IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1107/4/10/08

Victoria House
Bloomsbury Place
London WC1A.2EB

8th December 2008

Before:

THE HONOURABLE MR JUSTICE BARLING
(President)

MICHAEL BLAIR QC
PETER GRINYER

Sitting as a Tribunal in Scotland

BETWEEN:

MERGER ACTION GROUP Applicant

and

THE SECRETARY OF STATE FOR BUSINESS, ENTERPRISE AND REGULATORY REFORM Respondent

Supported by

(1) HBOS PLC
(2) LLOYDS TSB GROUP PLC Interveners

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HEARING DAY ONE

APPEARANCES

Mr. Ian Forrester QC and Mr. Andrew Bowen (instructed by White & Case and Mr. Walter Semple) appeared for the Applicants.

Mr. Paul Lasok QC, Mr. Paul Harris and Miss Elisa Holmes (instructed by the Treasury Solicitor) appeared for the Respondent.

Mr. Nicolas Green QC and Mr. Aidan Robertson (instructed by Allen & Overy) appeared for the Intervener HBOS.

Miss Helen Davies QC and Mr. Andrew Henshaw (instructed by Linklaters) appeared for the Intervener, Lloyds TSB Group plc.

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THE PRESIDENT: Just a couple of housekeeping points. Mr. Lasok, nice to see you. Although I believe you signed an undertaking I am not sure that you have been put on any order for the purposes of the confidentiality ring, I assume that that is something we ought to ----

MR. LASOK: I think actually all the confidentiality material is material that emanates from my own client and I have already seen anyway, but I am sure that that is a technicality that could be sorted out.

THE PRESIDENT: I assume there was no reason that you had not mentioned in the actual thing.

MR. LASOK: No, I think it was a deliberate insult actually! (Laughter)

THE PRESIDENT: We will put that in order then at some point. The other matter, relating to confidentiality we were wondering whether there was really anything much that was very confidential in the material that has been put before us, because one of the things that we have obviously got to decide is whether there is going to be any need to go into camera at some point or other and it may be, of course, in order to discuss this issue we may have to go briefly into camera. I do not want to take up too much time but it seemed to us that even if there were items that might be said to be confidential they could probably dealt with without going into camera just by referring us to passages – I see that Mr. Lasok agrees with that and Mr. Forrester too. Does anyone see any difficulty in doing that?

MR. GREEN: We may well have a problem with that, there is price sensitive information and some of it we may wish to refer to. At the moment there is quite a lot of information which is designated as confidential which I would wish to refer to, that is without prejudice to the question of whether in fact it is or it is not, but at the moment it is designated as such and I would wish to refer to it. Within that information there is also information which we would consider to be sensitive on any view. The alternative is that I simply draw your attention to it but it means I cannot then make submissions to it, it may be that the point is so obvious that submissions do not need to be made about it, but I cannot assume that necessarily.

THE PRESIDENT: Your first category, even though it is designated as confidential, a lot of this is in the public domain is it not, in fact? As I say, your second category might be more important. So how shall we proceed then in relation to that? Do we want to take a view now or is everyone sufficiently attuned to what is highly sensitive that they will know before they mention it to raise the matter?

MR. GREEN: Well so far as I am concerned, since I am third on I think it is not necessary to deal with it now. I can then form a view as the argument develops over the course of the day and see whether or not matters arise in the course of submission or discussion which I do not

have to deal with and I can then obviate the need to refer to it. But I would suggest insofar as I am concerned we do not need to address that at this juncture.

THE PRESIDENT: How do you know that others are not going to refer to it?

MR. GREEN: They may not have a problem with it, I do not know.

THE PRESIDENT: This is information that concerns your client, presumably.

(The Tribunal conferred)

MISS DAVIES: Sir, as I was in fact the only one who referred to any of the confidential material in my skeleton I am in a similar position to Mr. Green in that there are parts of the material that is currently designated as "confidential" to which I was proposing to refer the Tribunal. I had hoped I would be able to do it in the way you suggested, Sir, by pointing to the parts but of course we will have to see how that develops. It may be if there are questions that arise out of the submissions I intend to make then if necessary we may have to address it as and when it arises.

THE PRESIDENT: Both you and Mr. Green will leap up if Mr. Forrester or Mr. Lasok is proposing to refer to something which ----

MISS DAVIES: We have had the advantage over the weekend, I do not know to what extent it has come through to the Tribunal, of redacted versions of the Secretary of State's evidence and the appendices, what we do not have is a version which shows on each page "This is the part that is sensitive", so you have to have two in front of you. But with the benefit of that over the weekend it was possible, certainly for me at least to try and structure my submissions in a way that I could make the points and draw the Tribunal's attention to the passages without actually revealing the content of the confidential material and that is how I had hoped to do it but, as I say, that is subject to questions that may arise.

THE PRESIDENT: Of course.

(The Tribunal conferred)

THE PRESIDENT: We will proceed on that basis then and try and avoid reference to things other than by pointing us to a particular passage and see where we get to. Mr. Forrester.

MR. FORRESTER: Thank you, Sir. Last week I was meeting two of your confreres from Luxembourg and they were, I would say, green with envy that the Tribunal had made such rapid progress in such a short time in dealing with such a significant competition case. In order to move things forward briskly today I would like to begin by recollecting what is in dispute and what is not in dispute. In our application paragraph 22 is headed 'What is not at stake in these proceedings?' Some of the newspapers, and some of the intervening parties, I think, need reminding of the limited scope of this case. So, I am going to begin by listing a

few points which are either accepted or are irrelevant in determining whether the Minister's exercise of his discretion -- the Minister's decision was lawful or not.

We are not asking the Tribunal to pronounce on the competitive or pro-competitive or anti-competitive merits of the HSBOS/Lloyds merger. We are not doing that. We are not seeking to de-rail shareholder consideration of the merger. We accept that under the Act the Secretary of State can intervene on the grounds of public interest. We are not debating whether HBOS, was or was not, in financial difficulties. We do not need to discuss which of the various submissions about its future would be correct. Certainly we are not trying to diminish the scope of the problems that the financial sector was facing and is still facing. But, the importance of that sector and the importance of the merger confirm how important it is that the Secretary of State's decision was lawful.

Likewise, next point, we see nothing to criticise in the very interesting statement of Mr. Saunders. Viewed, the confidential one or the non-confidential one, both seem to us sound. We do not disagree. We do not criticise.

Next, we accept that the Secretary of State on 18th September - there were two Secretaries of State, successors in office - did not act as if he were fettering his discretion. We accept that. But, Her Majesty's government, in the persons of the Chancellor of Exchequer and apparently the Prime Minister, had made a decision that the competition rules would be waived (is one word), or ripped up (another word). My word would be 'discarded'. Now, this determination, this fettering (if you want to be legalistic) must have constrained how the Secretary of State analysed the merger before him. It is reflected in the legal errors which we challenge in our appeal.

We are challenging the legality of a ministerial decision not to apply the normally applicable law. Now, it is by looking at that text, at that decision, and not about what is said about that decision that we see the legal weaknesses that we appeal. I identify a general over-arching one and a specific one. The over-arching one is that the government decided regardless of who had to take the decision that the dish had been pre-cooked -- the decision had been pre-ordained -- the competition rules would not be invoked against this merger. That is the over-arching consideration.

The narrower, more specific point goes to how the Secretary of State framed his decision of 31st October. Now, instead of saying that the OFT sees a problem for competition in this merger, now is that problem outweighed by the public interest criterion that I have in my arsenal? That is not what the Secretary of State did, although he should have done it. He did something else. He tried to denigrate, to put it aside, discard the competition law fears.

He does not mention the inconvenient parts of the OFT report which was binding upon him - that report, as to competition. So, he relies for competition input on other sources which should have been considered only as to public interest.

THE PRESIDENT: This is the FSA versus, as you put it, the OFT's second stage.

MR. FORRESTER: Indeed, Sir, yes. I hope that by that short foretaste I have reduced the scope of matters which the Tribunal has to discuss today and possibly tomorrow.

That brings me to the normal context in which merger decisions are taken. It may be useful to remind ourselves of the normal rules which govern when substantial mergers are under consideration.

THE PRESIDENT: Just before we leave that, and just to make sure I have understood correctly, you do not rely upon what Mr. Hutton said on 18th September. It is really what the Prime Minister and the Chancellor said which you say constrained Lord Mandelson's decision when he came to make it.

MR. FORRESTER: Yes, Sir. Not just Lord Mandelson's decision, but it affected, for example, the behaviour of Lloyds Bank.

THE PRESIDENT: That is the undertaking point.

MR. FORRESTER: Yes, Sir. So, I think we should briefly look at how, normally, mergers are to be considered because how this merger manifestly departed from the norm.

THE PRESIDENT: You can take that pretty quickly though, Mr. Forrester, will you not?

MR. FORRESTER: I do not need to teach my grandmother's to such eggs.

THE PRESIDENT: We are reasonably familiar with the statutory scheme. Obviously do say something about it, but do not do it at length. I am sure you would not anyway.

MR. FORRESTER: Indeed. In the old days of merger control in the United Kingdom, government intervention was routine. There was big political debate: Should the Minister make a reference or should he not? The effect of making a reference was more or less to decide whether the deal would go through, or not. That is no longer the case. The Enterprise Act has given in the UK, as other modern democracies, a regime for the control of mergers which is based upon the technical expert input of competition officials skilled in that art, and ministerial meddling is, broadly speaking, put aside. That is, I think, the case for 99 percent of mergers in this country and other countries with sophisticated competition rules. So, normally, the Minister is kept out of it. Indeed, he is not part of the merger control process as such. He can only intervene on very narrow public interest grounds.

So, to be clear, the Minister's intervention in this case was most exceptional. I think we have been told that there have only been six cases in the history of the Act.

THE PRESIDENT: Six or seven, I think.

MR. FORRESTER: Ours being the seventh. Now, the ministerial intervention was what in films might be characterised as 'the red button': Would or should, or could the Minister press the red button to invoke the public interest criterion. The Minister can do that only if there is legal justification for doing so and, above all, whether there are competition concerns and, in our case, clearly the HBOS/Lloyds' merger presented substantial competition concerns. I do not think it is useful to suggest that there was not a competition concern; there was a big competition concern. Two years ago the parties abandoned merger negotiations precisely because of competition concerns, and the competition problems are described in detail in the OFT's report. So there were unquestionably, undeniably significant problems.

If the merger were to proceed, said the OFT, this would have significant impact, consequences for consumers who use banking services throughout Scotland and the UK as a whole. I hope I have not taught my grandfathers to suck eggs. That is all I would want to say about the normal regime. Normally Ministers must stay out of it, there was a competition problem it cannot be denied, the Minster's intervention can be excused only if done on lawful grounds.

That brings me to standing. It has been suggested that this challenge is being led by a "Group of mischief makers" (which was the reference this morning) who have no direct interest in the proposed merger. Well the Merger Action Group, a number are here before the Tribunal today, is a group of consumers of banking services who are worried about the foreclosure of competition in the banking sector. Now, whether the six members of the Association have HBOS or Lloyds' shares – and some of them do – or whether they have HBOS or Lloyds' accounts – and some of them do – is not in our submission a significant element in the assessment of their interest. It is as consumers, personal consumers and business consumers or users of banking services, particularly in Scotland, that they are voicing their concern. So the six individuals have significant personal interests and business interests which rely upon the availability of banking services. For example, Mr. Noble, is an investment banker, he has been a personal customer of the Bank of Scotland since 1973, and some of the companies of which he is (was) a director are customers of the bank. He says "I am worried about the effect of the proposed deal on the level of competition in the Scottish business and retail banking market."

THE PRESIDENT: This is the list you gave us last week.

MR. FORRESTER: Yes.

THE PRESIDENT: We do not actually have any evidence from Mr. Noble, or indeed from anyone specifically about their own position, because I think at the time when you put in your notice of application they were not even identified. We did not know who anybody was, and now we have this piece of paper. On this basis any one at all who has an account with HBOS or maybe Lloyds is a person aggrieved under s.120?

MR. FORRESTER: It is not necessary, I would say, to have an account with HBOS or with Lloyds, what would be necessary is to have legitimate reason to be concerned about a lack of competition or a loss of competition in the banking sector.

THE PRESIDENT: Right, which would include customers of the banks or indeed potential customers of the banks?

MR. FORRESTER: Indeed, it is a large class, but banking services are depended upon by every citizen, or nearly all citizens, and certainly all businesses.

THE PRESIDENT: You do not rely upon any shareholdings?

MR. FORRESTER: If it is helpful to the Tribunal, Sir ----

THE PRESIDENT: We are just interested to know that is all. Are the people who are shareholders – they are not identified as shareholders on this piece of paper, are they?

MR. FORRESTER: We are happy to furnish, if it is of interest to the Tribunal ----

THE PRESIDENT: It is up to you in a sense. Subject to what the other parties say if we are told some of them are shareholders then I think we are likely to accept that they are shareholders, even though it is not formally in evidence, but it is really much a matter for you.

MR. FORRESTER: Very well, Sir.

THE PRESIDENT: I am not saying it will make a difference either way, but it might be a relevant factor, which is why I mention it.

MR. FORRESTER: Thank you, Sir, for the guidance. At the end of the day today we will furnish the Tribunal with short precision as to which of the members are shareholders, which members have accounts with which banks.

THE PRESIDENT: I think you ought not to hold back on anything that you are going say because there are other parties who need to take instructions and work out what their submissions are going to be. I think if it is going to be said ----

MR. FORRESTER: Very well, shall I say at 2 o'clock?

THE PRESIDENT: -- it should be said at the earliest opportunity. If it is not going to be said then it is not going to be said.

MR. FORRESTER: Permit me then when we resume after the break – if there is one – that I will give that information to them.

THE PRESIDENT: I am not demanding it, this is not a requirement for disclosure or anything, it is just because you mentioned in your opening remarks that some of them were shareholders I wondered if you were going to expand on that, that was all.

