion on the subject lasted less than one minute". As we know, I think it was a minute and ten seconds because we have the record of the telephone log.
>
> "I do not have a note or record of the conversation, but I recall it clearly.
>
> 36. Afterwards, I did not give the call much thought. If any issue would have been raised about airports I did not want to know about it. I made that very clear to Steve Taylor by pre-empting that subject at once.
>
> 37. Looking back now, I can say that, had I thought about it at the time, I would in any vent have had no reason to think that GMPF would itself be considering participating in a bid for Gatwick. During my long association with GMPF it has never, to my knowledge, been involved in a similar investment. GMPF has invested in shares, bonds, property, and funds".

Just to make that last point good, if we turn to Mr. Morris' statement, which is at Tab 10. Picking it up at para. 24, if I may,

"The purpose of the advisers is to provide strategic investment advice to GMPF's management and Advisory Panels. The funds themselves are predominantly externally managed and the advisers have no role in stock selection decisions. An important element of their advice is their comments on the performance of the funds investment managers

(both external and internal). From time to time, the advisers may also be asked for specific advice on discrete matters, such as a particular property investment. All the advice given by the three advisers is of a strategic nature. None of the advisers are authorised to provide advice as to specific investments in companies".

One has to be registered in order to do that.

"Professor Moizer attends all of the meetings of the Pension Fund Management Panel and the Pension Fund Advisory Panel, which take place quarterly. He is somebody whose views carry weight and authority and he has a particular strength on economic issues.

> 26. However, in this regard, I should point out that he is paid a fee of only £12,600 per annum. The intention is that he should be remunerated on a basis that reflects the amount of time that he spends on GMPF, not in relation to the performance of the underlying investments.
>
> 27. Professor Moizer has never advised GMPF in relation to any actual or potential investment in an airport, or in relation to Gatwick Airport in particular.
>
> 28. Once it was identified, following Steven Taylor's call on 2nd December, that Professor Moizer was conflicted from discussing Gatwick Airport, he was not approached at any point thereafter in connection with that potential investment, whether in principle or in relation to the specific level of investment".

Now, I pose this question: If BAA are right that it was so readily obvious that the Greater Manchester Pension Fund might participate in a MAG bid for Gatwick Airport, why is there not an article, no scrap of paper, no document to suggest that anybody anticipated at the time?

MRS. HEWITT: Can I just take you to paras. 13, 14, and 15 of Mr. Morris' statement? My question relates to the fiduciary duties that you were alluding to of the trustees of the pension fund. Would one of those fiduciary duties include the optimisation, if you like, to get the optimal return for the fund? As a result of that aim there was this Special Opportunities Fund and the ""Fleet of Foot" Fund which is referred to in 13, 14 and 15. It says in 15:

> "The intention behind the Special Opportunities Fund was to broaden the range of assets in which the Fund invests that could be expected to deliver a satisfactory return."

In fact, what it is saying is if opportunities are created there should be a quick investment decision in the circumstances, with the recession, etc, kicking in. The fact that they

traditionally went for stocks, shares and some property did not preclude it setting up a fund to react quickly to good investment opportunities. So it is a moving scene.

MR. JOWELL: Absolutely correct. There are an infinity of good investment opportunities and what I would draw your attention to is para.17, over the page, which says:

> "In preparing the Fleet of Foot proposals and the creation of the Special Opportunities Fund, I had no awareness whatsoever at the time of the Fund's potential involvement in a consortium bidding for Golf."

"Golf" is the code for "Gatwick".

I am reminded that in para.12, the "fleet of foot" proposals pre-date any involvement. If it is common ground that the involvement in the bid did not come until late November 2008, whereas the "fleet of foot" proposals come way back in June 2008. You can see that from para.12. So the idea that they were gearing themselves up bid is just directly contrary to this evidence. Yes, they were preparing for possible investments in a whole range of things.

If you look at Mr. Taylor's statement – and can I take you to Mr. Taylor's statement, tab 12 of the same bundle – at para.7 he says:

> "In relation to 'Fleet of Foot" and the 'Special Opportunities Portfolio' I would like to add that, on the basis of my involvement in the development of the report that led to the adoption of the Fleet of Foot proposals, my involvement in the Management and Advisory Panel's meetings of June and November 2008, and my reading of the relevant minutes, it is not at all clear to me that Project Golf ..."

You will remember that is the project to buy Gatwick –

> "... would meet the current criteria for inclusion with the Special Opportunities Portfolio.
>
> I confirm that to the best of my knowledge and belief Professor Moizer has never advised the GMPF in relation to any actual or potential investment in an airport, or in relation to Gatwick Airport in particular."

I am asked to read para.18, in which he says:

> "My recollection of the relevant conversation in scant ..."

We have read this already actually. It is nothing on the point. I do not think we need to go back to his account of the conversation ----

MR. GREEN: It is the last sentence that may be relevant ----

MR. JOWELL: I do not want to get into a debate, but we were discussing, I thought, the Fleet of Foot and the Special Opportunities Funds, but I am perfectly content to re-read para.18.

"My recollection of the relevant conversation is scant, but there was no reason for it to stick in my memory and I have no memory that it went otherwise than as planned. I believe that I opened the conversation as I had planned, and agreed with Peter Morris, by first of all outlining to Professor Moizer my proposed approach of starting at a 'high level' and narrowing down gradually to detail and making it clear that if Professor Moizer wished the conversation to stop at any point he should tell me so. I believe I proceeded to use words to the effect that the GMPF was looking at the possibility of considering a potentially large single investment opportunity; that this opportunity related to an airport."

LORD CARLILE: Can I just ask, Mr. Jowell, in para.9 of Mr. Taylor's statement, who does he mean by "we" – is it the trustees or is it the senior management of GMPF? It is not entirely clear, even by cross-reference to Mr. Morris.

MR. JOWELL: Because I am not representing the Competition Commission, I do not think it would be appropriate for me to hazard a guess.

LORD CARLILE: Their first port of call was Professor Moizer.

MR. JOWELL: I am told by the Competition Commission representatives that it is Mr. Morris and Mr. Taylor.

When one looked at the documentary evidence in the course of 2008, there is speculation that MAG might team up with a Sovereign wealth fund or an infrastructure fund, but there is no suggestion, nobody anticipates that they might team up with the Greater Manchester Pension Fund. I suggest that it was not reasonably foreseeable that they would, because one can see the history of the investments that they have made and they just simply have no record of investing in such things, and there is no evidence that this Fleet of Foot and Special Opportunities Portfolio have anything to do with bidding for an airport. Nobody did it with that in mind.

There are two ways perhaps to test the proposition as to whether there was any conflict that was not waived in this first period. One is to ask, what was the response of Mr. Herga and Mr. Hawkins after they learnt, they say, of the information in the 2002 notice. The answer is they did not react with the sound and fury of Mr. Green, as Mr. Swift has said, they only articulated concern related to his involvement in Gatwick bid. There is no hint of any concern based on other matters in the 2002 disclosure.

It is interesting if one just turns to their statements on this point. It is quite revealing because one sees – I think it is in bundle 5, tab 82 – Mr. Herga at para.13 says:

"Following the CC's call we were unclear of the nature of Professor Moizer's conflict. The regulatory review team searched the CC's website on 26 January 2009 and discovered the CC's 2002 disclosure notice concerning Professor Moizer's conflict of interest in relation to the BAA London airports and Manchester airport inquiries."

Then what he says is this:

"I was puzzled by the contents of the notice and unclear of the implications for the market investigation."

Not "I was outraged, there was an obvious acute red hot conflict".

If one looks at what Mr. Hawkins says it is very similar. It is tab 83. At para.11, the last sentence, he says:

"Prior to this discovery I had not been aware of the CC's 2002 disclosure. Given the limited information that we had been provided with by the CC in relation to Professor Moizer's position, the significance of this earlier notice relating to Professor Moizer was unclear to me at this time."

If that was BAA's response what would be the response of the fair minded observer?

Another way to test the point is this: what would be the position if the Greater Manchester Pension Fund had never been approached by the local authority owners of MAG in November 2008 to make a joint bid, and they had simply gone forward with their sovereign wealth fund?

On BAA's case that should make no difference, they should be able to run this entire case and say there would still be a red hot conflict.

THE PRESIDENT: If the fund had not become involved.

MR. JOWELL: If it had never become involved at all. I would respectfully suggest that the reality is that if GMPF had not actually submitted a bid, not participated, this case on bias would never have got out of the starting blocks.

Can I now turn to stage 2? I would submit that in relation to the second stage we would agree with Mr. Swift that there was waiver here too. Mr. Herga and Mr. Hawkins say that they ----

THE PRESIDENT: The points you have just made go to whether there was an apparent bias at all?

MR. JOWELL: Apparent bias at all in relation to the first stage.

THE PRESIDENT: Not to waiver, they go to apparent bias.

MR. JOWELL: Yes, the points I have made hitherto, just now.

THE PRESIDENT: Are you going on to deal with apparent bias or waiver now?

MR. JOWELL: I am going on, if I may, I am joining them. I tell you in relation to the first period that they waived because they knew of the link such as it was, and I also say that there was no apparent bias.

THE PRESIDENT: No apparent bias by testing it in the way that you have just tested it.

MR. JOWELL: Indeed, but in any event clearly waived, I submit.

THE PRESIDENT: So then we go to period 2.

MR. JOWELL: In relation to the second stage Mr. Swift has already taken you to his point on waiver in relation to that stage, and I do not intend to repeat them. I would suggest that Mr. Jones had his discussion with Mr. Herga and then they disclosed on 25th February the relevant material about Professor Moizer and BAA simply remained silent for the next four weeks on the point, they raised no objection and they allowed the Competition Commission to proceed to its decision. Only after the decision is published is the point then raised. That has all the hallmarks of a party trying to keep the point in reserve and then trying to raise it later on.

The one point they did raise was Professor Moizer's actual involvement in the bid for Gatwick, they did raise that point, but as we have seen from the evidence Professor Moizer had no involvement in the bid for Gatwick, and I do not believe that is challenged or that there is any basis for challenge.

What I would like to address you on is the substantive question of apparent bias in relation to this second period, and whether it is sufficient to quash the decision. The first point to appreciate I think on this stage 2 is that the panel that took the ultimate decision in this case did not include Professor Moizer because he had resigned about one week previously and he had taken no active part for almost four weeks previously. I accept of course that is not decisive; I accept that the fact he has resigned prior to the final decision may still lead you to the conclusion that the actual panel members are infected by bias by reason of his participation n the decision making process in the period when he was under a possible conflict, but that will only be the case when it can plausibly be said that his participation n the decision making process in the relevant period when he was under a potential conflict could realistically have had a material effect on the other panel members.

THE PRESIDENT: So this submission is on the assumption that there was no apparent bias until the Gatwick bid arose?

MR. JOWELL: Yes, well I would say until Professor Moizer knew about the Gatwick bid. I do not think it matters terribly whether it is December or January, but it certainly was not any

earlier. The point I am making is that Professor Moizer was not the decision maker here. Can I ask you just to take Mr. Clarke's statement ----

LORD CARLILE: I am sorry to interrupt you, Mr. Jowell. Is it realistic to say that he would have no knowledge until December or January? I seem to recall Mr. Green drawing our attention to some of a larger number of press cuttings, some five or six months earlier in which the press were trailing a bid by MAG for Gatwick?

MR. JOWELL: No, everyone knew that MAG was a possible bidder for Gatwick, but what no one knew until December is that the Greater Manchester Pension Fund, which is a completely different entity, and that is the entity ----

LORD CARLILE: Well you have already addressed us on that. Thank you.

MR. JOWELL: That is the entity that he was advising – not MAG – Mr. Green did an enormously skilful job in blurring the distinction, but facts are stubborn and the law is stubborn too.

If I could ask you to turn to Mr. Clarke's statement which is in defence, which I believe is your bundle 6 at tab 5, para .43. He says:

> "The Group did not take its decisions on either the competition issues or the associated remedies until the final Group meeting on 10 March when the Report was approved. By which time of course Professor Moizer was no longer a member of the Group. All decisions were unanimous by all five remaining Members of the Group."