MR. FORRESTER: Yes. Then HBOS, for example, says that none of the members can be aggrieved if they are not a shareholder of HBOS or Lloyds. The argument is that what HBOS calls "investors" – I think shareholders – are more directly affected by the merger than the applicants, and that these investors have a general meeting in which they can voice concerns. I think this misses the point, the applicant is not seeking to challenge the merger, it is not trying to derail – the words are not mine – the shareholders' meeting, it is challenging the legality of the Secretary of State's decision not to refer the merger to the Competition Commission.

Now, I would submit, that a person does not need to be a shareholder in Lloyds or in HBOS, or even to have an account with either institution in order to be aggrieved by the contested decision. A person who uses the services of a bank in the UK can be concerned about the effect of competition in the market after the effect of the merger on competition in the market.

I also note, I would submit, that there is a lot of public interest in this matter. It is exceedingly rare that a Secretary of State uses the power, this is a freshly minted power issued for the purposes of this decision of this merger. Therefore, I suggest that it is too narrow to say that only shareholders are eligible to complain to the Tribunal about the contested decision.

Now, as a matter of Scottish law I refer the Tribunal to the remarks of Lord Ross in *Wilson v The Independent Broadcasting Authority* [1979] SC 351.

THE PRESIDENT: That is in your skeleton, is it not?

MR. FORRESTER: Yes.

THE PRESIDENT: Shall we have a look at it?

MR. FORRESTER: Yes.

THE PRESIDENT: (After a pause) I am sorry, I am not sure it is, I am thinking of Lord Clyde's remark – I am not sure we have got a reference to Lord Ross, have we? Page 5, yes, I am so sorry.

MR. FORRESTER: He says at p.356:

"I see no reason in principle why an individual should not sue in order to prevent a breach by a public body of a duty owed by that public body to the public."

I am sorry. I said that badly.

"I see no reason why, in principle, an individual should not sue in order to prevent a breach by a public body of a duty owed by that public body to the public.

THE PRESIDENT: Is there a copy available of that?

MR. FORRESTER: It is in the bundles that we provided. (Same handed)

THE PRESIDENT: Was this a person aggrieved case or was this a general ----

MR. FORRESTER: This was about the coverage of a political campaign and, roughly speaking, whether equal time was being given.

THE PRESIDENT: It is on p.7, is it not?

MR. FORRESTER: Correct. Page 356 of the Court of Session case.

MR. GREEN: Sir, can I ask if there are more copies because most of us do not have any copies of this authority. We have not been provided with it in advance. We have now been given one bundle, but there are a large number of us to share.

THE PRESIDENT: We ought to copy that. (After a pause):

PROFESSOR GRINYER: May I just ask you, Mr. Forrester: This is a point of the common law of Scotland about the title to sue. It is not about the word 'aggrieved'. Is that correct?

MR. FORRESTER: Correct.

THE PRESIDENT: It is internal paging, p.4 of 7 in the copy I have got. It is p.356 of the report.

MR. FORRESTER: We see there is a slight difference between English law and Scottish law.

"In England, it appears that proceedings of this kind might require the involvement of the Attorney-General, but, no such rule applies in Scotland. In Scotland, I see no reason in principle why an individual should not sue in order to prevent a breach by a public body of a duty owed by that public body to the public".

THE PRESIDENT: This being in the context, as you have said, of the referendum. (After a pause): Party political broadcasts.

MR. FORRESTER: Yes, party political broadcasts in the context of a political campaign. So, three members of the labour votes no campaign committee. Petition the Court of Session to interdict the broadcasting authority, ITN, from putting out the broadcast.

MR. BLAIR: Are you saying that this is helping us to interpret s.120 or that it is an entirely separate ground of review not based on the statute at all?

MR. FORRESTER: My contention is that Scottish law is tolerant of actions by responsible individuals bringing to the attention of the courts breaches of a duty performed by a public authority. Not more than that.

THE PRESIDENT: There is no issue in our case. The statute obviously applies to Scottish cases just as much as to English and Welsh cases and Northern Irish cases.

MR. FORRESTER: Yes.

THE PRESIDENT: So, we have to deal with the concept of a person aggrieved. I think you are saying that this is an indication, are you, of the general position in judicial review in Scottish law.

MR. FORRESTER: Yes, Sir.

THE PRESIDENT: That may have some bearing on the person aggrieved.

MR. FORRESTER: Yes. I would say that if we pass to the leading textbook on judicial review by Lord Clyde and Mr. Edwards. I quote para. 10.28 -- I apologise. I am told it is not in the bundle.

THE PRESIDENT: I am not sure I have seen that.

MR. FORRESTER: Do you want to just tell us about it for now?

THE PRESIDENT: It is a sentence which encapsulates our view and with which we agree.

> "There is no reason to suppose that the Scottish court would not recognise the title of a responsible pressure group to pursue an application for judicial review where the statute giving the power, the exercise of which has given rise to the challenge, can be seen to give expressly or impliedly a real interest to the group to complain of an alleged unlawfulness.

THE PRESIDENT: That is para. 7 of your skeleton, is it not?

MR. FORRESTER: Yes, Sir. So, echo-ing what the learned authors say in *Clyde & Edwards*, and applying those remarks to our situation, the Merger Action Group is a group of responsible individuals pursuing a real and legitimate interest. They are worried that, as the OFT report indicates, Lloyds Bank after the merger would aim to increase profits rather than winning new customers. They are concerned that individually they would suffer from the reduction of competition as might their businesses. These are genuine, not fanciful, fears and they apply to the individuals directly.

It is also, I submit, relevant to your analysis that the question of the merger has attracted a very great amount of public interest. Lloyds and HBOS separately accurately say that the merger is very important. Yes, of course, we agree, the merger is indeed very important, but that importance tends to favour the admissibility of these proceedings rather than the

opposite. The Merger Action Group makes no apology for bringing this matter to the Tribunal. Its members' fears are not fanciful or extravagant. I draw to your attention the remarks of Alex Salmond, the First Minister. I draw to the Tribunal's attention the remarks of Mr. Vickery-Smith the Chief Executive of "Which". You have this copy ----

THE PRESIDENT: We had a letter.

MR. FORRESTER: Yes.

THE PRESIDENT: I have not actually got it to hand. Sorry, Mr. Forrester, do go ahead, I have got it now.

MR. FORRESTER: So in his letter of December 4, which just shows how rapidly this case is going, that is only four days ago, Mr. Vickery-Smith writes, "Which", and I think you can take judicial notice of what "Which" is in this country:

> "… is concerned that the principles that may derive from the Secretary of State's decision may have far-reaching consequences where public interest interventions arise in relevant mergers. Such concerns may be exacerbated if the Tribunal approves the Secretary of State's decision, even if correct on the facts, without qualification as to the appropriate process to be employed."

"Which" is one publication among many, one organisation among several.

Maybe more weight might be attached to the letter sent by Alex Salmond, The First Minister, to the OFT on 22nd October 2008. The First Minister expresses concern about, he says, the impact of the proposed merger on the competitiveness of Scotland's banking sector is now a major concern, and that that concern has not diminished is confirmed by the letter of Cabinet Secretary Swinney from December 2nd, just last week. Mr. Swinney says, again in a letter to your Tribunal:

> "Given that level of public civic and political interest the need for the process followed by the Tribunal in reaching its conclusions to command confidence in Scotland is paramount."

The precise remarks of these two gentlemen are not essential to the point that I am making.

THE PRESIDENT: You are saying this is part of the public interest?

MR. FORRESTER: Yes, it is a manifestation of the phenomenon that a very considerable public interest on the part of ordinary citizens, political figures and consumer groups that have been voiced about the merger and about how the merger was handled. I submit that that is pertinent and helpful for your decision as to whether the members of the Merger Action Group have standing to bring this case. As of last night there were 630 supporters of the Merger Action Group who had signed up to the goals of that set Group, as set forth in our

application. As the Tribunal itself put it last Wednesday, there is a considerable head of steam about this merger.

So those factors, we contend, support us in suggesting that the applicants have, and should have, standing to bring this action.

A further factor in favour of what Continental lawyers would call "admissibility" is the fact that no other applicant has emerged to approach the Tribunal on this matter. The decision of the Secretary of State not to refer the merger to the Competition Commission should be open to public scrutiny. This was envisaged by the Enterprise Act of 2002, and I note that in the case of the Secretary of State for Foreign and Commonwealth Affairs, the *World Development Movement* case, factors deemed pertinent by that court – this is 12 years ago but not so long ago – were, or included, the importance of the issue raised and a likely absence of any other responsible challenger. We say that the issue is of great importance. The future as independent entities or as merged entities of the Bank of Scotland and Lloyds TSB, that is an important issue, of great importance to the UK economy and of particular importance to the Scottish economy.

THE PRESIDENT: The *World Development* case was under the old judicial review test of sufficient interest in bringing the proceedings?

MR. FORRESTER: I would suggest that a heavier test than under the Act; and also the likely absence of any other responsible challenger. It is evident that the two banks wish the merger to go through as quickly as possible, understandable. It is evident that the Secretary of State, having elected not to make the reference, wishes the merger to go through. It is plain that the Government at the highest level wishes the merger to go through. So there is an absence of other responsible challengers.

I think, on the basis of those factors and the others referred to in our skeleton and our application, the applicants should be granted standard.

That brings us to the question of substance and the unlawful fettering of the discretion. I wish to now focus on what we are saying in the interests of precision and concision. We do not contend that a decision to clear the merger was taken on 18th September. We do not contend that the then Secretary of State fettered his own discretion by his public comments at that time. To that extent we are narrowing the grounds advanced in our Notice of Appeal. We do contend that on or around 18th September the Government formed a clear policy that the merger between HBOS and Lloyds would be approved and that competition law would not be allowed to get in the way. It was this Government policy which the Secretary of State must have been aware of and which must have affected him when he came to take his

decision on 31st October. Our submission is that the Chancellor of the Exchequer, no less, and also the Prime Minister adopted and, I would say, announced, proclaimed, made clear that policy, and that policy was intended to have an effect upon Government and must have had an effect upon Government. It certainly had an effect, as we noted, upon Lloyds with respect to the making of undertakings. That is to say that Lloyds elected to make no undertakings knowing that the Competition Rules would not be applied.

So our contention is that the unambiguous support given to the merger by both the Prime Minister and the Chancellor and the clear statements made repeatedly and in different words about the fact that competition law would not get in the way of the merger constituted a clear statement of Government policy. It was meant to bind and it did bind Government departments. This may also explain why, although the Secretary of State received good input from the Civil Service he took a bad decision. Any Minister, even a Minister of great distinction, who has served in many Cabinet positions and in the European Commission can hardly have been uninfluenced by what Her Majesty's Government declared to be its intention and its policy.

THE PRESIDENT: What should he have done in those circumstances? Given the position that emerged on your submission, what would he have been able to do, if anything? Could he have cured the position at all?

MR. FORRESTER: He did, in part, make the right statements. His Civil Service armed him with the relevant material, with the relevant criteria and he did not publicly say anything like, "I have no choice, the Cabinet has spoken". He did not do that. What he did do was make a wrong application of the tests which were applicable to him.

THE PRESIDENT: That is the narrow point, is it not?

MR. FORRESTER: That is the narrow point, yes.

THE PRESIDENT: As I understand it, you have two points.

MR. FORRESTER: I do.

THE PRESIDENT: You have the wider point, which in a sense did not depend on him so much. I just want to know whether he could have done anything at all to cure that problem that you identified.

MR. FORRESTER: That is an interesting question, and I confess I had not reflected on that, I had not anticipated that. I presume that what he could have done would be to say, "Notwithstanding the statements by prominent Members of the Government, my duty is to be executed in strict conformity with the applicable legislation, and it is I who will decide

whether or not to make a reference to the Competition Commission in function of the applicable criteria".

What the Secretary of State should have done was to balance the public interest concern against the competition law concerns mentioned by the OFT. A manifestation, if you are minded to detect a fettering, of that fettering is that there are two scales. On this one is the competition problem identified by the OFT, and on this one are the public interest justifications.

THE PRESIDENT: Financial stability.

MR. FORRESTER: Yes. In our contention, the Chancellor is bound as to the contents of this pan of the scales, the competition assessment.

THE PRESIDENT: I think that is common ground, is it not?

MR. FORRESTER: What the Chancellor does is he takes pieces out of that. He manipulates, he alters, purports to alter, he denigrates, shall we say, the conclusions of the OFT. He reduces the level of competition concerns and that he is not permitted to do. That is possibly a manifestation of the fettering concern that I mentioned earlier.

THE PRESIDENT: So that is the narrow point?

MR. FORRESTER: Yes.

THE PRESIDENT: That is the specific point?

MR. FORRESTER: Yes.

THE PRESIDENT: Do you accept that he has got to carry out a balancing exercise under the statute?

MR. FORRESTER: Yes, Sir.

THE PRESIDENT: And, as I understand it, you accept that he purported to do it?

MR. FORRESTER: He is, so to speak, bound, he is "stuck" with, to use the word, the OFT.

THE PRESIDENT: The competition concern.

MR. FORRESTER: The next step is a justification. Does the public interest justify that problem there? The vice in what he did was he played around with that problem. He does not accept what the OFT says. He tries to reduce the competition concerns identified by the OFT relying on other sources who are not competent for these purposes for a competition analysis.

THE PRESIDENT: Namely the FSA?

MR. FORRESTER: Yes.

THE PRESIDENT: In particular the FSA?

MR. FORRESTER: In particular the FSA. He makes an error, which is a separate thing that we will come to, with respect to the question of State aid law.

MR. BLAIR: Can I just ask, you are saying that the FSA and the Treasury came out of your right hand and moved into his analysis of your left hand – is that the essence of what you are saying?

MR. FORRESTER: Sir, yes.

MR. BLAIR: If they had been analysed in your right hand there would have been no problem.

MR. FORRESTER: Correct.

MR. BLAIR: But you think that the Secretary of State went into the other hand when he should not have done?

MR. FORRESTER: Just so, sir.

MR. BLAIR: Thank you.

MR. FORRESTER: I think it cannot be contentious that sometimes things which are elementary and uncontentious may be fundamental.

Let us be clear why the Prime Minister and the Chancellor were not legally permitted to waive the Competition Rules or announce that the Government would waive the Competition Rules on 18th September. Obviously the Enterprise Act provides that all mergers over a certain threshold are to be examined in accordance with the law, and only Parliament can alter the applicable legal criteria. By contrast, if one listens – and we will, thanks to the miracles of technology, allow you to listen – to what the Chancellor said around the time of the announcement of the merger, it is very striking that the Government says competition law will be set aside in relation to this transaction. It is very difficult, listening to the Chancellor, to avoid the conclusion that he is saying that a decision has been taken by the Government without any legal basis whatever to brush aside competition law as to this merger.

A second consideration is that under the Act is only the Secretary of State for Business Enterprise and Regulatory Affairs who can intervene in the public interest in mergers. This power is only granted to the Secretary of State, and the grounds upon which he can act are, prudently, wisely, understandably, closely limited. So the Secretary of State, when he contemplates intervening, has got to produce clear reasons in his intervention notice as to why the public interest is relevant to the merger. The Secretary of State may indicate only at the stage of intervention that he believes a public interest consideration is relevant. By contrast, in this case, we have the Chancellor and senior Ministers, including the Prime

Minister, saying, "Do not worry, the Competition Rules will be put aside". That, we say, is a vice which carries forward into the way in which the Secretary of State took his decision.

THE PRESIDENT: Are you looking now to develop some of that?

MR. FORRESTER: Yes, sir.

THE PRESIDENT: Would that be a convenient moment to break?

MR. FORRESTER: It certainly would.

THE PRESIDENT: Do you have a feel, Mr. Forrester, and we are not hurrying you at all, for roughly how long you are going to be?

MR. FORRESTER: If I could have under another hour I would be very grateful, Sir.

(Adjourned for a short time)

THE PRESIDENT: Mr. Forrester?

MR. FORRESTER: I am going to start with the manifestations of the fettering of which we complain in Annex 2 – I will just refer to these briefly, I do not think it is necessary for the Tribunal to study them. Annex 2 to our Notice of Appeal quotes a newspaper article which says:

> "Gordon Brown intervened to broker a solution to HBOS and Downing Street made clear it was prepared to rip up Britain's competition laws to allow the [merger] takeover."

At Annex 3 to our Notice of Appeal a BBC report is quoted saying:

> "The government has also said it would overrule any concerns that competition authorities may raise."

At Annex 7:

> "The UK government confirmed it would use public interest grounds to push the deal through."

Therefore, I suggest to the Tribunal that from 18th September onwards the merger was presented to the public as a *fait acomplis*. The government has made the commitment that inconvenient competition barriers would be set aside, and perhaps the clearest indication of this is, and this is the first time I have done it, attached to a court a disk, a recording and, with the Tribunal's permission, we will now listen to what the Chancellor of the Exchequer said.

(Disk played)

MR. FORRESTER: Sir, the almost last words were: "We have made a decision that we will waive the competition requirements in relation to these two banks; that is not going to get revisited."

THE PRESIDENT: I think we have a transcript of that, of the whole interview?

MR. LASOK: The transcript is at tab 39 and the relevant bit is the fourth page, the first extract dealing with Mr. Darling, that is the last bit that we have just heard, but he goes on to say – if you look at the last two lines:

> "… there will be exceptional circumstances where, as I say, financial stability, rather like national security, can trump competition concerns."

THE PRESIDENT: Yes, speaking for myself I have read all that transcript but obviously others will want to make comments in due course.

MR. FORRESTER: HBOS replies in its skeleton over the weekend that the Chancellor was free to say what he liked, but only the Secretary of State had the power to decide what other government members would say would be irrelevant. Of course, sometimes Ministers will make mistakes as to law, they may go "off message" to use the language of the spin-doctors, by wrongly stating government policy, but what we heard from the Chancellor on this occasion was clearly not a Minister going off message, it was a Minister conveying a firm, clear, government commitment. It was a delivered, pre-meditated statement of policy which followed on the heels of an announcement that the Prime Minister himself had helped broker with the promise that the Competition Law would be waived, so the Chancellor was declaring government policy.

Lloyds says, in para. 53 of its submissions, that Mr. Saunders' evidence demonstrates that the Secretary of State exercised his own discretion, taking all the relevant considerations into account. I think that it is not by reference to Mr. Saunders, but rather by reference to the decision itself that we have to decide whether the decision was lawful, and for the reasons that we will come to we say that the decision was unlawful.

Just before the break I was asked: what could the Minister do in the event that he was confronted with the phenomenon of a government policy saying one thing, and his duty possibly pointing in another direction? Well I invite the Tribunal to think about what would happen if a Government Minister were to say: "We are not going to apply the Human Rights Act in this particular circumstance", or "Immigrants from Latvia are not going to receive Social Security benefits", or something of that kind. If the officer – of course, it does not have to be a Minister, it might be a very junior official – if the officer who has to apply the rule appears to be constrained by an unlawful pronouncement by someone superior to him in the governmental hierarchy, if the officer, or the Minister goes along with, or appears to go along with the rule, the declaration, he may indeed give the

impression of acting in accordance with discretion that has been fettered by an unlawful taking of position by his superior.

THE PRESIDENT: But you take the example of where he appears to go along with it, supposing he does not appear to go along with it, is the only way that he can – to use a shorthand – "cure" it to decide the opposite, or can he decide consistently with the previously expressed policy or fettering statement and still act lawfully?

MR. FORRESTER: I think his best way is to say: "This pronouncement appears not to be consistent with the duties which I must obey in accordance with the Statute, and I therefore reject, put aside, will not be bound by, that statement, that declaration of policy. It requires courage to take that step, but if he were to have taken that step it would go a way to curing the problem of fettering. The reason that we worry about fettering of discretion is that, as you have said, Sir, if the official who is acting, acts in apparent conformity with the unlawful instruction, then he might be taking a good decision but one cannot be sure because of the cloud that has been created by the unlawful fetter. So, in the case of the Secretary of State on this occasion given that the policy was taken at such a high level, given the statement, "We will waive the competition rules". Given the strength of those statements what the Secretary of State should have done but did not do was to say, "I put aside all those government assertions of six weeks ago, and I am going to confine myself only to the following criteria. We suggest that a Minister bound by collective responsibility must inevitably, to some degree, have had regard to the government pronouncements in the middle of September to the effect that the competition rules were not to play any kind of obstacle to this important merger.

Since time passes, if there is anything more to say on that I am happy to address it. But, otherwise, I would plan to move on to exactly what it was that he received from the OFT and how he handled that input.

Now, by way of background you will see from the submissions of all the parties, particularly the applicants, that there was as shift in how the undoubted problems of the financial sector would be addressed -- could be addressed. From mid-October onwards the notion of re-capitalisation as a solution was becoming broadly acceptable. So, the OFT's submissions on the subject of how HBOS, if re-capitalised, would be a competitor are particularly interesting and important. I would like to turn to Item 23, appended to our application. That is the OFT report itself. Appendix 23 to our Notice of Appeal. I am sure the members of the Tribunal have looked at this already. I would refer the members to para. 78 and following. I am happy to read it to the Tribunal.

THE PRESIDENT: Is it the whole of that section down to conclusion?

MR. FORRESTER: Yes. That is right - to the end of para. 85. Paragraph 78. This is the OFT giving its competition conclusions to the newly-appointed Secretary of State after its enquiry. I remind you of the OFT's findings on competition are binding upon the Secretary of State.

> "In relation to the recapitalisation measures announced by HMT on 13th October, Government indicated that it is not a permanent investor in UK banks, and that its intention, over time, is to dispose of the investments it has made.
>
> 79. In light of this, the Oft considers that it is realistic to consider that:
>
> if not in the short term, in the medium term (in other words, it would be a question of when, not if) the Government would have withdrawn its support once the current financial turbulence was over, and customer and investor confidence had been restored in HBOS. In circumstances where the Government's support included recapitalisation, this would entail Government reducing its shareholding in HSBOS to aero and brokering the sale of the bank to a third party purchaser (or selling its shares on the open market). If the Government had not taken any shareholding in HSBOS, it would remove its support, thereby leaving HBOS as a fully independent entity once again, and
>
> in the case of recapitalisation, the Government would not, as a matter of public policy, broker a deal that raised competition concerns under normal market conditions".

So, there are the assumptions. Now,

> "80. In these circumstances, the OFT believes that it is realistic to consider that any such third party purchaser (or purchasers if, for example, HBOS were sold off in parts) would therefore be a 'no overlap' bidder, or at least, one where any competition problems which might have arisen had been cured by the normal functioning of the UK merger regime (for example, through remedies). Accordingly, assessing the proposed merger against the counterfactual of HBOS remaining independent would follow the same analysis as here.
>
> 81. While merger analysis is essentially a predictive exercise, the further in the future that the OFT must predict, the greater the margin of error. Nevertheless, in this case, it is appropriate to attach weight to the Government's stated intention not to be a long-term investor in banks, irrespective of precisely when the withdrawal of Government support would occur. This counterfactual is referred to

as the 'Stage II' counterfactual, as it would be sequential (rather than an alternative) to the Stage I counterfactual (HBOS with some form of Government rescue package). In other words, any competition concerns that arise at Stage I would be concerns arising in the short term, while those arising (only or in addition) at Stage II are based on medium to longer run effects".

Then go on to para. 85,

"In summary, the OFT accepts the parties' arguments that pr-merger conditions of competition is not the appropriate counterfactual in this case. Instead, the OFT has considered a range of counterfactuals, of which the two most realistic, and therefore reasonable to consider, are set out below. These would be expected to occur sequentially rather than as alternatives.

Government would not have allowed HBOS to fail, and rather would have intervened in the short term with some form of rescue package: the Stage I counterfactual. In these circumstances, the OFT believes it is realistic to consider that HBOS would still be able to exert competitive pressure in the market (although it recognises the possibility that HBOS might, at least in the shorter term, be a weaker force when compared to the HBOS prior to the current financial crisis.

In the medium to longer-term, Government would have withdrawn its support, leaving either a fully independent HBOS once more, or an HBOS in the hands of a 'no overlap' purchase: the Stage II counterfactual. In these circumstances HBOS would also constitute a significant player in the market place in the medium term".

So, that is what the OFT says by way of authoritative competition analysis.

Let us observe what Lloyds did, knowing that it was immunised from the scope of the competition rules. The OFT (paras. 14,15, and 15) explains that Lloyds had offered no remedies, no proposals and, says the OFT,

"This makes it inherently difficult, particularly in light of time constraints, for the OFT to formulate a hypothetical set of undertakings and subsequently test whether they might be appropriate.

16. The OFT does not rule out entirely the possibility that with more time and more willing engagement by the parties it might have been possible to develop structural remedies".

So, the OFT, in its report to the Secretary of State ----

MISS DAVIES: It is important to read the rest of para. 16.

MR. FORRESTER: Yes . Very well.

"Although it accepts that given the competition concerns this would certainly have been challenging in Phase 1".

So, it is remarkable, I suggest, that an obviously problematic merger would go ahead without the offering of any remedies whatever to cure the anticipated competition problems. Such a course of action would normally be a one-way ticket to a Competition Commission reference, but Lloyds knew, and we know, that a decision had been taken that the Competition Rules would not pose any obstacle to the merger being cleared, come what may. We presume that a guarantee from Government that was strong enough convinced Lloyds that it could go through the motions of making a merger filing, but need not make any concessions or propose any remedies.

THE PRESIDENT: I just want to clear my mind on what the effect of this is, if you are right, where does it go to? Is it further evidence of the constraining effect of what had gone before?

MR. FORRESTER: Yes.

THE PRESIDENT: Or is it, as it were, an additional point that renders the decision unlawful?

MR. FORRESTER: It is a manifestation of the unwholesome consequences of the Government decision to waive the Competition Rules in the examination of this merger.

THE PRESIDENT: It may be an unwholesome manifestation of the consequences of the Government's decision, but if the decision is otherwise lawful what I am really trying to get as is this: does it add anything to the lawfulness or otherwise of the Government's decision?

MR. FORRESTER: The decision of 31st October is the end of a *continuum* of which a further element is Lloyds refusing to give any remedies. I think it is not independently a ground that vitiates the decision, it is manifestation of the unlawful and regrettable consequences of a Government which acts too categorically when it lacks the power properly to do so.

THE PRESIDENT: Thank you.

MR. FORRESTER: There are three excuses offered by Lloyds for not offering remedies. The first one is uncertainty in the market. We would suggest that when Lloyds says that assessing remedies would be too difficult for the OFT to do in the current climate, that one just should not bother, I would suggest that that is a decision for the OFT to take and not a ground for Lloyds not offering possible remedies in the first place.

Second, the suggestion that the need to offer undertakings might lead to the deal not proceeding, again that is a little bit like saying, "Because English counsel have been chosen,

so English law must govern". It is a kind of tail wagging the dog. The parties elected to structure the deal in that way. They could have structured it otherwise.

Finally, the notion that after the merger has gone through the parties would be subject to the Competition Rules, that is no comfort either. That is perfectly normal in every merged situation. So the arguments that are made to justify the non-offering of remedies, those seem to me to confirm there was something wrong, it was an imprudent and undesirable fettering of the discretion at the highest level, which had adverse consequences for the process of respecting the Competition Rules.

I would like to pass now to the question of illegality and in particular the most interesting evidence of Mr. Saunders. If there is anything more that the Tribunal would like me to say on the subject of the OFT report ----

THE PRESIDENT: No, but as I understood it you are going to come back to comparing that with something else.

MR. FORRESTER: What he did do and what he should have done.

THE PRESIDENT: Yes.