So Professor Moizer was not a decision maker, he did not participate in the ultimate decision. As I said, I am not saying this is some decisive point, but it does change the question that the Tribunal must ask itself, which is: was the decision maker realistically affected by possible bias from the perspective of a fair minded observer?

THE PRESIDENT: I am just analysing it, again on the assumption that no conflict arose until Professor Moizer knew about the Gatwick bid involving the GMPF.

MR. JOWELL: Yes.

THE PRESIDENT: Then the question one focuses on is where there opportunities for Professor Moizer to influence the other members of the group once he knew about the possibility of the Gatwick bid?

MR. JOWELL: Exactly, I would put it slightly differently because it is not a question of whether there were opportunities, but whether it was a realistic possibility that the process of deliberations or the outcome was in fact biased. It has to be a realistic possibility.

THE PRESIDENT: That is the ultimate test.

MR. JOWELL: That was the ultimate test, but I think that ----

THE PRESIDENT: But before you get to that ----

MR. JOWELL: Yes, before that, that is right, there have to be opportunities, and then one must ask ----

THE PRESIDENT: If there was no possibility of ----

MR. JOWELL: Absolutely, if there was no possibility ----

THE PRESIDENT: -- of a biased or possibly biased … for having any influence then the question would not arise.

MR. JOWELL: Absolutely, that is a prior question, and what I would like to do is to address you on the basis – we assume you are with us and with the Competition Commission that there was no real conflict until Professor Moizer knew that the Greater Manchester Pension Fund was likely to bid for Gatwick, either because there was no prior conflict or because any conflict had been clearly and unequivocally waived by their conduct of the proceedings in knowledge ----

THE PRESIDENT: That would raise another interesting question, would it not, as to whether if you waive the original conflict, whether you must be taken to waive another conflict.

MR. JOWELL: I think that you do not. I think the answer to that is that if there is a new substantial point -- The point I am making is simply that because he was not actually a member of the decision-making panel one has to ask the question in a different way. We say that the fair-minded and informed observer would therefore be asking himself the ultimate question: whether in the period of the professor's conflict, when he was involved in the inquiry, whether that is from December to mid-February, because he stops all his involvement on 17th February -- I am sorry. I should have made that point.

THE PRESIDENT: So when is your period starting?

MR. JOWELL: One can take it either from 3rd December to 27th February, if you prefer Mr. Taylor's evidence, and you draw inferences from that that Professor Moizer knew, or if you prefer Professor Moizer's evidence that it comes from 9th January to 17th February. So, depending on whose evidence you prefer on that point ----

THE PRESIDENT: 17th February is the cut-off point.

THE PRESIDENT: 17th is the cut-off because he had no -- I will just give you the reference to that. It is at para. 52 of Professor Moizer's statement (in the defence bundle at Tab 3) that he had no further involvement after 17th February. He did not formally resign until 3rd March. The decision which Mr. Clarke says available - he was still keeping an open mind right up until the end - took place on 10th March.

THE PRESIDENT: The alternative start date was --?

MR. JOWELL: January 9th. Professor Moizer' evidence is that that is when he first realised that they might be bidding. So, the question you have to ask is: "Would a fair-minded and informed observer consider that in the period of the professor's conflict - whatever that may be from December to February, or January to February - when he was involved in the inquiry, that he so influenced the remainder of the panel that there was a realistic possibility that the process of deliberations, or the outcome, was in fact biased? By 'biased' one means prejudiced against BAA notwithstanding the merits of the case.

I am not confining myself to outcome. I accept that if he materially affected the process of deliberation, or if there was a realistic possibility that he did, that would suffice.

THE PRESIDENT: Just give me an example.

MR. JOWELL: Let us suppose there was a hearing and Professor Moizer kept intervening and saying, "Ah! But you, BAA, you are a bunch of scoundrels. You are not nearly as good as others. You should definitely divest every airport in your portfolio!" I exaggerate, of course.

THE PRESIDENT: So, some possibility of influence.

MR. JOWELL: Yes, if there was something one could show that he somehow influenced -- If he had made such an intervention -- It might not matter that one had affidavits from the rest of the panel that said, "We ignored it --" I accept that.

I would say that the fair-minded and informed observer would consider the following factors in reaching its decision: first of all, the stage that the deliberations had already reached (I will come back to that); the fact that you had five other distinguished and independent-minded panel members; the very limited involvement of Professor Moizer during this stage; the fact that Professor Moizer, if he had a conflict, this was entirely out in the open. So, everybody else knew about it. All the other panel members knew about it -- They had to know about it. His quarantine from the most sensitive decisions on Gatwick and purchaser criteria ----

THE PRESIDENT: I am so sorry. I missed that one.

MR. JOWELL: His quarantine, and the fact that his involvement was limited by the quarantine. That was from the most decisions which were those on Gatwick itself and on purchaser criteria for those that might wish to buy any divested airports.

The further point that would be borne well in mind by the informed observer is the very transparent specific decision-making process adopted by the Competition Commission. The Competition Commission's decision-making process is quite unlike that of a court where, of

course, we make our submissions and we await judgment which is then handed down. The judgment is then only subject to typographical errors. As you see in this case, you know exactly where you are because you have emerging thinking; you have the provisional decision on AECs; then you have provision decisions on remedies. Reading the provisional decisions it is quite plain that the logic and the express findings were towards divestment of the airports and the very finding that the Competition Commission made in its final report.

Of course, I entirely accept that it was always possible that the Competition Commission might change its mind. It clearly expressed provisional views. But, my point is only this: that one cannot detect any shift in the Commission's thinking about any of the material issues in the period of Professor Moizer's possible conflict in January and February 2009. They were not diverted off course. Nothing took an unexpected turn. They just continued their steady course, driven by the logic that a structural problem - common ownership - required a structure solution - divestiture.

Finally, I would suggest that an informed observer would take cognisance of the fact that there is just no indication that Professor Moizer did anything, nor played any significant role in influencing the other members of the Competition Commission panel in this period on any of the issues. I can see that if BAA could show that he had made some important intervention -- But, there is no evidence that he made any material impact in this period. The defence bundle at Tab 4 exhibits the agendas and minutes of the inquiry meetings (pp.18 to 77 of Tab 4 of the defence bundle). We just do not see him doing anything material ----

THE PRESIDENT: He took part in a meeting on 20th, did he not, I seem to remember?

MR. JOWELL: Yes, he took part in two or three meetings. We have got the minutes and the agendas, but there is not evidence that he had an effect on anyone and said anything of any moment.

MRS. HEWITT: But the Chairman did say that he wanted Professor Moizer to remain involved until the March date because he valued his contribution - not on this particular Gatwick bit, but on the regulatory factors.

MR. JOWELL: Yes, and he also wanted his comment on one specific document, but in the event he never did provide any comment on that document. I cannot remember the name of the -- It was on airport regulation, but he never actually got round to providing it. So, there was no effect.

One has to ask: In this period, is it realistic? I would say that there is no real possibility that the process of deliberations or the outcome was prejudiced against BAA irrespective of the merits of the case.

THE PRESIDENT: This goes to the tainting point.

MR. JOWELL: Yes, indeed. I think another point that I think is terribly important by way of background - more than background - is this: this is a conflict that arises in very specific and quite unusual circumstances. It arose when Professor Moizer discovered that the Greater Manchester Pension Fund decided to participate in the MAG bid for Gatwick. So, it was a conflict that arose mid-stream, long after the Tribunal had commenced. It was not the usual conflict that arises from the outset of the hearing in question - at least, of course, if you accept my submissions on the first point. But, the bid arises late in the day. It was not a conflict that arose from any act on the part of Professor Moizer, but rather from an unanticipated act of a third party, or third parties - both BAA's conduct in selling Gatwick early and then the pension fund's decision to participate in the MAG bid in response to the invitation to do so. So, this is a conflict that arose - to use the American expression - out of left field. I have been searching the authorities for a similar case - one which arises from an unanticipated act of a third party at a late stage in the Tribunal's process. I have not been able to find one. Re. Medicaments, of course, is quite different because it arises from a Tribunal member's own act.

THE PRESIDENT: But as far as the tainting is concerned, it was ----

MR. JOWELL: Yes, that is correct, although, as I have submitted, this is a different case, because actually the final panel did not contain Professor Moizer, which is why it is on all fours with – not on all fours with – closer to the authority I took you to earlier.

I am not suggesting this is necessarily a unique position, but one can think of it arising that supposing in the middle of an inquiry someone discovers that their nephew, who they see a few times a year, is thinking of applying to join a firm that is in a partnership with another firm that may be interested in the outcome of the inquiry. That might be a similar situation to the present. I have not found any reported case like this.

As I say, this Tribunal has to decide what approach is the appropriate one. One approach, I would suggest that it cannot be sensible to take unless perhaps there is some sort of presumed or actual bias, is to say that such a conflict when introduced automatically vitiates the entire process. Suppose, for example, that Professor Moizer having realised in January that GMPF was bidding, had resigned a day or a week later, not even BAA would surely

suggest that the entire report should then be ripped up. That would be contrary to realism and common sense.

It cannot be the law that if one member of a multi-member tribunal is conflicted for one day or one week of the process that the entire process is thereby rendered unlawful.

What the court, I would suggest, like the informed observer, would expect in those circumstances is to consider a number of factors before any recusal or forced resignation is imposed upon the conflicted member. First of all, they would have to ascertain what are the precise facts that give rise to the conflict. That might require not just information from the potentially conflicted panel member but also information from third parties, as it did in this case.

They would also have to consider whether those facts give rise to any appearance of bias. They would doubtless want to take legal advice. They would have to consider whether any appearance can be contained or cured by some kind of quarantining of limited exclusion from certain issues, as it was in this case. They would have to consider whether it was appropriate to give the participants in the process the opportunity to waive any conflict following full disclosure.

There is quite a lot to consider when these arise and it will inevitably take time. Any tribunal that did not take that approach would be exposing itself in a different direction because you cannot have a situation where mere hint of any possible appearance of bias leads immediately to the resignation of the relevant panel member from the tribunal. That is particularly the case where the panel member has been selected for their specialist skill or their expertise in a particular area, because failing to continue having them on the panel could undermine the decision in other ways. Again, I will not ask you to take this up but I would refer to the judgment of Lord Justice Woolf in *Taylor v. Lawrence*, which is in bundle 3, tab 4, p.549, para.64, where Lord Justice Woolf says that where there is not a conflict you should not raise it, nothing should be done it, one can go too far in the opposite direction. You are always treading a fine line.

I appreciate that it will be tempting, very tempting, in view of the informal and rather disorganised way that the Competition Commission dealt with Professor Moizer's position, to overturn this decision in order to send a message. I am sure that they will get that message regardless of the outcome of this case. What I would also ask the Tribunal to bear in mind is that if it were to overturn this decision it would mean a lot more than the fact that two years of work of a large team at the Competition Commission and many others will go down the drain. It will also mean that the airline passengers in this country will continue to

suffer from the horrendous inefficiencies, the delays, the expense, that the continued existence of BAA's airport monopoly will mean. Our entire economy will wear this albatross round its neck.

LORD CARLILE: Is this another Ryanair commercial coming up!

MR. JOWELL: I do say one does have to bear in mind that there is more than just the report itself here that is at stake, and there is a public interest in preventing it.

I can actually make all of those points without fear of contradiction because what is very striking is that, notwithstanding BAA's massive resources, its huge team of lawyers, it has actually been unable to come up with a single substantive point on which it is even able to mount a challenge – even a challenge – to the substantive conclusions of the Competition Commission's report.

Ultimately, I appreciate of course, the court must stand in the shoes of the informed observer and assess the position in the round and ask whether the nature and the duration of the participation of this one conflicted member in this relatively brief period was such as to mean that the Tribunal's decision was realistically affected by bias, whether that was a realistic possibility. I would suggest that if you step back after Mr. Green's thunder has subsided, and the last adjective is ringing in your ears, and you ask yourselves, "Is it a realistic possibility that Professor Moizer's participation in this period in the decision making process in January and February exercised any material influence on either that process or the final report", I would suggest that the answer is actually clear, it is no.

With that I would like to turn to proportionality, if I may, very briefly.

THE PRESIDENT: Can I just ask you one question, and it may be one I phrased badly before.