MR. FORRESTER: Indeed, yes.

I will be looking at the duty of the Minister. In order to comply with the law in a case like this, a public interest exception, the Minister has to do two things. He has to accept the OFT report, and that is s.46(2); and he has to justify any anti-competitive concerns by reference to relevant public interest considerations, that is s.45(6).

So, in our contention, what the Minister decided in his decision of 31st October is defective in two ways: failure to consider legally binding considerations and considering irrelevant ones; and relying on mistakes in law.

Let us now think of what Mr. Saunders said in his very lengthy submissions that we saw on Thursday and Friday.

THE PRESIDENT: Do you want us to turn to that?

MR. FORRESTER: Yes, please.

THE PRESIDENT: You are going to, no doubt, exercise all due caution regarding anything that might be ----

MR. FORRESTER: I cannot think that anything I am planning to say will the threaten the stability of financial markets.

By way of introduction let me say that I find very little to disagree with in the contents of Mr. Saunders' statement. I think we could find reassurance that this particular part of the Civil Service is fully aware of the extraordinary nature of this unusual right and how it

should be exercised. Let us go through the Act and Mr. Saunders' (shall we say) commentary on the relevant parts. Let us start with 42(2) of the Act. That says:

> "The Secretary of State may give a notice to the OFT if he believes that it is or may be the case that one or more than one public interest consideration is relevant to a consideration of the relevant merger situation concerned."

So the Minister can intervene if there is a reasonable basis to suspect – these are Mr. Saunders' words – that a merger situation may exist to which a specified public interest consideration may be relevant. That is Mr. Saunders' para.6, no disagreement.

Then the Act requires an initial investigation under s.44, which is to be carried out by the OFT. That provides evidence and materials on which the Minister must base his decision.

Then para.7 of Mr. Saunders, the report is a crucial step that must occur before the Secretary of State can make a decision under s.45. That is the next step.

So where the Secretary of State decides there are grounds for a referral he may accept statutory undertakings instead of a reference in accordance with para.3, Schedule VII of the Act. He can do this if he decides that they would adequately address public interest raised.

In para.8 Mr. Saunders says:

> "This has been the outcome in all cases where the Secretary of State has intervened on national security grounds in mergers within the defence sector."

The only other case was *BSkyB v. ITV* where there was a reference. So in each previous case where a reference was not made undertakings had been provided. Of course, no undertakings in this case.

Then Mr. Saunders says, para.21:

> "… it was particularly important for the Secretary of State to consider directly the representations annexed to the OFT's report, including the submissions from the Tripartite Authorities whose views would be of particular significance in view of their relevant expertise in assessing financial stability issues across the UK as a whole."

Indeed, the Tripartite Authorities were of particular importance and had expertise in assessing financial stability, so it made perfect sense for any Minister to take these into account.

In coming to a decision, this is under 45(6), the Minister must bear in mind the test.

Mr. Saunders in paras.22 and 24 summarises it. He says:

> "The submission explained that the Secretary of State was required to accept the OFT's conclusions about the impact of the merger on competition …"

Correct.

> "… but must apply his own judgment – drawing on all the available information and representations – as to whether any anti-competitive effects may be justified by the public interest consideration specified in the intervention notice."

- paragraph 22 of Mr. Saunders. Then para.24:

> "In accordance with section 45(6) of the Act, he also had to consider whether any potentially anti-competitive outcomes identified by the OFT might be justified by a relevant public interest consideration."

So there we have the OFT's conclusions on the one hand, which relate to potentially anti-competitive outcomes and public interest concerns on the other hand, that is to say about the stability of the UK financial system on which the Tripartite Authorities made submissions. There is no question that the Tripartite Authorities were indeed qualified to make submissions to the Minister on public interest concerns, considerations that were inside their area of expertise, no doubt at all.

Then the Minister has to assess and balance in the two pans of scales all the relevant considerations in front of him. Mr. Saunders describes how that should be done but, in our contention, the decision does not correspond to that which Mr. Saunders recommends, commends as to how such a decision should be written. So I am quoting Mr. Saunders:

> "Having satisfied himself that all the evidence and options had been fully examined the Secretary of State reached the decision, in line with our recommendation, and on the basis of the arguments set out in the submission dated 28th October not to refer the merger ----"

THE PRESIDENT: Sorry, Mr. Forrester, which paragraph are you on?

MR. FORRESTER: I am sorry, para. 34 of Mr. Saunders. That is what Mr. Saunders says should have happened and we say, yes, it should have happened but it is not what did happen. So let us now consider what went wrong and what the error was in how the Secretary of State wrote his decision.

THE PRESIDENT: So as a statement of, as it were, the required procedure, you have no quarrel with that sentence?

MR. FORRESTER: Not at all, no, Sir. I go back to my analogy, my metaphor of the scales, on the one hand (my left hand) the OFT's findings, competition problems, flashing red light – amber light, perhaps; I am mixing my metaphors, remove reference to flashing lights. On the left hand, in that pan, the competition problems identified by the OFT, those bind the Minister – our contention. On the other hand, public interest concerns, including freshly

minted new public interest concerns are legitimate anxieties to which the Minister may properly have regard and as to which the Minister can seek guidance from competent authorities.

The Minister thus is making a public interest weighing this competition problem threatens damage to the public interest, these public interest concerns justify those public interest dangers in the form of restrictions in competition. That is the exercise the Minister has to do.

Now, it is not by reference to Mr. Saunders, or to the legislation, or to the advice of the Civil Service, or to the advice of the Tripartite Authorities that we can decide whether the decision was lawful, we look at the decision itself, and on the basis of the analysis I am going to offer you, we contend that the decision was unlawful.

THE PRESIDENT: Shall we turn to that then?

MR. FORRESTER: I think it is useful to go the decision, and that is Annex 27 to our Notice of Appeal. Before I get into the precise details of what is going on here, let me, using the visual analogy, remind you of our contention. In the left hand are the competition concerns identified by the OFT, the experts. On the right hand are public interest justifications.

What the Minister does, instead of saying: "I see, I hear what the OFT has to say", he goes and picks away at the OFT's findings by diminishing the competition concerns. We say he does this, or the decision does this in an unfair way, but "constitutionally" – if we were to use that word – what he does is not lawful in any event. That is one observation.

Before plunging into the exact words of the decision, I would like to ask the Tribunal to bear in mind that there are two related but separate concepts. One is whether HBOS could actually survive or not as a stand alone entity with the help of Government intervention. That is a question for accountants and finance experts.

Separately, is the question of HBOS providing effective competition as a stand alone entity and that is a matter for competition people at the OFT. Naturally the latter proposition is premised on the assumption that HBOS can actually survive as an independent undertaking, but those are two separate contentions.

As I have said, the Secretary of State or, at least – I do not want to personalise it – the decision signed by the Secretary of State appears to believe that the views of the OFT on competition matters are just one set of opinions to be weighed against other, more attractive opinions or submissions. Let us look now, if you please, at para.18 of the contested decision:

"The OFT Report does not consider the most likely short term outcome absent the merger would be a strong, independent HBOS continuing to exist and exerting the same competitive pressure as it has done in the past. Rather the OFT concludes the more realistic counterfactual scenario is that, absent such a commercial merger, the Government would have intervened to prevent the failure of HBOS with the most likely outcome being that the Government would have brought HBOS into partial or full public ownership. While this may have led to the imposition of restrictions on the scope of HBOS to compete in the market (to comply with EC law on state aid), a publicly owned HBOS would continue to exert some competitive pressure in the market, though it would potentially be a significantly weaker force in comparison with conditions prior to the current financial crisis. In the medium term, once stability had returned to the markets, the Government would sell HBOS on to a new owner or owners."

I will return in a moment to the misunderstanding on the subject of State Aid, but let us for now just focus on HBOS's ability to provide effective competition. As I have read it, it sounds rather bleak. The Secretary of State relies on the stage 1 counterfactual of the OFT report. Now, the decision refer to the report as stating that in the short term HBOS "… would potentially be a significantly weaker force", that is the Secretary of State speaking. What the OFT report states at para.85 is a bit more cheerful.

THE PRESIDENT: We had better put them side by side for this purpose?

MR. FORRESTER: Yes, I think that is a good idea.

THE PRESIDENT: Paragraph 18 is the Secretary of State's paraphrase of what is said to be in the OFT report.

MR. FORRESTER: Yes. Our contention is that it is not quite what the OFT said.

THE PRESIDENT: So, should we look at 85?

MR. FORRESTER: Yes. This is the OFT talking, "In these circumstances ----"

THE PRESIDENT: We see,

"--it is realistic to consider that HBOS would still be able to exert competitive pressure, although it recognises the possibility that HBOS might at least in the short term be a weaker force when compared to HBOS prior to the current financial crisis".

What the Secretary of State has said is ----

MR. FORRESTER: -- a bit bleaker. There is no mention of 'significantly'.

THE PRESIDENT: Right.

MR. FORRESTER: The Secretary of State then goes on to say that in the medium term, once stability had returned to the markets, the government would sell HBOS on to a new owner or owners. But, there is no mention of the OFT's Stage II counterfactual which states as follows ----

THE PRESIDENT: That is the mention of the Stage II counterfactual, is it not?

MR. FORRESTER: Indeed.

THE PRESIDENT: Your point presumably is, "That does not really describe it in full".

MR. FORRESTER: Yes.

THE PRESIDENT: But it is certainly a reference to it, is it not?

MR. FORRESTER: It is indeed, yes. So, what the OFT says is that,

> "In the medium to longer term Government would have withdrawn its support, leaving either a fully independent HBOS once more or an HBOS in the hands of a 'no overlap' purchaser (the Stage II counterfactual) . In these circumstances HBOS would also constitute a significant player in the market place in the medium term".

Now, the decision does not say that HBOS would be a significant player in the market in the medium term.

THE PRESIDENT: This does not purport to be a verbatim account of what is in the OFT report, does it?

MR. FORRESTER: We do not suggest it is.

THE PRESIDENT: It says it is a summary. You are right, it does not repeat it verbatim.

MR. FORRESTER: That is obvious and we do not complain that it is not verbatim, but we say that it under-estimates -- it paints too bleakly -- it paints too negatively the picture as described by the OFT.

THE PRESIDENT: I just want to be clear on why you say that. Because it uses different words?

MR. FORRESTER: Because it uses different words. Because it omits significant qualifications that the OFT report included. So, it does seem to us significant that at the end of a paraphrased version of what the OFT says, it would have been preferable for the optimistic ending to have been referred to. We do not insist that any particular words be used, but we do think that when the Minister is looking at the OFT report and describing it in his decision, he has got to do so fairly and completely, and omitting the optimistic conclusion that the OFT proposed is significant.

THE PRESIDENT: Just explain why it is significant. I think this is really at the heart of your case, is it not? Are you saying that the Minister must therefore have forgotten and not take account of it, or ----?

MR. FORRESTER: Here is the perplexing thing. The Minister has to take the first decision in this country, possibly making use of his freshly-minted powers. It is a matter of great public concern. There is urgency. He has received lots of input. Now, it is in those circumstances very, very important that the Minister fairly and neutrally set forth the considerations of the Oft about the competitive future of an independent HBOS. Now, remember where we are. It is the end of October. At the time that the merger was contemplated shotgun marriages were happening. That was the way to deal with a financial services body that got into difficulties. By the end of October alternative mechanisms/methods were emerging - that is to say, recapitalisation. HBOS says - and these are my words - "Looking forward, don't be too gloomy. HBOS can have a future. It can offer real competition". That positive approach, that reassurance is not reflected in -- 'Reassurance' is not a good word. That positive, optimistic (I think) prediction is not included in the Minister's decision, and it should have been.

THE PRESIDENT: Why do you say that? In the last sentence what it says is,

> "In the medium term once stability has returned to the markets the Government would sell HBOS on to a new owner (or owners)".

You say that is not a fair reflection.

MR. FORRESTER: It omits the statement of the Oft that HBOS would constitute a significant player in the market in the medium term. Now, that is, I think, the Stage II counterfactual - that HBOS would be a significant player in the medium term is important.

THE PRESIDENT: It is not implicit in that? I mean, if the government was going to sell them off, why would the government do that, unless they were going to be someone capable of holding their own as a competitor, either under new ownership or ----

MR. FORRESTER: He does not exclude it. Indeed not. But, the fact that the Oft says that in the future HBOS would be a significant player in the market place in the medium term seems to me troublesome that two important sentences are omitted from the paraphrasing by the Secretary of State in the decision.

THE PRESIDENT: How does that affect the lawfulness of the decision then?

MR. FORRESTER: There are two aspects. The Secretary of State is bound by the findings of the Oft as to competition. So, to the extent his decision omits to acknowledge - and maybe we are disagreeing as to whether he did acknowledge it - that the Oft gives optimistic

predictions for HBOS's future, that is a problem. But, there is a further problem and that is that the Secretary of State then goes on to the FSA - the Financial Services Authority's analysis. They paint a more gloomy picture. He prefers the views of the FSA to what the Oft has to say.

THE PRESIDENT: Yes. Obviously you are going to come on to that, but just before you leave this there are two possibilities: either he has forgotten, as it were, if he ever read it -- He did not take account of the slightly more optimistic approach and, therefore, although he was bound by it but he did not appreciate it, or he deliberately, as it were, chose to disagree with something he was bound by. It has got to be one or the other of those, has it, for it to have some effect on the lawfulness – is that the position?

MR. FORRESTER: Yes, the Minister is bound by what the OFT has to say. If the OFT says, "There are competition problems", it is not acceptable for the Minister in his Decision not fully to acknowledge the competition assessment of the OFT. To the extent he narrows it or omits things or does not give full play to certain things, to that extent there is a legal problem.

THE PRESIDENT: Yes, I see.

MR. FORRESTER: In addition, he compounds matters in that the Decision goes on to rely upon another source of input which is not competent for the competition assessment, and that is the FSA. The views of the FSA are certainly entitled to credit, but on this side of the scale, the public interest side, not as competition.