Supposing there was – again, this is purely hypothetical – the appearance of bias, the apparent bias, in the earlier period, but it was waived. How does that affect that you have now made? In other words, there was a real possibility that bias was operating, but that is not capable of being relied on, that aspect of it.

MR. JOWELL: What one is then left with is, if you like, the new bias or the new appearance of bias in respect of Professor Moizer in that limited period.

THE PRESIDENT: Do you treat the sheet as being clean in respect of the decision making and everything that has taken place?

MR. JOWELL: Yes, absolutely.

THE PRESIDENT: Why?

MR. JOWELL: Because there has been waiver, they knew that and ----

THE PRESIDENT: Yes, but is this not a question of fact, as you have just been telling us. Would the Tribunal not have to decide whether, as a matter of fact – the waiver would not affect that question of fact, would it, as to whether the fair minded observer would perceive a real possibility of bias? The waiver would, as it were, prevent ----

MR. JOWELL: The waiver means that the observer takes his stance in December 08 or January 09 and asks the question from that date in the light of what has gone on previously and in the light of the fact that one has to assume that any conflict there was waived, that there was no – I think "waiver" means "waiver", you have to say that they cannot then complain about the previous conflict.

THE PRESIDENT: I do not know whether that can be right. If what you are looking at is actually whether the decision that is ultimately arrived at, as it were, is it not highly artificial just to look at the possibility of influence by the allegedly biased party in the very small window after the second conflict arose if, in fact, there was an appearance of bias in a previous bid, albeit waived?

MR. JOWELL: I am only partly with you in this sense that temporarily I think you have to take the position up as at the date of the new conflict arising. I simply submit I do not have authority either way on the point to hand, but it seems to me that logic and commonsense would mean that having waived you cannot then go back and reopen the whole issue. But I am with you to this degree that I think that one can consider the new conflict in light of the old conflict, that it can be regarded cumulatively, I would have to accept that, but I do not think that alters the position.

THE PRESIDENT: I hasten to add that was a purely academic question.

MR. JOWELL: Yes, with no preconceptions, no. Very briefly proportionality. We have prepared a confidential note on the timing of divestitures to save time and so that I do not stray into any confidential areas, and I will hand it up (Document handed to the Tribunal) Very briefly, the Competition Commission did take into account and seek to quantify the cost to BAA of the divestiture remedy generally. If I could briefly take you to the confidential version of the final report, or the extract from it. You will see in tab 2 of this we have appendix 10.3, which is a very detailed appendix relating to the costs and loss of benefits resulting from the divestiture remedy.

You will see they say in the introduction:

> "BAA's assessment of the costs of divestiture and benefits of common ownership falls into three categories"

- and then it sets them out. Then it says: "We examine ach of these categories in turn in the following sections." Then in para. 3 they say:

> "BAA provided us with several submissions on both the economies of scale and the costs of divestiture, and two reports commissioned by BAA from consultants"

- one from Deloitte & Touche, and one from PricewaterhouseCoopers. So when BAA wanted to raise a particular cost and … report at the time they did so; they were not shy about it, and you will see in this – I do not intend to go through it – but they meticulously go through each cost that BAA raise and they evaluate.

As to the timing of the divestiture, and in particular the difficulties of raising capital in the short term in an adverse financial environment, which I understand to be the point that is said not to have been taken into account, or given proportionate consideration. This was explicitly factored into the Competition Commission's assessment of the relevant timing for divestiture, and that is clear from the report at 10.160, and Mr. Swift has already taken you to that.

You will have seen our note that is intended to give a rough idea but not necessarily trying to do the Competition Commission's calculations for it, or saying that a particular time frame would have been reached, we are just doing a quick calculation to indicate the sort of range within which the Competition Commission could have selected to put BAA's complaints into some context.

The cost to BAA of divestment in a short timescale might have been a relevant consideration but it was not the only consideration. The Competition Commission also had to balance the costs to BAA against the costs of extending the timetable for divestment in the form of harm to the industry at large. It is uncontested that the effects of BAA's monopoly are hugely damaging to customers, to passengers and airlines, and the general economy. It is just commonsense that the longer consumers have to wait for divestment to take effect and to have proper competition the longer they have to suffer the effects of BAA's monopoly, so there is a huge public interest in making the divestment as soon as possible. One sees that referred to in the report at 10.65 and 10.66, which is where they refer to those factors, and they are cross referring actually to findings they made in the body of the report, and if I may quickly – just to give you a flavour of it – ask you to turn up the report itself which is in bundle 2. Page 15 – and I promise, Mr. Green, I will not be more than five minutes, para. 32,you will see:

> "We have concluded that the AECs resulting from common ownership by BAA can only be effectively remedied by divestiture, and that:

(a) The divestiture of both Gatwick and Stansted to different purchasers is required to remedy the AEC arising from BAA's ownership of London airports."

Then it continues:

"The main benefits from the divestitures will result from the dynamic aspects of competition, improving the way in which the London airports deliver capacity in terms of its timelines, design, and cost effectiveness as well as its allocation to users. Although the outcomes of competition over capacity development may not manifest themselves fully for several years the benefits of the processes of capacity development and allocation will be likely to accrue much sooner as decisions begin to reflect competitive pressures from the outset. However, competition would also deliver quality and modest pricing benefits in the shorter term while capacity shortages and price control regulation persist."

Then after section (b) one then sees:

"Following the completion of the Gatwick sale process, we would require the divestiture of Stansted earlier than that of either the Scottish airports due to its relative scale and importance in addressing the AEC and detriments we have found and in the interests of resolving uncertainty with respect to the planning inquiry for a new runway at Stansted so as to facilitate the development of capacity as soon as it may be required. We believe it important to ensure that the next tranche of airport capacity in the south-east of England best meets the requirements of airlines and passengers, which is more likely to be achieved if the design, cost, timing and allocation of this investment are determined under conditions of rivalry following divestment".

I will not invite you to turn up each and every page, but, very briefly, at p.119 of the report you will see, again at 5.15, the second sentence,

"We would expect the benefits from competition to manifest themselves straightaway (particularly in relation to planning and capacity development) and to increase over time as the prospect of additional capacity is realised".