THE PRESIDENT: Is it your submission that they are not entitled to include in their submissions anything about the competition side?

MR. FORRESTER: No, public servants and official bodies are welcome to make such submissions as they think appropriate to the Minister, but on this occasion has ----

THE PRESIDENT: He is bound by the OFT.

MR. FORRESTER: He is bound by the OFT. He cannot depart from what the OFT has found. Using my analogy of picking away at the competition problems identified in this scale in my left hand he can neither say the FSA says there are competition considerations and those contradict those of the OFT, nor can he pick away at the OFT's findings by omitting or downplaying relevant portions. We say he did both those things.

In para.22 of the contested Decision the Secretary of State relies on the FSA's submission to the OFT.

THE PRESIDENT: Where are we now?

MR. FORRESTER: At para.22 of the contested Decision.

"The FSA concludes that:

'Full or partial temporary ownership could have been considered in the absence of the Lloyds TSB proposal, although EU State aid rules preclude a Government owned entity from competing aggressively with private sector banks which would likely have caused HBOS's balance sheet to shrink and limited its ability to provide loans and services. Under this scenario, HBOS would not have been able to provide effective competition.

The FSA believes that the … merger affords a means to maintain financial stability and to sustain confidence of an HBOS creditors (including retail depositors). In particular, it provides a sustainable medium-term future for HBOS in a way that none of the alternative scenarios does. We consider these benefits to be considerable relative to the competition aspects of the proposed merger, particularly when account is taken of the lack of competition offered under the alternative scenario.'"

THE PRESIDENT: The FSA is referring there to the balancing, is it not?

MR. FORRESTER: The Decision, the contested Decision, seems to prefer the FSA's prediction about the future of HBOS as a competitive force to the OFT prediction about the future of HBOS as a competitive force.

THE PRESIDENT: Where do you get that preference from?

MR. FORRESTER: There is no preference. Here ----

THE PRESIDENT: They are just reciting submissions not made to the Secretary of State actually, but submissions that were made to the OFT, are they not?

MR. FORRESTER: Sir, I guess that at the beginning of the portion I am quoting is the implicit "by contrast, the FSA says so and so and so and so". So in para.18 the Decision speaks of what the OFT has to say and in para.22 the Decision seems to rely on or attach weight to the FSA's prediction of the future of HBOS. We say that there are two errors that the contested Decision has. First of all, this is a matter which to the extent the FSA submissions relate to competition, this is a matter as to which the Secretary of State is bound by the OFT's findings and it cannot go beyond that.

Secondly, and that is what I will come on to now, the FSA is mistaken in how it describes Community law on the subject of State aid. The contested Decision in a sense borrows or swallows that erroneous assertion by the FSA.

The competition analysis the FSA's views about how effective a competitor HBOS would be are not pertinent. The OFT's are binding. One of the elements that the FSA relies upon

is its contention that State aid Rules would hinder the competitive capacity of an HBOS which had been recapitalised for the State. Let me address that.

MR. BLAIR: Can I just stop you for a minute, because I think it is important. If we go to the turnover at para.22, when the FSA are talking about the competition aspects, I think it is your submission that the last line and a half:

> "We consider these benefits to be considerable relevant to the competition aspects …"

can be fitted into s.45(6), because that is comparing ----

MR. FORRESTER: I am sorry, may I ask you to repeat the question?

MR. BLAIR: The paragraph starts, "The FSA concludes", then there are three sub-paragraphs, and at the bottom of the page:

> "We consider these benefits to be considerable relevant to the competition aspects of the proposed merger …"

Have you got that half sentence?

MR. FORRESTER: Yes.

MR. BLAIR: I think it is your submission that that can be fitted into 45(6) because there they are measuring, but the second half the sentence:

> "… particularly when account is taken of the lack of competition …"

is when you say the FSA are jumping from one scale to the other?

MR. FORRESTER: Yes.

MR. BLAIR: That is the essence of the point?

MR. FORRESTER: Yes.

MR. BLAIR: Thank you.

MR. FORRESTER: I invite you to look at para.76 of the OFT which talks about the State aid question. Paragraph 76 is the OFT talking about the State aid question. It is a very long sentence:

> "In light of the evidence before it, while the OFT cannot exclude the possibility that State aid restrictions could apply, and further that such restrictions could have some impact on HBOS's freedom to compete (compared to its [previous] position …) the OFT believes that it is realistic to consider that HBOS would be an effective competitive force in the market place even if it received some form of Government rescue package."

That is especially important because of what the FSA is relied upon as saying. So para.76, and these are my words, of what the OFT has to say , says: "We cannot exclude that State

Aid restrictions would apply, but we think it is realistic to consider HBOS would, notwithstanding, be an effective competitor force in the market."

Now, the FSA says, and these are my words, that State Aid problems would prevent HBOS competing effectively.

THE PRESIDENT: So we look at that and compare it now with para. ----

MR. FORRESTER: Yes, so if we go back to para.22 of the decision:

"The FSA concludes that:

'Full or partial temporary public ownership … could have been considered in the absence of the Lloyds TSB proposal, although EU State Aid rules …"

And this is the error:

"… preclude a government-owned entity from competing aggressively with private sector banks."

That is not correct, it is not the case that EU State Aid Law precludes a government owned entity from competing aggressively with private sector banks.

THE PRESIDENT: Well the OFT presumably did not think it was too important to correct that, did they? Because this was a submission made to them, was it not, and they recorded their own view of that in the paragraph you have shown us. Presumably they read the ….

MR. FORRESTER: My criticism of the FSA is that it is ----

THE PRESIDENT: It is too strong a statement ----

MR. FORRESTER: It is too strong a statement, that is right.

THE PRESIDENT: -- is your point, is it not?

MR. FORRESTER: Yes. It is too simple.

THE PRESIDENT: And therefore, what should have happened, the OFT should have picked them up on it and pointed it out to the Secretary of State, or the Secretary of State should have disavowed it himself? The trouble is, there were submissions coming in from lots of people, were there not, at this point?

MR. FORRESTER: The Secretary of State, of course, had just two weeks previously been sitting in Brussels so he was pretty expert on the State Aid Rules himself, so I would imagine that he would be able to be rather confident that this assertion was over bold, and that is why it is troubling that an over simple, over bold prediction about the situation of HBOS, gets carried forward into the contested decision.

THE PRESIDENT: Well it is referred to as the FSA submission to the OFT, and it is certainly not expressly accepted as being preferable to the OFT's position, is it?

MR. FORRESTER: Well to the extent that the Minister puts it into his decision, he puts it there because he believes it is important.

THE PRESIDENT: Well, I am not sure about that.

MR. FORRESTER: If he had wanted to be more careful the decision could have purged the inaccuracy out of the FSA advice. When a Minister (or anyone else) quotes bad advice inevitably there must be the concern that the badness or the inaccuracy has not been caught by the decision maker.

So just to mention what the difficulty is: European State Aid Law prohibits the subsidisation of enterprises to injure their competitors, State subsidies, which immediately translate into absurdly low figures, that is prohibited by European State Aid Rules, but it is not the case that European State Aid Rules prohibit publicly owned enterprises from competing aggressively or energetically.

Moreover, an equally significant omission is that on October 13th new guidance emerged from the European Commission, and that guidance is quoted extensively in our application. I do not think I need to go into it. That new guidance confirms even more clearly that what the FSA was saying was exaggerated and wrong. It was not the case that the European Commission was opposed to the recapitalisation of Banks because of a fear of aggressive competition, it is simply inaccurate, and to quote it in the decision was most unfortunate. It would have been much better, the decision would have been fuller and more reliable if the guidance of October 13 had been quoted if ever there was indeed to be a discussion about the State Aid Laws; that was the authentic, authoritative source on State Aid law.

THE PRESIDENT: As you pointed out, the OFT itself said that there was a possibility that they would have some impact on the freedom to compete.

MR. FORRESTER: Yes.

THE PRESIDENT: So it is the difference between aggressive competition and some impact.

MR. FORRESTER: Yes, but this is not a trivial distinction. These fine nuances are very important because they go to the heart of whether the decision was wisely and properly taken, and the decision – I repeat – was not taken lawfully because there was a picking away at the competition concerns, and the acceptance as relevant for the competition analysis of inputs from the FSA, for example, predictions about the future of HBOS, which were in part erroneous.

So I am now coming to the end of my submissions. Our contention is that the Secretary of State dismissed too confidently the notion of an HBOS in public ownership after recapitalisation on the grounds of the State Aid Rules. That is mistaken as to the State Aid

Rules, the reference to the State Aid Rules is inaccurate and it takes no account of the new wave of community policy in this field.

Now, it may be that there were weaknesses at the HBOS which made capitalisation difficult or particularly challenging, or particularly risky or uncertain; that may be so, but for the Minister to suggest in his decision that there is nothing to be done because of the State Aid Rules, and in the light of input from the FSA that is a legal error. So the Minister did the decision, I do not want to personalise it to the individual Minister, but the decision had these vices. First of all, that there was instead of a balancing of the competition problem against the public interest considerations, there was a tinkering with the competition analysis instead of an acceptance of the competition analysis by the OFT. The Minister should have been bound by what the OFT had to say. Secondly, and related the Minister did not have the right to go to the FSA (to its report) for competition analysis. He certainly had the right to go to it for public interest analysis. Thirdly, by incorporating an error from the FSA into the decision the Minister perpetuated that error. Now, those are the particular points. They come under the over-arching one which we spoke about this morning - the declared policy of Her Majesty's Government that competition law was not going to be an obstacle. If the Minister had merely said, "This is what the OFT says. Here are the public interest concerns. I find the public interest concerns justify tolerating this merger going forward" -- If he had only said that, we would not be here. But, what he did unfortunately was to depart from the Act which circumscribes how the Minister can apply public interest criteria in these very, very special circumstances. We say it is especially regrettable, for the first time the newly-minted power was to be used, that the Minister appeared to have got it wrong.

So, for those reasons we contend that the decision should be quashed and that the Tribunal should recommend to the Minister that the matter be referred the Competition Commission. The Tribunal should quash the decision and refer it to the Minister with the recommendation that the matter be referred to the Competition Commission for examination by experts.

I have two housekeeping matters to end with. With our apologies for the delay, fresh bundles have arrived. My colleagues will be amply bundled.

Separately, we have prepared a list - I am sorry it is handwritten - of the interests of the members of the action group.

THE PRESIDENT: Thank you very much. Mr. Forrester, just before you sit down, in your Notice of Application you raise one or two other points. Can I assume that those have gone by the wayside now? There is an EC proportionality point ----

MR. FORRESTER: I think it is not necessary. It is an interesting point, but I think it is just something of a distraction.

THE PRESIDENT: There is another point which perhaps had more prominence - and this may also have gone by the wayside - that the Secretary of State failed to take account of the new situation which had arisen in relation to the recapitalisation scheme of the government. In the light of Mr. Saunders' evidence I do not know whether that, in a sense, has also gone by the board? You have not mentioned it.

MR. FORRESTER: The consequence of the Secretary of State being confronted -- functioning within an atmosphere where government had determined that the competition rules were not to be a problem -- That necessarily, we would suggest, meant that the Secretary of State's attention, in a sense, was elsewhere. Now, there were alternative methods available - that is to say, of securing the future of HBOS. Now, the decision does not give enough weight to those alternative solutions to the problem which were emerging during October. Instead, the Secretary of State simply brushes aside those possibilities, stating (and these are now my words) that the future of HBOS as a significant competitor would be weak other than via the merger. So, I am not withdrawing the proposition that the Secretary of State give insufficient attention to alternative means of addressing the problem of HSBOS. He focused on the merger and tended to put aside and discard alternative ways of contemplating the future of HBOS.

THE PRESIDENT: So, you are maintaining the argument that he failed to take account of the relevant -- I mean, there is a distinction, which may be relevant in terms of a judicial review such as this, which is that someone, as it were, took account of something but placed insufficient weight on it -- did not give the weight to it which you might say it deserved (which might be a difficult point to run in a judicial review) as opposed to saying that he simply did not take account of something -- he left out of account a relevant consideration. In your application notice I was not quite sure which of those two was really being put.

MR. FORRESTER: We still contend that new facts were not properly considered - for example, we said in our application that the section on FSA state aid did not take any account of the new state aid guidance from the European Commission, which emerged on 13th October. Now, that was very, very relevant. But, it was not considered -- Well, one cannot detect that any account was taken of it in the contested decision. So, that was an unfortunate omission because that omission, in a sense, doomed to failure -- the prediction was a gloomy prediction about the future of HBOS in the absence of these newly identified methods of dealing with financial problems.

MR. BLAIR: I had assumed, perhaps foolishly, that you were not placing much emphasis on the change of circumstances at point, because in your view the fetter that had been placed on the Secretary of State in the early stage meant that he was also blindfold and could not see what was happening since, and therefore it is an example of the existence of the fetter you allege.

MR. FORRESTER: Yes, sir. I endorse that. My response to that question is, "Yes, indeed".

THE PRESIDENT: So, it is really part of the fettering case. It is swept up in that.

MR. FORRESTER: Yes.

THE PRESIDENT: Thank you, Mr. Forrester. Mr. Lasok?

MR. LASOK: Can I begin with an apology? I think the Tribunal has asked for an explanation of the delay in the service of the Secretary of State's evidence.

THE PRESIDENT: It was a very tight deadline that everybody was under. In the end, it was done, I think, an hour after the deadline ----

MR. LASOK: It was just one of those things. Everybody was using their best endeavours in order to hit the deadline, but, for logistic reasons, we missed it. So, we apologise to the Tribunal for that.

THE PRESIDENT: Thank you very much.

MR. LASOK: I do not think that has caused any disadvantage to the claimants.

THE PRESIDENT: It just meant that people had to wait around until seven o'clock on Thursday evening.