You will see over the page, at p.120, 121, and all the way through to -- It is picked up again on p.123,

"We also expect competition between BAA's London airports to result in constant pressure on airports to innovate in the way in which infrastructure is developed to

> meet the needs of their customers. This is in contrast to the status quo in which, not only is here no competition between BAA's London airports, they are also regulated imperfectly. Competition will reveal opportunities to win business through superior and innovative design, lower costs, higher quality, greater flexibility and more efficient delivery of capacity. Competition could be particularly beneficial in the context of SG2 development where BAA has been repeatedly accused by the Stansted-based airlines of 'gold plating' and applying a one-size-fits-all approach".

Ryanair would absolutely endorse that.

> "Indeed ... in the course of our Stansted Q5 review, our cost consultants (Gleeds) considered that a saving of £500 million on the development of a second runway and associated facilities at Stansted might be achieved through capital efficiency".

One can pick it up at pp.125 and 127 as well. I am not going to read them all. I would invite you at your leisure to read those parts of the report. That is what is cross-referred to. That minor matter is what is cross-referred to at para. 10.65 and 10.66 of the report. This hugely damaging effect of BAA's monopoly to customers, to passengers and airlines and the economy is very clearly recorded there, and is not contested. There is a huge public interest in bringing this to an end as quickly as possible. Viewed in light of that fact, I would suggest that the Competition Commission was rather generous to BAA and rather over-generous. If anything, it failed -- it gave too much weight to BAA's narrow financial interests and not enough weight to the interests of consumers at large in setting the remedy. But, all that is necessary for present purposes is that they clearly did undertake a qualitative assessment. A quantitative assessment would have been utterly spurious because you would be trying to compare apples and oranges. You cannot compare the huge consumer benefit of competition - that is an incredibly difficult thing to quantify in money terms - against the additional money that would go into BAA's pocket. They are completely different. They are incommensurable, to use the jargon. Any quantitative assessment of BAA's costs would have been utterly speculative in any event.

Additionally because nobody knows - not even George Soros knows - how long the credit crunch is going to last or what effect it is going to have. The balancing exercise that they carried out is implicit both in the result they came to and is explicit in the terms of this section of the report.

Unless I can be of any further assistance, those are my submissions.

(Short break)

MR. GREEN: Thank you for the time. Can I start by handing in a press report in relation to the Gatwick sale? (Same handed): You will understand we have been constrained from an ability to say anything about it until the announcement was made. It was announced at seven o'clock this morning. This is the press release in relation to it. It does not require too much elaboration. There are two points I would like to draw your attention to. You will see that it says that,

> "BAA today announces that it has agreed to sell its 100 percent interest in Gatwick Airport Ltd. to an entity controlled by Global Infrastructure Partners for £1.51 billion.
>
> Of the sale price, £55 million is conditional on future traffic performance and the buyer's future capital structure.
>
> Proceeds will be used primarily to repay part of BAA's existing debt.
>
> BAA announced its plans to sell Gatwick in September 2008, before the end of the Competition Commission's UK Airport market investigation.
>
> Colin Matthews, BAA's Chief Executive, said, 'Gatwick and its people have long been a central part of BAA and we are proud of the airport's development as one of the world's leading international airports. BAA is changing and today's announcement marks a new beginning for both Gatwick and BAA. We wish Gatwick well for the future and are confident that the airport will flourish under new ownership. BAA will focus on improving Heathrow and our other airports'.
>
> The sale is subject to, amongst other things, EU merger regulation clearance.
>
> Completion of the sale is scheduled for December".

You will see that the sale is not a foregone conclusion. You will be able to compare the deadline for completion there with the deadline in the report at para. 10.183 and 184. You will see under the heading 'Notes to Editors' that it refers to when Gatwick opened; it refers to the number of passengers that it handles; it refers to the number of employees and then Gatwick's regulated asset base (RAB) at the end of the most recent regulatory period - 1st April, 2008 to 31st March, 2009 was £1.575 billion. You will therefore see that the sale price was below the RAB. The RAB, as you might know, is part of the methodology used by the Competition Commission in its quinquennial review. It is true to say that invariably a sale would be expected to be at above, i.e. at a premium to RAB. It is not here.

I think that is all I would wish to say about that.

What I propose to do is to spend probably about fifteen/twenty minute dealing with proportionality and then I have a number of introductory points to make about bias. That

will probably take me to quarter past/twenty past. I will need probably no more than about forty minutes to an hour tomorrow morning.

So far as proportionality is concerned, the Tribunal has our point well in mind. It was and it remains a simple point: this is not a margin of appreciation or discretion issue. It concerns a matter which is relevant to the proportionality of the remedy which the Competition Commission recognised and acknowledged as important and germane, but which it neither qualitatively nor quantitatively analysed. If we are correct on this then the consequence is that the issue of remedies would need to be reconsidered. Timing is a factor, amongst others, affecting the remedy. The Competition Commission would need to examine the issue in the round having regard to prevailing circumstances as of the date of any new decision. The timing would be one, but not the only issue which would be relevant. Timing and other factors are interwoven and the Competition Commission in changed circumstances would need to devise, or might need to devise, new and different remedies.

Our case is that the Competition Commission remedy was one of the most draconian ever imposed, and it was incumbent upon the Competition Commission either to perform a quantitative assessment or a qualitative assessment. As to a quantitative assessment, the Competition Commission could have done this. It did not. Mr. Falkner shows it is possible, if the Competition Commission disagreed, it was incumbent upon it to say so and why.

As to a qualitative analysis, if the Competition Commission did not consider it appropriate to conduct a quantitative assessment, it had to engage in a qualitative or a descriptive analysis. It needed to explain how the loss to BAA was taken account of and how it conducted the netting off process with the AEC and/or the benefits of divestiture in the same way that it assessed the costs of separation and netted those off explicitly against other perceived and computed benefits.

A number of factors were submitted by the Competition Commission to be relevant to what was put as an exercise of discretion. With respect, all miss the point. This is not a case about the exercise of discretion.