MR. LASOK: Secondly, in relation to permission to appeal, I know that this is anticipating something that is going to happen because the Tribunal is going to make a decision and somebody is going to lose -- In our submission it would be right - following on, I believe, from an indication that the Chairman gave last week - that any application for permission to the Tribunal by whoever happens to be the losing party ought to be made sooner rather than later. We would respectfully suggest that the Tribunal should direct, or indicate at any rate, that if any application for permission is to be made, it ought to be made as soon as is possible after the Tribunal has given the reasons for its decision. In that connection, the Tribunal may recall that last week Mr. Harris indicated that due to the price sensitivity or possible price sensitivity of the Tribunal's decision it might be appropriate if the decision was released after markets closed. So it is entirely conceivable that there might be an interval of time between the giving of reasons, if that is contemporaneous with the release of the decision, and the point at which the parties can come back to make submissions on

any application for permission to appeal. I thought I would raise that with the Tribunal now.

THE PRESIDENT: That is very helpful. I will hear what others say. One way of doing it could be that we direct that any application for permission to appeal be made orally immediately after a judgment is given, which is, after all, the way that it is typically done in many courts.

MR. LASOK: It may well be that this is something that my learned friends might think about, so that when we end at 4.15 or whenever it is that the Tribunal wishes to end this evening, the Tribunal might at that stage want to ask them to make any submissions they might want to make on the topic.

THE PRESIDENT: Yes, that is probably a better time to do it. I think it would be helpful for us to hear what people say sooner rather than later on that. As I say, our present inclination would be to call for permission applications to be made orally when we give judgment, immediately after we give judgment, as would normally be the case.

MR. LASOK: I am much obliged.

The next point concerns a topic that, in fact, I am about to come to which is the question of standing. It relates to information and evidence concerning the members of MAG, and one assumes that whatever is the manuscript document that is gradually making its way from one end down here or wherever it is going ----

THE PRESIDENT: Is there only one copy?

MR. LASOK: It is going to cover the outstanding points. It may be that it is not germane to the main point about standing, which I will proceed to develop now.

THE PRESIDENT: Do you want to have two seconds to glance at it. It only takes about two seconds to sum it up, so perhaps you would like to have a look at it.

MR. LASOK: (After a pause) Sir, as the Tribunal appreciates, s.120, which deals with effectively judicial review applications concerning decisions on merger situations, limits the class of persons who may make such an application to persons who are aggrieved by the decision in question. It was obviously open to Parliament to use other language. Parliament could have used the phrase “persons have sufficient interest”, or something of that nature. Instead it opted for the concept of a person aggrieved by the decision. In our submission, the general acceptation of the meaning of that phrase is that it is narrower in scope than a person having sufficient interest. It is in that sense more precise.

The context, of course, in our submission, is relevant. The context is the judicial review of decisions dealing with merger situations and, as Mr. Forrester has correctly pointed out, the bedrock, if you like, of the merger control regime in the Enterprise Act is control by

reference to competition considerations. Public interest considerations tend to be the exception. The normal approach of the competition criteria that are applicable to mergers is that their function is to protect the processes of competition because by those processes consumers' welfare is increased rather than diminished. So competition criteria, even in the context of merger control, are actually directed in the final analysis to securing consumer welfare.

Consumer welfare can be understood, and typically is understood in the broad sense, that the consumers in question may be purchasers or users and they may also be final consumers, the ordinary man or woman in the street. The upshot is that when Parliament was confronting s.120 it must have known that it was dealing with a situation in which the decisions would be of interest to a wide number of wide groups of persons, both consumers as a whole, and it could be said the public as a whole. When, therefore, Parliament decided to adopt a particular expression, the "person aggrieved" approach, that was, in our submission, a reliable indication that Parliament's intention was not to leave the right of action under s.120 open as a kind of *acteo popularis* or one that the world and his wife would be able to bring before this Tribunal.

A "person aggrieved" because of the language that is used was intended, we submit, to narrow the class of person who could make an application, and narrow it by reference to the ordinary class that could be described as having an interest, namely the entire class of consumers.

There is no basis, in our submission, for assimilating "person aggrieved" to the other expression, "person having sufficient interest", and therefore there is no basis for drawing a parallel with the criterion for standing in the context of normal judicial review cases.

A different approach was adopted by Parliament in relation to s.120. It therefore follows that the cases cited by Mr. Forrester are, in our submission, not in point. The ones that he directed the Tribunal's attention to this morning were either judicial review cases or, in one of the Scottish cases, a case in which the question was whether or not the person concerned had title and interest to bring in effect an action for breach of statutory duty against a public body. That is, at any rate, how I understand the Decision.

None of that is relevant where Parliament has actually sought to define the criterion identifying the class of person who may make an application. Indeed, one of the passages from a textbook cited by my learned friend Mr. Forrester effectively made that point, because it was a passage that drew attention to the necessity to look at the way Parliament

has decided, or the statute has determined, the class of person able to bring proceedings is to be defined.

In those circumstances, it is perfectly obvious, and I think this is stating something that is trite law, it is not appropriate, certainly not appropriate for an advocate, to seek to substitute one formula for the formula used by the statute – in other words, it is inappropriate to take the phrase "person aggrieved" and seek to substitute for it an all encompassing formula or slogan that seeks to distil for all time the meaning of the phrase, and that is not what I am going to do. In our submission, the point that is material to the present case is that "aggrieved person" implies necessarily that the person able to bring proceedings under s.120 must be a person who can identify some specific and concrete factor, feature or quality, however you put it, that differentiates that person from the general body of consumers or of members of the public so far as the challenged decision is concerned, hence there must be some particular relationship between the person bringing the proceedings and the decision contested in the proceedings.

The nature of that factor, that link, that quality, can be identified by the word "aggrieved", but in present circumstances the difficulty is that in our submission the claimants have not identified any factor that distinguishes them from the general body of consumers, or members of the public, so far as the contested decision is concerned. All that they have done is to identify that they share factors with ordinary members of the public, ordinary consumers and, in our submission, that is not good enough. It does not satisfy, we submit, the concern of Parliament to limit the class of persons able to bring proceedings, to persons who are aggrieved. If my learned friend were to identify factors of a special nature that were said to be factors applicable to the members of the Action Group that set them apart from others, then I would seek to deal with submissions of that nature in order to make submissions as to whether or not they brought any of the individual members of the MAG within the class of "a person aggrieved". My difficulty is that no such argument has been advanced before the Tribunal because the general tenor of the case advanced by my learned friend is that the members of the Action Group have the same concerns as everyone else and that, in our submission, is not the criterion that Parliament selected when it decided upon the wording of s.120.

That brings me to deal with the first matter of substance in the case. I perhaps ought to add this, in our submission – and I well accept that this is strenuously opposed by Mr. Forrester – this is one of those cases in which the Tribunal could dismiss the proceedings on the grounds that the claimants lacked standing, or dismiss it on the ground of substance. In our

submission, whatever the Tribunal's view about the standing question, it would be appropriate for the Tribunal also to make its views clear on the matter of substance.

If I turn to the question of substance, the way my learned friend divided it up was between an attack based on the idea of the Minister fettering his discretion, or having his discretion fettered for him, and secondly, an attack based on what could be described loosely as "the merits of the contested decision" on the grounds that he conveniently summarised at the end of his submissions.

If I focus for a minute first on the question of fettering of discretion, in relation to that there is, in our submission, no real difference between the parties, or at least between the Secretary of State and the claimant in terms of the legal principles to apply and the relevant cases. The question is whether or not discretion was fettered, or whether or not the Minister, on 30th October (which was actually the date on which he made the decision and it was published the following day) the Minister had a closed mind. Now, that effectively is a question of fact and not of law. In our submission, any attempt to run a fettering of discretion or closing of mind argument must advance at least two factors, or prove two factors. The first is some event or some action that is said to have been the action that causes the fettering of the discretion, but secondly, there must also be the actual fettering of the discretion; in other words, there must be both cause and effect. If there is cause but no effect, then the argument f ails. So, for example, if reliance is placed on a particular event as being what I can describe as a "fettering event", but in actual fact the object or target of this fettering event simply ignored it, and the object or target made its own, or his/her own, decision exercising his/her own discretion, then the fettering of discretion argument just falls away, because the gist of the point is not that somebody in the past has made some pronouncement, or in other circumstances uttered some threat, the gist of the argument is that what has previously been done has had an effect on the mind of the decision maker, turning the decision maker into somebody who does not exercise for himself/herself his/her own discretion but permits himself/herself to be the instrument of another.

We can argue about the fettering events. For example, reference is made to millions of press reports. Some of us were brought up to believe, with all due respect to people who may be present in the Tribunal today, that you do not believe everything that you read in the press. But press reports are all jolly fine in their own way and, indeed, off the cuff comments in a radio interview, are all very fine. One can discuss what they meant, what people thought that they meant, one can discuss what effect did they have on the operations of the minds of Lloyds? which is another point raised by my learned friend; that has nothing

to do with it. The question is when he made the decision on 30th October did the Secretary of State act as a kind of puppet, or instrument of somebody else, or was he making his own mind up? So we can cut through this debate about what people were saying on 18th September, or some of the other dates that have been suggested, and we can actually go straight through to some evidence that indicates the views of the Secretary of State. To that end I propose to turn to an extract from Hansard, that appears exhibited to the witness statement of Mr. Saunders. This is exhibit 14.

THE PRESIDENT: This is Lord Mandelson moving the order.

MR. LASOK: Yes, and this is the debate on 16th October. In my copy I have paginated at the bottom, the first page being 64. If you turn to p.65 there were some introductory remarks, and if you look at the first full paragraph towards the top of the page, starting: "It is critical …" you see that Lord Mandelson introduces the motion that he was putting to the House, he then begs to move, that is the next paragraph. If you drop down to just before the second hole punch, there is a reference to his predecessor, Mr. Hutton, who had made the announcement on 18th September concerning the issue of the intervention notice, and the Secretary of State goes on to report that Mr. Hutton had also announced that he would place an order seeking the necessary power to enable him to take into account the vital public interest issues surrounding this merger.

The Secretary of State then goes on to say:

"Let me be clear. It is not that the merged bank would be sheltered, if the merger goes ahead, from competition law."

And he then refers to action with in the normal power of the competition authorities that could be taken. He then talks about the order:

> "The order specifies the maintenance of stability in the UK financial system as a public interest consideration ----"

He says that it will enable the Secretary of State to intervene in those mergers in order to be able to make the final decisions. Then he says at the bottom of the page,

> "As Secretary of State, I am unable to take decisions on this merger until parliamentary approval is received for the order. Subject to approval of the order by your Lordships, I will ensure that I will receive all available evidence and views before I make any decisions. This will include advice from the Treasury, the Bank of England and the FSA which make up the Tripartite Authorities".

In the next paragraph he says,

> "The order will allow us to make careful and urgent consideration of financial stability an additional part of our assessment process".

There was then a reply by Lord Hunt. If you turn to look at the next page, p.67 there is a paragraph in the middle of that page, beginning "The Bank of England --" If you look at the second half of it you will see that Lord Hunt then raised queries about what he described as the 'merged super bank' and referred at the end of that paragraph to concerns that had been raised by "Which". At the bottom of that page in the last two lines he refers to "the investments announced this week in several of our biggest banking names". That is what is often described as the recapitalisation programme. However, Lord Hunt went on to say, "-- serves only to underline our wider concerns". He wished those concerns to be addressed. If you look at the bottom of that page you have Lord Razzal. On the next page, in the second full paragraph, beginning with, "I agree with almost everything --" In that paragraph he refers to concerns about the merger. Then if you go to p.72 you have an intervention by Lord Borrie, whom the Tribunal may recall was a past Director of Fair Trading. In his speech he also refers to concerns about the merger. I am not going to read out all that, but I would ask the Tribunal to cast an eye over it, down to the second hole punch. (After a pause): If you would turn to p.76, towards the bottom of the page you have got Lord Mandelson replying. That is just to indicate who is speaking when we get to the next page, p.77. If you go down to the bottom of that page, the last four lines, the Secretary of State says this:

> "The order that we are considering is brought forward to allow for the careful consideration of financial stability as part of our assessment of the proposed merger. This debate therefore is not about the assessment which I have yet to undertake. I will do so following receipt by me of the Oft's recommendations due by 24th October."

He refers to the public interest issues He says,

> "I have an open mind to both the competition and the public interest considerations".

That, in our submission, is a clear and direct indication from the decision-maker, the Secretary of State, that he had an open mind as to both the competition and the public interest considerations. It was a situation, in effect, in which comments had been made to him in the course of the debate that related to the substance - if you like, the merits of his decision - and what he does is to make it absolutely clear that his mind is open.

Now, that, in our submission, is extremely clear evidence. In addition to that, the Tribunal has got the witness statement of Mr. Saunders that describes the process that was followed within what is known as BERR. That led to the decision contested in these proceedings. My learned friend has stated that he finds nothing to disagree with in the witness statement of Mr. Saunders. When he commenced his submissions this morning my learned friend said that he found Mr. Saunders' witness statement to be sound. In those circumstances, in our respectful submission, there is simply no basis in fact for the allegation that has been persisted in by my learned friend that there was any fettering of discretion of the Secretary of State, or, indeed, that there was any closing of the mind of the Secretary of State before he came to make the contested decision. My learned friend was therefore driven to making what I will, perhaps in an insulting fashion, describe as the plaintive observation that the so-called fettering events -- the statements made by the Chancellor of the Exchequer and attributed to the Prime Minister, but not substantiated, must have constrained how the Secretary of State analysed the merger. In our submission there is no 'must have' about it at all. It either did or did not. There is no evidence that it did. Therefore, this submission ought to be rejected.