The starting point for Mr. Swift's submissions was that the Competition Commission was more generous to BAA than its guidelines. Indeed, Mr. Jowell makes that the centrepiece of his submissions. Of course, that does not answer our point which is that they did not address our concern. It is a sideshow therefore. In fact, both the analysis of the Competition Commission and Mr. Jowell's note is based upon an inaccurate reference to the Competition Commission's own guidelines.

We will make sure that you have the right references tomorrow, but the Competition Commission cite their document, "CC8", which is entitled "Merger Remedies" – I think you will have noticed this is not a merger case – but in any event, CC2, which is on merger divestments, refers to the time periods which are to be granted in terms of there being specified and reasonable time. CC8 at para.3.24, which the Competition Commission relies upon, says as follows:

> "The CC will state in its report the period in which the parties should achieve effective disposal of a divestiture package to a suitable purchaser, i.e. the initial divestiture period. However, this period may be excised from the report if it is concerned that disclosure to third parties may undermine the divestiture process. The length of this period will depend on the circumstances of the merger, but will normally have a maximum duration of six months."

So even taking the Competition Commission's erroneous reference it depends on the circumstances and normally it is six months. That does not mean to say that you have to apply six months slavishly. The Competition Commission, however, make no reference to the wider rule in relation to merger divestments in CC2 where the following is stated, and we will make sure that you have got copies tomorrow:

> "The CC will expect remedial action, including divestment, to occur within a specified and reasonable time after the CC has published its decision in order to minimise the possible reduction in the commercial value of the business to be divested. It is not possible to be prescriptive in this guidance about the period within which a divestment must be made. When deciding the period the CC will take account of all the circumstances, including market conditions and the adverse effects to be remedied. Until the divestment is complete measures intended to safeguard the commercial value of the business, including the appointment of a trustee or other person to monitor the process, may be implemented."

So the relevant guidelines on divestiture simply say, "You use a reasonable and appropriate period". There was nothing unusual about that.

Of course, the Competition Commission overlooks the fact that this is a guideline applying to merger references and they do have equivalent guidelines in relation to market references. CC3 has no equivalent provision to that in CC8 and the most relevant guideline on timing is in CC3, para.4.16, where it is stated:

> "A third consideration is the timescale within which the effects of any remedial action will occur. Some remedies will have a more or less immediate effect while

the effects of others will be delayed. The Commission will tend to favour a remedy that can be expected to show results in a relatively short time period so long as it is satisfied that the remedy is both reasonable and practicable and has no adverse long running consequences."

So the Competition Commission, and indeed Mr. Jowell's basic premise is wrong. The Competition Commission has not been more generous than its guidelines indicate. The Competition Commission's basic premise is that it ought to do what is reasonable and practicable. There is no objection to the Competition Commission saying, "We want to do it as quickly as we reasonably and practicably and proportionally can", but there is no benchmark against which to measure a case such as the present.

THE PRESIDENT: Excuse me, Mr. Green, just remind me have we got all those various documents in our bundles?

MR. GREEN: I do not think they are. I know they are easily accessible but we will provide copies.

THE PRESIDENT: They are probably in **Butterworths**.

MR. GREEN: I am sure they will be, but we will provide copies of the relevant sections.

That was the first point which was said to be considered. The second point, which I think probably has disappeared over the horizon, is change of circumstances. Again, a great deal was made in the defence about s.138 which permits variations to the time period to be introduced where there is a change of circumstance.

For the purpose of deciding what the appropriate remedy is as of the date of the decision, you do not assume there will be a change of circumstance. You simply look at the facts as they were as of the date of the decision. Mr. Swift, I think, did ultimately accept that one had to assess that as of the date of the decision and operate upon the assumption, *ex hypothesi*, that there was no change of circumstance. You have seen the letter which the Competition Commission sent to BAA following the report where the Competition Commission say that in relation to Stansted – I do not think it was confidential I think it was referred to ----

THE PRESIDENT: We had better be careful about periods, when you mention periods.

MR. GREEN: I think the whole of it is confidential. Perhaps I had better save that and either deal with it in writing tomorrow. I want to discuss the point and make a submission about the point and it does not really suffice just to ask you to read it again.

THE PRESIDENT: If you could put it in a note that would be very helpful.

MR. GREEN: Point three which was put against us, I suspect somewhat forensically, it was said our case invites open timescales. You have heard that it never did. We simply asked for the 12 + 12 + 12 in late autumn of 2008, but it was up to the Competition Commission at the end of the day to work out what was the appropriate timescale having regard to the issue that we put to them about loss of value. It might have been that, it might have been something else, it might have been a combination of a longer period plus other things, interim undertakings, etc, etc. There are a range of permutations open to the Competition Commission, but we never once asked for an open time limit and the fact never seems to have been part of anybody's thought process at the time.

It was then put to you that you ought to read the whole of section 10, and the Competition Commission said that when you look at it in the round it demonstrates an overall reasonable approach. I took you to every paragraph referred to in the defence in which it was said that the Competition Commission had conducted a qualitative analysis, and you will decide whether we are right or wrong in relation to that, but if the Competition Commission was satisfied that there were other paragraphs which demonstrated a qualitative analysis I am sure they would have taken you to them. So far as we are concerned there are none. The fact remains that the relevant issue was not addressed.

It is also said that in some way the burden of proof is upon BAA. Can I respectfully remind the Tribunal of its observation in *Tesco* para. 139: "The Commission must do what is necessary to put itself into a position properly to decide the statutory questions." Here the point was on the table between BAA and the Competition Commission. We accept that we did not put a quantitative analysis to them. That might *arguendo* have justified them in not having conducted a quantitative analysis but it does not entirely let them off the hook on that basis; we have demonstrated via Falkner that it is at least possible, but at the very least if they decided a quantitative analysis was inappropriate they are not forgiven the obligation to produce a qualitative analysis. We say that comes from the Act and from the Tribunal's analysis of the Act. The short point is that it simply failed to address the issue which it was required so to do. The conclusion therefore is that it failed to address a relevant consideration. It was self evidently a material one and no answer has been given to you which addresses this criticism. As to Mr. Jowell's and Miss Love's note, it is based upon the wrong Competition Commission guidelines and it starts with a premise that there was some benchmark against which timing was to be appraised and it is erroneous for that reason, that there are one or two points which we picked up from it of detail, for example, para. 2(1) which are illogical. This is a confidential note. You will see there is a reference

to the start point of a period of time, the reason they have got that wrong is because the Competition Commission would never have had that ability, they only have the power to fix time once the report was published. But the short answer to this note is it is all very interesting, but it just does not address the criticism we make, which is that this is not an exercise of discretion or a rationality case, it is a failure to address a relevant issue. Mr. Jowell made references to the report, para. 32, para. 5.15 and so on – again all very interesting, but it does not tell you what the result would have been had they factored into those same assessments the additional question. You cannot ignore an illegality which was essentially Mr. Jowell's finishing point. It is also important, particularly to his client – he being the consumer, of course – that you should not do anything which upsets that particular apple cart.

THE PRESIDENT: Mr. Green, if there are points of detail at para. 2.1 ----

MR. GREEN: Yes, I am conscious of that, yes.

THE PRESIDENT: Could that be in the note that you are going to prepare as well?

MR. GREEN: Yes, it is quite difficult actually to somewhat gnomically telegraph a point in the way I have just done on 2.1. We will do that.

I want now to turn to bias, because that is all we have to say about proportionality, and in the last 10 minutes or so I want to take the Competition Commission's case, Mr. Jowell's case at its very highest and analyse it. Their case at its highest is that no conflict arises until Professor Moizer knew of the intended bid by the fund as part of the consortium for Gatwick. It therefore excludes a range of possibilities. It ignores the fund's declared intent on non-Gatwick assets. It ignores all of Professor Moizer's pre-existing links to MAG, and it starts with the proposition that no conflict arises until Professor Moizer has actual knowledge of the fund's – not MAG's, the fund's – clear intent to bid. The starting point for our response to that is this is the wrong test in law. The test in law is when Professor Moizer might have been inclined towards MAG and I suppose, *a fortiori* against BAA, and I emphasise the words "might" and "inclined". That is the language used, for example, in *Pinochet* and other cases, and this state of affairs evidently arose long before he knew of the actual bid.

If a bid was a possibility then someone with a conflict of interest has the power through his influence over the decision making process to translate that possibility into a reality, so the conflict arises long before Professor Moizer knows exactly that there is a bid to be launched it arises when there is a possibility because he can then influence the process which affects the possibility. If we consider the facts, tracking backwards in time, we know that in

November 2008 the fund approved the special opportunities portfolio for the purchase of assets, distressed assets – whatever one wants to call them. We know that in June 2008 the fund first mooted the possibility through the circulation of papers to the management and advisory panel of Fleet of Foot, and one presumes there was work being conducted in relation to those papers before then. We know that in the summer of 2008 MAG was loud in the Press expressing its interest in the purchase of a BAA asset at the right price.

THE PRESIDENT: What date did you say?

MR. GREEN: I said "summer".

THE PRESIDENT: Summer 08.

MR. GREEN: We know that from the Press, largely through articles around 17th and 18th August, which is more or less the same time as the fund is contemplating Fleet of Foot . We know 18th August is when the Press report this, that MAG's shareholders had given consent for a bid, because that is reported in the Press. One presumes if they had given consent there must have been some prior process of discussion between MAG and its shareholders, you do not make a public announcement until such time as you have formed and considered the decision. At that time it was known in the Press that MAG and its shareholders were considering bidding for all BAA assets not just Gatwick.

It was also known in the Press because it was so referred to at or about that time that MAG would need external funding for those assets which it could not bite off and chew itself, namely the South East airports, and that was *circa* summer of 2008. So as of that date, if Professor Moizer had been so inclined, just on the basis of information in the public domain, he could well have turned that possibility into a reality. I do not have to say to you that it is inevitable that the fund would have been used, I simply have to say it is a possibility that the shareholders, owners of MAG might have wished to have recourse to their own fund, and we know that is exactly what did happen (see Mr. Morris, para. 19) it was the local authority's (i.e. MAG's owners) who wanted to have recourse to the fund. It does not matter whether you say they are trustees, in fact I think trustees – as an aside – is probably the wrong description, they are subject to a statutory regime, which is probably the statutory equivalent of a trusteeship. I do not think that matters.

All of this was in the context of the Competition Commission already on lesser facts having concluded that Professor Moizer had an interest in MAG. One tracks back from the Summer of 08 to October of 07, when MAG went to the Competition Commission and said they were interested in a bid, and then one tracks back from that to the Office of Fair Trading report leading to the reference in 07, which Mr. Swift says is irrelevant, but it is

quite plain that was a report in which one regulatory body had, at least on a prima facie or provisional analysis concluded that there was a possibility that divestiture might be ordered. If there is a possibility then you can count on one hand the really serious contenders for a bid and MAG is pretty much at the front of that list. You can easily predict that the owners of MAG might – I do not put it any higher than that – might have been interested in their own fund.

So taking my learned friend's case at its highest, which is a conflict only arises when Professor Moizer knows of the fund's interest in Gatwick and just tweaking the knowledge into a prospective possibility one goes right back to April 2007. I would submit to you that none of the planks in that particular argument are remote or fanciful because they were borne out by events. The events proved them to be realistic. All of that ignores what happened in 2002 In 2002 we know that the Competition Commission itself considered that he had a sufficiently strong conflict vis-à-vis MAG that they would not have appointed him to the MAG panel. Mr. Jones says that in express terms. That was the Competition Commission's considered view - they would not have appointed him to the MAG panel because it would be inappropriate for him to be able to able to influence MAG's position. Going beyond that, Professor Moizer made the same point in his witness statement. He said, "I have a connection with MAG because I advise their owners". He, himself, concluded there was a real concern. So, he went to see Mr. Jones. It does not really matter actually whether the Commission was wrong. In our submission they were quite plainly correct. The fair-minded observer would look at the Commission's reaction and say and this is my starting point, " If the Competition Commission is the expert body purporting to protect the procedure in the eyes of the public and concludes that we must keep Professor Moizer from anything which could affect MAG, then that is the correct starting point" - because that is a fact which the fair-minded observer would take account of.

I am now going to launch into a much more substantial subject. That may be an appropriate moment.

THE PRESIDENT: Thank you very much.

(Adjourned until Thursday, 21st October, 2009 at 10.00 a.m.)