That brings me to the next part of the submissions made by the claimant which concerns, in rather more general terms, the legality of the contested decision. A number of points have been made by my learned friend. Towards the end of his submissions he summarised them more or less along the following lines: that the decision was vitiated by firstly the fact that instead of conducting a balancing exercise the Secretary of State tinkered, as he put it, with the competition analysis instead of accepting it. My learned friend says that the Secretary of State should have been bound by the competition analysis, but he goes on to submit that he behaved on the basis that he was not. The second point is that the Secretary of State did not have the right to go to the FSA for the competition analysis, but my learned friend admits and accepts that the Secretary of State could go to the FSA for its public interest analysis. Thirdly, it is asserted that the Secretary of State incorporated into his decision an error concerning the state aid position that was made by the FSA. Finally, it would appear, my learned friend asserts that the decision was wrong because the Secretary of State did not give enough weight to alternative solutions. That goes to the debate between the parties about the efficacy, or supposed efficacy of the recapitalisation process. Apparently in the view of the claimant that was a nostrum that would magic away all the difficulties with which HBOS was faced.

In our submission it may be useful, when dealing with those arguments, to actually have a look at the contested decision. I have got it as Exhibit 23 to the witness statement of Mr. Saunders, but the Tribunal may have looked at it at Tab 27 in the bundle from the claimants. This is going to be a rather boring exercise. It is not going to be fun and there are no jokes in it, because sad to say there are no jokes that I can identify in the contested Decision. It starts off with a recitation of the parties, the intervention notice, jurisdiction and then we have advice from the OFT and other representations. That starts at para.7, and I would draw the Tribunal's attention to para.7, and more particularly to the last sentence, and what you see in para.7 is a complete summary of advice that was given by the OFT in its report. It is not adulterated in any way, it is not criticised by Mr. Forrester, and the last sentence of the paragraph is a clear indication that the Secretary of State acknowledged that he was required to accept the decisions of the OFT on those issues.

Then in the first sentence of the next paragraph, para.8, it is stated:

> "In coming to his decision, the Secretary of State has taken into account the OFT Report …"

Then there is a reference to the fact that the report was being published. The Tribunal may consider that the fact that the report was being published was relevant to the way in which the report was summarised later on in the contested decision, because of course the Secretary of State later on in the contested decision was setting out extracts or a summary or digest of what he knew to be a public document. In our submission, there is little point in the Secretary of State setting out *in extenso,* or indeed quoting verbatim, a public document because, having identified the document in his decision, he knows that the reader to be fully and accurately informed as to the contents of the document can go and look at the document for themselves.

What is relevant here is that in para.8 it is categorically stated without any qualification that the Secretary of State had taken the OFT report into account. The sentence actually goes on:

> "… including the information and range of views contained in the detailed summaries of representations on the stability of the UK financial system made by the merging parties and third parties that are annexed to the OFT Report."

Then we get to a part of the contested decision that is headed "Secretary of State's Decision", and I am going to go through this relatively slowly. I am not going to read it out. Paragraph 9 says again that the Secretary of State is required to accept a decision of the OFT. The accuracy of that paragraph is not disputed by the claimants.

Then in para.10 we have a summary of what the OFT has decided, following at the end of that paragraph by the comment that:

> "The Secretary of State is required under the Act to accept this decision."

The summary provided there is no disputed by the claimant.

Then we have para.11 which refers to the new public interest consideration and, more particularly, it refers to a decision of the Secretary of State that the new public interest consideration was relevant to the merger situation. That paragraph is not disputed, so the legality of the decision that the stability of the UK financial system was relevant to the Lloyds/HBOS merger is not disputed.

Then we have in para.12 this, and I am going to read this out:

> "Taking account only of the substantial lessening of competition and the relevant public interest consideration, the Secretary of State believes that the creation of the relevant merger situation is not expected to operate against the public interest. The OFT has decided …"

What then follows is not, as I understand it at any rate, criticised in any way as being an accurate description of what the OFT had decided. After setting out the relevant decision of the OFT we have then the sentence beginning, "However", where the Secretary of State says:

> "However, having had regard in particular to the submissions made to the OFT by the tripartite authorities (…) the Secretary of State considers that the merger will result in significant benefits to the public interest as it relates to ensuring the stability of the UK financial system and that these benefits outweigh the potential for the merger to result in the anti-competitive outcomes identified by the OFT. As a result of this decision, no reference will be made to the Competition Commission."

From my learned friend's submissions, I detect that he accepts that the first sentence of that paragraph sets out the correct approach that had to be followed by the Secretary of State.

I interpolate there to say that in the course of his submissions my learned friend referred to para.34 of the witness statement of Mr. Saunders as setting out what he described as what should have been done but not what did happen. In our submission, that is, with all due respect, an erroneous way of describing what Mr. Saunders actually says. What he describes is what happened. My learned friend was then asked, I think, whether or not he quarrelled with that description and he said he did not quarrel with it. Since the evidence of

Mr. Saunders is that that is what happened and Mr. Forrester does not quarrel with that as a description of what should have happened, it follows that the claimants have no case.

Coming back to the contested decision, we see in para.12 unadulterated acceptance by the Secretary of State of the critical decision of the OFT. What we also see is the balancing exercise that was entrusted to the Secretary of State by Parliament in the Enterprise Act.

I think one can reiterate the point that, so far as can be seen, the claimants do not dispute the fact that the merger did relate to ensuring the stability of the UK financial system because of the fact that they nowhere contest the relevance of that specified public interest consideration to the merger.

The really point, what has really happened in the present case, is that the members of MAG simply disagree with the Secretary of State's conclusion, but to disagree with a view taken by the decision maker that is, like the present, a judgmental view, is not a basis for challenging the decision. It is trite that reasonable people can disagree about matters of judgment without ceasing to be reasonable. So in the present case it is incumbent the claimant actually to identify some particular aspects of the contested decision where it can be said in all truthfulness that the Secretary of State has gone wrong. But where do we find the claimant criticising the part in the contested decision that is actually headed: "Secretary of State's Decision"? Where are the submissions on paras. 9 to 12? There are no submissions. What we actually have is a criticism of the way in which the Secretary of State dealt with the summary of the reasons for the decision and more particularly a criticism of the way in which he summarised or cut down for insertion in his decision the reasoning and conclusions of the OFT. But, in our submission, that is not a proper basis for substituting the legality or the reasonableness of the Secretary of State's decision.

When I was at school I had to do exercises like that, I think they were called "précis", and if you did not do it properly you got told off, but it did not make what you did unlawful. So here, the fact that in the course of summarising a public document the Secretary of State has omitted some passages that Mr. Forrester finds attractive is neither here nor there. What actually happened in the present case is adequately described in paras. 9 to 12. The Secretary of State regarded himself as being bound by the decisions of the OFT that were binding on him. He then had to carry out an exercise of balancing the Secretary of State's conclusions as to the anti-competitive outcome against the new specified public interest consideration and that is what he did. Therefore, the critical parts are paras. 9 to 12, and if no criticism can be advanced of those parts, then the claimant's claim just falls away.

THE PRESIDENT: Well, except that, I suppose, insofar as the reasons expand upon the thinking behind them, you could say it reflects on them, though I think you are going to come on to deal with Mr. Forrester's three criticisms, that he says in effect that the Secretary of State incorporated an error of the FSA, an error of law as it were, into his reasoning, he should have disavowed it and by implication gave prominence to the FSA's view of the competition factors which the OFT had already dealt with, by which he was bound.

MR. LASOK: On the first point, disavowal, in our submission it was not necessary for the Secretary of State to disavow preceding statements that had either been made by the Chancellor of the Exchequer, or attributed to the Prime Minister.

THE PRESIDENT: Well I think that was the State Aid point.

MR. LASOK: Oh yes, but when we go through this particular part of the contested decision, what we actually see is almost vividly displayed, my learned friend's analogy of the two hands – the right hand and the left hand, because the first thing that happens is that in paras. 13 down to 18 we see a gist of the OFT report. It starts off with the decisions contained in the OFT report, that is para.13. 13 and 14, which are in large part perhaps the more material part of the OFT's report because what is binding on the Secretary of State is what the OFT decided arguably on one interpretation of the Act it is not the reasoning of the OFT that is binding on the Secretary of State, it is the conclusion of the OFT, but we can put that on one side as being of academic interest. The main thing is that what you see here is a correct summary and description of the OFT's decisions and then a summary of the reasoning. Then you get to para.19.

THE PRESIDENT: You dealt with para.18, you say that that was just a précis.

MR. LASOK: Quite correct, that was just a précis of a public document. Now, it is true to say that in that précis the Secretary of State also omitted a lot of other things that are contained in the OFT's report. For example, if you go to the Report itself, and go to para.5. Paragraph 5 says that the competition review:

> "… involves a predictive merger assessment of financial markets in the UK (and also globally) that are currently experiencing extraordinary turbulence and change. These uncertain conditions, as exogenous forces affecting the market being investigated, are a reason for caution."

I do not think that that actually appears in the summary made by the Secretary of State, but what it does is to show that the OFT itself regarded the conclusions to which it was coming and the analysis that it was following as something that had to be accepted with a degree of caution because of the nature of the markets that it was examining, at least at that stage, of

their evolution. But you do not find – I looked for it but I could not find – an elusion to that need for caution in the summary of the OFT's report that one finds in paras. 13 to 19. Paragraph 5 of the OFT's report was not the only paragraph in which a note of caution was raised by the OFT, because another one appeared in para.47. That simply goes to show that if one is adopting the sort of conspiratorial analysis of the making of the contested decision, namely, that it was a decision whose terms were devised in order to create an impression, it looks a little odd that the contested decision does not cite from the OFT report bits that could be regarded as showing that the OFT's analysis and conclusions ought to be approached withy caution; that does not appear. One might say what is sauce for the goose is sauce for the gander, and one could say that the Secretary of State, if he omitted some things that were favourable to the claimant, because they like them, but omitted others that were unfavourable to the claimant, he ought to be regarded as having erred for that reason as well, but where does that lead us? This is just a summary exercise. It is not an exercise in trying to swing the impression of the reader, because this is not a pleading.

My learned friend's case really supposes that this document was drafted in the way he describes, but what is the purpose of that? What is the purpose of tilting the balance or the description of things in the way that my learned friend describes it? You do that in a pleading, or some other document in which you want to persuade somebody else to make a decision, but that is not this kind of document. This reports the decision. It sets out the decision. It sets out a summary of the reasons for the decision. It is not doing anything else, it is not seeking to persuade somebody else to make a decision. Therefore, this idea that this part of the document should have contained some things, and therefore their absence is suspicious or leads to the inference that the Secretary of State's mind was closed, all these things just disappear; they are completely ridiculous.

THE PRESIDENT: I think one of the ways in which it was being put was that there is the duty you have referred to, to follow, or regard oneself as bound by the findings or decisions at any rate of the OFT, whereas the Secretary of State here, by giving prominence to arguably different views, or differing views of the FSA as regards to the competition factor was in a sense incorporating an error of law. He was taking account of something which, if taken account of and given weight to, would mean that the duty under s.45(6) was not being complied with. That is one of the ways in which it was being put.

MR. LASOK: Yes. In our submission one needs to be a bit careful about that because it is accepted by the claimant that it was perfectly right for the Secretary of State to take into account the views of the FSA on the public interest side of the equation. What was wrong --

or would be wrong would be for the Secretary of State to take those views expressed in that context and move them across into the competition context. But, there one needs to bear in mind that the Secretary of State was actually bound by the conclusions, the findings, the decisions of the Oft - and he said that he was bound by them. You then get a summary of the report and then you get to para. 19. That is, if you like, the fulcrum in the case. It is the point at which one passes in the summary of reasons from the competition concerns that lay at one side of the scales, and you move into the other side of the scales where you are looking at the public interest consideration. Paragraph 19 says,

> "Against this assessment of the potential impact of the merger on competition, it is necessary to consider the public interest as it relates to the stability of the UK financial system".

Two points can be made about para. 19. The first is that when the Secretary of State talks about 'this assessment'. In our submission he is referring to the Oft's assessment in the whole. He is not referring to those bits that he has summarised and mentioned specifically. He is referring to the assessment of the Oft. The summary, in the preceding paragraphs, is to inform the reader -- to pull out the bits in the Oft's assessment. But, it is the assessment itself that the Secretary of State is taking into consideration.

The second thing one says about para. 19 is that he is now saying, "Right. This is what appears on one side of the scales. Now we have to look at what appears on the other". All that then follows is in the other side of the scales. It is on that other side of the scales that one sees the quotations from the submissions made by the FSA that are criticised by my learned friend. However, in the structure of this summary of the reasons, they are all in the public interest side of the scales. They are not in the competition side. There is no suggestion in this summary that the Secretary of State was mingling the FSA's views on competition in with the assessment made by the Oft in such a way, or in any way, as to diminish or denigrate, or devalue, or de-nature (whatever verb you use) the assessment made by the Oft. In the structure of the decision this is in a complete different part of it. It is right to point out as we go through this that in para. 20 you have got a bit from the Bank of England which refers to the recapitalisation programme.

THE PRESIDENT: I think the bit he particularly relied upon as, if you like, for want of a better word, importing some cross-contamination as between the two hands was the bit on the bottom of the next page, and in particular the last sentence of para. 22.

MR. LASOK: The problem, of course, about that is that what occurs in this part of the decision is that views expressed by the FSA are quoted. They are quoted because I think these

documents are not public documents. The Oft's report was a public document. These documents are not public documents. The bits are quoted. There is no dispute that the FSA did say these things. The question is: Where do we get the idea advanced by my learned friend that there was a contamination exercise going on when what the Secretary of State actually does is to make it abundantly clear (because he has repeated this now about, something like six times so far in the decision) that he is obliged to follow the decisions of the Oft and, furthermore, we find these references to what the FSA submitted to the Oft in that part of the summary that does not concern the competition aspect. So, what is the basis for this idea that there is some sort of contamination? It is not in the document. It is not in the evidence of Mr. Saunders. It is not anywhere else. Actually it is nothing other than an assertion made by the claimants?

Another curious point concerns the criticism of the Secretary of State for referring to the FSA's views on state aid because, of course, the Secretary of State also summarised the views of the Oft on state aid because he did that in -- If you look at the preceding page, at para. 18, towards the top of the page, there is a reference to EC law on state aid in the fourth line. That is the Secretary of State's summary of the views expressed by the Oft. So, we have here, on the state aid aspect the Secretary of State summarising the views of the Oft, summarising the views of the FSA. He does not express a preference for the one or the other. But, where do we get the idea from that the mere fact that he has summarised the view, or quoted the views, of the FSA in the second part of this section of the contested decision, but all of a sudden this is contaminating the earlier part in which he has also summarised the views of the Oft which we know to have been slightly different. Where does this contamination argument come from?

THE PRESIDENT: As I understand it, by reciting it in the reasons for the decision it is something that was therefore considered -- taken account of and therefore it could have a contaminating effect.

MR. LASOK: The problem about that of course is that a decision-maker who receives submissions from people has got to read them. If he comes across a particular submission that has something in it that is not germane to the decision that he has to make, what he then does is to say, "Well, I ignore it". But that does not alter the fact that it has been part of a submission made to him, and that he has read it. So, he has to leave it out of account. But, it would be ridiculous for him to try and suppress the fact that he had received this information. The only alternative open to him is to say that he is now conflicted out of making his decision, which would be a wonderful device for reducing decision-making to a

complete paralysis because what you would do is in order to prevent a decision ever being made you would make a submission that had inserted somewhere within it something that the decision-maker should not take into account.

THE PRESIDENT: A virus.

MR. LASOK: A virus, yes.

THE PRESIDENT: I suppose the alternative, where something is wrong, would be to make it clear that you know that it is wrong and you have discounted it. That would be an alternative to recusing yourself, as it were.

MR. LASOK: Yes. The difficulty with that is that you would have to go line by line through everything that you had received, carry out an evaluative exercise as to whether or not it was relevant, and if it was relevant how you regarded it. You would then have decisions that would take an extremely long time to draft and would be extremely long. In our respectful submission that is not required of a decision-maker. What we actually have here is a situation in which the Secretary of State in paras. 9 to 12 has told us what the decision is and what the reasons are for the decision. We then have, in the summary section, a summary of submissions that were made to the Secretary of State. Some of those submissions he acknowledged were binding on him as a matter of law, and he identifies what those are. Then there are other submissions that are not. It is also right to say that when we go to the end of all this, we get to paras. 27 and 28 where the Secretary of State reverts to the OFT report and he says,

> "It is clear from the Oft report that the proposed merger is capable of giving rise to competition concerns".

I do not think that is criticised. Then he says,

> "However, as can be seen from the submissions made to the Oft by the Tripartite Authorities, the merger also provides an effective market-based means of restoring the stability of HBOS and helps to secure the stability of the UK financial system as a whole".

It is very difficult to see what in that is actually criticised on proper grounds by the claimant. What the claimant really says is that it disagrees with those views, but it has not really adduced any arguments to demonstrate that those views were erroneous or erroneously held.

Then you have in 28 the judgment that has to be made. Paragraphs 27 and 28, in our submission, also make it clear, as part of the summary of the reasons, the process that was followed by the Secretary of State. So you first have the Secretary of State identifying what

is in one scale, then he identifies what is the other scale, and then he explains in paras.27 and 28 what he concluded as a result of it.

It has gone past 4.20.

THE PRESIDENT: You have not quite finished, I assume?

MR. LASOK: No, I have not quite finished. I have probably got another half an hour, 20 minutes to half an hour.

THE PRESIDENT: We will stop, shall we?

MR. BLAIR: I think the President has indicated that he is going to stop, but there is one question that I would like to give you notice of. In para.12 of the decision the third word is "only":

> "Taking account only of the substantial lessening of competition and the relevant public interest consideration …"

Two points on "only": can you help me by saying where in the statute, if at all, that word appears and comes from; and secondly, does that word help you in the fettering argument that was put to you by Mr. Forrester? I do not need an answer tonight, but I thought I would give it to you overnight.

MR. LASOK: Can I give you a provisional answer. The "only" really relates to the fact that there were a number of decisions identified in Act that are binding on the Secretary of State.

MR. BLAIR: Where is it in the Act?

MR. LASOK: It is 45(2) – I do not think 45(2) is actually the right one.

MR. BLAIR: Is it 45(2)(d).

MR. LASOK: The relevant power is s.45(4), because that is the situation which confronted the Secretary of State. If you look at (4)(a), it is, "arrangements are in progress or in contemplation which, if carried into effect, will result". That was the type of merger situation he was confronted with. If you then go down to (d) it says:

> "Taking account only of the substantial lessening of competition …"

So what he was doing was he was applying the statutory test that he was required to apply. What you may then say to me, if he was using the statutory language then what is the significance of "only"? Well, "only" means that he was directing his mind to the statutory test, and he was excluding from his mind those factors that he should have left out of account, which would have included prior statements of the Chancellor of the Exchequer and those attributed to the Prime Minister had they impressed him at all, for which there is no evidence.

MR. BLAIR: So even though he was actually taking a decision in the opposite sense to 45(4) the word "only" is still right?

MR. LASOK: They are the relevant factors that he has to take into account.

MR. BLAIR: Thank you.

MR. LASOK: I said when I started off that the Tribunal might want to hear the views of the other parties on the question of permission to appeal.

THE PRESIDENT: Just before we get on to that, Mr. Lasok, again this is for now, but just things that I am interested in, if you are going to deal with them. You said at the beginning there were two things that had to be established. One is the fettering point, the fettering act; and two is the fettering effect. I would be quite interested at some point, tomorrow is fine, in your submissions on how we look at something like the statement of the Chancellor. We heard a bit of it and we have got the full transcript. I think Mr. Forrester has probably put it in various ways. There is a political aspect to it, how difficult is it for a Minister to make a different decision in the light of a statement at that level, a fairly categorical statement, how can it be cured, if at all, and so on and so forth. I think you dealt with the decision part of it, but I am not sure that we have quite discussed that aspect of it. I would be very grateful if you had anything to add on that.

MR. LASOK: Certainly.

THE PRESIDENT: Permission: would anyone else like to say anything about the timing of any permission applications?

MISS DAVIES: Yes, please, Sir. On timing, our position remains as I indicated at the hearing last Wednesday, the Tribunal being willing of course, we would invite the Tribunal, if at all possible, to deliver its decision in this matter by Wednesday morning. The reason for that is, as the Tribunal is well aware, the HBOS shareholders meeting is due to take place on Friday. There are, as the Tribunal may have appreciated from various names that have been added to the confidentiality ring, numerous of our Scottish brethren here in this Tribunal hearing today. Enquiries have been and are continuing to be made in relation to potential expedition of any proceedings that would have to take place in the Court of Session after this Tribunal. There is no certainty – one cannot say to the Tribunal today there is any certainty about how quickly matters could be accommodated in Scotland, but the one certainty is the sooner a decision is reached by this Tribunal the sooner the necessary steps can be taken in Scotland.

In terms of the practicality of that, that, I would submit, would require logistically a hearing to be arranged now if application for permission is to be made straight away in accordance with the President's direction, and we would invite the Tribunal to fix that hearing for Wednesday morning.

Logistically, there may be questions about whether a draft of the decision could be released to the parties on an embargoed basis to allow the parties to make their submissions at that hearing, and that is what we would invite. We remain of the view that this does require urgent consideration for the reasons we addressed last week.

THE PRESIDENT: Just working through those points, of course other submissions were made to us that as and when a decision is made it should, if at all possible, be made when the market is closed so that there is time to reflect. That would not be the case there.

MISS DAVIES: There is a practical difficulty about that in terms of the timing of the market opening. I anticipate that inviting the Tribunal to set before seven o'clock in the morning may not make myself very popular!

THE PRESIDENT: We are more inclined to be sitting at five o'clock in the evening than at seven o'clock in the morning.

MISS DAVIES: The two alternatives to meet the timetable that I am suggesting are to sit tomorrow evening at some stage and to take the decision after the close of the market. The alternative, which is what I am suggesting, is that if the decision is made available on an embargoed basis to the parties' legal advisors in accordance with the approach that is often adopted in the High Court, the parties can at least prepare themselves for an announcement to be made at the same time as the decision is then subsequently handed down.

THE PRESIDENT: You have got a touching faith in our ability to turn out ----

MISS DAVIES: I appreciate that and, as I said on Wednesday, I well appreciate the burden that this request would impose on the Tribunal, but the fact remains, as the Tribunal has recognised in getting this hearing on so quickly, this does remain a very urgent matter.

THE PRESIDENT: We do remain as committed as humanly possible to getting a decision out before Friday, but what you are suggesting is quite a tall order actually and would not deal with the market position that has been raised by others. I do not think it was you, Miss Davies, that raised that, someone else raised that, someone else raised that. Assuming we are able to reach a decision by then, we were tentatively hoping that we would be in a position to give it by Wednesday afternoon, that is a clear day before the shareholders' meeting. I frankly doubt whether we will be able to do any better than that.

MISS DAVIES: It may well be that we will have to review matters as we progress, and how much time is left to the Tribunal tomorrow and so on. Insofar as it is possible ----

THE PRESIDENT: Well we hear what you say.

MISS DAVIES: Because if we do get a ruling and a decision on Wednesday morning it does make matters in Scotland – should they arise, and of course it is a big "should" – that much

easier. Whereas if we do not get a decision until Wednesday evening, of course, nothing would happen in Scotland until Thursday morning. That is the dilemma.

THE PRESIDENT: It may be that that would be a sensible basis to work on, realistically speaking, although, as I said, we cannot guarantee even that. We would try and do better if we could.

MISS DAVIES: Of course, certainly, speaking for myself we would be very willing to accommodate the Tribunal at short notice to come along and take the decision and deal with any application for permission and as long as all parties are prepared to proceed on that basis then we do not need to take the step of fixing a time for the decision at the moment, we can wait to see how matters progress.

THE PRESIDENT: Does anybody else want to add anything to that?

MR. GREEN: We would support everything that Miss Davies has said. We, of course, do not know how quickly the Court of Session, assuming it arises, can accommodate us, but it is clear that the quicker we get a decision from the Tribunal the more quickly we can inform the Court of Session, the more quickly urgent arrangements can be made in Scotland. It is not inconceivable that an appeal could be heard this week in Scotland, that depends upon the court's decision, and that is very much up in the air, but the later the Tribunal's judgment the less chance we have of getting a judgment and a decision from the Scottish Court this week. That is where we stand, which is why we are urging a Herculean task upon the Tribunal.

MR. BLAIR: I am not aware how big the window is between closing the markets in London and the closing of the door of the Court of Session for applications, is it half an hour?

MR. GREEN: That I do not know. Discussions are going on with the Scottish Courts and obviously nothing I say can fetter anything which the Scottish Court says or does, but there is a willingness to be co-operative and flexible if it can be achieved. We, of course, are reliant upon, to some degree – if we were to prevail in this application – then we would expect the applicants to co-operate fully in bringing on an expedited appeal just as we would co-operate fully if we were unsuccessful and I assume that Mr. Forrester would accept that the high degree of urgency would result in all parties co-operating to the maximum possible degree to bring this matter to the Scottish Courts as soon as conceivably possible, and that is an assumption we are making, which we assume is correct, and there will not be efforts to delay or derail the matter going to Scotland. Assuming that to be the case then the earliest possible decision from the Tribunal would be very welcome.

MR. FORRESTER: Well, Sir, the applicants certainly have no wish to delay, and I speak as the only Scottish lawyer who has so far been heard, who has so far spoken, I am perfectly happy to confirm that we would fully co-operate in the event that an appeal by either side were to be necessary. The only obvious elementary respectful submission I would make is that the Tribunal is the one that has to address difficult questions, and we would recommend that the Tribunal take the timetable in the urgent circumstances that it thinks appropriate, and we have no wish to impose or propose any particular timetable other than the one that is suitable to the Tribunal itself.

THE PRESIDENT: How important is the market, the timing of any decision by us, where that has a bearing on it?

MR. GREEN: There are means and ways of dealing with it, if the Tribunal were to give a judgment, let us say, for the sake of argument on Wednesday morning, or Wednesday lunchtime, that judgment can be embargoed until the markets closed and an announcement made at the appropriate time. I do not see any difficulty with the judgment being given in camera subject to announcement in the public domain at a later point in the afternoon.

THE PRESIDENT: The trouble with that is embargoed judgments in that way that may be very share sensitive or ----

MR. GREEN: There is a risk that any breach of a confidentiality regime which applied for a number of hours would be a contempt of court, and everybody would be aware of that, and one would have to rely upon the professionalism of everybody concerned to ensure that it did not leak and there are means and ways of achieving that. It would be quite easy to ensure that nobody who was not in the confidentiality ring was in court or was in the precincts outside where people might be discussing it until, let us say, 4.30 or 5 o'clock, or when the markets closed. That is within the realms of possibility.

THE PRESIDENT: The other alternative is not to worry about the embargo.

MR. GREEN: That is another alternative, simply to announce it at the relevant time, and certainly we can all take instructions on that.

MR. FORRESTER: I observe I have been involved in plenty of cases, as you, Sir, have, which have been important for the enterprises concerned, and in my experience courts normally announce their judgment, and of course it is important in the market place, and there is a Stock Exchange reaction, but that is, it seems to me not a reason for refraining from communicating a judgment that the Tribunal has adopted. It would seem to me a pity if the Tribunal felt constrained to delay promulgating a judgment for fear of an impact in the market – there will perhaps be an impact, whether it is immediately or the following

morning seems to me less important than that the judgment should be out so that those who wish to take the matter further are able to do so confidently and without constraint. I just submit that with a light touch.

THE PRESIDENT: Thank you. Do you think we should start a bit earlier tomorrow? We could start at 10 – is that going to put anyone in any difficulties? (After a pause) Shall we start at 10 o'clock tomorrow.

(Adjourned until 10.00 a.m. on Tuesday, 9th December 2008)